MRD Procedural Law Guide

Part 3 – The Hearing

12. REVIEW OF FILES AND DUTY TO INVITE THE APPLICANT TO A HEARING

12.REVIEW OF FILES AND DUTY TO INVITE THE APPLICANT TO A HEARING[1]

12.1 Introduction

12.1.1 Sections 360(1) [Part 5 - migration] and 425(1) [Part 7 - protection] of the *Migration Act 1958* (Cth) (the Migration Act) require the Tribunal to invite the review applicant(s)[2] to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review. As the duty only arises in respect of a 'decision under review', the Tribunal is not required to invite the applicant to appear where it is considering the question of jurisdiction.[3]

12.1.2 Under ss 360(2) and 425(2), the Tribunal is not required to invite the applicant to appear before it if:

- the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
- the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
- ss 359C(1), (2) [Part 5] / 424C(1), (2) [Part 7] apply to the applicant. i.e. failure of the applicant to give information in response to a written invitation or failure of the applicant to comment on, or respond to, information. See Chapter 11 – Power to obtain information and Chapter 10 – Statutory duty to disclose adverse information.

12.2 Reviewing the files

12.2.1 There will generally be at least two sets of files before the Tribunal: the Tribunal's own file and the Department of Home Affairs' (the Department) file.[4] In some

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] In *SZPZH v MIAC* [2011] FMCA 407 the Court confirmed s 360 does not refer to a visa applicant and did not operate to require the Tribunal to invite the visa applicant to give evidence in the event that it was unable, on the papers, to reach a favourable decision on the review application. The Court held that the words 'the applicant' in Division 5 of Part 5 of the Migration Act refers to the person who has made the application to the Tribunal and to no one else: at [25]. Upheld on appeal in *SZPZH v MIAC* [2011] FCA 960. This principle was followed in *Huynh v MIBP* [2015] FCCA 34, where the Court held that visa applicants who are not a party to the review do not have an entitlement to be invited to a hearing, nor is there an obligation on the part of the Tribunal to raise any critical or dispositive 'issues' at hearing with such a person: at [29], [37]. This aspect of the reasoning was not overturned on appeal in *Huynh v MIBP* [2015] FCA 701, with the Court agreeing that the visa applicant was not 'the applicant' for the purposes of ss 359A and 360 at [63]. This issue only arises where the visa applicant and review applicant are not the same person. This does not arise in reviews under Part 7 [Protection reviews].
[3] See *SZEYK v MIAC* [2008] FCA 1940 at [34] and *Benissa v MIBP* [2016] FCA 76 at [28]–[36].
[4] Typically the Department's file will also include an audio recording of the interview. In *SZQSC v MIAC* [2012] FMCA 531, the Court rejected the applicant's contention that the Tribunal erred in not listening to the audio recording of the interview with the delegate. The Court found there was no evidence to challenge the Tribunal's clear statement that it determined the matter

circumstances, there may be more than one file provided by the Department or the Tribunal may also hold a related file(s) from a previous review. When reviewing Departmental files, the Tribunal generally ensures that they are, as far as practicable, complete files.[5]

12.2.2 Where a matter has been remitted by a court, the Tribunal file(s) relating to the previous consideration of the matter (including the recordings of any hearings conducted by the Tribunal as previously constituted) will also be before the Member. In reviewing these files, it is open to the Member to consider whether any action should be taken prior to inviting the applicant to a hearing. For example, the Member may consider it appropriate to give the applicant a written invitation to give information or written invitation to comment on or respond to adverse information prior to the hearing.

12.3 Statutory exceptions to the duty to invite applicant to appear

12.3.1 The review applicant is entitled to appear before the Tribunal at a hearing unless a favourable decision can be made on the papers; they have consented to a decision being made without a hearing; or they have failed to respond to a s 359(2) [Part 5] or 424(2) [Part 7], or s 359A [Part 5] or 424A [Part 7] invitation within the prescribed period.[6] Each of these are discussed in more detail below.

12.3.2 There is no temporal restriction on when an exception may be engaged, meaning that an event may occur at any time during the review leading to the loss of the applicant's entitlement to appear. This includes after an invitation to appear has been given but before the hearing itself has taken place.[7]

12.3.3 In a Part 7 review, the Tribunal retains a discretion to still hold a hearing even if one or more of the above exceptions apply.[8] In a Part 5 review however, the combined effect of ss 360(3) and 363A means that once the applicant's entitlement to appear has been lost, the Tribunal is no longer permitted to hold a hearing.[9]

12.3.4 If the Tribunal decides, or is required, to cancel a scheduled hearing because one of the exceptions has become applicable after an invitation to appear had already

based on the 'written material' before it, which included the delegate's decision record containing an extensive account of what was said to have occurred at the interview, and the Tribunal's reference to the delegate's account was sufficient to address the evidence given at the interview: at [39]–[41].

[5] In *Nguyen v MIAC* [2007] FMCA 453 the Court made a factual finding at [63]–[64] that a substantial part of the Departmental file was either not before, or not considered by, the Tribunal. The Court held that by failing to have regard to the material that was before the delegate, the Tribunal had failed to conduct a review of the delegate's decision and had therefore committed jurisdictional error. Moreover, at [65] it was stated '[a] purported review which is based on a fraction of the materials before the original decision-maker, especially where those materials were obviously relevant to the decision to be made, is no review at all'. In *SZQDI v MIAC* [2012] FMCA 166 the Court found a failure of the Tribunal to have considered the delegate's decision prior to sending an invitation to a hearing was not an error that went to the Tribunal's jurisdiction in circumstances where the Tribunal had in its possession a copy of the delegate's decision by the time it embarked on the hearing at [67]–[70]. Upheld on appeal in *SZQDI v MIAC* [2012] FCA 932. An application for special leave to appeal to the High Court was dismissed: *SZQDI v MIAC* [2013] HCASL 94.

[6] The entitlement to appear under ss 360(1) or 425(1) is triggered by the making of a valid application for review and continues until one of the exceptions in ss 360(2) or 425(2) arises: *Singh v MIBP* [2017] FCAFC 67 at [39].

[7] *Singh v MIBP* [2017] FCAFC 67 at [52]–[53]. Although the Court was specifically considering s 360(2)(c), its reasoning is applicable to all of ss 360(2) and 425(2).

[8] There is no Part 7 equivalent to s 363A in Part 5 that prevents the Tribunal from doing something that it is not permitted to.

been given, it generally ensures that the applicant is properly informed that the hearing will not be proceeding as the Tribunal does not wish to mislead applicants into thinking they will have an opportunity to appear.

12.3.5 For a detailed discussion of this issue relating to a failure to respond to invitations issued under ss 359A, 424A, 359(2) and 424(2), see also Chapter 10 - Statutory duty to disclose adverse information and Chapter 11 - Power to obtain information.

Favourable decision 'on the papers'

12.3.6 The exception in s 360(2)(a) or 425(2)(a) applies if, in the course of reviewing the files, the Member comes to a conclusion that the review may be decided in the applicant's favour without a hearing. For example, where the Member is satisfied of all the facts but considers that the delegate has made an error in applying the law, then the review may be decided in the applicant's favour on the material before the Member. Similarly, if the applicant was not interviewed by the delegate and further compelling evidence is put before the Tribunal by the applicant or as a result of the Member's research, the review might be decided in the applicant's favour. It is also open for the Tribunal to dispense with a pre-scheduled hearing once it has decided that a favourable decision can be made on the papers and there is no requirement to continue to a hearing merely because an invitation had already been issued.[10]

Consent to a decision 'on the papers'

12.3.7 If an applicant consents to the Tribunal deciding the review without them appearing before it, the exception in s 360(2)(b) or 425(2)(b) will apply.[11] Where an agent consents on behalf of the applicant, the applicant must have effectively authorised the agent to give such consent. The Tribunal generally seeks to obtain written consent from the applicant where the Tribunal is on notice of an unexplained reversal of the applicant's attitude to attend a hearing,[12] or if there is any doubt that the agent holds the requisite authority. The Tribunal generally also ensures that, if the applicant's consent is conditional, the consent is effective in the circumstances.[13] For example, if the applicant only consents to the Tribunal deciding the matter without a hearing if the issues before the Tribunal are the same

[9] *Singh v MIBP* [2017] FCAFC 67; *MIMIA v Sun* (2005) 146 FCR 498 at [50], *M v MIMA* (2006) 155 FCR 333 at [46].
[10] *Singh v MIBP* [2017] FCAFC 67 at [44], [53]–[56].
[11] The power to proceed without a hearing under ss 360(2)(b) and 425(2)(b) is separate and distinct from the power in ss 362B(1A)(a) and 426A(1A)(a) to proceed where an applicant *fails to appear* at a scheduled hearing, however a reference within the Tribunal's decision to the wrong power, e.g. s 362B(1A)(a) or 426A(1A)(a), will not vitiate the Tribunal's decision provided the Migration Act nevertheless provided the capacity for the Tribunal to do as it had done: *Nadesan v MIAC* [2013] FMCA 152 at [10]–[12]. See also *K.C. v MIAC* [2013] FCCA 294 at [15] and *Guachan v MIAC* [2013] FCCA 385 at [9]. See also *MIAC v Le* (2007) 164 FCR 151, where the Federal Court found there was no proper basis for the Federal Magistrate in *Le v MIAC* [2007] FMCA 427 to conclude that the Tribunal had a continuing obligation under s 360 to hold a further hearing, where the original hearing was interrupted because the interpreter had to leave. The Tribunal made an offer to hold a further hearing to the applicant's agent but that offer was not interpreted to the applicant. The agent indicated that a further hearing would not be necessary.
[12] *MIMIA v SZFML* (2006) 154 FCR 572 at [63], [65], [71], [72], [74].
[13] See, for example, *SZNFE v MIAC* [2009] FMCA 364. Note, however, that the Court's consideration of this case on the basis of the way the Tribunal exercised its discretion under s 426A, meant that it did not have to consider whether the applicant's consent could properly be treated as effective for the purposes of s 425(2)(b).

as for the delegate, the exception in s 360(2)(b) or 425(2)(b) may not be engaged if the Tribunal intends to decide the matter on a different basis.

12.3.8 In some circumstances prior to inviting an applicant to a hearing, the Tribunal may send correspondence to applicants seeking information relevant to the review, which includes a question about whether they consent to the Tribunal deciding the review without a hearing.[14] In relation to the online 'Request for Student Visa Information' form (the form), the Federal Court in *Khadgi v MICMSMA* held that the Tribunal had not acted unreasonably when it found that the appellant had consented to the Tribunal deciding the review without a hearing by responding to a question in the form about the hearing.[15] The appellant contended that he hadn't understood the question and information in the form, and consent was received in an ambiguous manner. The question was as follows '*Do you and any other applicants consent to the Tribunal deciding the review without a hearing?*' and under the drop down box to select an answer was the following explanatory note: '*If you consent to us deciding your review without a hearing: We will make a decision on your application based on the information and evidence before us, and you will not be invited to appear at a hearing to give evidence and present arguments relating to the issues arising from the decision under review. This means that we may either affirm or set aside the decision under review. Please see our Information about Decisions fact sheet for more information about different types of decisions and what happens once we've made our decision…If there is more than one review applicant, you may only consent to us deciding the review without a hearing if you have the authority of each applicant to do so.*' The Court held that it was not unreasonable for the Tribunal to find that the applicant had consented to a decision on the papers and that the wording in the form was not confusing and unintelligible; it also endorsed the primary judge's conclusion that there was no ambiguity as to whether consent was given.[16] In reaching this finding, the Court noted that the appellant was represented by a migration agent at all relevant times.[17]

Failure to respond to an invitation to provide information / comment

12.3.9 In relation to a Part 5 review, the entitlement to a hearing is lost if the review applicant does not respond to an invitation to provide information or comment within the prescribed period. Provided the due date for response was before the scheduled hearing date, the entitlement to a hearing is not preserved merely because an invitation to appear might already have been given.[18]

[14] E.g. the s 359(2) invitation seeking information in Student visa matters such as the 'Request for Student Visa Information' form.
[15] *Khadgi v MICMSMA* [2021] FCA 991 at [17].
[16] *Khadgi v MICMSMA* [2021] FCA 991 at [17]–[18].
[17] *Khadgi v MICMSMA* [2021] FCA 991 at [17].
[18] *Singh v MIBP* [2017] FCAFC 67 at [52]–[53].

12.4 Duty to invite applicant to a further hearing following reconstitution

12.4.1 Whether or not a reconstituted Tribunal is required to invite the applicant to a hearing depends upon the particular circumstances of each case. This includes the reason for the Tribunal being reconstituted and, if the case has been remitted by a court, the nature of the jurisdictional error identified.

Reconstitution generally

12.4.2 Although it needs to be considered on a case by case basis, a new hearing does not generally appear to be required following reconstitution because of member unavailability,[19] or where directed by the President for the efficient conduct of the review.[20]

12.4.3 In *Liu v MIMA; Ahmed v MIMA,*[21] for example, the Full Federal Court held that a later Tribunal, reconstituted because the first member became unavailable, could rely upon a hearing that took place with the previous member without the need to hold a further hearing. The Court observed that s 428, as it then was, gave the Tribunal a discretionary power to authorise a person other than the Member deciding the case to take evidence from the applicant and constituted an express recognition by Parliament that the Tribunal's decision-making function may be exercised on the papers in the absence of a hearing before it.[22]

Reconstitution following Court remittal

12.4.4 There is conflicting authority on whether a further hearing is required following remittal of a matter from a Court and subsequent reconstitution of the Tribunal. Although contrary to the underlying reasoning in *Liu v MIMIA* discussed above, the better view appears to be that a fresh hearing is required whenever a matter is remitted back to the Tribunal by a court and that case is reconstituted to a new member.

12.4.5 In *SZEPZ v MIMA*,[23] the Full Federal Court considered what further action a reconstituted Tribunal needed to take following a court remittal. The Court held that

[19] The Tribunal may be reconstituted due to unavailability of the original Member or where the original Member stops being a Member: *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) s 19D(1), (2). Prior to 1 July 2015 the power to re-constitute vested with the Principal Member under ss 355 [pt 5] and 422 [pt 7]. These provisions were repealed by the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act) with effect from 1 July 2015. For transitional arrangements, see sch 9 to that Act.
[20] The President of the Tribunal may direct that a different Member constitute the Tribunal in the interests of achieving the efficient conduct of the review: AAT Act s 19D (2)(b).
[21] *Liu v MIMA; Ahmed v MIMA* [2001] FCA 1362. *Liu* was subsequently followed in *NADG of 2002 v MIMIA* [2002] FCA 893 at [21]; *SXXB v MIMIA* [2005] FCA 537 at [18]; *SZFDR v MIMIA* [2005] FMCA 1585 at [7] - an appeal from the judgment was dismissed: *SZFDR v MIMIA* [2006] FCA 181.
[22] *Liu v MIMA; Ahmed v MIMA* [2001] FCA 1362 at [48]–[49]. Whilst the version of s 428 considered in *Liu* was subsequently repealed and substituted by the Amalgamation Act with effect on and from 1 July 2015, the reasoning of the Court applies equally to the similarly worded substituted provision.
[23] *SZEPZ v MIMA* [2006] FCAFC 107.

it did not follow that all the steps and procedures taken in arriving at the invalid decision were themselves invalid and that the Tribunal was obliged to continue and complete the review not commence a new one. As a consequence, the reconstituted Tribunal in that case was entitled to rely upon a s 424A letter that had been sent by the previous member. Both *Liu* and *SZEPZ* were subsequently cited with approval in *NBKM v MIAC,*[24] and *Liu* was also approved by the Full Federal Court in *AEK15 v MIBP*.[25]

12.4.6 However a different view was taken by the Full Federal Court in *SZHKA v MIAC; SXGOD v MIAC*[26] which considered whether a later Tribunal (reconstituted after the first Tribunal's decision had been remitted by the court) was itself required to invite the applicant to a hearing and found that it was. *Liu* was distinguished on the basis of that case dealing with reconstitution following member unavailability and not involving a Court remittal. Justice Gyles (with whom Gray J agreed) considered that *SZEPZ* had been misconstrued and that the passage in that case which stated "…*so long as an applicant has been given information that the* ***member of the Tribunal who is to make the decision*** *considers would be the reason, or part of the reason for affirming the decision under review…s 424A will be satisfied*"[27] was consistent with his own reasoning in *SZHKA* (emphasis in original). Further, and although only obiter comments, the majority reasoning of Gyles and Gray JJ suggested that other procedures would also have to be repeated by the reconstituted Tribunal. Justice Gyles also expressly stated that *NBKM* had been wrongly decided. *SZHKA* was subsequently relied upon in *NBKB v MIAC*[28] to support a conclusion that a second Tribunal Member was required to raise with the applicant any live issues, even if they were put to the applicant and discussed at a hearing before the original Tribunal Member. For further discussion, see Chapter 6 - Constitution and Reconstitution.

12.5 Notice of invitation to appear and period of notice

12.5.1 Where the applicant is to be invited to a hearing, ss 360A [Part 5] and 425A [Part 7] require the Tribunal to give the applicant notice of the day on which, and the time and place at which, the applicant is to appear.

12.5.2 Subject to the statutory limitations set out below, it is a matter for the Tribunal to determine the date, time and place of the hearing. The case law indicates, however, that the invitation must be 'real and meaningful'.[29] In some cases, this may require the Tribunal to consider the known circumstances of the applicant including his or her location and ability to travel, in settling on a date, time and location for the

[24] *NBKM v MIAC* [2007] FCA 1413.
[25] *AEK15 v MIBP* [2016] FCAFC 131.
[26] *SZHKA v MIAC; SXGOD v MIAC* [2008] FCAFC 138.
[27] *SZHKA v MIAC; SXGOD v MIAC* [2008] FCAFC 138 at [33] citing *SZEPZ v MIMA* [2006] FCAFC 107 at [42].
[28] *NBKB v MIAC* [2009] FCA 69.
[29] *MIMIA v SCAR* (2003) 128 FCR 553.

hearing.[30] The Tribunal is generally mindful that the time a hearing is scheduled for should be appropriate for the applicant, which may require consideration of any time difference between the applicant's location and the location where the Tribunal member will conduct the hearing from.[31]

12.5.3 There is no obligation to hold a face to face hearing and ss 366 [Part 5] and 429A [Part 7] permit the Tribunal to allow a person's appearance to take place by telephone or video link. In determining whether to have a face to face hearing or a telephone or video link, the Tribunal takes relevant considerations into account.[32] For further discussion see Chapter 15 - Hearing by video conference or telephone.

Content of the notice

12.5.4 The invitation to hearing must:

- tell the applicant that he or she is invited to appear to give evidence and present arguments;
- tell the applicant that he or she may give the Tribunal written notice that the applicant wants the Tribunal to obtain evidence from a witness;[33] and
- contain a statement of the effect of s 362B [Part 5] or 426A [Part 7].[34] That is, if the applicant fails to appear at a scheduled hearing, the Tribunal may make a decision without taking any further action to allow or enable the applicant to appear, or the Tribunal may dismiss the application without any further consideration of the application or information before the Tribunal.[35]

[30] In *SZLLY v MIAC* (2009) 107 ALD 352 the Federal Court found that in circumstances where the applicant could not travel from Griffith to Sydney to attend the hearing because of his financial position and lack of work, there was no real invitation given under s 425(1), as the Tribunal did not give the applicant an opportunity to substantiate his claimed inability to attend.
[31] In *Mamun v MICMSMA* [2021] FCCA 95, in *obiter* comments, the Court said that scheduling a hearing for 7:30am in the applicant's local time (9:30am for the Member) was unusual and 'frankly unacceptable', and 'reflected poorly on the Tribunal as a federal entity' (at [56]). However, the Court found that scheduling a hearing at 7:30am for the applicant was not legally unreasonable. The Court also noted that the applicant could have sought a postponement if they had concerns with it proceeding as scheduled. The Court concluded that, while it was clearly undesirable for a hearing to be scheduled at 7:30am, the decision to do so was not arbitrary or capricious but it was not a scheduling decision that is to be encouraged.
[32] *SZNPK v MIAC* [2009] FMCA 806. Note in *SZORN v MIAC* [2010] FMCA 987 the Court raised the issue of whether the fact that the applicant (who lived in Griffith) had filed her review application in Sydney but was offered a hearing by video conference or a hearing in person in Melbourne, breached s 425 (at [53]). Ultimately, however, the Court did not make a finding on that issue and refused the applicant's request for leave to make an amended application to pursue that ground on the basis that in the circumstances of the case there was no prejudice in the Tribunal inviting the applicant to a hearing in the terms that it did (at [62]).
[33] ss 361 and 426. In *Dowlat v MIAC* [2009] FMCA 171 at [26], the Court found that the Tribunal committed jurisdictional error under s 361(2) as it failed to notify the applicant that within seven days after being notified, she could give the Tribunal written notice that she wanted the Tribunal to obtain oral evidence from a person or persons named in the notice. In *SZLAR v MIAC* [2008] FMCA 210 at [18], the Court noted that there is no obligation under s 426(1)(b) on the Tribunal to summarise or paraphrase or to render the wording contained in s 426(2) into plain English. The effect of the seven day notice period contained in s 426(2) was satisfied by giving a specific date, by which notice might be given, which was seven days after the deemed receipt of the s 425A letter. Note that for Part 5 reviewable decisions covered by s 338(4) (i.e. cancellation or refusal of a bridging visa where the applicant is in immigration detention), s 361 does not apply. Instead, s 362 provides for such applicants to request that the Tribunal take evidence from a witness in the review application form.
[34] ss 360A(5), 425A(4).
[35] ss 362B, 426A. Sections 362B and 426A were significantly amended by the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015) to enable the Tribunal to dismiss an application if the review applicant fails to appear at the time and date of the scheduled hearing.

12.5.5 There is no obligation on the Tribunal to advise the applicant of the issues prior to the hearing, or to provide a list of proposed questions.[36]

12.5.6 There is no obligation on the part of the Tribunal to ensure that the hearing invitation is provided in a language which the applicant could understand.[37] The 'Multilingual Advice' (MR4) attached to the hearing invitations contains a general enquiry phone line to 'the Translating and Interpreting Service' (TIS) for applicants to call if they have questions about the hearing. This would appear to overcome any lingering concerns in this regard.[38]

Method of notification

12.5.7 Sections 360A(2) [Part 5] and 425A(2) [Part 7] require that the notice be given to the applicant by one of the methods specified in s 379A [Part 5] or 441A [Part 7].[39] The methods available under ss 379A and 441A are discussed in Chapter 8 - Notification by the tribunal.[40]

Period of notice

12.5.8 The Tribunal must give the applicant a minimum period of notice of the day, place and time of the hearing.[41] A failure to give at least the prescribed period of notice will generally result in jurisdictional error.[42]

12.5.9 For a Part 7 review, the prescribed period for an applicant in immigration detention commences when the detainee receives notice of the invitation to appear and ends at the end of 7 days after the day the detainee receives notice or, if the detainee agrees, in writing, to a shorter period of not less than 1 working day, the shorter period.[43] In all other reviews under Part 7, the period of notice commences when the person receives notice of the invitation to appear before the Tribunal and ends at the end of 14 days after the day the person receives notice or, if the person agrees, in writing, to a shorter period of not less than 1 working day, the shorter period.[44] For discussion on when the notice is taken to have been received, see Chapter 8 – Notification by the Tribunal.

[36] *SZNYM v MIAC* [2009] FMCA 1273 at [56]. The Court commented that if it were a requirement, it would make the hearing a meaningless exercise, as the very essence of a hearing before the Tribunal is to enable that 'face to face' exchange, which distinguishes a hearing from the making of written submissions. Further, it would not allow for the Tribunal to properly explore, and test, the applicant's responses: at [57].
[37] *SZGWH v MIAC* [2007] FCA 543 at [12] and followed by Middleton J in *SZHVM v MIAC* (2008) 170 FCR 211 at [57].
[38] *SZLEM v MIAC* [2008] FMCA 507 at [38].
[39] Except if the applicant is in immigration detention, in which case the prescribed method is that set out in reg 5.02. See Chapter 8 - Notification by the tribunal for further discussion.
[40] Without an actual record of the letter being sent the Tribunal may be found not to have complied with s 379A(4) or 441A(4). Evidence of the Tribunal's standard procedures may be insufficient: *SZIRS v MIMA* [2007] FMCA 214 at [48]–[52]. That case concerned letters sent by ordinary post and has limited effect following the introduction of registered post procedures from 12 March 2007.
[41] ss 360A(4) [pt 5] and 425A(3) [pt 7].
[42] *MIMIA v SZFML* (2006) 154 FCR 572. Note, however, that where the notice period for the hearing is incorrect, but the applicant, within that time, declines to attend the hearing in the response to a hearing invitation, that invalid period will not constitute a jurisdictional error: *SZGGJ v MIMA* [2006] FMCA 1933 at [10]–[11].
[43] reg 4.35D(2).
[44] reg 4.35D(3).

12.5.10 For a Part 5 review, if the applicant is in immigration detention *and* is seeking review of a bridging visa decision, the period of notice commences when the detainee receives notice of the invitation to appear before the Tribunal and ends at the end of 2 working days after the day the detainee receives notice or, if the detainee agrees, in writing, to a shorter period of not less than 1 working day, the shorter period.[45] Where a Part 5 applicant is in immigration detention and is not seeking review of a bridging visa decision, the period of notice commences when the detainee receives notice of the invitation to appear before the Tribunal and ends at the end of 7 days after the day the detainee receives notice or, if the detainee agrees, in writing, to a shorter period of not less than 1 working day, the shorter period.[46] In all other reviews under Part 5, the period of notice commences when the person receives notice of the invitation to appear before the Tribunal and ends at the end of 14 days after the day the person receives notice of the invitation to appear before the Tribunal or, if the person agrees, in writing, to a shorter period of not less than 1 working day, the shorter period.[47]

Inviting multiple applicants to a hearing

12.5.11 All review applicants in a combined review must be invited to appear for a hearing, unless any of the three exceptions in s 360(2) or 425(2) apply.[48] For hearing invitations sent on, or after, 27 October 2008, s 379EA [Part 5] or 441EA [Part 7] provide that documents given by the Tribunal to one applicant in a combined review application are taken to be given to all applicants included in that review application. This means that it is only necessary to address the invitation to one of the applicants (or his or her authorised recipient) in a combined review. However, the invitation itself will generally make clear that all applicants are invited to appear.

12.6 Failure of applicant to respond to notice of hearing or hearing invitation returned to sender

12.6.1 It is the usual practice of the Tribunal to send a Response to Hearing Invitation form for the applicant to complete and return when inviting an applicant to appear. There is no legal obligation for an applicant to respond to the invitation,[49] however it assists the Tribunal to know who intends to participate in a hearing. A failure to complete and return that form does not of itself permit the Tribunal to make a decision prior to the scheduled hearing date. As indicated above, the obligation to invite an applicant to appear continues until discharged unless one of the exceptions in s 360(2) or 425(2) applies, or if the applicant fails to appear on the day or at the time and place at which he or she is scheduled to appear.[50] A non-

[45] reg 4.21(2).
[46] reg 4.21(3).
[47] reg 4.21(4).
[48] *MZWJY v MIMIA* [2005] FMCA 1027.
[49] *SZJQP v MIAC* (2007) 98 ALD 575 at [40]–[41]. The Court held that the Tribunal had arguably taken into account an irrelevant consideration to the exercise of the discretion under s 426A whether or not to reschedule the hearing by having regard to, among other things, the applicant's failure to reply to the hearing invitation.
[50] ss 362B [pt 5], 426A [pt 7].

response to the invitation is not generally construed as consent to the Tribunal deciding the review without the applicant appearing before it.

12.6.2 An applicant who has not replied to the invitation to appear may nonetheless appear on the scheduled day of the hearing. In this situation, the Member may wish to reschedule the hearing for a later date (if the hearing room hasn't been booked or if an interpreter hasn't been booked, where one is required and the Tribunal wasn't aware of the need for one because of the lack of reply to the hearing invitation). Where a hearing is rescheduled in these circumstances, the Tribunal is required to give only reasonable notice of the new hearing date, time and place.[51] For further discussion of rescheduling a hearing, see Chapter 22 – Rescheduling or adjourning the hearing.

12.6.3 Although there may be certain circumstances in which it is appropriate for the Tribunal to make further inquiries when hearing invitation letters are returned unclaimed, there is no general duty to do so where the hearing notification has been sent in accordance with ss 360A and 425A. Where the Tribunal has discharged its obligation to invite an applicant to appear, and the applicant does not appear, the Tribunal has the discretion to make a decision on the review without 'taking any further action to allow or enable the applicant to appear before it' or to 'dismiss the application without any further consideration of the application or information before the Tribunal': s 362B(1A) [Part 5] or 426A(1A) [Part 7].[52]

12.6.4 In relation to the discretion to make a decision on the review without taking any further action to allow or enable the applicant to appear, the Court in *Aneja v MIBP* found no error in circumstances where a valid hearing invitation was returned to the Tribunal marked 'return to sender', the applicant did not attend the hearing and the Tribunal proceeded to a decision on the information before it.[53]

12.7 Failure of applicant to attend scheduled hearing

12.7.1 If an applicant is invited to a hearing and does not appear on the day or at the time or place scheduled, ss 362B(1A) and 426A(1A) permit the Tribunal to either make a decision on the review without taking any further action to allow or enable the applicant to appear before it[54] or to dismiss the application without any further

[51] *MIMIA v SZFML* (2006) 154 FCR 572 at [79]–[83].
[52] Sections 362B and 426A were significantly amended by the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35 of 2015) to enable the Tribunal to dismiss an application if the review applicant fails to appear at the time and date of the scheduled hearing.
[53] *Aneja v MIBP* [2014] FCCA 413 at [35]. Upheld on appeal in *Aneja v MIBP* [2014] FCA 572. See also *Kumar v MIAC* [2013] FCCA 1440 and *Kaur v MIBP* [2014] FCCA 161.
[54] In *SZHVR v MIAC* [2008] FMCA 198, the Court found that the Tribunal did not fail to comply with s 425 of the *Migration Act* when it proceeded to make a decision on the review pursuant to s 426A after the applicant failed to appear at the scheduled hearing where he claimed that he was under the misconception or confusion that the Tribunal treated his wife's request for a combined hearing with him in a separate application as a joint request for hearing. This view was upheld on appeal in *SZHVR v MIAC* [2008] FCA 776. Similarly in *SZLJK v MIAC* [2008] FMCA 694, the Court found no error in the Tribunal's decision when it proceeded to make a decision on the review pursuant to s 426A, after the applicant failed to appear at the scheduled hearing where the applicant who spoke no English claimed he mistakenly formed an understanding from an unidentified person to whom he had spoken that the place of the hearing was in Sydney rather than in Griffith. In *SZOKD v MIAC* [2010] FCA 1335, the Court, refusing to grant an extension of time, held that once the applicant had failed to attend the hearing there was no

consideration of the application or information before it. A warning as to the effect of these provisions must appear in the invitation to hearing otherwise the Tribunal's discretion in ss 362B(1A) and 426A(1A) cannot be enlivened.[55] For discussion of the Tribunal's power to dismiss proceedings, see Chapter 23 - Making a decision without a hearing.

12.7.2 In some cases where the applicant does not appear, the Tribunal may decide to reschedule the applicant's appearance before it.[56] The exercise of the discretion to reschedule a hearing when the applicant fails to attend may depend, to a large degree, on whether an applicant offers a reasonable explanation for his or her failure to appear. That is, the exercise of the discretion in ss 362B/426A depends on the circumstances of each case.[57] For discussion of the Tribunal's power to reschedule a hearing generally, see Chapter 22 - Rescheduling or adjourning the hearing.

12.7.3 Although there may be circumstances in which it is appropriate for the Tribunal to make further inquiries,[58] there is no general duty to ascertain whether or not an applicant wishes to have a further opportunity to appear following their non-appearance at a scheduled hearing. To impose such a requirement would undermine the administrative certainty sought to be achieved by the deemed receipt provisions which apply to the sending of hearing invitations.[59]

12.7.4 If, in a combined application, one or more of the applicants fails to appear, but at least one applicant does appear, the Tribunal is under no *obligation* to adjourn or reschedule the hearing to enable the others to appear, but may do so if it considers it appropriate in the circumstances. In *SZFCE v MIAC*[60] the Court found that the reconstituted Tribunal did not breach s 425 when it did not adjourn the hearing to provide a further opportunity for the applicant's mother to appear. The applicant's mother in this decision was included in her daughter's protection visa application form as a member of her family unit and made no specific claims of her own. She failed to appear at the hearing due to illness and provided a medical certificate. Neither the applicant nor the applicant's mother sought to have the hearing adjourned.

obligation on the Tribunal to take initiative to contact the applicant or take any further step to find out why he had not attended: at [22].

[55] ss 360A(5), 425A(4).

[56] ss 362B(2), 426A(2). In *SZNFE v MIAC* [2009] FMCA 364, the applicant consented to the Tribunal deciding the review without a hearing, but placed conditions on the consent such as 'observe taking at least 6 months [to make its decision]' and 'find the Delegate's decision was fictional'. The Tribunal rescheduled the hearing pursuant to s 426A(2). The applicant refused to attend the rescheduled hearing. The Tribunal refused to accept the applicant's conditions and made a decision pursuant to s 426A. The Court concluded that the Tribunal was well within its rights to refuse to accept the applicant's conditions, and did not fall into any error in the way it exercised its discretion under s 426A.

[57] See *SZJQP v MIAC* (2007) 98 ALD 575; *Kaur v MIAC* [2010] FMCA 822 at [34]–[35].

[58] See, for example, *SZJBA v MIAC* (2007) 164 FCR 14, *SZHVM v MIAC* (2008) 170 FCR 211.

[59] *Shah v MIAC* [2011] FMCA 18 at [110]–[113]. In that case, the Court held that the fact that the applicant had responded to the Tribunal's correspondence in the past but failed to do so in respect of the hearing invitation did not make it obvious that an inquiry should be made as to whether he wished to attend the hearing, particularly as the hearing invitation had apparently been sent without incident to a migration professional. See also *Kumar v MIAC* [2013] FCCA 1440 where the Court found that there was no denial of procedural fairness to the applicant in circumstances where the hearing invitation was returned to the Tribunal marked 'unclaimed' a month before the scheduled hearing date and the Tribunal took no further steps to bring the invitation to the applicant's attention. The Court found that the Tribunal properly complied with the requirements for inviting the applicant to appear by sending the invitation to the applicant's agent's PO Box address, and the failure of the agent to collect the invitation did not diminish the properly afforded natural justice.

12.7.5 Similarly, in *SZOZE v MIAC*[61] the Court found no error with the Tribunal proceeding to a hearing in the absence of the applicant wife, who was included in the protection visa application as a member of her husband's family unit and made no specific claims of her own, in circumstances where she herself made no request to the Tribunal for another hearing date and the applicant husband did not ask for an adjournment. The Court found that in the absence of anything else from the applicant wife, the applicant husband's evidence that his wife had nothing to say, in circumstances where she had not indicated she wanted to attend, remained as the probative basis on which the Tribunal proceeded to exercise its discretion under s 426A in the way that it did.

12.7.6 There are situations, such as a medical emergency, when a request for an adjournment cannot be made prior to the scheduled hearing. On occasion, the Tribunal may wait a day or two days after the scheduled hearing in order to ascertain whether the applicant has contacted the Tribunal in order to provide a reason for non-attendance, before deciding upon which option to take (see Chapter 23 - Making a decision without a hearing), although there is no obligation on the Tribunal to do so. The details surrounding the failure to appear are generally canvassed in the Tribunal's reasons for decision, where appropriate.

12.7.7 The Tribunal will not generally be entitled to proceed to decision where the applicant has been fraudulently advised not to appear.[62] In *SZFDE v MIAC*, an 'agent' represented himself to the applicants as a solicitor and registered migration agent, when he had been disbarred, and advised the applicants against attending the hearing.[63] The applicants did not attend, and the Tribunal affirmed the decision. The High Court found that even though the Tribunal had acted blamelessly in this case, it was disabled from the due discharge of its imperative statutory functions by the fraud of the agent, perpetrated on the Tribunal as well as on the applicants.[64] These sorts of cases would be rare.

12.7.8 A distinction can be drawn from the discussion of the High Court in *SZFDE v MIAC* between cases where an applicant does not appear because of *fraud* on the part of his or her migration agent, and those where the applicant does not appear because of *poor or negligent*, but not fraudulent advice.[65]

12.7.9 In *SZFDE v MIAC* there was evidence before the Court which strongly suggested the behaviour of the agent was due to fraud which, the Court found, 'unravels everything', even the blameless conduct of the Tribunal.[66] This will not be the case where the agent merely gives poor advice.[67] However, given that there may be little

[60] *SZFCE v MIAC* [2008] FCA 966 at [42]–[45].
[61] *SZOZE v MIAC* [2011] FMCA 300. An appeal from the judgment was dismissed: *SZOZE v MIAC* [2012] FCA 470.
[62] *SZFDE v MIAC* (2007) 232 CLR 189 at [49]–[52].
[63] *SZFDE v MIAC* (2007) 232 CLR 189.
[64] *SZFDE v MIAC* (2007) 232 CLR 189 at [51].
[65] *SZFDE v MIAC* (2007) 232 CLR 189 at [28], [37], [49]–[51].
[66] *SZFDE v MIAC* (2007) 232 CLR 189 at [14].
[67] *MIAC v SZLIX* (2008) 245 ALR 501. In that case an unqualified person holding himself out to be a migration agent had not forwarded information to the applicant or told him when a rescheduled hearing was to be held. On appeal, the Full Federal Court found that a simple failure to inform, bare negligence or inadvertence will not necessarily be sufficient to give rise to fraud on the Tribunal: at [33]. Similarly, in *SZHVM v MIAC* (2008) 170 FCR 211, the Court distinguished 'bad' advice, conflicts of

way of determining this at the time, in situations where the Tribunal suspects that there is fraud, which may arise because of the behaviour of the agent or material that on its face suggests an error or irregularity in an applicant's response to a Tribunal's invitation, the Tribunal may occasionally take administrative steps to clarify the matter (e.g. making a phone call to the applicant or sending a letter) or seek to reschedule a hearing. Again, this sort of situation would be rare. Where an applicant fails to appear due to *negligent* advice, *SZFDE v MIAC* would not prevent the Tribunal from proceeding to make a decision.[68]

interest and duress on the part of a third party from 'fraud'. The appellant in that matter worked as a live-in nanny for her agent. Two weeks before the Tribunal hearing, the agent told her she had an interview with the Department. On the day of the hearing, the agent told her that the 'interview' was important but looking after his child was more important and instructed her to take care of the child. The Court found that there was no evidence of a fraud on the Tribunal within the meaning of *SZFDE*. The Court found that the agent may have put his interests above the appellant's but that could not amount to a finding of fraud and was more properly characterised as 'bad' advice. Even accepting that the negative response to the invitation was procured by the purported agent's coercion, which might be characterised as duress, this did not amount to material dishonesty which conveyed a false impression of another to the decision-maker such as to make the conduct cognisable as fraud.

[68] *SZHVM v MIAC* (2008) 170 FCR 211 at [63]; *SZJBA v MIAC* [2007] 164 FCR 14.

13. THE HEARING

13. THE HEARING[1]

13.1 The hearing

13.1.1 Sections 360(1) [Part 5 - migration] and 425(1) [Part 7 - protection] of the *Migration Act 1958* (Cth) (the Migration Act) require the Migration and Refugee Division (MRD) of the Tribunal to invite applicants to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review. This obligation exists until discharged, subject only to three exceptions, namely:

- the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
- the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
- ss 359C [Part 5] or 424C [Part 7] applies to the applicant, i.e. the applicant fails to give information in response to a written invitation or fails to comment on or respond to information within prescribed period. See Chapter 11 – Power to obtain information and Chapter 10 – Statutory duty to disclose adverse information, for further information.

For further discussion about the duty to invite an applicant to appear, see Chapter 12 – Review of files and duty to invite applicant to a hearing.

13.1.2 The hearing supplements the information already provided to the Tribunal and forms part of the evidence the Tribunal will consider when making a decision. The hearing is an opportunity for the Tribunal to further investigate the applicant's claims and an opportunity for the applicant to give evidence and present arguments to support those claims.

The inquisitorial nature of proceedings

13.1.3 The MRD of the Tribunal is based on an inquisitorial rather than an adversarial model. However, the term 'inquisitorial' as applied to the Tribunal determines the boundaries of the nature of the Tribunal's functions, rather than referring to the full ordinary meaning of that term.[2] The core function of the Tribunal under s 414

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *MIAC v SZIAI* (2009) 259 ALR 429 at [18], noting the full ordinary meaning as 'having or exercising the function of an inquisitor', i.e. one whose official duty it is to inquire, examine or investigate.

[Part 7] and s 348 [Part 5] of the Migration Act is to review the decision which is the subject of a valid application.[3] In reviewing the decision, the Tribunal may obtain any information that it considers relevant[4] and may instigate investigative procedures.[5] The Tribunal's powers of inquiry for Part 7 reviewable decisions under ss 415(1), 424 and 427(1)(d) and the equivalent powers for Part 5 reviewable decisions under ss 349(1), 359 and 363(1)(d) are discretionary powers.[6]

13.1.4 The Tribunal is not required to make an applicant's case for him or her and may ordinarily decide an application on what the applicant puts forward. However, a failure to make an obvious inquiry about a critical fact the existence of which is easily ascertained could in some circumstances be sufficiently linked to the outcome to constitute a failure to review.[7] Such a failure could give rise to jurisdictional error for constructive failure to exercise jurisdiction.[8] The circumstances in which this type of error may occur are dependent upon the specific facts of each matter, and there is no overriding principle that the Tribunal must undertake all inquiries asked of it.

13.1.5 In *Applicant M164/2002 v MIMIA*[9] the Court found that positive findings of forgery, fraud or perjury cannot be based on a superficial examination of events and materials, particularly where the conclusion represents no more than a suspicion held by the Tribunal, and that where that suspicion remains untested by the reasonable use of powers available to the Tribunal to have further enquiries made, such findings will not be open to the Tribunal. Other examples of a failure to enquire resulting in jurisdictional error include: failure to obtain evidence from the delegate regarding the circumstances in which a statement of sponsorship withdrawal was signed and then retracted during a departmental interview;[10] failure to check the wording of foreign legislation written in English, readily available on the internet;[11] and failure to make enquiries of the Document Examination Unit to clarify the source on which it based its advice in light of a request for further particulars from the applicant.[12] See Chapter 11 – Power to obtain information for further discussion of these principles, in particular 'Failure to inquire' and 'Requesting missing or correct information from applicants'.

[3] *MIAC v SZIAI* (2009) 259 ALR 429 at [18].
[4] ss 359(1) [pt 5], 424(1) [pt 7].
[5] ss 363(1)(d) [pt 5], 427(1)(d) [pt 7].
[6] *MIMIA v SGLB* (2004) 207 ALR 12 at [43], [124]; *MIEA v Singh* (1997) 74 FCR 553 at 561 and *SBBA v MIMIA* [2003] FCAFC 90 at [8]; *MIMIA v VSAF of 2003* [2005] FCAFC 73 at [20]; *Re MIMA; Ex parte Cassim* (2000) 175 ALR 209.
[7] In *SZSHU v MIBP* [2013] FCCA 2258 the Court found the Tribunal's failure to consider country information available in the Tribunal's own database did not result in jurisdictional error because it was not an inquiry about a critical fact in issue. The Court held the Tribunal's adverse credibility finding was plainly critical to the outcome of the review and that there were a number of elements that the Tribunal relied upon to reach an adverse credibility conclusion that were not related to the country information.
[8] *MIAC v SZIAI* (2009) 259 ALR 429 at [25].The joint judgment of the High Court considered at [25] that, although decisions in the Federal Court have led to references to a 'duty to inquire', this term may direct consideration away from the question whether the decision is vitiated by jurisdictional error, and the relevant duty is a duty to review. Earlier Federal Court judgments have found errors in terms of a failure of the Tribunal to make an inquiry, but have described the consequence or relevant jurisdictional error in varying ways.
[9] *Applicant M164/2002 v MIMIA* [2006] FCAFC 16.
[10] *Le v MIAC* [2007] FMCA 427, upheld on appeal, *MIAC v Le* (2007) 164 FCR 151.
[11] *SZCAQ v MIMIA* [2006] FMCA 229.
[12] *SZELA v MIMIA* [2005] FMCA 1068.

Taking evidence

13.1.6 The Tribunal is not bound by technicalities, legal forms or rules of evidence.[13] As such, the Tribunal may accept, and may, with limited exceptions, be bound to consider, evidence presented in any form.[14] However, in some circumstances, the Migration Act and *Migration Regulations 1994* (Cth) (the Regulations) do require evidence to be presented in a particular form, for example, the evidentiary requirements in Part 1 Division 1.5 of the Regulations for a 'non-judicially determined claim of domestic violence'.

13.1.7 The Tribunal has an express power to take evidence under oath or affirmation.[15] The Migration Act does not prescribe a form of words for an oath or affirmation, and any form of oath which the witness regards as binding on his or her conscience is sufficient.[16] The procedure for taking oaths and affirmations is set out in the Tribunal's General Practice Direction. The Tribunal generally keeps a Bible, Koran, and Bhagavad Gita in each hearing room for the purpose of administering oaths. Where an appropriate religious text is not available, a person may take an oath without using a religious text or may instead take an affirmation.[17]

13.1.8 How a person chooses to give their evidence before the Tribunal, whether by an oath or an affirmation, may, in certain circumstances, also be a relevant matter to take into account when considering the credibility of that person's claims. In *SZROK v MIAC*,[18] the Court held than an applicant's decision to take an affirmation instead of an oath assumed evidentiary significance where the credibility of the applicant's claim to have undergone a recent conversion to Christianity was central to the Tribunal's consideration. In the particular circumstances of that case, the applicant's decision to not make an oath was held to assume evidentiary significance.[19] A refusal or failure to take an oath or make an affirmation, or answer a question when required to do by the Tribunal, may expose a person appearing before the Tribunal to give evidence to a penalty of imprisonment.[20] However, there may be circumstances where it is not appropriate for a person to take an oath or make an

[13] See, ss 353(a) [pt 5] and 420(a) [pt 7], as amended by the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act). In *Ortiz v MIAC* [2011] FMCA 432 the Court confirmed at [54] that the Tribunal's processes are not governed by strict rules of evidence and the Tribunal is required to assess applications based upon the material placed before it subject to an overriding duty in inquire. Accordingly, the Court held that the presumption of paternity in s 69Q of the *Family Law Act 1975 (*Cth) had no role to play in the Tribunal's decision making processes and the Tribunal was not bound to take it into account. An appeal from this judgment was successful, but on the basis of a procedural matter: *Ortiz v MIAC* [2011] FCA 1498.
[14] *AZAAL v MIAC* [2009] FMCA 23 at [22]; *SBLF v MIAC* (2008) 103 ALD 566 at [36]–[37].
[15] ss 363(1)(a) [pt 5], 427(1)(a) [pt 7].
[16] *Sirimanne v MIBP* [2021] FCCA 1291 at [29]–[38]. The applicant contended that the Tribunal had failed to administer a valid oath and that this meant that their evidence was 'null, void, illegal, and otherwise not in accordance with law'. The applicant referred to the *Evidence Act 1995* (Cth) as prescribing a form of words for an oath. However, the Court held that as s 353 provides the Tribunal is not bound by technicalities, legal forms or rules of evidence and is required to act according to the substantial justice and merits of the case, there was no basis to find that the Tribunal was required to administer an oath in particular terms. The Court concluded that at common law, any form of oath which the witness regards as binding on his or her conscience is sufficient. There was no basis on which to conclude that the oath administered in this instance was not regarded by the applicant as binding on his conscience. There was also no suggestion that had the oath been administered in a different form, the applicant would have given different evidence.
[17] *Evidence Act 1995* (Cth), ss 23(3), 24(1). See also *BZAAG v MIAC* [2011] FCA 217 at [16]–[24].
[18] *SZROK v MIAC* [2012] FMCA 1043 at [28].
[19] *SZROK v MIAC* [2012] FMCA 1043 at [28].
[20] ss 371(1) and 433(1). For further discussion see Chapter 30 – Penalties.

affirmation. These circumstances include where the person is a minor (see Chapter 21 – Minors before the Tribunal) or otherwise lacks the mental capacity to understand the nature of the oath or affirmation (see Chapter 14 – Competency to give evidence).

13.1.9 Evidence will ordinarily be taken in a hearing by the member conducting the review,[21] however the Tribunal can authorise another person (whether or not a member) to take evidence on behalf of the Tribunal.[22] This power is discretionary and it has been suggested that it may only be appropriate where it is impractical for the member conducting the review to take the evidence,[23] or where the applicant is in a remote location and nothing turned on credibility.[24] However, the Migration Act does not restrict the circumstances in which the power may be exercised.

13.1.10 If another person is authorised to take evidence, that person must be authorised in writing by a member conducting the review.[25] That person must cause a written record of the evidence to be made and sent to the member who authorised the person to exercise the evidence power, and if that member receives the record of evidence, the Tribunal is taken to have given the applicant an opportunity to appear before it to give evidence for the purposes of s 360 or 425.[26]

13.1.11 The Tribunal can take evidence at hearing by telephone, closed-circuit television, or any other means of communication.[27] For further discussion see Chapter 15 – Hearing by video conference or telephone.

13.1.12 If the Tribunal misinterprets an applicant's evidence, it may give rise to a jurisdictional error for not taking into account relevant material.[28] The Tribunal takes care to carefully consider an applicant's evidence and, where necessary, generally seeks clarification in order to avoid potential errors. The Tribunal also takes care when considering evidence tendered by the applicant at hearing which may corroborate an applicant's claims and other evidence.[29] On occasion an applicant may form the view that the Tribunal has misunderstood their evidence. If an applicant informs the Tribunal that a misunderstanding has occurred, the Tribunal takes care to allow the applicant to clarify their evidence.

[21] ss 363(1)(a), 364(1) [pt 5], 427(1)(a), 428(1) [pt 7].
[22] ss 364 [pt 5] and 428 [pt 7], as amended by the Amalgamation Act.
[23] *SZHKA v MIAC* (2008) 172 FCR 1 at [30]. Although this judgment considered the version of s 428 in force prior to 1 July 2015, this principle nonetheless appears applicable to the current version (as amended by the Amalgamation Act).
[24] *Liu v MIMA* (2001) 113 FCR 541 at [49]. Although this judgment considered the version of s 428 in force prior to 1 July 2015, this principle nonetheless appears applicable to the current version (as amended by the Amalgamation Act).
[25] ss 364(1)(b) [pt 5] and 428(1)(b) [pt 7], as amended by the Amalgamation Act.
[26] ss 364(3) [pt 5] and 428(3) [pt 7], as amended by the Amalgamation Act.
[27] ss 366(1) [pt 5], 429A [pt 7].
[28] In *AJAJ v MIAC* [2010] FMCA 873 the Court held that the Tribunal misunderstood the applicant's evidence and thereby failed to address an important component of the case presented by the applicant resulting in jurisdictional error for ignoring relevant material.
[29] In *CNU17 v MICMSMA (No 2)* [2019] FCA 1651 at [38]–[41], the Tribunal denied the appellant an objectively meaningful hearing and failed to consider relevant material, when it mistakenly rejected a tendered document capable of corroborating other evidence that was central to the appellant's visa claim. The Tribunal rejected the document as it believed it was already in its possession. The Tribunal didn't have regard to the document when it was later lodged online after the hearing.

13.1.13 When taking evidence from an applicant, it is important that the applicant is not incapacitated or prevented from making his or her case to the Tribunal in any way. For example, if the Tribunal proceeds with an interpreter who is not able to properly interpret for the applicant, or in some circumstances, denies the applicant access to his or her adviser during a hearing,[30] the Tribunal may be found to be in breach of ss 360 or 425. Similarly, if it is apparent that an applicant is too unwell to give evidence, the Tribunal can adjourn the hearing.[31] However, a mere assertion by an applicant regarding his or her state of health does not necessarily establish that he or she is unfit to give evidence at a Tribunal hearing.[32] See Chapter 14 – Competency to give evidence for further information.

Representation at the hearing

13.1.14 The applicant is the only party to the proceedings in the MRD of the Tribunal. With limited exception,[33] applicants appearing before the Tribunal in relation to a Part 7 reviewable decision (protection) are not entitled to be represented in giving evidence.[34] However, applicants appearing before the Tribunal in relation to a Part 5 reviewable decision (migration) are entitled to be 'assisted' by another person but not represented.[35]

13.1.15 For further discussion of the role of advisers at Tribunal hearings see Chapter 18 – The role of the adviser at the hearing.

Witnesses

13.1.16 In most cases, when inviting an applicant to appear for hearing, the Tribunal will notify the applicant in the hearing invitation that he or she may request that the Tribunal take evidence from a witness.

13.1.17 For Part 5 reviews, s 361 requires the Tribunal to inform an applicant that he or she may, within 7 days after being notified of the hearing, request that the Tribunal take oral or written evidence or obtain written material. For a decision that is a Part 5–reviewable decision under s 338(4) (decisions to refuse or cancel bridging visas where the applicant is in immigration detention because of that decision), s 361 does not apply, but s 362 requires the Tribunal to have regard to a request to obtain

[30] See *WABZ v MIMIA* (2004) 134 FCR 271.
[31] See, for example, *MZXQF v MIAC* [2008] FMCA 177 where the Court found there was material before the Tribunal that the applicant was mentally impaired at the time of the hearing. By proceeding with a hearing notwithstanding that material, the Tribunal denied the applicant a fair hearing: at [30]. See also *SZNBT v MIAC* [2009] FCA 670 at [9]–[11].
[32] *SZLTI v MIAC* [2008] FCA 1274 at [19]. His Honour adopted a similar approach in *SZMBU v MIAC* [2008] FCA 1290 at [20]. In *Alsaket v MIAC* [2012] FMCA 411 the Court found no breach of s 360 in circumstances where the applicant did not attend a scheduled hearing and did not provide evidence or contact with the Tribunal to indicate he was ill. Although the Court accepted the applicant suffered from a medical condition, on the evidence before it, it did not accept he was too ill to attend the hearing.
[33] In some circumstances, the Tribunal may not fully discharge its obligation under s 425 if it unreasonably refuses to permit an applicant to be represented at a hearing if the effect of that refusal is to deny the applicant a real and meaningful opportunity to present evidence and arguments in relation to the issues in the review. These may include when the issues are serious and the applicant is not highly educated, speaks little English and would have difficulty dealing with the issues in the review: *WABZ v MIMIA* (2004) 134 FCR 27.
[34] s 427(6).

oral evidence if the request is in the approved form and accompanies the application for review. The Tribunal is not required to obtain such evidence.

13.1.18 For Part 7 reviews, the Tribunal is required by s 426 to inform an applicant that he or she may, within 7 days after being notified of the hearing, give the Tribunal written notice that he or she wants the Tribunal to obtain oral evidence from a named person or persons.

13.1.19 If an applicant makes a request under ss 361, 362 or 426, the Tribunal must have regard to that request but is not required to comply with it.[36] Strictly speaking, the Migration Act only requires the Tribunal to consider such a request if it complies with ss 361, 362 or 426 as relevant (i.e. made within 7 days after being notified of the hearing, in writing/or the approved form etc.).[37] However, procedural fairness may require (and ss 360/425 may be construed as requiring) the Tribunal to have proper regard to any request to take evidence from a witness.

13.1.20 If a witness appears before the Tribunal to give evidence, the Tribunal may take evidence from the person under oath or affirmation.[38] The applicant is not entitled to examine or cross-examine that person.[39] Nor are witnesses entitled to be represented while appearing before the Tribunal.[40]

13.1.21 While the Tribunal has a discretionary power to exclude the applicant from the hearing while a witness gives evidence, the Tribunal is to exercise this power reasonably and make clear in its reasons why the applicant was excluded.[41]

13.1.22 For further discussion on the role, and obligations in respect to witnesses, see Chapter 17 – Requests to call witnesses.

Interpreters

13.1.23 If an applicant cannot adequately express himself or herself in English, the Tribunal is under a statutory obligation, under ss 360 and 366C[42], and 425 and 427[43] to

[35] s 366A.
[36] See *SZOWT v MIAC* [2011] FMCA 540 at [42]. An appeal from this judgment was dismissed: *SZOWT v MIAC* [2012] FCA 192.
[37] In *Vuong v MIAC* [2009] FMCA 433 it was held that where an applicant had not given any written notice to the Tribunal under s 361(2) or (2A), the Tribunal's obligation under s 361(3) did not apply.
[38] ss 363(1)(a) [pt 5], 427(1)(a) [pt 7].
[39] ss 366D [pt 5], 427(6) [pt 7]. See *SZEQH v MIAC* (2008) 172 FCR 127 at [30] where the Court held that following the introduction of s 422B, and consistent with *MIMIA v Lay Lat* (2006) 151 FCR 214, a failure to permit cross-examination of a witness did not constitute a denial of procedural fairness. In doing so, his Honour found that to the extent that *WABZ v MIMIA* (2004) 134 FCR 271 suggested otherwise, and in light of s 422B, it was no longer good law. Justice Dowsett did however conclude that the Tribunal retained a *discretion* to permit cross-examination and further suggested that s 422B(3) ['Tribunal must act in a way that is fair and just'] may, if it imposes a further requirement as to fairness, require that discretion to be exercised fairly: at [34].
[40] ss 366B(1)(b) [pt 5], 427(6)(a) [pt 7].
[41] See *Tong v MIBP* [2018] FCCA 1329 at [29]–[35]. The Court found that the Tribunal had denied the applicant procedural fairness and breached s 360 by excluding the applicant from the hearing room, without her consent or reasons given for her exclusion, while a material witness gave evidence. The affordance of a second hearing (where the material witness did not attend) and the raising of the inconsistencies arising from the witness' evidence under s 359AA, did not overcome the want of fair process that occurred at the first hearing. The Court noted that there may not have been a denial of procedural fairness if the applicant's representative, that was present throughout, was a qualified lawyer.

provide an interpreter, who provides competent interpretation.[44] If the Tribunal provides an interpreter whose interpretation is such that the applicant is unable adequately to give evidence and present arguments to the Tribunal, there will be a breach of the Tribunal's statutory obligation under ss 360 or 425.[45]

13.1.24 In *SZSEI v MIBP*,[46] the Federal Court observed that it is not necessary that the applicant be prevented from giving *any* evidence or that there to be a causal connection between a mistranslation and the outcome of the review to establish a failure to comply with s 425 [s 360], rather the focus should be on whether the applicant was afforded a fair process. Griffiths J noted that the determination of whether inadequate interpretation has deprived the applicant of a fair hearing under s 425 requires an assessment of the individual and cumulative effect of the mistranslations on the fairness of the hearing process as a whole. The following cases are illustrations of circumstances in which the Tribunal was found not to have discharged its duty to the applicant:

- In *SZGWN v MIAC*, the Court found that notwithstanding the Tribunal's reliance on a transcript of the hearing translated by a NAATI accredited specialist which identified interpreting errors at the hearing, the errors were so comprehensive that they prevented the asking of relevant questions by the member as well as hindering the applicant's evidence in response.[47]

- In *SZLDY v MIAC*, the Court found that despite the Tribunal holding a second hearing with a different interpreter, mistranslations and omission at the first hearing so infected the second hearing that the applicant was denied an opportunity to present his evidence.[48] The Court was not satisfied that the Tribunal was fully aware of the extent of the mistranslations and it may have had regard to evidence given at the first hearing in reaching adverse conclusions on the applicant's credibility.

- In *SZLMN v MIAC*, the applicant indicated in her visa application that she spoke, read and wrote English, Zulu and Xhosa. In her response to a hearing invitation, the applicant requested an interpreter in the Xhosa language. The Tribunal was unable to locate an acceptable Xhosa interpreter and conducted the hearing in English. The applicant confirmed at the outset of the hearing that she understood English but not 'very well'. The Court found that it was

[42] s 366C sets out requirements for the Tribunal to appoint an interpreter where requested by the applicant (s 366C(1) and (2)), and where the Tribunal considers the person appearing is not sufficiently proficient in English (s 366C(3)).
[43] Section 427(7) states that '[i]f a person appearing before the Tribunal to give evidence is not proficient in English, the Tribunal may direct that communication with that person during his or her appearance proceed through an interpreter'.
[44] *Perera v MIMA* (1999) 92 FCR 6 at [17], [20]; *Mohsen Soltanyzand v MIMA* [2000] FCA 917 at [20].
[45] *Perera v MIMA* (1999) 92 FCR 6 at [38]–[42], *Mazhar v MIMA* (2000) 183 ALR 188 at [31]. For a useful review of case law on the standard of interpretation required for a fair hearing, see *SZGWM v MIMA* [2006] FMCA 1161 at [18]–[22].
[46] *SZSEI v MIBP* [2014] FCA 465 at [73]. The Court, applying *SZRMQ v MIBP* (2013) 219 FCR 212, held the frequent and numerous mistranslations and gratuitous remarks of an interpreter amounted to a breach of the requirements in s 425 when considered cumulatively and in view of the significance of the mistranslations to the outcome of the review.
[47] *SZGWN v MIAC* (2008) 103 ALD 144.
[48] *SZLDY v MIAC* [2008] FMCA 1684 at [111].

not apparent from the transcript that the applicant had the necessary proficiency in English to communicate with and comprehend the Tribunal.[49]

- In *MHA v CAK16*, more than half the answers translated by the interpreter were in the third person, giving the perception of paraphrasing the applicant's evidence, and a number of occurrences of the applicant's answers were recorded in the transcript of the hearing as 'indecipherable'. Due to the nature, frequency, pattern and extent of the irregularities and their importance in the context of the issues before the Tribunal, the Court found that the Tribunal breached its procedural obligation under s 425.[50] The Court found that the applicant was not required to establish a causal link between defective interpretation and the outcome, and that in some circumstances, it is enough that the irregularities in interpretation might reasonably have led to an adverse outcome.[51]

13.1.25 By way of contrast, in *CJC16 v MICMSMA*, the Court found that there was no breach of s 425 in circumstances where, after a two and a half hour hearing, the interpreter withdrew from the hearing, the appellant contended that the interpreter had not been able to convey their evidence accurately and in the next hearing the Tribunal explained to the appellant that it would place 'little weight' on the appellant's oral evidence at the previous hearing.[52] The appellant had claimed that the previous interpreter had altered their evidence by shortening their comments and contributing to the impression that the appellant was providing oral evidence lacking in detail. The Court confirmed that the Tribunal was not required to completely disregard the evidence from the earlier hearing, and whether there would be a breach of s 425 as a result of the earlier hearing would turn on the circumstances of the matter. In this instance there was no error as there was no causal link between the impugned evidence from the hearing with the interpreter who withdrew and the Tribunal's ultimate decision, and the Tribunal acknowledged that its use of the evidence from the earlier hearing would be limited and was used only to support its conclusion that the account of facts by the appellant was consistent and accepted.[53] In *SZQSP v MIAC*, the Court found, notwithstanding that the interpreter did not translate the applicant's utterances, nor the Tribunal's, word for word, the instances of claimed errors were not such as to deny the applicant an adequate opportunity to give evidence and present argument because of the interpretation provided.[54]

13.1.26 For further discussion on the role of interpreters at hearing, see Chapter 20 – The role of the interpreter at the hearing.

[49] *SZLMN v MIAC* (2009) 110 ALD 367.
[50] *MIBP v CAK16* [2019] FCA 322 at [68]–[70], upholding the findings of the primary judge in *CAK16 v MIBP* [2018] FCCA 2670.
[51] *MIBP v CAK16* [2019] FCA 322 at [61]–[62], upholding the findings of the primary judge in *CAK16 v MIBP* [2018] FCCA 2670.
[52] *CJC16 v MICMSMA* [2021] FCA 50 at [40]–[50].
[53] *CJC16 v MICMSMA* [2021] FCA 50 at [49]–[50].
[54] *SZQSP v MIAC* [2012] FMCA 890 at [103]–[106].

Legal Professional Privilege

13.1.27 Legal Professional Privilege (LPP) is a common law principle which protects from disclosure communications made confidentially between a client and his or her legal adviser for the purpose of obtaining or giving legal advice or assistance.[55]

13.1.28 A person appearing before the Tribunal is also entitled to rely on Legal Professional Privilege, insofar as it may lead to self-incrimination.[56]

13.1.29 In the case of *SZHWY v MIAC*,[57] the Federal Court considered whether the Tribunal was authorised by the Migration Act to ask an applicant questions about communications he had had with his solicitor. The Court unanimously held that applicants and other persons appearing before the Tribunal are entitled to claim legal professional privilege and on that basis decline to answer any questions.[58]

13.1.30 A majority in *SZHWY* found that the Tribunal erred by asking the questions it did without warning the applicant of his entitlement to claim LPP.[59] This reasoning has been followed in the Federal Magistrates Court[60] where the Tribunal was found to have erred by asking the applicant when he first saw a solicitor and whether he asked the solicitor for any advice about migration or visas, without advising the applicant that he could refuse to answer those questions. The response to this question formed a part of the Tribunal's reasoning in affirming the decision and hence the Tribunal had erred.[61] By way of contrast, in *SZFPA v MIAC*[62] the Tribunal had asked the applicant a general question about what he thought his chances were of coming to live in Australia and in response the applicant volunteered that he had spoken to a migration lawyer and disclosed the essence of that advice. The Federal Magistrates Court held that a fair reading of the exchange between the Tribunal and the applicant did not support the contention that there was an uninformed disclosure of a privileged communication.[63]

[55] The discussion in this Chapter is about Legal Professional Privilege (LPP) claimed by an applicant when appearing before the Tribunal. For consideration of LPP claimed by a Commonwealth agency in relation to internal legal advice, and whether the agency had waived privilege, see *Alpert v Secretary, Department of Defence* [2022] FCA 54 at [77]–[91]. In particular, the Court noted that waiver of legal professional privilege may be express or implied, and privilege may in fact be waived notwithstanding that the holder of the privilege did not intend to do so. However, in the circumstances of the Department disclosing a legal opinion to the Office of the Australian Information Commissioner (OAIC), privilege had been maintained because it was disclosed to the OAIC on the express basis that it was to remain confidential and not be disclosed to the applicant; and was in an email marked "Sensitive: Legal".
[56] *SZHWY v MIAC* (2007) 159 FCR 1.
[57] *SZHWY v MIAC* (2007) 159 FCR 1.
[58] *SZHWY v MIAC* (2007) 159 FCR 1 at [38], [44], [113], [158], [163]. Note however that the Court in *SZHWY v MIAC* was considering the issue in the context of the Migration Act as it stood prior to 1 July 2015. That is, when ss 371 and 433 provided that it was not an offence to answer a question if there was a 'reasonable excuse'. Justice Lander held that unless the Migration Act says otherwise, a party or witness appearing before the Tribunal could claim the benefit of LPP. It is not clear whether the amendments to s 371 and 433 by the Amalgamation Act, which removed reference to 'reasonable excuse' evidence a contrary intention.
[59] *SZHWY v MIAC* (2007) 159 FCR 1 at [77], [188]–[190].
[60] *SZHLO v MIAC* [2007] FMCA 1837.
[61] *SZHLO v MIAC* [2007] FMCA 1837 at [19], [24].
[62] *SZFPA v MIAC* [2008] FMCA 550.
[63] *SZFPA v MIAC* [2008] FMCA 550. In *SZOGO v MIAC* [2010] FMCA 55 the applicant's migration agent who was also a solicitor had emailed the delegate to advise that the applicant would not attend the interview, and the Tribunal questioned the applicant about his non-attendance. The Court found that the Tribunal was not in any way seeking to elicit from the applicant any discussion between himself and his solicitor, and the fact that the intention not to attend the hearing was communicated by

13.1.31 Similarly, in *SZTRY v MIBP*[64] the applicant volunteered the content of communications with his lawyer in response to a general question asked by the Tribunal about why the applicant had not mentioned a particular claim to the Department. The Federal Circuit Court found that, in the circumstances, the Tribunal was not under an obligation to warn or advise the applicant of his right to claim legal professional privilege. It could not be said that the Tribunal was asking or knew that it was about to ask a question or questions that would tend to reveal privileged information and, in any event, the applicant unexpectedly volunteered the information.[65]

13.1.32 In *AEC15 v MIBP*[66] the Court found the applicant had waived privilege in circumstances where his response to a question from the Tribunal was what led to the disclosure of privileged communication. The Court further found the Tribunal did not in fact use the information given by the applicant which might have been subject to a claim of LPP.

13.1.33 In *BWO19 v MICMSMA*,[67] the Tribunal asked the applicant questions about why claims had not been included in the original protection visa application to which the applicant volunteered information about a discussion between him and his migration agent, who was a lawyer, in which the agent allegedly said there would be an opportunity to provide further details about claims later. The Federal Circuit Court distinguished the Tribunal's questioning in this case from that in *SZHWY*, on the basis that the Tribunal was not inviting the disclosure of privileged communications but was instead asking questions that were procedural in nature and directed at how the application came to be completed.[68] In the alternative, the Court noted that even if the issue of legal professional privileged arose, it followed *AEC15* in finding that privilege may be impliedly waived in circumstances where the applicant discloses communications voluntarily as the applicant's conduct of voluntarily disclosing information about his communication with his migration agent was inconsistent with maintaining legal professional privilege.[69] The Court also went on to find that any failure by the Tribunal to warn the applicant that he could claim legal professional privilege did not deprive the applicant of a favourable outcome and would therefore not lead to jurisdictional error.[70]

his solicitor did not give rise to any need to provide the applicant with a warning as to the operation of LPP (at [44]). See also *WAAF v MIMIA* [2003] FMCA 36 at [23].

[64] *SZTRY v MIBP* [2015] FCCA 169.

[65] *SZTRY v MIBP* [2015] FCCA 169 at [153]–[154].

[66] *AEC15 v MIBP* [2015] FCCA 3428.

[67] *BWO19 v MICMSMA* [2020] FCCA 384.

[68] *BWO19 v MICMSMA* [2020] FCCA 384 at [69]–[72]. The Court noted that in *SZHWY*, the Tribunal asked what the lawyer advised the applicant to do in relation to a claim for protection and contrasted it to the present circumstances where no such question was asked.

[69] *BWO19 v MICMSMA* [2020] FCCA 384 at [79]–[80].

[70] *BWO19 v MICMSMA* [2020] FCCA 384 at [81]. The Court noted held that as the lack of warning was not material to the outcome, it did not result in jurisdictional error (referring to *Hossain v MIBP* (2018) 264 CLR 123 and *MIBP v SZMTA* (2019) 264 CLR 421).

13.1.34 LPP does not apply to discussions between a person and a migration agent who is not also a Legal Practitioner.[71]

Privilege against self-incrimination

13.1.35 Like LPP, the common law privilege against self-incrimination has been codified in the *Evidence Act 1995* (Cth) (Evidence Act) and the Migration Act.[72] The Evidence Act is not applicable to Tribunal proceedings.[73]

Protection under the Migration Act

13.1.36 Sections 371(3) and 433(3) expressly codify the common law right to claim a privilege against self-incrimination, providing that the offence of refusal to answer questions under ss 371 and 433 does not apply if answering the question might tend to incriminate the person.

13.1.37 This could hinder the Tribunal in the discharge of its statutory obligation in some circumstances. For example, it is an offence under s 235 of the Migration Act for a non-citizen to work in contravention of a condition on a temporary visa restricting the work that the non-citizen may do in Australia. However, it is sometimes the case that the very question that the Tribunal must determine in order to discharge its obligation to review the delegate's decision is whether or not the person breached a condition of their visa by working. If an applicant refuses to answer questions about whether or not he or she breached a condition of their work visa by claiming a privilege against self-incrimination, it may impede the Tribunal from carrying out its statutory functions.

13.1.38 It may be expected that the Tribunal will generally warn an applicant about the privilege against self-incrimination.[74] However, if the Tribunal does not warn an applicant about the privilege against self-incrimination, it is likely to only result in a jurisdictional error in relation to the Tribunal's decision if the failure to warn the applicant leads to their suffering practical injustice or the applicant is deprived of a meaningful opportunity to be heard.[75]

13.1.39 An applicant may waive their privilege against self-incrimination if they freely admit, or disclose, incriminating details about matters which are relevant to the criteria in dispute and enable the Tribunal to determine whether they satisfy the criteria.[76]

[71] *SZKTQ v MIAC* [2008] FMCA 91 at [39].
[72] E.g. ss 371(3) [pt 5], 433(3) [pt 7].
[73] ss 353(a) [pt 5], 420(a) [pt 7], as amended by the Amalgamation Act. See also *SZHWY v MIAC* (2007) 159 FCR 1 at [17].
[74] *Kohli v MIBP* [2018] FCA 540 at [33], [38]. In finding no error where the applicant wasn't warned about the privilege against self-incrimination, the Court acknowledged that the Tribunal may have been required to advise the applicant of his right to refuse to answer questions on the basis of self-incrimination.
[75] *Kohli v MIBP* [2018] FCA 540 at [36]–[39].
[76] *Prasad v MICMSMA* [2020] FCCA 2131 at [17]. The issue before the Tribunal was whether the applicant had complied with the requirement in reg 2.03A(2)(a) to provide a statement about his criminal history and whether he satisfied the character test in PIC 4001. The applicant contended that the Tribunal had fallen into error by not cautioning him about the privilege against self-incrimination, as it was submitted that he would have had to provide information about the different identities and have to

Misleading statements

13.1.40 The Tribunal can assist the applicant to give evidence by outlining what the relevant issues are. The Courts have held that making misleading statements as to what is or is not relevant to the review, or by focusing solely on one issue so that the applicant believes it is the only issue in dispute, may lead to jurisdictional error for breach of s 360(1) or 425(1).[77]

13.1.41 In *MIMA v Cho,* Tamberlin and Katz JJ observed that there may be a failure to comply with s 425 where relevant evidence is not admitted or misleading statements are made by the decision-maker which discourage an applicant from calling or proceeding with a particular line of evidence.[78] For example, in *Applicant VBAB v MIMIA*, the Court found an error in circumstances where the Tribunal's statements at the hearing had induced the applicant and her adviser into wrongly believing that the timing and method of the applicant's departure from her home country would not influence the Tribunal's resolution of the ultimate issues.[79] Similarly, in *SZMBT v MIAC*, the Court found that the Tribunal erred by telling the applicant that it did not want to hear evidence about the applicant's son because he was not part of the applicant's original application. By foreclosing discussion about the son, the Tribunal denied the applicant the opportunity to provide evidence about his son's experience of religious persecution, which depending upon its content, may have been relevant to the determinative issue of whether the applicant's alleged fears of religious persecution were well founded.[80]

13.1.42 The Tribunal's decision to not communicate further with the applicant and receive further submissions, in circumstances where it had undertaken to give the applicant a further opportunity to make further submissions, has been characterised as a breach of procedural fairness going to jurisdiction (prior to the introduction of ss 357A [Part 5], 422B [Part 7]),[81] or as a breach of s 360 or 425.[82]

admit to having contravened s 234 of the Migration Act, which makes it an offence to provide false documentation in connection with entry. The Court found the applicant had waived his privilege against self-incrimination by admitting, in a statutory declaration provided to the Department in connection with the visa application, that he had travelled to Australia on three passports obtained under three identities.

[77] *Chey v MIAC* [2007] FCA 871 at [30]–[31].

[78] *MIMA v Cho* (1999) 92 FCR 315 at [33].

[79] *Applicant VBAB v MIMIA* [2002] FCA 804 at [62]. See also *SZHAI v MIAC* [2008] FMCA 49.

[80] *SZMBT v MIAC* [2008] FMCA 862.

[81] *Applicant NAFF of 2002 v MIMIA* (2005) 211 ALR 642.

[82] In *SZLRD v MIAC* [2008] FMCA 462 the Tribunal invited the applicant during the hearing to respond to country information after the hearing but only provided him with an inaudible recording of the hearing from which the relevant country information could not be identified. The Court found the Tribunal breached s 425 by failing to provide the applicant with an alternative means of identifying and dealing with the country information. In *SZQCO v MIAC* [2011] FMCA 613 the Tribunal declined the applicant's adviser's request to postpone the hearing to a time when he could attend but sent a letter indicating it would determine at the hearing whether further submissions would be required and, if so, then the applicant would be given time to provide further submissions. The Court found the undertaking in the letter was not enlivened as it could be inferred that the member did not consider that anything further was required from the applicant.

Adjournments

13.1.43 The Tribunal has a general power to adjourn a review from time to time: ss 363(1)(b) and 427(1)(b). Whether or not a hearing should be adjourned is generally a matter of discretion for the Tribunal, having regard to the circumstances of the case.[83]

13.1.44 See Chapter 22 – Rescheduling or adjourning the hearing for further discussion on rescheduling or adjourning the hearing.

Cancelling a further hearing once invitation issued

13.1.45 Occasionally after completing the hearing, the Tribunal may invite an applicant to a further hearing (this may be, for example, to ask further questions about an issue or to put adverse information to an applicant under s 359A or 424A). However, if the Tribunal invites an applicant to attend a further hearing and then cancels that hearing without a sufficient explanation, a court may consider that the Tribunal has erred by not complying with its duty to complete the review process.[84] That is, once the Tribunal has determined that another hearing should take place, the Tribunal may only abandon that course of action by providing a sufficient explanation as to why the s 360 or 425 obligation has already been discharged (if it does not provide such an explanation, the obligation to have a hearing may remain). For example, in *Vo v MHA*,[85] the Tribunal invited the applicant to attend a second hearing but following a request from the applicant's representative to postpone the hearing, the Tribunal cancelled the hearing and issued a s 359A letter. The Court found that the Tribunal erred by cancelling the hearing, and that issuing a s 359A invitation did not explain why the original course had been abandoned.[86]

13.2 Identifying the issues

13.2.1 A failure by the Tribunal to give an applicant sufficient opportunity to give evidence or make submissions about the issues arising in relation to the decision under review will lead to a breach of the hearing obligations in ss 360/425 of the Migration

[83] A refusal to adjourn a hearing may result in a breach of ss 360 or 425 if it has the effect of preventing an applicant from giving evidence and presenting arguments on all the issues in the review, however, such errors are usually dependent on the specific circumstances of the matter and the nature of the request, and as such it is difficult to outline the parameters of what will lead to such an error.
[84] *Vo v MHA* [2020] FCA 468 at [36]–[44].
[85] *Vo v MHA* [2020] FCA 468.
[86] In *Vo v MHA* [2020] FCA 468 the Court considered that sending a s 359A letter did not explain why the original course of action (i.e. holding a hearing) had been abandoned. In coming to this conclusion, the Court noted that as a s 359A letter does not offer the advantages of a hearing, such as personal interaction with the decision-maker or an opportunity to persuade the decision-maker that their version of events is true: at [35]. It was also not clear to the Court why the Tribunal considered the hearing was required on one day but was not required the next, and the unavailability of the applicant's migration agent or the fact that there had already been a hearing were not sufficient reasons: at [42].

Act.[87] The leading authority is *SZBEL v MIMA* in which the High Court found that the Tribunal did not accord the applicant procedural fairness as it did not give him a sufficient opportunity to give evidence or make submissions about what turned out to be two of the three determinative issues arising in relation to the decision under review.[88] For further discussion in relation to the hearing rule and the applicant's right to know the case against him or her see Chapter 7 – Procedural fairness and the Tribunal.

What is an 'issue'?

13.2.2 The scope of the Tribunal's obligations under ss 360 and 425 has received considerable judicial attention since *SZBEL*. The case law establishes that the Tribunal must identify for the applicant the determinative, dispositive, critical or important issues, in the sense of issues on which the decision to reject the applicant's claim is based.[89]

Language of ss 360 and 425

13.2.3 Some courts have placed emphasis on the language of ss 360 and 425 to support an expansive approach to identifying the matters in relation to which the Tribunal is required to give an applicant an opportunity to give evidence and present arguments. In *SZDFZ v MIAC*, for example, the Federal Court found that ss 360 and 425 are not to be narrowly construed, observing that the width of the terminology of 'relating to' and 'in relation to' is well recognised.[90]

Adverse information and conclusions

13.2.4 In *SZLNW v MIAC*, the Federal Court held that the decision in *SZBEL* makes it plain that if the Tribunal is to determine the application before it adversely to the applicant for a *specific reason*, it is obliged to put that circumstance to the applicant and to invite the applicant to respond.[91] The specific reason or circumstance that the Tribunal was obliged to disclose in that case was that the Tribunal would draw an adverse inference if the persons from whom the applicant feared persecution were not specifically identified. Failing to ask the applicant questions about the identity of such persons or otherwise put him on notice of the issue was a breach of s 425.

13.2.5 There is a distinction between the obligation to accord procedural fairness by identifying any issue critical to the decision that is not apparent from its nature or

[87] *SZBEL v MIMA* (2006) 228 CLR 152 at [36], [44], [47]. Note that this judgment predated the introduction of ss 357A [pt 5] and 422B [pt 7] (limitations on procedural fairness) but has been held to be authority for the view that a failure to give an applicant this opportunity will result in a breach of the statutory obligation in ss 360 or 425, resulting in jurisdictional error. Review applications made on or after 4 July 2002 are subject to ss 357A or 422B: s 7, *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth).
[88] *SZBEL v MIMA* (2006) 228 CLR 152 at [44].
[89] See *SZIMM v MIAC* [2008] FMCA 34 at [65].
[90] *SZDFZ v MIAC* (2008) 168 FCR 1 at [23].
[91] *SZLNW v MIAC* [2008] FCA 910.

the terms of the statute under which it is to be made and to advise of any adverse conclusion arrived at which would not obviously be open on the known material. The Federal Court in *SZOZU v MIAC* found that a potential dichotomy may arise between the requirements of procedural fairness and mere elaboration of thought processes.[92] However in this regard, it noted that the High Court in *SZBEL*[93] pointed to the need to exercise considerable care in approaching a problem by reference to such a dichotomy, with the correct approach requiring the decision-maker to give the affected party the opportunity of ascertaining the relevant issues and to be informed of the nature and content of any adverse material.[94]

Determinative in nature

13.2.6 Whether a matter is an issue depends on whether the decision turns in part or in whole on that matter.[95] An issue could be a matter that arises in the intricate details of a claim, including where, as in that case, it is used as evidence in support of a finding, and is not itself a finding.[96]

13.2.7 However, where a matter is of such an 'insubstantial nature' that it would not have 'played a part in the Tribunal's decision', it may not require any warning that it might be covered by the Tribunal's adverse findings of fact. For example, in *SZNJT v MIAC* the Tribunal rejected the applicant's claim because it disbelieved his evidence of being an officer and active member of the BNP Party and the Court distinguished *SZBEL* in finding that the applicant's party membership was not an issue as it had no significance in the Tribunal's decision.[97]

13.2.8 In contrast, in *SZHAI v MIAC*[98] the Tribunal rejected the applicant's claim to have been involved in the distribution of a pamphlet, finding that there was no credible evidence to corroborate the claim that the pamphlet was translated and printed in Malaysia. The Court found that evidence on whether the pamphlet was printed in Malaysia was, or was related to, one of the issues which was determinative of the applicant's claim. By indicating to the applicant at hearing that whether the pamphlet was printed in Malaysia or Sydney was 'neither here nor there', the Tribunal breached s 425.

[92] *SZOZU v MIAC* [2011] FCA 1005.
[93] *SZBEL v MIMA* (2006) 228 CLR 152 at [31]–[33].
[94] See also *Kaur v MIBP* [2015] FCA 1 where the Court found that the Tribunal erred by failing to advise the applicant of adverse conclusions which would not obviously be open on the known material. While the Court characterised the error in this case as a breach of procedural fairness, errors of this kind are more typically characterised as a breach of the ss 360/425 obligation to provide a meaningful hearing in the Tribunal context.
[95] *MZXPO v MIAC* [2007] FMCA 1484.
[96] See also *SZIWX v MIAC* [2008] FMCA 368 at [14] where the Court found that the Tribunal had erred in its consideration of a membership card. The word 'INCHARGE' appeared under the applicant's photograph. The Tribunal construed this as asserting that the applicant was 'in charge', which was inconsistent with other evidence. The Court took the view the Tribunal had made a mistake of fact about the card and was required to clarify its concerns with the applicant because of the importance of this finding to the Tribunal's conclusions about the applicant's credibility.
[97] *SZNJT v MIAC* [2009] FMCA 730.
[98] *SZHAI v MIAC* [2008] FMCA 49.

Where matter not previously in issue

13.2.9 In *SZQPY v MIBP* the Federal Court found the Tribunal failed to comply with its obligations under s 425 by not raising reasonableness of relocation as an 'issue' at hearing, where it was not raised by the delegate.[99]

13.2.10 In *BDF15 v MIBP*[100] the Court found the Tribunal failed to afford the applicant a fair hearing as required by s 425 in circumstances where the Tribunal's acceptance of the plausibility of the applicant's evidence had changed from the time of the hearing. The Tribunal may seek to avoid such errors by ensuring that the applicant is clearly put on notice of any departure from any previous representation by the Tribunal as to what is accepted.

13.2.11 If a reconstituted Tribunal proposes or envisages revisiting one or another of the issues previously resolved in favour of an applicant (and taking an adverse view), such a course would also attract the obligation imposed by ss 360(1) and 425(1).[101]

13.2.12 In *Gacic v MIAC* however the Court found no error, in circumstances where it was contended the applicant husband was not given the opportunity to provide evidence on the issue of whether he satisfied the primary criteria for a Business Skills visa, as at no time had the applicant husband contended he satisfied the primary criteria, the applicants had proceeded on the basis that it was the applicant wife who sought to satisfy the primary criteria and in any event, unlike *SZBEL*, the delegate and the first Tribunal in its decision had found the applicant husband did not satisfy the primary criteria.[102]

When is a matter not an 'issue'

13.2.13 While the Tribunal has an obligation under ss 360 and 425 to provide the applicant with a meaningful opportunity to present evidence and argument relating to the issues arising in relation to the decision under review, that obligation does not extend to explaining the nature and scope of the evidence that the applicant might submit to the Tribunal relating to that issue.[103] For example:

- In *MIBP v SZRTF*, the Court found that the applicant was well aware that the extant issue was whether she would suffer discrimination by reason of China's family planning laws and that she was given ample opportunity to address it.[104] The Court held that even if the fact of her pregnancy was to be classed an issue within the meaning of s 425, it was something she knew and that she, herself, had raised, and it was not necessary for the Tribunal to put

[99] *SZQPY v MIBP* [2013] FCA 1133.
[100] *BDF15 v MIBP* [2015] FCCA 3014.
[101] *SZDFZ v MIAC* (2008) 168 FCR 1.
[102] *Gacic v MIAC* [2012] FCA 531. A subsequent application for special leave to appeal to the High Court was refused: *Gacic v MIAC* [2013] HCASL 14.
[103] *SZRPL v MIAC* [2013] FCA 1198.
[104] *MIBP v SZRTF* [2013] FCA 1377.

to her that her assertion might not be accepted.[105] It was for the applicant to satisfy the Tribunal that she was pregnant and to submit any evidence that she wanted the Tribunal to consider.

- In *MIAC v Pham*, the Court held that there was no obligation on the Tribunal to expressly advise an applicant of deficiencies in his statutory declarations evidencing domestic violence at the hearing, because the nature of the claim and statute dictated that whether the statutory declarations satisfied the Regulations would be an issue before the Tribunal.[106]

- In *Uppu v MIAC*, the Court found that, in consideration of the Schedule 5A English language requirements, the Tribunal had no obligation to traverse each of the alternative requirements in cl 5A404 at the hearing. The Court's finding confirms that provided the applicant is aware of the issue, it is up to the applicant to make his or her case.[107]

- In *Khanna v MIAC*, the Court held the applicant was plainly put on notice of the relevant issue, namely, whether he was a genuine student. If the issue itself is identified, the fact that the Tribunal did not cite the particular clause of the Regulations which was the background to the issue is not significant.[108]

- In *SZUBI v MIBP*, the Court found that new case law did not raise a new 'issue' for the purpose of s 425. The Court held the relevant issue in that case was whether the applicant had taken all possible steps to avail himself of the right to enter and reside in India for the purposes of s 36(3) of the Migration Act. The applicant was aware of that issue, and the fact that he was unaware of recent case law on the meaning of s 36(3) was not relevant.[109]

Merely factual matters

13.2.14 A distinction may be drawn between an issue and merely factual matters that relate to a general issue.[110] The Court in *SZJUB v MIAC* held that if something was a factual matter that went to an issue arising in relation to the decision under review the Tribunal was not obliged to put each of those factual matters to the applicant. It was obliged to inform the applicant of the issue but not of each fact that related to

[105] *MIBP v SZRTF* [2013] FCA 1377 at [66].
[106] *MIAC v Pham* [2008] FCA 320.
[107] *Uppu v MIAC* [2012] FMCA 34. See also *Shah v MIAC* [2011] FMCA 18 at [41]–[42] where the Court held that the Tribunal's reliance upon an applicant's failure to attend a hearing was not an 'issue' in the s 360 sense.
[108] *Khanna v MIAC* [2011] FMCA 658 at [27].
[109] *SZUBI v MIBP* [2015] FCCA 226.
[110] *SZJUB v MIAC* [2007] FCA 1486. See also *SZHKA v MIAC* (2008) 172 FCR 1 at [103] where Besanko J found a distinction between evidence relating to an issue and the issue itself. It was further observed that not every matter which engages the obligation in s 424A involves a new issue or a further or previously unidentified issue. In *SZQTV v MIAC* [2012] FMCA 827 the Court rejected the argument that the question of whether the applicant would be able to undertake paid employment if he were to return to Pakistan was a dispositive issue separate to that of relocation, distinguishing the applicant's ability to undertake paid employment as a factual matter that went towards the issue of relocation, (at [47]–[49]).

it.[111] In *SZNXI v MIAC*[112] in rejecting the applicant's claim, the Tribunal had regard to the applicant's failure to provide any corroborative evidence in relation to a particular aspect of that claim. The applicant claimed the Tribunal had failed to comply with its obligations under s 425 by failing to give her an opportunity to comment on this issue and the Court held the applicant knew from the delegate's decision that the relevant aspect of her claim was doubted and that she had to persuade the Tribunal about it. The particular reason why the Tribunal found the claim implausible was not in itself one of the 'issues arising'.

13.2.15 Another useful illustration of matters which may be an issue or merely factual is contained in *SZRRX v MIAC*[113] where the applicant's claims centred on his claimed sexuality. As evidence was given to the Tribunal by the applicant's claimed former partner that the applicant had had a girlfriend who had become pregnant three times, the Tribunal raised with the applicant the issue of his *ongoing* relationship with a woman. The Court rejected the applicant's argument that the evidence regarding the *sexual* nature of the alleged relationship was a distinct issue which was required to have been raised and found that while this evidence was a critical part of the Tribunal's ultimate determination of the question of the applicant's claimed sexuality, simply because the claimed former partner made mention of the pregnancies did not elevate that to an issue, or even the substratum of facts on which the issue was determined.

Credibility

13.2.16 An applicant's general credibility[114] may in some matters be a determinative issue. If this is the case, the Tribunal generally avoids giving an applicant the impression that aspects of his or her claims have been or will be accepted. In *SZIMM v MIAC*[115] the Tribunal put to the applicant that certain matters were in issue, but did not alert the applicant to the fact that everything he said was in issue. While the member indicated he was undertaking a new examination of the application, the member also advised that 'at this hearing I will only raise points on which I like further

[111] *SZJUB v MIAC* [2007] FCA 1486 at [25]. See also *Shrestha v MIAC* [2013] FCCA 710 at [60]. In contrast, the Court in *Dhillon v MIBP* [2014] FCCA 552 took a more expansive approach to s 360 and found that the failure of the Tribunal to provide the applicant redacted documents (pursuant to a s 362A request), which contained an inconsistent statement in relation to a PIC 4020 issue, meant that the applicant was not afforded a fair hearing. On appeal in *MIBP v Dhillon* (2014) 227 FCR 525 the Full Court did not ultimately rely on a breach of s 360 but nonetheless found the Tribunal erred in finding an error in the application of PIC 4020, having made that finding in breach of the respondent's entitlement to access redacted information to which he was entitled to under s 362A. The Federal Court in *Singh v MIBP* [2017] FCA 1443 at [138] agreed with the observations of the Full Court in *Dhillon* that, if there is a breach of s 362A in circumstances where access to the redacted material might reasonably have affected the decision on a particular ground, the decision should not be affirmed on that ground. The Court did not support the view that a breach of s 362A *per se* would amount to jurisdictional error on the basis the applicant had not been afforded a fair hearing.

[112] *SZNXI v MIAC* [2010] FMCA 535.

[113] *SZRRX v MIAC* [2013] FMCA 84.

[114] In *WZAOF v MIAC* [2012] FMCA 668 the Court noted that the applicant's credibility was tested extensively and was put as an issue at hearing and that subsequent evidence from the applicant as to her medical condition simply reinforced the need for her medical condition to be considered in the context of any findings to be made as to credibility or otherwise at [87]. See also *AZACT v MIAC* [2013] FCCA 1221, where the Court observed that the applicant's credibility was an issue before the delegate and remained a core issue before the Tribunal. The Court held that in addressing a post-hearing submission from the applicant's agent, the Tribunal did not move beyond any of the issues on review which had been adumbrated by the delegate's decision itself: at [28]. Undisturbed on appeal: *AZACT v MIBP* [2014] FCA 70.

[115] *SZIMM v MIAC* [2008] FMCA 34.

clarification or more detailed information and I will not necessarily cover everything you cover in detail.' This was found to amount to a clear statement or implication that not everything was in issue.[116]

13.2.17 The Tribunal will likely fall into jurisdictional error for not complying with ss 360 or 425 if a claim has been accepted by the delegate or a previous Tribunal as true, but it does not inform the inform the applicant that such claims are now in doubt.[117] The following judgments are examples of this situation:

- In *SZSRB v MIBP*, the Tribunal did not accept an aspect of the applicant's evidence accepted by the delegate, and relied on the non-acceptance of this evidence to affirm the decision and the Court held that the Tribunal was obliged to inform the applicant that the correct characterisation of that evidence was an issue, and in failing to do so did not comply with s 425.[118]

- In *ABAR15 v MIBP*, the Tribunal failed to comply with s 425 when it failed to put the applicant on notice, by making it clear through its questioning, that her political claims and issue of state protection were no longer the central and determinative issues on review, and that the dispositive issue would be her credit as to her domestic violence claims.[119]

- In contrast, in *SZQEB v MIAC*, the Court found that the determinative issue, namely the credibility of the applicant, was discussed at the hearing and noted that the obligation to raise issues that are determinative does not extend to those issues already notified to the applicant as a result of the delegate's decision record.[120]

13.2.18 If it is clearly apparent that all aspects of an applicant's claims are in issue, for example, because they were all rejected as lacking credibility by the delegate, a requirement to specifically alert the applicant to the fact that a particular matter might not be believed, may not arise.[121] In *SZIWX v MIAC*[122] the delegate and an

[116] *SZIMM v MIAC* [2008] FMCA 34 at [76]. Cf *MIAC v SZJGY* [2008] FCAFC 87. The Full Federal Court held that the Tribunal's questioning of the applicant about the initial elements of his claims was sufficient reason not to explore later claims, as it put the applicant on notice that an issue arose as to the credibility of his entire account of his experiences in China, not just some of his claims.

[117] See *SZIOZ v MIAC* [2007] FCA1870 where the delegate had accepted that the applicant was a Falun Gong practitioner but not one 'of interest'. The Tribunal rejected the applicant's claim to be a Falun Gong practitioner at all without notifying him that this was an issue. A similar conclusion was reached in *SZLNM v MIAC* [2008] FMCA 366. This can be contrasted to *SZLRJ v MIAC* [2008] FMCA 942 where the Court found that the applicant had been put on notice by the Tribunal's questioning about the 'Nine Commentaries' that it did not accept her claim that she was a Falun Gong practitioner and therefore she was not truthful about her claims and not a credible witnesses. This was contrary to the delegate's finding that she was a Falun Gong practitioner but her chance of being persecuted was remote.

[118] *SZSRB v MIBP* [2013] FCCA 1382 at [70]. See also *AZAAD v MIAC* (2010) 189 FCR 494 and *SZOZF v MIAC* [2011] FMCA 364 where the applicant gave evidence of his sexual relationship with a Saudi prince who had sponsored his visit to Saudi Arabia and the delegate accepted the applicant had engaged in sex with his sponsor. However, relying on the same evidence, the Tribunal found it pointed 'more to the applicant being employed by the prince's company in Saudi Arabia, rather than travelling there as the prince's lover'. The Court held the Tribunal's interpretation of the evidence was fundamentally different to that of the delegate and the Tribunal was required to put the applicant on notice that the issue was still live so the applicant had the opportunity to address it at hearing.

[119] *ABAR15 v MIBP (No 3)* [2019] FCCA 540 at [48]–[51].

[120] *SZQEB v MIAC* [2011] FMCA 974 at [50].

[121] *MZXTQ v MIAC* [2008] FMCA 1692. In *SZNWA v MIAC* [2010] FCA 470 at [33], where the Court held that the delegate's reasons and the Tribunal's questions at hearing, including asking the applicant to expand upon relevant factual aspects of her claims, indicated that everything she said was in issue. See also *SZOSE v MIAC* [2011] FMCA 640 at [77] where the Court

earlier Tribunal had rejected the applicant's claims as not credible and the applicant raised a new claim at the second Tribunal hearing. The Court distinguished *SZBEL* finding there was nothing which could have 'hidden' that issue from the applicant. It was his responsibility to provide the Tribunal with sufficient information concerning that claim to allow the Tribunal to reach the necessary state of satisfaction. The Court found the Tribunal's rejection of that claim was based solely on lack of evidence, whereas in *SZBEL* and other cases, the Tribunal's lack of satisfaction arose out of evidence which had not previously been seen to be controversial or constituting '*an issue'*.[123]

13.2.19 A general admonition that the truthfulness of the applicant's account is in question may not be sufficient to discharge the obligation under s 425 to identify particular issues in circumstances where there would be a departure from findings by the delegate in favour of the applicant.[124]

New issues raised or material provided after the hearing

13.2.20 If further material becomes available after the hearing, the Tribunal shall carefully consider whether that material raises any new issue to which it is required to give the applicant an opportunity to respond at a further hearing.[125] Whether a new issue has arisen requiring a further hearing in these circumstances will depend on the circumstances of each case.[126]

13.2.21 For example, in *ANH16 v MICMSMA*,[127] the Federal Court found that a new DFAT Country Information Report published after the hearing did not give rise to a new 'issue' in circumstances where the new DFAT country report suggested that the level of sectarian violence in the applicant's home area had reduced since the previous report. The report was described as going to a factual matter underlying an 'issue', being that the issue was the trend in reduced violence, which had been

found the Tribunal did not need to expressly put the applicant on notice that his claims of having been a practicing Catholic in China might not be accepted, as he was clearly put on notice by the Tribunal's statements and questions during the hearing that the credibility of his claims in their entirety was in issue. In *AZACT v MIAC* [2013] FCCA 1221, the Court in dismissing his application, noted the applicant's credibility was an issue identified by the delegate and remained an issue for determination on review. The way in which the Tribunal dealt with the issue was no more than the process of evaluation of the issues already identified: at [24], [29].

[122] *SZIWX v MIAC* [2009] FMCA 92 at [16].

[123] See also *SZNTO v MIAC* [2009] FMCA 1156 at [14]–[16], citing *SZHBX v MIAC* [2007] FCA 1169. The Court found the Tribunal had no duty under s 425 to identify the potential determinative significance of the applicant's claimed intention to evangelise in China, where the applicant's claims before the delegate related to Falun Gong, but at the Tribunal hearing the applicant claimed he was not really a Falun Gong practitioner and raised claims about attending Church and becoming a Christian in Australia and that he would evangelise in China. It was sufficient that the Tribunal asked whether there was any reason why the applicant would be persecuted upon return and the applicant raised that he would evangelise and the Tribunal assessed the claim on the evidence given.

[124] *SZITH v MIAC* (2008) 105 ALD 541 at [41]. See also *SZLTF v MIAC* [2009] FMCA 401.

[125] See *SZHKA v MIAC* (2008) 172 FCR 1 at [103] and *SZEUI v MIAC* [2008] FCA 1338 at [11]. See also *SZQBF v MIAC* [2011] FMCA 708 where the Court held there is no breach of s 425 in circumstances where the applicant merely does not perform well at the hearing. This obligation arises where an issue determinative of the review arises or becomes apparent to the Tribunal after the hearing, or is not properly exposed at the hearing. This did not occur or apply in the current circumstances. The Tribunal's consideration of the applicant's request for a second hearing, and its refusal to grant it, was not some arbitrary or capricious exercise of its discretion. The Tribunal gave cogent reasons for its decision in this regard at [45]–[48].

[126] *MIAC v SZKTI* (2009) 238 CLR 489 at [51].

[127] *ANH16 v MICMSMA* [2020] FCA 10 at [61]..

addressed by the applicant's representative, and the information from the newer report was merely confirming it.

13.2.22 In *SZILQ v MIAC*[128] the applicant submitted for the first time after the hearing material indicating that he had engaged in conduct in Australia which potentially supported his claim to have a well-founded fear of persecution. The issues that had been discussed at the hearing had related only to the applicant's activities outside Australia. The Federal Court found that the applicant's motivation for engaging in the conduct in Australia for the purposes of the then s 91R(3) of the Migration Act was a new issue arising in relation to the decision under review.[129] However, while an applicant's *motivation* for engaging in conduct in Australia can be an issue, a distinction has been drawn in the authorities between this and the legal effect or operation of ss 91R(3)/5J(6). In *SZJVI v MIAC,* the Federal Magistrates Court found that, having raised the question of the applicant's motivation in pursuing the practice of Falun Gong in Australia in the manner which she did, the Tribunal was not required to go on to warn the applicant about the consequences of ss 91R(3)/5J(6) directly.[130]

13.2.23 If post-hearing material provides further detail relevant to an issue already identified at hearing, a further hearing will not be required.[131] In *MIAC v SZKTI* the extant issue was said to be whether the respondent had been an active Christian in China. Information obtained over the telephone from a witness after the hearing was found to be directly related to that issue and so no further hearing was required.[132] In *MIAC v SZMOK*[133] the visa applicant presented at hearing a new claim that there were false proceedings pending against him in Bangladesh. He requested additional time to present documents in support of this claim. The Tribunal made it clear to the applicant that it did not believe the very late claim, and that even if documents were provided, the Tribunal may not accept them. The Tribunal went on to find that the documents later provided were fabricated. The Court found that in the circumstances, the Tribunal was not obliged to hold a further hearing before making this finding.[134]

13.2.24 Where a post-hearing submission includes documents which, if accepted would support the applicant's claims and could be considered critical to those claims, but the Tribunal proposes to reject those documents on a basis which has not been raised at the hearing (e.g. the authenticity, or lack thereof, of the documents), it may

[128] *SZILQ v MIAC* (2007) 163 FCR 304. Approved in *SZJYA v MIAC (No 2)* (2008) 102 ALD 598 at [38] and [54], where the Court commented 'it is an essential premise of s 91R(3) [s 5J(6)] that an applicant for review have a proper opportunity to satisfy the Tribunal (or the Minister or a delegate) that the conduct in Australia which is said to be relevant was not engaged in just for the purpose of strengthening his or her claim to be a refugee'.
[129] *SZILQ v MIAC* (2007) 163 FCR 304 at [32]–[35]. Section 91R was repealed by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135 of 2014). For protection visa applications made on or after 16 December 2014, the good faith requirement in s 91R(3) has been incorporated into s 5J(6).
[130] *SZJVI v MIAC* [2008] FMCA133 at [38].
[131] *MIAC v SZKTI* (2009) 238 CLR 489 at [51].
[132] *MIAC v SZKTI* (2009) 238 CLR 489 at [51].
[133] *MIAC v SZMOK* (2009) 257 ALR 427.
[134] *MIAC v SZMOK* (2009) 257 ALR 427 at [74].

raise a new issue in relation to which the Tribunal would be required to give the applicant an opportunity to respond at a further hearing.[135]

13.2.25 The Tribunal will not be obliged to hold a further hearing in circumstances where matters are intertwined with other matters already discussed at hearing. In *SZEUI v MIAC*, the Federal Court found that a s 424A letter sent after the hearing did not raise any new issue requiring a further hearing.[136] The Tribunal's s 424A letter referred to two matters not raised at the hearing relating to the fact that certain certificates submitted to the Tribunal were all dated the same day and were not given to the first Tribunal. The Court found that those matters were so intertwined with other matters which were discussed at hearing that they were not of themselves issues and, in any event, were not relied on by the Tribunal in its decision.[137]

How should the Tribunal notify the applicant of the issues?

13.2.26 The Tribunal may put the applicant on notice of the issues in a number of ways, which comply with s 360 or 425. One way of doing this is to state the issue and then invite the applicant to explain, elaborate or respond to it. The applicant's attention is to be directed to the issues arising and an opportunity given to address them.[138] The following are examples of ways in which the Tribunal may discharge its obligation:

- In *SZJUB v MIAC,* the Court found that it was possible to give the applicant an opportunity to present evidence and arguments in relation to the issues in the review by asking questions pertinent to the issue.[139] The Court found that the tenor of the Tribunal's questions in that case made it apparent that the Tribunal did not accept the mere assertion and was testing it. The Tribunal was not obliged to explain its reasoning or thinking to the appellant.[140]

[135] See e.g. *DEQ17 v MICMSMA* [2021] FCCA 458 at [45]–[48]. The applicant had been granted a protection visa which had been cancelled under s 101(b) because he was found to have provided incorrect answers in his visa application, being those referring to his protection claims. In cancelling the visa, the delegate found that the applicant had returned to his country of origin on five separate occasions. At the Tribunal, the applicant claimed an arrest warrant had been issued for him in his country of origin. The Tribunal put to him that he had not produced any arrest warrants to the Department but may have provided one for his Refugee Status Assessment. After the hearing, the applicant provided to the Tribunal a 'Tribunal Ruling Extract – Warrant of Commitment' and 'Arrest and Investigation Warrant'. The Tribunal found that the applicant's decision to return to his country of origin in the circumstances supported the conclusion that his claim to fear being arrested as an army deserter was not true and that he had not been sentenced to imprisonment *in absentia* for deserting the army nor had a warrant been issued for his arrest as indicated by the documents which were produced after the hearing. The Court held that the Tribunal did not afford a fair hearing opportunity to the applicant as it had not put him on notice that the authenticity, or lack thereof, of the documents was a critical issue in the review. The Court held that by failing to invite further information from the applicant about the documents, the Tribunal deprived itself of the opportunity of determining with clarity whether the documents were genuine which, if they were not, would have provided a far more reliable basis for the Tribunal's decision than reliance on the applicant's return visits to his country of origin.
[136] *SZEUI v MIAC* [2008] FCA 1338.
[137] *SZEUI v MIAC* [2008] FCA 1338 at [14].
[138] *Chey v MIAC* [2007] FCA 871 at [33]–[34]. See also *SZRFQ v MIAC* [2012] FMCA 772. In that case, although the applicant had accepted a statement of his claims which did not include China's family planning policy as a fair summary, and had also stated that he had no claims other than those just summarised, the absence of a volunteered additional reference to China's family planning policy in the course of the hearing did not reasonably allow an inference of a knowing and intentional abandonment of a potential refugee claim: at [24]–[31]. This should have been explicitly drawn to the applicant's attention.
[139] *SZJUB v MIAC* [2007] FCA 1486.
[140] *SZJUB v MIAC* [2007] FCA 1486 at [21]. See also *SZBJH v MIAC* [2009] FMCA 473 at [145].

- In *ASR15 v MIBP*, the Tribunal clearly put the applicant on notice of a dispositive issue during the hearing by utilising the s 424AA provisions to raise its concerns about a claim that had previously been accepted by the delegate. The Court held that by raising those concerns at the end of the hearing, there could have been no doubt that the applicant was on notice of the issue and that their post hearing response to those concerns demonstrated that they had understood what the information was and why it was considered relevant by the Tribunal.[141]

- Similarly, the Full Court in *MIAC v A125 of 2003* found that the Tribunal had sufficiently put an applicant on notice of its concerns about his evidence by the questions it had asked of him.[142] The Court considered that the Tribunal was not required to identify the significance of the questions that it put to a claimant or the ultimate matter or issue to which those questions go, and that requiring the Tribunal to do so would be to attempt to import the requirements of s 424A into s 425.[143] It confirmed that the Tribunal was not obliged to provide a running commentary upon what it thinks about the evidence that is given.[144]

- In *SZITH v MIAC*, the Court rejected a contention that the Tribunal was obliged to replay parts of the tapes of an earlier hearing, or provide the applicant with transcripts when identifying inconsistencies in the previous evidence given by the applicant.[145] The Court was satisfied that the Tribunal had brought such issues to the applicant's attention and how it did that was a matter for the Tribunal.[146]

- In *SZRCQ v MIAC*, the Court found that, in circumstances where the delegate's decision set out the whole of s 36(3) including the matter of the applicant not taking all possible steps to avail themselves of a right to enter and reside in Nepal under the Indo-Nepal Treaty of Peace and Friendship, the applicant had sufficient notice of the issue prior to coming to the Tribunal to know that this was a question that he would have to respond to, and the fact that he was not asked it directly by the Tribunal did not lead to the conclusion

[141] *ASR15 v MIBP* [2015] FCA 1513 at [32], [35]. See also *SZOLP v MIAC* [2010] FMCA 609, where Driver FM found that the Tribunal's hearing obligation under s 425 may also be met by its disclosure of adverse information at the hearing for the purposes of s 424AA.
[142] *MIAC v A125 of 2003* [2007] FCAFC 162.
[143] Note, however, *obiter* comments made in *SZMTJ v MIAC (No 2)* (2009) 109 ALD 242 that there is considerable merit to the argument that the Tribunal can discharge the obligation imposed by s 424A(1)(b) by discussing the material with the applicant at hearing.
[144] See also *SZIMM v MIAC* [2008] FMCA 34 at [56]–[72]; *SZLRJ v MIAC* [2008] FMCA 942 at [22]–[25]. In *SZMWQ v MIAC* (2010) 187 FCR 109, Flick J (Besanko J agreeing) found that in circumstances where the appellant had advanced materials and made detailed submissions in support of his claims, the materials and submissions had been canvassed during the course of the Tribunal hearing, and the Tribunal had disclosed the manner in which it was approaching the analysis of the material, there was no breach of s 425 - any further criticism of the Tribunal would be an impermissible attempt to compel it to disclose its thought processes or the manner in which it was evaluating the material or submissions (at [138], [139], [142]).
[145] *SZITH v MIAC* (2008) 105 ALD 541 at [51]–[54].
[146] *SZITH v MIAC* (2008) 105 ALD 541 at [53].

that the Tribunal had breached s 425 by not giving him an opportunity to give evidence and present arguments.[147]

13.2.27 Where the Tribunal gives the applicant an opportunity to respond to an issue at a hearing, there is no obligation per se to record opportunities given at hearing in the decision record. In some instances, the courts have cautioned against drawing an inference that an issue was not discussed at hearing in the absence of any reference to that issue in Tribunal's decision record, especially where a transcript is not available.[148] However, on other occasions, the courts have been prepared to rely on the decision record alone as evidence of what occurred at the hearing. In *SZJYA v MIAC (No 2)*[149] the Federal Court found, based on the absence of any mention of it in the Tribunal's decision, that the Tribunal did not give the applicant an opportunity to address her motivation for engaging in certain conduct in Australia pursuant to the then s 91R(3), resulting in a breach of s 425.

When must the applicant be notified of the issues?

13.2.28 To comply with ss 360 and 425, the Tribunal alerts the applicant to the issues during the course of a hearing.[150]

13.2.29 In *Hui v MIAC* the Court confirmed that it will be sufficient for the purposes of s 360 for the Tribunal to raise a new issue in the course of its hearing, and there is no requirement on the Tribunal to give an applicant notice of the issues in advance of the hearing.[151] However, note that in certain limited situations, the Tribunal may be in error to undertake certain inquiries before having a hearing because in doing so it may appear that the Tribunal has prejudged an issue which may mean that the Tribunal has deprived the applicant of an opportunity to be heard on the issue. For example, in *Sok v MIAC*, the obtaining of an independent expert's opinion as to whether a person has suffered domestic violence under reg 1.23 that was dispositive of the issue *before* a hearing was conducted effectively deprived the applicant of an opportunity to be heard on matters of critical importance (because the Tribunal hadn't yet considered for itself whether the violence had occurred and whether a report was required).[152]

[147] *SZRCQ v MIAC* [2012] FMCA 788 at [11].
[148] See *NAOA v MIAC* [2004] FCAFC 241. In that case, the Court held that it was not open to the Federal Magistrate to make a finding that an issue had not been canvassed 'from the record of the Tribunal's decision', as his Honour had no transcript. Similarly, in *SZMTJ v MIAC (No 2)* (2009) 109 ALD 242 the Court was unwilling to draw an inference that an issue had not been canvassed over the course of three hearings from the brief summary of the hearing in the Tribunal's decision.
[149] *SZJYA v MIAC (No 2)* (2008) 102 ALD 598.
[150] In *MZYXY v MIAC* [2012] FMCA 1185 the Court noted there was a gap between the obligations under s 425 to raise critical issues and the discretion under s 426A to proceed to a decision in circumstances where an applicant fails to attend a hearing. However, ultimately the Court found that it was bound by the Federal Court judgment in *SZIAO v MIAC* [2007] FCA 848 which considered the interrelationship between ss 425 and 426A and that there was no denial of procedural fairness in such circumstances.
[151] In *Hui v MIAC* [2011] FMCA 486 the Court found there was no jurisdictional insufficiency in how the Tribunal raised the relevant issue with the applicant at the hearing, and then gave her an opportunity to respond to it in the course of the hearing. The Court held the issue was clearly raised , the Tribunal's potential adverse reasoning was clearly foreshadowed and the applicant's responses suggested she understood the issue which was being put to her, and was able to respond to it: at [52]. On appeal, in *Hui v MIAC (No 2)* [2011] FCA 1364, the Court found no appealable error in the Federal Magistrate's decision. An application for special leave to appeal from the FCA judgment was refused: *Hui v MIAC* [2012] HCASL 70.
[152] *Sok v MIAC* (2008) 238 CLR 251 at [40].

13.2.30 It is not possible to comply with ss 360 and 425 by writing to the applicant about an issue *after* the hearing. For example, in *Zhang v MIAC*[153] the Tribunal gave the applicant an opportunity at the hearing to address whether she had complied with the attendance requirements in condition 8202 which had been attached to her student visa. After the hearing the Tribunal received further information suggesting the applicant also did not meet the academic progress requirements in condition 8202. The Tribunal put this information to the applicant in a s 359A letter, but did not invite the applicant to a further hearing to give evidence and present arguments on the issue. In relying on a breach of the academic progress requirements in its decision, the Tribunal was found to have breached s 360.[154] Similarly, in *SZIOZ v MIAC*, the Federal Court found that a letter sent after the hearing pursuant to s 424A, raised the relevant issue but did not satisfy the provisions of s 425(1).[155]

13.2.31 If the Tribunal informs the applicant of an issue in writing *before* a hearing, a general opportunity to give evidence and present arguments at the hearing may be sufficient compliance with s 360 or 425.[156] For example, in *SZRPL v MIAC*, the Court confirmed that there is no jurisdictional error on the part of the Tribunal to choose to draw the applicant's attention to the issue of concern by letter *before* a hearing.[157] In that case, the Tribunal sent the applicant a letter *before* conducting a further hearing, which invited the applicant to provide further information at the resumed hearing about whether the applicant met the criteria for complementary protection. The Court found that the letter plainly identified the issue and provided the applicant with a clear and meaningful opportunity to deal with the issue at the resumed hearing.[158]

13.2.32 While the Tribunal can identify the issues in the case in writing before the hearing, ss 360 and 425 do not put the Tribunal under any obligation to do so.[159]

13.2.33 In circumstances where an applicant is unfit to participate at a hearing and is expected to be unfit to do so for the foreseeable future, the Tribunal may offer an alternative method to accord an applicant procedural fairness, such as putting the dispositive issues of concern to the applicant for response in writing.[160]

[153] *Zhang v MIAC* [2007] FMCA 1855.
[154] *Zhang v MIAC* [2007] FMCA 1855 at [26].
[155] *SZIOZ v MIAC* [2007] FCA 1870 at [59]. See also *SZJYA v MIAC (No 2* (2008) 102 ALD 598 at [56] and *SZHKA v MIAC* (2008) 172 FCR 1 at [108].
[156] In *MZXPO v MIAC* [2007] FMCA 1484, the Tribunal as previously constituted had sent the applicant a letter alerting him to the issue of whether his MASSOB membership card was a fabrication. This issue was not specifically raised by the reconstituted Tribunal at hearing although the Tribunal did ask a number of times if the applicant thought that anything had not been covered at the hearing. The Court held that *SZBEL* required the Tribunal to do no more than identify the issues either in writing before the hearing or orally during the hearing. The Tribunal in this case did identify the issue of the genuineness of the membership card in writing before the Tribunal hearing. See also *SZIOZ v MIAC* [2007] FCA 1870 at [59].
[157] *SZRPL v MIAC* [2013] FCA 1198.
[158] *SZRPL v MIAC* [2013] FCA 1198 at [17], [21]–[22]. See also *Lin v MIBP* [2014] FCCA 485 where the Court found that there was no denial of procedural fairness in circumstances where the Tribunal decided the application on a different basis to the delegate and had alerted the applicant to the dispositive issue in the hearing invitation letter.
[159] *SZNYM v MIAC* [2009] FMCA 1273 at [56]–[57], [59].
[160] *Kalinoviene v MIAC* [2011] FMCA 760 at [89]. An appeal from the judgment was dismissed: *Kalinoviene v MIAC* [2012] FCA 205.

Hearings following a court remittal

13.2.34 If the Tribunal is reconstituted because the Tribunal's decision was set aside by a court and the matter remitted for reconsideration, the new Tribunal member must give the applicant a further opportunity to appear for a hearing, unless any of the exceptions in s 360(2) or 425(2) apply.[161]

13.2.35 In *SZHKA v MIAC*, Justice Gyles, with whom Gray J agreed, found that the opportunity to be provided by virtue of s 425 to appear before the Tribunal face to face is not provided by an appearance before another Tribunal member on an earlier occasion.[162]

13.2.36 This reasoning of the majority in *SZHKA* suggests that it is not sufficient, when holding a further hearing following a remittal, to only give the applicant opportunity to present arguments and evidence on any *new* issues in the review, or those issues not fully addressed at the previous hearing(s). Justice Gray, in particular, emphasised that because of the part that the Tribunal's reasoning processes play in the ascertainment of what the issues are, there is necessary fluidity of those issues until the particular Tribunal member is in the process of grappling with the case. His Honour commented that this means that the statutory obligation cannot be met by simply asking the applicant whether there are any new issues, or whether he or she wishes to provide new information.[163]

13.2.37 The majority reasoning in *SZHKA* was relied on in *NBKB v MIAC*[164] as authority for the view that all live issues must be raised again at the further hearing and the Tribunal cannot rely on the fact that issues were raised at an earlier hearing to discharge its obligations under ss 360 or 425.

13.2.38 This reasoning does not sit easily with the principle from *SZBEL* that the applicant is entitled to treat the issues raised by the delegate's decision as the issues in relation to the review unless or until the Tribunal indicates otherwise.[165] Furthermore, in *MZXRE v MIAC* the Federal Magistrates Court suggested that a further hearing is not required following a remittal in certain circumstances, including if the Tribunal is constituted by the same member.[166] Nevertheless, the current state of court authority suggests that a court may expect that a further hearing should be held in all cases following a remittal, at which the member gives the applicant a further

[161] *SZHKA v MIAC* (2008) 249 FCR 58. Followed in *SZEUI v MIAC* [2008] FCA 1338 at [11]. *SZHKA* signified a departure from the approach previously taken in the Federal Court and Federal Magistrates Court which indicated that a further opportunity to appear may only be *required* if the obligation under ss 360(1) or 425(1) had not been fully discharged by the previous member, for example because a new issue in the review had arisen or because of some defect in the procedure followed at the previous hearing: See *SZHKA v MIAC* (2008) 172 FCR 1 at [97]; *SZILQ v MIAC* (2007) 163 FCR 304; *SZIBW v MIAC* [2008] FCA160; *SBRF v MIAC* (2008) 101 ALD 559.
[162] *SZHKA v MIAC* (2008) (2008) 172 FCR 1 at [28], [23].
[163] *SZHKA v MIAC* (2008) 172 FCR 1 at [19].
[164] *NBKB v MIAC* (2009) 106 ALD 525. The Minister's application for special leave to appeal from this judgment was refused: *MIAC v NBKB* [2009] HCATrans 289.
[165] See also *SZEUI v MIAC* [2008] FCA 1338 at [11].
[166] *MZXRE v MIAC* [2009] FMCA 99.

opportunity to present evidence and arguments on, all issues that arise in the view of the particular member completing the review.[167]

13.3 The procedure at hearings

13.3.1 The Tribunal adopts a procedure that is consistent with the Tribunal's objective of providing a mechanism of review that 'is accessible'; 'fair, just, economical, informal and quick'; 'proportionate to the importance and complexity of the matter'; and 'promotes public trust and confidence in the decision-making of the Tribunal'.[168]

13.3.2 In *SZQBK v MIAC*[169] the Court noted if hearings are too brief and matters that need to be covered are not, the Tribunal may well be challenged for not having exposed relevant, critical issues determinative of the review to the applicant.

13.3.3 See the MRD's Guidelines on Vulnerable Persons for discussion relating to vulnerable persons whose ability to understand and effectively present their case or fully participate in the review process may be impaired, due to their age or physical, mental, psychological or intellectual condition, disability or frailty.

13.3.4 While the Tribunal, as a matter of standard procedure, records all hearings, there is no specific statutory requirement to record the hearing or provide a copy to the applicant. In some circumstances, an applicant may request access to a part heard case to respond to issues. Access to a recording is a matter for the member to determine, taking into account the circumstances of the case, for example, if the release of the recording will impair their ability to test the evidence or conduct related reviews, this may be relevant in determining whether access should be granted or delayed until after the completion of the hearing. Whilst a hearing record may establish the events at hearing, an absence of such recording will not of itself amount to a jurisdictional error.[170] Where the hearing recording fails, a detailed decision record may suffice to provide sufficient detail of the evidence before the Tribunal to support the Tribunal's findings.[171]

[167] See *MIAC v NBKB* [2009] HCATrans 289. In rejecting the application for special leave to appeal from the Federal Court decision *NBKB v MIAC* French CJ commented 'It may be that some of the issues raised before the previous Tribunal are not dispositive and need not be mentioned from the point of view of this particular decision-maker, but I do not quite understand what the difficulty is and why it is inconsistent with the general obligation under s 425 for the second decision-maker to identify what for him or her are dispositive issues.' The Court held the Court's approach to s 425 did not appear in the circumstances of the case to disclose any error.
[168] *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) s 2A.
[169] *SZQBK v MIAC* [2011] FMCA 829. In this case, the Court was of the view that although the Tribunal hearing was five hours involving a series of questions, it was appropriate given the range of factors that the Tribunal felt were relevant and needed to be dealt with and the Court found no error in the Tribunal comprehensively dealing with what it saw as being its legal obligations in conducting a fair hearing.
[170] *SZLVW v MIAC* [2008] FMCA 1199 at [28].
[171] *Pham v MIBP* [2018] FCCA 2522 at [39]–[40] in which there was no hearing recording or transcript of the hearing available and the Court held that, as it was unable to assess the Tribunal's reasons for its decision and whether the Tribunal had considered all the evidence, the decision of the Tribunal should be quashed. However, on appeal in *MIBP v Pham* [2019] FCA 1689 at [27]–[29] the Court remitted the matter to the Federal Circuit Court for a further hearing, holding that the lower court had erred in quashing the Tribunal decision without making a finding of jurisdictional error and that the failure of the Tribunal to make an audio-recording could not of itself amount to a jurisdictional error as there is no provision in the Migration Act which requires an audio-recording. The Court considered that findings as to what occurred at a Tribunal hearing may be made by reference to evidence other than a transcript of an audio-recording, such as the Tribunal's reasons and affidavit evidence of the applicants and/or the representative involved in the hearing, and it would be for a Court to determine whether to accept or reject

13.3.5 If the member approaches the applicant or their adviser for any purpose during the hearing, e.g. to show them a document, the member will generally explain through the interpreter what they intend to do before doing so to avoid any potential misunderstandings.[172] This is particularly relevant in Part 7 (protection) cases where applicants may have some fear or distrust of government officials.

13.4 Hearings to be in private – Part 7 reviews

13.4.1 The hearing of an application for review of a Part 7 reviewable decision before the Tribunal is to be in private.[173] There is however no requirement for the Tribunal to ensure that evidence taken from witnesses at a hearing remain confidential. This includes evidence taken by telephone.[174]

13.4.2 In *SZAYW v MIMIA*, it was held that for a hearing to be in private, it must not be open to the general public, but this alone is not sufficient to satisfy the requirement. It is not open to the Tribunal to allow other individuals to be present at the hearing.[175] However, presence of 'persons reasonably required for purposes of, or in connection with, the performance of the Tribunal's functions' is permissible.[176] The High Court noted the following as examples of such persons:

- interpreters;
- security officers;[177]
- necessary administrative staff; and

such evidence (at [30]). Upon remittal, the Federal Circuit Court dismissed the matter as the applicants did not attend the final hearing: *Pham v MIBP (No 2)* [2020] FCCA 1509.

[172] In *SZITH v MIAC* [2009] FMCA 877 the Court accepted evidence by the applicant and his adviser that during the Tribunal hearing the member rose from his chair and moved quickly towards the applicant and adviser and that they felt intimidated by this and this affected proceedings from that point on. The Court found this gave rise to a reasonable apprehension of bias.

[173] s 429.

[174] In *SZQXL v MIAC* [2012] FMCA 361, the Court held the Tribunal misunderstood that s 429 obliged it to ensure the confidentiality of any telephone call to a witness overseas in order to maintain the hearing in private. Rather in order for a hearing to be in private, it was necessary that it not be in public, which is different from asserting that s 429 requires the Tribunal to ensure that the evidence from the witnesses to remain confidential. In *SZQZR v MIAC* [2012] FMCA 768 the Court, whilst agreeing with Emmett FM's findings in *SZQXL*, distinguished that case on the basis that the Tribunal's statement that it would not take oral evidence by telephone because it could not ensure that the 'telephone call would remain confidential as required by s 429' was not concerned with witnesses keeping their own evidence confidential, but, rather, with the confidentiality of the electronic communication itself. The Court, having regard to the definitions of 'private' and 'confidential' within the Shorter Oxford English Dictionary (6th ed.) and Macquarie Dictionary (5th ed.) found the ordinary meaning of the two words overlapped in a relevant respect, and that the Tribunal's use of the word 'confidential' was a synonym for 'private' and in the relevant statement was not intended to refer to anything more than what s 429 required (at [29]–[34]). In *SZRIU v MIAC* [2013] FMCA 92 the Court found no error in the Tribunal's refusal to call the applicant's parents in Bangladesh because it could not be sure the calls would not be intercepted, made clear that the Tribunal's concern was not with witnesses keeping their own evidence confidential, rather it was with the confidentiality of the electronic communication itself: at [72]–[74]. Upheld on appeal in *SZRIU v MIAC* [2013] FCA 435. In *SZVBB v MIBP* [2015] FCA 1414 the Court commented in *obiter* that refusing to take evidence for reasons of privacy based merely on speculation about possible interception of telephone calls could be unreasonable. In contrast, in *SZCSC v MIMA* [2007] FCA 418 and *SZRFN v MIAC* [2012] FMCA 1036, the privacy of the review was held to be a proper concern for the Tribunal.

[175] *SZAYW v MIMIA* (2006) 230 CLR 486 at [23]–[25].

[176] *SZAYW v MIMIA* (2006) 230 CLR 486 at [25].

[177] In *SZQCV v MIAC* [2011] FMCA 984 the Court held it is the task of the member conducting a hearing to assess in every case in relation to a person held in immigration detention whether it is necessary for a Serco officer to be present in the hearing room during the hearing. Appeal dismissed: *SZQCV v MIAC* [2012] FCA 441.

- witnesses, although the Court noted that privacy may require them to be excluded when the witness is not giving evidence.[178]

13.4.3 The mere characterisation of a person as fitting within one of the categories identified by the High Court in *SZAYW v MIMIA*, will not necessarily be sufficient, and the context is relevant. For example, in *SZQLT v MIAC* the Court found that the presence of a trainee Tribunal member would come within the implicit allowance under s 429 of a person 'reasonably required'.[179] Similarly, in *SZQCV v MIAC* the Court, applying *SZAYW v MIMIA*, found on the evidence that it was not established that the presence of a Serco guard in the hearing room was not 'reasonably required' in connection with the performance of the Tribunal's functions under the Migration Act in relation to the conduct of a hearing concerning a person who was required under the Migration Act to be held in immigration detention.[180]

13.4.4 'Necessary administrative staff', will clearly include hearing attendants. It is also likely to include staff observing the hearing as part of the Tribunal's in-house hearing observation program – because this program is run to give staff an understanding of how the Tribunal operates, and enhance their functioning.[181] It is less clear whether external observers would fall within the class of persons able to attend a Part 7 hearing. In some cases it is arguable that an observer would contribute to the operations of the Tribunal, for example, by offering views on the differences between Australian or overseas tribunal hearings, but whether their presence is 'reasonably required' is uncertain. If observers do attend a hearing, the consent of the applicant may first be obtained.[182]

13.4.5 It is open to the Tribunal to consider making an order for non-disclosure under s 440 which would restrict persons attending the hearing publishing or otherwise disclosing evidence, information or contents of documents produced to the Tribunal.

13.4.6 For further discussion of the role of observers at a hearing see Chapter 19 – The role of observers at the hearing.

Can the privacy obligation be waived?

13.4.7 The obligation for the hearing to be in private cannot be waived by an applicant. In *SZRFN v MIAC* the applicant argued that an applicant before the Tribunal may waive the privacy provision in s 429 of the Migration Act.[183] In that case the Tribunal

[178] *SZAYW v MIMIA* (2006) 230 CLR 486.
[179] *SZQLT v MIAC* [2012] FMCA 554.
[180] *SZQCV v MIAC* [2011] FMCA 984. An appeal from the judgment was dismissed: *SZQCV v MIAC* [2012] FCA 441.
[181] In *SZIME v MIMA* [2007] FCAFC 10 where an inexperienced interpreter requested that she not continue interpreting, the Tribunal retained her during the remainder of the hearing with another interpreter for training and education, the Court held that the presence of the inexperienced interpreter did not mean the hearing was not in private as the purpose of the interpreter remaining was one reasonably required in connection with the Tribunal's functions generally.
[182] See, in particular, *SZAYW v MIMIA* (2006) 230 CLR 486, where the High Court noted that 'a meeting between A and B does not cease to be private if, by mutual consent, one is accompanied by a friend or supporter.' That is, where mutual consent to the observer, friend or supporter is gained, the hearing will still be in private within the terms of s 429. The Court went on to suggest in some circumstances the Tribunal may impose a requirement of confidentiality on the third party.
[183] *SZRFN v MIAC* [2012] FMCA 1036 at [58].

refused to take evidence by telephone from the applicant's wife and lawyer in Egypt because, based on the applicant's own evidence, the Tribunal did not believe that it could ensure any communication by telephone would remain private.[184] The Court found that in the circumstances, the assumption of risk by the witnesses and the applicant's own assumption of risk did not displace the statutory compulsion to ensure the hearing was in private.[185]

13.5 Hearings to be in public – Part 5 reviews

13.5.1 The hearing of an application for review of a Part 5-reviewable decision must be conducted in public.[186] A hearing is conducted in public if members of the public have a right of admission to the hearing which is reasonably and conveniently exercisable.[187] However, where the Tribunal is satisfied that it is in the public interest to do so or where it considers it impracticable to take particular evidence in public, the Tribunal may direct that particular oral evidence is to be taken in private.[188]

13.5.2 If the Tribunal gives a direction to take evidence in private, it may also specify which persons may be present during the giving of the oral evidence.[189]

Multi-applicant hearings

13.5.3 Some hearings of Part 5-reviewable decisions, such as Multi Applicant Hearing Lists (MAHLs), may be conducted in sequence on the same day by the same member. In multi-applicant hearings such as these, applicants for all cases in the list are invited to attend at the same time and undertake part of the hearing (such as the introduction) as a group. Cases are then heard consecutively.

13.5.4 The legality of multi-applicant hearings was considered by the Court in *Uddin v MIMAC*.[190] In that case, the applicant claimed that the Tribunal committed jurisdictional error by holding his hearing in the presence of other applicants. The Court noted s 365 of the Migration Act provides that Tribunal hearings must be in public, unless the Tribunal directs that particular oral evidence be taken in private and held that there is no legal objection to multi-applicant hearings in the Migration Act. The Court observed the Tribunal is a busy Tribunal, and in order to deal with its

[184] *SZRFN v MIAC* [2012] FMCA 1036 at [56].
[185] *SZRFN v MIAC* [2012] FMCA 1036 at [77].
[186] s 365.
[187] Hearings of Part 5 reviews by video or telephone must also be in public. If a hearing of such a matter is by video or telephone, interested persons are asked to contact the Registry prior to the hearing. Access is usually granted by providing an internet link which may be used to view or listen to the hearing from a computer or phone. In relation to access at in person hearings, see *Zeng v MIAC* [2007] FMCA 169. In that case, the Tribunal conducted the hearing with the hearing room door locked in such a way that people inside the room could open the door but people outside it could not. Although the Court held that the fact that the hearing room door was locked and could only be opened from inside did not mean that the right of admission was not reasonably and conveniently exercisable, it would be preferable, as is usual Tribunal practice, that doors be open from each side to facilitate entry.
[188] ss 365(2)–(3).
[189] s 365(4).
[190] *Uddin v MIMAC* [2013] FCCA 906.

substantial workload, it may be necessary for it to conduct running lists with a number of applicants in the hearing room at any one time. The Court rejected that the presence of other applicants in the hearing room pointed to a procedural error.[191]

13.5.5 In *Kumar v MIBP* the Court found that by conducting a multiple-applicant hearing the Tribunal had complied with the Tribunal's objective to provide a just, economical, informal and quick review process. The Court also rejected a claim that the hearing was not conducted in a proper and fair way because there were a number of other applicants in the hearing room, there was laughter and there were people coming in and out of the hearing room and found that the Tribunal appropriately exercised its powers by hearing the applicant at a multiple-applicant hearing.[192] This approach was followed in *Eros v MICMSMA*,[193] where a group introduction was used for a set of Student visa matters and it was contended that the Tribunal had no lawful basis to hold multiple-applicant hearings, and that there was a risk of 'contamination' among the matters. The Court rejected that contention and found that there was no injustice or unfairness to the applicant as a result of the process and no defect in the hearing itself or procedural unfairness.

13.5.6 The Court in *Ramasahayam v MIBP* also endorsed the MAHL process, however, the Court's reasons, essentially its acceptance of the Minster's submissions, suggest that the MAHL process could potentially involve a breach of procedure if the applicant is able to identify specific issues arising from the 'group hearing' that impacted on his or her ability to give evidence and present arguments, or opportunity to have his or her case considered.[194]

13.6 Joint hearings

Combined applications

13.6.1 The Tribunal's obligation in ss 360 and 425 extends to each review applicant in a combined application, and the opportunity to appear is extended to all review applicants even if only one or other of them wishes to give evidence.[195]

13.6.2 In *SZVGA v MIBP*[196] the Court found that the Tribunal complied with s 425 by inviting all of the applicants to appear before it and that the invitation did not cease

[191] *Uddin v MIMAC* [2013] FCCA 906 at [13]–[15].
[192] *Kumar v MIBP* [2013] FCCA 1860. However, note that the Court also indicated that multiple-applicant hearings may have limited application and confined its consideration to the facts of the case, including the nature of the criterion at issue and the fact that the Tribunal did not have a discretion to exercise in making its decision.
[193] *Eros v MICMSMA* [2020] FCA 1061 at [35]–[37] which upheld *Eros v MICMSMA* [2019] FCCA 3805 at [33]–[44].
[194] *Ramasahayam v MIBP* [2014] FCCA 442.
[195] See *SZUXI v MIBP* [2015] FCCA 2106 and *SZXTU v MIBP* [2015] FCCA 2080, dismissed on appeal in *SZXTU v MIBP* [2015] FCA 1210 and *SZUXI v MIBP* [2015] FCA 1475. Note also *obiter* comments in *SZSXV v MIBP* [2014] FCCA 1584 at [84] where the Court noted that all review applicants, regardless of whether they have made independent claims to protection (or to meet the primary criteria), ought be given the opportunity to address all critical or dispositive issues arising in the review, including issues that relate to the substantive claims of the primary applicant. Subsequently, in *SZTIN v MIBP* [2015] FCCA

to be real and meaningful only because, at the hearing, the Tribunal reasonably understood that the applicant made a claim on behalf of the second applicant which she had not previously made. The Court also commented that the Tribunal is not obliged to actively assist a secondary applicant, who has chosen not to appear, by suggesting to the primary applicant that the secondary applicant should appear before the Tribunal to give evidence and make submissions.

13.6.3 In *Huang v MIBP*[197] the Court found that the Tribunal had not denied the second and third named review applicants (sons of the primary applicant) procedural fairness in circumstances where it had asked them to leave the hearing room while the first named review applicant gave evidence. The Court, relying upon the authority of *MZZMG v MIBP*[198] (referred to below), found that the Tribunal has the power to exclude an applicant from a hearing subject to the Tribunal's express and implied obligation to afford procedural fairness. As the Tribunal in this instance sought approval of its approach to exclude some applicants, made clear to the second and third named review applicants what the issues on the review were (complying with s 360 in relation to those applicants), and specifically asked them whether they had any further evidence to give, there was no breach of procedural fairness.

13.6.4 In *C7A/2017 v MIBP*,[199] there was no breach of s 425 where two of the appellants (the children of the other appellant) were excluded from the hearing. The Federal Court found that while the decision to exclude them was 'puzzling', it resulted in no practical injustice to the appellants in the particular circumstances of the matter and so the procedural fairness of the review was not impinged. The circumstances of the matter included that the appellants were represented in the hearing and there was no evidence to indicate that the two children wished to give evidence or that they (or their representative) wished for them to be called.

13.6.5 Similarly, in *BDA16 v MIBP*[200] the Court found that the Tribunal had not denied the review applicants procedural fairness by excluding them from the hearing at certain points in circumstances where it provided the first and second applicants with a meaningful opportunity to give evidence in relation to the issues in their own review and in relation to the issues in their children's reviews (the third, fourth and fifth applicants). The Court found the applicants did not suffer any practical injustice because the third, fourth and fifth applicants' claims were advanced by their parents and although the second applicant was asked if she had any additional claims to the first applicant without being present while he gave evidence, she had

1972 the Court held that a secondary applicant should be given the opportunity to present evidence and arguments on the issues arising in relation to the decision under review with respect to the primary applicant.

[196] *SZVGA v MIBP* [2015] FCCA 3269.

[197] *Huang v MIBP* [2016] FCCA 3069 at [42]–[46].

[198] *MZZMG v MIBP* [2015] FCAFC 134.

[199] *C7A/2017 v MIBP* [2020] FCAFC 63 at [74]–[76]. While finding no error on the part of the Tribunal in excluding the appellant children from the hearing, the Court also that it would have been preferable for the Tribunal to have directly raised with the representative as to whether either of them wanted to give evidence or listen to the submissions or simply re-enter the hearing room.

[200] *BDA16 v MIBP* [2018] FCCA 2370 at [152]–[166]. An appeal from the judgment was dismissed, although it did not address the particular issue raised in the lower court judgment: *BDA16 v MHA* [2019] FCA 874.

demonstrated her knowledge of these claims in a statutory declaration submitted to the Tribunal before the hearing.

13.6.6 In *BPD16 v MIBP*[201] the Court found that no practical unfairness resulted to the first and second named applicants (husband and wife) in circumstances where the Tribunal took evidence from each of them separately, while the other was excluded from the hearing room, but subsequently informed both applicants of the inconsistencies in their evidence and invited them to comment on it under s 424AA of the Act. The Court found that the detail put to the applicants in relation to the inconsistencies cured any procedural unfairness which may have arisen.

13.6.7 In *SZSXV v MIBP*[202] the Court found that despite a review applicant's acceptance at a hearing that she had no protection claims 'separate' to that of her husband, she was not given a meaningful opportunity to give evidence and present arguments. This was because the material before the Tribunal squarely raised substantive protection claims based on her religion and not only her membership of her husband's family unit. The absence of any express protest or request in relation to the wife giving evidence was not such as to indicate that she resiled from her indication (in the hearing response and by attending the hearing) that she wished to participate in the hearing.[203]Similarly, in *AZM20 v MICMSMA*[204], where the applicants consisted of a husband and wife (and their children), the Court found that the Tribunal had not given the wife a meaningful opportunity to give evidence and present arguments where the Tribunal had asked the wife whether her claims were the same as her husband's and she answered 'yes'. The Court held that there is a difference between identifying claims and being given the opportunity to give evidence and present arguments in relation to those claims.

Separate applications

13.6.8 The Tribunal may conduct a joint hearing where two review applicants have inter-related claims or have nominated each other as witnesses, and have made separate review applications. However, due to the private nature of Part 7 (protection) hearings, the Tribunal carefully considers its obligations in the conduct of joint hearings involving more than one Part 7 (protection) review application. As an alternative to a joint hearing, the Tribunal may schedule each of the hearings consecutively.

13.6.9 Before the Tribunal proceeds with a joint hearing for two or more separate reviews, the Tribunal may seek and obtain the consent of each applicant; and if necessary,

[201] *BPD16 v MIBP* [2018] FCCA 3293 at [67]–[70].
[202] *SZSXV v MIBP* [2014] FCCA 1584.
[203] See also *SZQRD v MIAC* [2012] FMCA 163, where the Court held that the Tribunal did not fail to provide the second applicant with a proper opportunity to give evidence and present arguments in circumstances where the second applicant did give evidence and was asked about the most serious allegations that had been made on behalf of herself and her husband.
[204] *AZM20 v MICMSMA* [2020] FCCA 3653 at [4]–[10]. The Tribunal had also asked, after the husband had given evidence, whether there was anything to raise before witnesses would be brought, but the Court held that this question also did not invite the wife to give evidence and present arguments and there was no other invitation or engagement that could be described as an invitation to the wife to give evidence.

give each applicant the opportunity to give evidence and make submissions without the other applicants being present[205] (see Chapters 7 – Procedural fairness and the Tribunal and 31 – Restrictions on disclosing and publishing information). There is no stipulated method by which consent must be sought or obtained. Consent may be provided orally, but the Tribunal prefers to ensure that some evidence of the applicants' consent is recorded.

13.6.10 In *SZAYW v MIMIA*, the High Court held that s 429 does not necessarily prevent hearings which are wholly or partly concurrent, if that course is dictated by the objectives in s 420 and is consistent with procedural fairness.[206]

13.6.11 In *BZAAZ v MIAC*,[207] in the context of a hearing conducted by an Independent Merits Reviewer (IMR), no denial of procedural fairness was found to result from the applicant's case being heard with her brother's case. The Court found the applicants chose to have a tandem hearing, and the applicant had an opportunity to present her case before, during and after the hearing.

13.6.12 In *MZZMG v MIBP*[208] where two brothers consented to the Tribunal conducting a joint review hearing, and the Tribunal took some evidence from each of them separately without the other one present, the Full Federal Court held that the taking of evidence at a hearing in circumstances where a review applicant has been excluded from part of the hearing is authorised by the decision-making process in Part 7 of the Act, subject to the express and implied requirements of procedural fairness. As the power to require a review applicant to leave a hearing is discretionary, the Court emphasised the discretion must be exercised reasonably.

13.6.13 In finding there was no error in the Tribunal's approach in dealing with the two brothers' evidence, the Court in *MZZMG v MIBP*[209] also noted it might have been a problematic approach to reject a piece of the brother's evidence in the appellant's review yet accept the very same piece of evidence in the brother's own review, however, this did not occur in that case.

13.7 Multi-member panels

[205] In *SZAFE v MIMIA* [2003] FMCA 410 it was held that the applicant wife, who made a noise which sounded like assent but which did not appear on the written transcript, did not clearly assent to the procedure. Conversely, it was clear that the husband had consented and, thus, no jurisdictional error occurred in relation to him. The Court held, at [26], [27] and [30], that as the wife applicant (in a joint hearing with the husband applicant) was not given an opportunity to present her evidence in private, the Tribunal was in breach of s 429 resulting in a jurisdictional error. Note that whilst this conclusion on s 429 is contrary to *SZAYW v MIMIA* (2006) 230 CLR 486 and no longer good law, the principle that a hearing should not be joined without consent is nevertheless sound, as the applicant's ability to present evidence in such circumstances may be constrained. Note in *SZBIO v MIMIA* [2005] FMCA 465, Driver FM found that where there is no indication to the Tribunal that a member of a family unit needs to be heard privately, there is nothing in s 429 that requires a private hearing for an applicant who is not making separate claims. Further, in *SZAYW v MIMIA* (2006) 230 CLR 486 the Court noted, at [27], that it may sometimes be appropriate to hear separate applications by members of the same family together, although, in some circumstances s 429 may present an obstacle to that course.

[206] *SZAYW v* MIMIA (2006) 230 CLR 486.

[207] *BZAAZ v MIAC* [2013] FCCA 38. Whilst this judgment concerns an IMR hearing, the Court's findings could equally apply to Tribunal hearings.

[208] *MZZMG v MIBP* [2015] FCAFC 134.

[209] *MZZMG v MIBP* [2015] FCAFC 134.

13.7.1 Under ss 19A and 19B of the *Administrative Appeals Act 1975* (AAT Act), the Tribunal may be constituted by up to three members.[210] The President may give a written direction as to who is the presiding member if more than one member constitutes the Tribunal for the purposes of a proceeding.[211] If more than one member constitutes the Tribunal for the purposes of a proceeding, a disagreement between the members will be settled according to the opinion of the majority of the members.[212] If the Tribunal is constituted by two members, a disagreement between the members will be settled according to the opinion of the presiding member.[213]

13.7.2 Where the Tribunal is constituted by more than one member, different considerations arise in relation to the conduct of the review compared to cases where the Tribunal is constituted by a single member. While there is no judicial consideration of this issue, the power to take evidence on oath or affirmation is exercisable by any member conducting the review[214] and it is likely that other references to 'the Tribunal' in various sections in Part 5 Division 5 and Part 7 Division 4 of the Migration Act would be construed by a court as references to each member constituting the Tribunal for the purposes of the review. On this construction, any member constituting the Tribunal may exercise the powers set out in ss 363 and 427, including adjourning the review from time to time and summon a person to appear before the Tribunal to give evidence or to produce documents. The obligation under ss 360 and 425 to put an applicant on notice of an 'issue' in the review would appear to extend to what each individual member considers would be determinative, critical or dispositive of the review.

[210] This rule applies unless another provision of the AAT Act or another enactment provides otherwise: s 19B(1)(a). The Tribunal as constituted must not have more than one member who is a judge: s 19B(1)(b). Prior to 1 July 2015, only MRT cases (i.e. reviews of Part 5 reviewable decisions) could be constituted by more than one member under s 354 of the Migration Act. This provision was repealed by the Amalgamation Act with effect on and from 1 July 2015.
[211] AAT Act s 19A(1)(b).
[212] AAT Act s 42(1).
[213] AAT Act s 42(2).
[214] s 364(1)(a).

14. COMPETENCY TO GIVE EVIDENCE

14.COMPETENCY TO GIVE EVIDENCE[1]

14.1 Introduction

14.1.1 This chapter considers situations where the claims or evidence before the Migration and Refugee Division (MRD) of the Tribunal raise a question as to the competency of a person to give evidence. 'Competency' to give evidence in the Tribunal context arises for consideration when the applicant has claimed to have a psychiatric condition, psychological disorder or an intellectual disability which may affect their ability to recall or give evidence, or the evidence raises the possibility of such a condition. Such a condition may result in inconsistent, incoherent or illogical testimony which may reflect poorly on the applicant's credibility or the reliability of testimony. The Tribunal must ensure that it properly takes into account any claims relating to the applicant's competency in discharging its obligation to provide a real and meaningful invitation to hearing and in considering the credibility of the applicant's evidence.

14.2 What constitutes a meaningful invitation to hearing?

14.2.1 Sections 360 [Part 5] and 425 [Part 7] of the *Migration Act 1958* (Cth) (the Migration Act) impose an objective requirement on the Tribunal to provide an applicant with a 'real and meaningful invitation' to appear before the Tribunal to give evidence and present argument.[2] There will be a breach of these provisions where the Tribunal proceeds on a false assumption about the applicant's ability to 'give evidence and present arguments relating to the issues arising in relation to the decision under review'.[3] This may also amount to a relevant failure to accord procedural fairness.[4]

14.2.2 For a hearing invitation to be meaningful, the applicant should be competent to do that which the Migration Act envisages: namely, to give evidence and present arguments relating to the relevant issues. However in considering such matters, it is necessary to bear in mind the nature of the Tribunal and the manner in which a hearing can be expected to be conducted.[5] In particular, that the hearing is not

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *MIMIA v SCAR* (2003) 128 FCR 553. The Full Federal Court in that case held that given the findings of fact made by the primary judge that the visa applicant was not in a fit state to represent himself before the Tribunal it was clear that the invitation he received under s 425 was not a meaningful one: at [41]. This was so, even though the Tribunal was unaware of the applicant's condition; the matter only being raised for the first time before the primary judge.
[3] *MIAC v SZNVW* (2010) 183 FCR 575 at [19]. In *SZOGP v MIAC* (2010) 244 FLR 139, the Court observed at [44] that *SZNVW* indicated a current disposition in the Federal Court to confine the operation of the propositions made in *SCAR* by reference to the terms of the Migration Act, and of s 425 in particular.
[4] See, for example, *MZXQF v MIAC* [2008] FMCA 177 at [30] where the Court found there was material before the Tribunal that the applicant was mentally impaired at the time of the hearing and by proceeding with a hearing notwithstanding that material, the Tribunal denied the applicant a fair hearing.
[5] *NAMJ v MIMIA* [2003] FCA 983, at [55]; followed in *SZMSA v MIAC* [2009] FMCA 716 at [80], [98]. In *SZMSA*, the Court held that the fact the applicant suffered from depression and post traumatic stress disorder and continued to receive treatment was

adversarial in nature, and that the Tribunal has the capacity to modify procedures to accommodate the particular circumstances of an applicant.[6]

14.2.3 In those cases where the applicant is not disabled by psychological deficits from giving evidence and presenting arguments, the hearing required by s 360 or 425 of the Migration Act is not nullified by a mere failure by an applicant to present their case in the best possible light.[7] In *SZODR v MIAC,*[8] for example, the Court found the applicant's diagnosed mental impairment, of which the Tribunal was aware, did not prevent her from being coherent and responsive to questioning for five hours over two hearings.

14.2.4 Findings of jurisdictional error on the basis of a failure of the Tribunal to provide a real and meaningful invitation to hearing are more likely to arise where the claimed impairment has not been properly considered or in relation to cases where evidence of impaired capacity becomes available after the Tribunal decision has been made.

14.3 When is a person competent to give evidence and present argument?

14.3.1 There is no formal 'competency requirement' at the Tribunal in the sense that a Member does not need to formally establish that an applicant is legally 'competent' to participate in a hearing before proceeding with the hearing or giving of evidence.[9] The Tribunal is not bound by the rules of evidence which may apply in court or other tribunal proceedings.[10]

14.3.2 However, ss 360 and 425 do impose an objective requirement on the Tribunal to provide an applicant with a 'real and meaningful invitation' to appear before the Tribunal to give evidence and present arguments.[11] The Full Federal Court in *MIMIA v SCAR* found, for example, that given the findings of fact made by the primary judge that the visa applicant was not in a fit state to represent himself before the Tribunal it was clear that the invitation he received under s 425 was not a

relevant to but not determinative of his fitness to participate in the Tribunal hearing. Upheld on appeal in *SZMSA v MIAC* [2010] FCA 345.

[6] *NAMJ v MIMIA* [2003] FCA 983 at [56].

[7] *MIAC v SZNVW* (2010) 183 FCR 575 at [22]. In that case, the Full Federal Court drew a distinction between an applicant's inability to participate in a hearing due to a disability and whether the applicant could have better presented their case. This distinction was also drawn in *SZMOD v MIAC* [2010] FMCA 1001 at [76] where the Court found that the relevant question was not whether the Tribunal recognised that the applicant's diagnosed PTSD affected his capacity but whether the applicant was denied a 'meaningful opportunity' to present arguments in support of his claims and to be able to understand and respond to the Tribunal's questions.

[8] *SZODR v MIAC* [2010] FMCA 402 at [49]. Upheld on appeal in *SZODR v MIAC* [2010] FCA 1362.

[9] *MIMIA v SGLB* (2004) 207 ALR 12 at [1], [45]. Followed in *SZGZH v MIMIA* [2006] FMCA 1761 at [42]. See also *SZCBB v MIMIA* [2006] FMCA 210 at [14].

[10] ss 353 and 420, as amended by the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act).

[11] *MIMIA v SCAR* (2003) 128 FCR 553. In *Saha v MIAC* [2010] FMCA 715, the applicant argued the Tribunal failed to provide a meaningful hearing because he had misunderstood the meaning of 'de facto' when he was giving evidence and the Court held even if that were so it would not be enough to establish jurisdictional error. In *SZQEH v MIAC* [2012] FCA 127 the Court found no error where medical evidence about the applicant's fitness to participate in the hearing was considered by the Tribunal and the evidence before the Court indicated the applicant was able to respond appropriately to questions and discuss issues raised with him during the hearing at [28]. See also *SZQLY v MIAC* [2012] FMCA 113 where the Court found no error where the applicant was represented and no suggestion was made by the applicant or his adviser that he was in some way disabled from presenting his case at [38]. See also *Gjonej v MIBP* [2015] FCA 159 at [17].

meaningful one.[12] This was so, even though the Tribunal was unaware of the applicant's condition, the matter only being raised for the first time before the primary judge.

14.3.3 In order to satisfy itself that a proper hearing under s 360 or 425 is being provided, the Tribunal is required to make its own assessment of the applicant's ability to participate in the hearing.[13] Accordingly, the Tribunal must have regard to any impairment to a person's capacity to participate in the hearing.[14] For example, in *SZQKO v MIAC*[15] the Court concluded there was no error where the Tribunal asked the applicant how he was feeling and whether he understood the questions put to him. In the view of the Court, this demonstrated the Tribunal plainly understood and considered the applicant's claims and evidence relating to his medical condition and was alert to the impact of the medical condition on the hearing. The Court found it was open for the Tribunal to conclude the applicant was not taking any medication which affected his memory or capacity to participate meaningfully in the hearing.

14.3.4 The standard of fitness required before a person can participate in a hearing is not defined by the legislation. Fitness, in the relevant sense, must be assessed having regard to the particular circumstances of each case, including the intended purpose of the hearing and the support and assistance available to the applicant.[16]

14.3.5 It is not uncommon for applicants appearing before the Tribunal, to be stressed or to claim to be suffering from psychological disorders or psychiatric illnesses or to submit evidence of such conditions. The fact that a person may suffer some measure of psychological stress or disorder does not necessarily mean that a hearing cannot proceed.[17]

14.3.6 While total fitness is not required for a hearing to proceed, the extent of the disability is a relevant consideration. It is also relevant whether the claimed condition impaired the applicant's capacity to make decisions in their own interest in putting their case.[18] For example:

- In *MIAC v SZNVW* the Court held that there was no error in the Tribunal giving no weight to a document relating to the applicant's depressive condition as there was no suggestion that the applicant's condition impaired in any

[12] *MIMIA v SCAR* (2003) 128 FCR 553 at [41].
[13] *SZSRL v MIBP* [2013] FCCA 2206 at [12]. See also *AYU15 v MIBP (No 2)* [2016] FCCA 2309 at [20] where the Court held that at the very least, a 'real and meaningful' opportunity to participate in a hearing would require the applicant to be able to understand the questions asked of him or her, to understand words and sentences spoken by the Tribunal, and to be able to communicate answers by the construction and uttering of meaningful sentences.
[14] In *SZOVP v MIAC (No 2)* [2011] FMCA 442 the Court found there was no error with the Tribunal determining that the applicant was capable of participating in a second hearing. The Court held the Tribunal was aware the applicant was mentally ill and that it had available to it medical evidence which, coupled with its own questioning of the applicant, enabled it to form a view that she was capable of giving evidence and presenting arguments notwithstanding her schizophrenia. Appeal dismissed: *SZOVP v MIAC* [2012] FCA 244.
[15] *SZQKO v MIAC* [2011] FMCA 821. See also *SZQLS v MAIC* [2012] FMCA 624 at [14].
[16] *NAMJ v MIMIA* [2003] FCA 983 at [58]. See also *SZMSA v MIAC* [2009] FMCA 716 at [83] upheld on appeal *SZMSA v MIAC* [2010] FCA 345.
[17] *NAMJ v MIMIA* [2003] FCA 983 at [52]. In *SZODR v MIAC* [2010] FMCA 402 at [42], the Court stated that a hearing opportunity does not cease to be real and meaningful simply because an applicant suffers stress or confusion on account of a disability. The Court noted that the Tribunal can, if necessary, provide an adjournment and take that condition into account when making its decision. This decision was upheld on appeal in *SZODR v MIAC* [2010] FCA 1362.
[18] *MIAC v SZNVW* (2010) 183 FCR 575 at [36].

substantial way his capacity for rational decision-making in his own interests so far as the presentation of his case was concerned.[19]

- Similarly, in *SZMSA v MIAC* no appealable error was established as the appellant did not lack the capacity to give an account of his experiences, to present arguments in support of his claims, to understand and answer the Tribunal's detailed questions, or to put his case to the Tribunal.[20]

- In *Gjonej v MIBP* the Court found the applicant was not precluded from giving evidence in circumstances where the Tribunal was aware of the applicant's mental health issues and had rescheduled the hearing after reassurances from the applicant's solicitor that he was well enough to take part, the applicant was represented throughout the hearing, and although the applicant did not provide his evidence with acumen or flair he did provide some level of detail.[21]

- In *MZAEN v MIBP* the applicant provided an affidavit claiming that she was too overwhelmed and exhausted to say all the things she had wished to say during the hearing because she was in an advanced stage of pregnancy at the time. The Court held that the applicant was not denied a meaningful hearing as there was nothing in the material she subsequently provided to suggest that if she had felt any better during the hearing she would have said anything differently which could have altered the outcome.[22]

- In *AYU15 v MIBP* the applicant claimed he was 'always confused' about what he was saying at the Tribunal hearing and did not understand 'nearly half' of the issues and questions raised by the Tribunal. The Tribunal recorded in its reasons that the applicant had not informed the Tribunal of any difficulties in his understanding and observed that the applicant gave evidence without any apparent difficulties. The Tribunal had regard to a psychometric report which stated that he was suffering from a major depressive disorder, but the report did not indicate that the disorder impaired or potentially impaired his ability to participate in a hearing. The Court held that the applicant was not denied a meaningful hearing as there was no evidence that the applicant was unable to understand the questions.[23]

[19] *MIAC v SZNVW* (2010) 183 FCR 575 at [15].
[20] *SZMSA v MIAC* [2010] FCA 345 at [33]. See also *SZQUY v MIAC* [2012] FMCA 319 where the Tribunal examined the psychological evidence put forward by the applicant and assessed his capacity to participate in the hearing on the basis of the responses that he gave at the actual hearing. The Tribunal found that the applicant was able to answer questions and address issues put to him at hearing and concluded that the applicant was able to participate effectively in the hearing. The Court found that there was nothing in the Tribunal's decision to indicate that it fell into jurisdictional error (at [17]). Appeal dismissed: *SZQUY v MIAC* [2012] FCA 856.
[21] *Gjonej v MIBP* [2014] FCCA 2113. Upheld on appeal in *Gjonej v MIBP* [2015] FCA 159. On appeal the Court found the applicant was not denied a meaningful hearing in circumstances where: his solicitor informed the Tribunal the applicant was well enough to attend; the applicant was granted a recess during the hearing; he was able to express himself and his emotions and provide details of his partner relationship with the Tribunal; the hearing proceeded without demur from the applicant or his solicitor; and, finally, the times in which the applicant's evidence was incoherent were in response to difficult or uncomfortable questions.
[22] *MZAEN v MIBP* [2016] FCCA 620 at [74].
[23] *AYU15 v MIBP (No 2)* [2016] FCCA 2309 at [21]–[25]. It was also of particular relevance to the Court that the applicant had made no attempt to identify the matters which he was confused about in his judicial review application. Upheld on appeal in *AYU15 v MIBP* [2017] FCA 151.

- In *AFD16 v MIBP* the appellant provided a medical opinion which stated he was not fit to attend a Tribunal hearing because 'it might seriously endanger his health'. While the Court held that the Tribunal erred by not recognising the seriousness of the appellant's illness and the complexity of his symptoms in its assessment of his credibility including his inability to concentrate, the Court upheld the finding of the primary judge that the transcript of the hearing showed very clearly that the appellant was able to take part in the hearing and indicated that, apart from exhaustion, he was fit and able to attend the hearing, and that even if it were accepted that the hearing would endanger his health, it would not be sufficient to establish a breach of s 425.[24]

- By way of contrast, in *DNB17 v MIBP and DYT17 v MIBP* the Court found there had been practical injustice to the applicant in circumstances where the Court considered that recommendations from a psychologist report on to how to conduct a hearing had not been followed. The applicant's assessing psychologist had recommended that she not be questioned about her rape and if possible the Tribunal not be constituted by a male. The recommendations were not followed and the applicant became distressed during the hearing which adversely impacted upon her ability to give evidence.[25]

14.3.7 A mere assertion by an applicant regarding his or her state of health does not necessarily establish that he or she is unfit to give evidence at a Tribunal hearing or that his or her evidence is affected by a medical condition.[26]

14.3.8 Generally, the onus is upon the applicant to establish he or she is unfit to take part in the hearing and to supply evidence of any medical condition.[27] In *SZOOJ v MIAC*[28], the Court took into consideration the fact that the applicant was represented by a qualified migration agent who should have been familiar with the procedures to adopt in circumstances where the applicant claimed to have mental health issues. The agent did not address the Tribunal on the issue and the Court held that in the absence of medical evidence it was open to the Tribunal to reject the assertion that the applicant was unfit to give evidence. In the absence of such

[24] *AFD16 v MIBP* [2020] FCA 964 at [75]–[80], [110]; *AFD16 v MIBP* [2016] FCCA 2810 at [27].
[25] *DNB17 v MIBP & DYT17 v MIBP* [2018] FCCA 3320 at [44]–[48].
[26] *SZLTI v MIAC* [2008] FCA 1274 at [19]. A similar approach was taken in *SZMBU v MIAC* [2008] FCA 1290 at [20].
[27] *NAMJ v MIMIA* [2003] FCA 983 at [69]. This approach was confirmed in *SZMSF v MIAC* [2010] FCA 585 at [17]–[21]. See also *MZAEN v MIBP* [2016] FCCA 620, where the Court also had regard to the fact of the applicant's representation by a solicitor and migration agent during the Tribunal process. The Court considered that the solicitor, having attended the Tribunal by telephone, had become aware of the advanced stage of the applicant's pregnancy and could have spoken to the applicant to obtain instructions, and if he had thought it advantageous, have asked the Tribunal for further time after the applicant gave birth to give evidence (at [74]). Nevertheless, in some instances it may be prudent for the Tribunal to consider whether any evidence or statement given by an applicant bears upon the issue of competency and ensure that the applicant is fit to give evidence. For example, in *MZAQB v MIBP* [2017] FCCA 161, the applicant, who was represented, indicated that she was suffering from mental health issues, however the Tribunal gave little weight to her evidence in light of its overall adverse credibility finding and did not query the applicant further. The applicant subsequently sought judicial review and provided to the Court a psychiatrist report dated a few weeks after the Tribunal hearing indicating she had been suffering from severe mental health issues for over two years, including depression, anxiety, and suicidal thoughts and had formed an intention to kill her own children. The Court, following *MIMIA v SCAR* and accepting the psychiatrist report, held that the applicant was not of sound mind during the hearing, which meant that she had not been given a meaningful hearing.
[28] *SZOOJ v MIAC* [2011] FMCA 56 at [20]–[21].

documentary evidence or any obvious impediment at hearing, Courts has found that it is open to the Tribunal to proceed to conduct the hearing.[29]

Taking into account claims and evidence of impairment

14.3.9 Where an applicant submits that a medical condition may affect their capacity to participate in the hearing, the Tribunal is to consider the claim and any evidence submitted to support the claim to determine whether there is a condition which would affect the applicant's ability to give evidence.

14.3.10 For example, in *SZQLJ v MIAC*[30] the Court found the Tribunal's conclusion that the applicant did not have claimed memory problems were open on the material given that she could not substantiate her claims. Similarly, in *SZQTP v MIAC*[31] the Court found that the Tribunal properly took into account a social worker's report which included a 'provisional diagnosis' of Post-Traumatic Stress Disorder, and that it was open to the Tribunal to have regard to all the other evidence before it in reaching its conclusion that the applicant was able to participate effectively in the hearing.

14.3.11 A recent opinion from a qualified doctor/psychiatrist who has personally examined the applicant will generally constitute probative medical evidence relevant to the person's competence to give evidence. In *SZOES v MIAC*,[32] for example, the Court found the Tribunal's failure to postpone a scheduled hearing after receiving a formal request which was supported by medical documentation resulted in jurisdictional error. This was so even though the medical evidence did not expressly refer to the applicant's fitness to appear before the Tribunal. In contrast, however, the Court in *SZOGB v MIAC*[33] found no breach of s 425 in circumstances where there was an absence of evidence within the psychological report to support the proposition that the applicant's mental and emotional state was such as to render her incapable of meaningfully participating in the hearing.

14.3.12 Where the person's credibility is in issue, the Tribunal generally considers any claimed or apparent medical condition as a possible explanation for any credibility concerns.[34] However, the Tribunal still considers the effect the medical condition has on the person and what weight it can give to that person's evidence.[35]

[29] See for example, *SZMAI v MIAC* [2009] FMCA 934; *SZQUM v MIAC* [2012] FCA 493 and *DZACB v MIAC* [2012] FMCA 376.
[30] *SZQLJ v MIAC* [2011] FMCA 932. Appeal dismissed: *SZQLJ v MIAC* [2012] FCA 456. See also *SZSRL v MIBP* [2013] FCCA 2206 at [11].
[31] *SZQTP v MIAC* [2013] FCCA 1209 at [44]–[47]. See also *SZQKO v MIAC* [2011] FMCA 821.
[32] *SZOES v MIAC* [2010] FMCA 686.
[33] *SZOGB v MIAC* [2010] FMCA 748. See also *SZOVS v MIAC* [2011] FMCA 226 at [41] where the Court held that by acknowledging the applicant's claim to have suffered a memory-affecting injury and by permitting and encouraging the applicant to substantiate that claim by relevant evidence, the Tribunal discharged its obligations to her in relation to that issue. Appeal dismissed: *SZOVS v MIAC* [2011] FCA 916. See also *AYU15 v MIBP (No 2)* [2016] FCCA 2309 at [21] where the Court was satisfied that a psychometric report which stated that the applicant was suffering from a 'major depressive disorder' was not capable of establishing that the applicant was denied a real and meaningful opportunity, as it did not indicate that the disorder impaired or potentially impaired the applicant's ability to participate in the hearing.
[34] In *SZQTP v MIAC* [2013] FCCA 1209 the Court found no error where the Tribunal addressed the applicant's evidence in relation to his capacity to participate in the hearing in its findings and reasons, including the applicant's claim that he could not remember dates and was muddled, and did not in fact rely on the applicant's failure to recall dates in reaching its adverse credibility findings: at [53]–[54]. See also *SZQPV v MIAC* [2011] FMCA 1024 where the Court found that it was apparent from its reasons for decision that the Tribunal took the applicant's mental health into account before making an adverse credibility

14.3.13 A failure to properly consider a claim of such a medical condition may be found to constitute a failure to take account of a relevant consideration, or it may give rise to a breach of the obligation to give the applicant an opportunity to give evidence and present arguments under s 360 or 425, or otherwise amount to a relevant failure to accord procedural fairness.[36] For example, in *SZMOI v MIAC*[37] the Court held the Tribunal committed jurisdictional error in failing to consider a psychologist's report in relation to the applicant's capacity to give reliable evidence. In considering a report from a psychologist, which was prepared for the Red Cross for another purpose and which concluded the applicant's symptoms, including poor concentration and memory, were consistent with Post Traumatic Stress Disorder, the Tribunal stated only that it was 'not determinative of the Tribunal's consideration of the … claims'. However, *SZMOI* was distinguished in *SZODR v MIAC*[38] in circumstances where, although the Tribunal had failed to refer to a Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) assessment in its reasons, it could be inferred from the conduct of the hearing that the Tribunal had considered and understood it.

What weight must be given to medical opinions provided to the Tribunal?

14.3.14 The amount and level of medical evidence required by the Tribunal to make proper findings on claimed medical conditions will depend on the circumstances.[39] In general, the Tribunal does not substitute its own lay opinion for an expert opinion on a matter that is properly the subject of an expert opinion, such as a medical diagnosis.[40]

14.3.15 Nevertheless, the Tribunal may need to apply such an opinion to determine whether a person is fit to give evidence. In assessing and applying such an opinion, it is important to have regard to the nature and impact of the applicant's condition and the specific deficiencies in competence identified in the medical report relevant to

finding and that it had considered whether or not such matters provided an explanation for the inconsistencies in the applicant's evidence at [29].

[35] In *SZSFS v MIBP* (2015) 232 FCR 262; [2015] FCA 534 at [36], the applicant contended that the Tribunal failed to take into account psychological assessments which referred to a severe lack of concentration and memory and were capable of providing a satisfactory explanation for omissions, inconsistencies and contradictions which the Tribunal considered were a feature of the applicant's evidence. The Tribunal placed 'significant weight' on the psychological reports, but formed a different view of the applicant based on its lay observations. The Court held that where so much depended on the credibility of an account given by an applicant, the Tribunal's decision was unreasonable where it had not considered the ramifications of accepting the psychological assessments. This judgment can be contrasted with *SZTSC v MIBP* [2016] FCCA 543 at [87]–[89], in which the Court found no error in the Tribunal giving psychological reports limited weight in its assessment of the applicant's claims, as the Court found that the Tribunal's credibility concerns were founded on the inherent implausibility of certain claims based on independent country information, and limited internal inconsistencies in the applicant's evidence had been identified. While this Federal Circuit Court judgment was set aside on appeal in *SZTSC v MIBP* [2017] FCA 1032 on a different issue, the Federal Court did not address the Federal Circuit Court's consideration on this point or consider the Tribunal's treatment of the psychological reports.

[36] In *MZXQF v MIAC* [2008] FMCA 177 at [30] the Court found there was material before the Tribunal that the applicant was mentally impaired at the time of the hearing and by proceeding with a hearing notwithstanding that material, the Tribunal denied the applicant a fair hearing.

[37] *SZMOI v MIAC* [2008] FMCA 1507 at [24]–[25].

[38] *SZODR v MIAC* [2010] FMCA 402 at [66].

[39] In *SZQLY v MIAC* [2012] FMCA 113 the Court noted that the weight to be accorded to any particular evidence before the Tribunal is a matter for it as part of its fact finding function and it held that nothing in the evidence before it supported a conclusion that the Tribunal's consideration of the medical evidence demonstrated jurisdictional error. See also *SZQTP v MIAC* [2013] FCCA 1209 at [44]–[48].

[40] *MZXTT v MIAC* [2008] FMCA 1007 at [37].

the issue of whether the applicant is fit to participate in a Tribunal hearing at the relevant time.[41]

14.3.16 Sometimes evidence is submitted from a medical practitioner in relation to a claim of a psychological or other condition which is based on or expresses a view on the facts of a case. The Tribunal is the finder of fact and so is not bound to accept the opinions of a medical practitioner as to the truth of the applicant's claims for the visa, however, it must have regard to any relevant medical evidence relating to the applicant's ability to give evidence.[42] In *MZXTT v MIAC*,[43] a psychiatric report did not just express the proper psychiatric opinion that the applicant suffered from anxiety and depression, but purported to explain why the applicant had not previously raised claims of torture, presupposing the applicant had suffered torture. The Tribunal found the applicant to be unreliable and did not accept he was tortured. The Court found the Tribunal had clearly considered the psychiatric evidence and the decision to reject the expert evidence was reasonable and open on the evidence and after giving the applicant ample opportunity to supplement his case.

14.3.17 Where a medical opinion is based on particular facts, the Courts have indicated that the Tribunal is to make clear in its findings that is has addressed both the diagnosis in terms of the applicant's ability to give reliable evidence, as well as the weight given to the factual basis for any opinion and diagnosis of the expert.[44]

14.3.18 Medical reports prepared for other purposes, such as STARTTS reports may not necessarily be sufficient to establish an applicant's inability to give evidence.[45] In *SZNOC v MIAC*[46] the Court considered whether a report prepared by STARTTS, which on its face was prepared for the purposes of establishing an inability to

[41] *SZMSA v MIAC* [2009] FMCA 716 at [91] upheld on appeal in *SZMSA v MIAC* [2010] FCA 345. See also *SZNWZ v MIAC* [2010] FMCA 481 at [34]–[35], *SZQKO v MIAC* [2011] FMCA 821, *SZQUY v MIAC* [2012] FMCA 319, and *SZQTP v MIAC* [2013] FCCA 1209.

[42] *MZXTT v MIAC* [2008] FMCA 1007 at [37]. In *SZOJF v MIAC* [2011] FCA 1384 the Court held the Tribunal did not fall into error by failing to treat a medical certificate or a preliminary assessment as reasonable or strong evidence corroborative of the claims made before it in support of the contention that the applicant held a well-founded fear of persecution for the reasons identified on the facts.

[43] *MZXTT v MIAC* [2008] FMCA 1007 at [37].

[44] For example, *SZKHD v MIAC* [2008] FCA 112 at [25]–[28]. The Tribunal had rejected the applicant's claims of past harm, but stated that it was 'mindful of the applicant's mental health issues and [did] not question the conclusions of the treating psychologist.' The Court found the psychologist's diagnostic formulations were inextricably linked with her acceptance of the factual claims of the appellant and concluded that the Tribunal had failed to give proper consideration to the psychologist's report. However, see *SZNMJ v MIAC* [2009] FCA 1345 and *SZNOC v MIAC* [2010] FCA 149, where the Courts in both matters considered reports prepared by STARTTS. In *SZNMJ*, the Court, distinguishing *SZKHD,* rejected the appellant's submission that the Tribunal had failed to lawfully consider the content of the report by failing to take into account that the report stated that the appellant had been 'subject to trauma in the past and has fears for his family' at [43]–[45]. The Court held that there was no obligation upon the Tribunal to consider the report for any reason other than its role in assessing whether the appellant had the capacity to participate in the hearing and noted that there was no factual history in the report which tended to support the appellant's claims. The Court in *SZNOC* held at [10] the Tribunal was not bound to accept the factual basis for an accepted diagnosis, noting the report did not deal with the connection between the claims and the psychological symptoms the appellant displayed. See also *SZOJF v MIAC* [2011] FCA 1384 where the Court found that *SZKHD* was incorrectly decided at [52]–[53]. The Court held, in contrast to the Court in *SZKHD,* that a failure by the Tribunal to have regard to a demonstrated consistency between a clinical condition found to exist by a relevant expert and a version of the facts put to the expert which, in turn, is consistent with the facts put to the Tribunal in support of a claim to hold a well-founded fear of persecution does not give rise to jurisdictional error.

[45] The Court in *SZOIN v MIAC* [2010] FMCA 741 at [71] commented that even if it were taken that the applicant in that case suffered depression and PTSD as was stated in the STARTTS report, this does not automatically lead to the conclusion that it affected his performance before the Tribunal or affected his capacity to give evidence. The Court's reasoning on this issue was untouched on appeal: *SZOIN v MIAC* (2011) 191 FCR 123.

[46] *SZNOC v MIAC* [2010] FCA 149.

perform paid employment, supported the appellant's claims that she had been receiving counselling and that she was unable to recall events or confused dates and places. The Court held that it could not be said that the Tribunal had failed to consider the report in relation to the appellant's ability to participate in the hearing and that the weight given to the report was a matter for the Tribunal. Similarly, in *SZROZ v MIAC*[47] the Court found a STARTTS report relating to the applicant's capacity for work was of little assistance in relation to his capacity as a witness and that the Tribunal was generous in considering the report to determine whether his evidence was affected by symptoms of mental illness.

14.3.19 Where there is conflicting medical evidence about an applicant's condition, the Tribunal is entitled to evaluate each opinion and state reasons for preferring one view over another. See for example *SZASF v MIMIA*[48] where a more recent psychiatrist's report, which concluded that there was no ongoing psychiatric disorder but instead some evasiveness, was preferred over an older psychologist's report.

14.4 Is there a duty to make further enquiries?

14.4.1 Generally, the onus is upon the applicant to supply evidence of any medical condition as it is for the applicant to make their case.[49] The Tribunal is not duty bound to press an applicant to call further evidence on an issue or to seek an adjournment of the hearing to enable him to do so or to seek out such evidence itself.[50] However, in considering whether to exercise its powers, the Tribunal must act fairly and justly in all the circumstances of the case.[51]

14.4.2 The Courts have generally found that the Tribunal does not have a duty to make further inquiries or obtain medical evidence where the applicant is able to make their own case; where there are no readily available reports which are relevant; and where the issue of capacity has been properly considered by the Tribunal. For example:

- In *MIAC v SZNVW*[52] the Full Federal Court held that the Tribunal was not obliged to conduct an inquiry to discover whether the respondent's case might be better put or supported by other evidence. The applicant had the opportunity to adduce such evidence as to his psychological state and its impact on his 'demeanour, memory and consistency', as he wished.

[47] *SZROZ v MIAC* [2012] FMCA 215.
[48] *SZASF v MIMIA* [2004] FMCA 473.
[49] *MIAC v SZNVW* (2010) 183 FCR 575 at [36] where Keane CJ (Emmett J agreeing) found the Tribunal was not obliged to conduct an inquiry to discover whether the applicant's case might be better put or supported by other evidence.
[50] *MIAC v SZNVW* (2010) 183 FCR 575 at [22].
[51] This may be particularly relevant for review applications made on, or after, 29 June 2007 that are subject to s 357A(3) and s 422B(3) which provide that the Tribunal must act in a way that is fair and just in applying the relevant 'Conduct of review' provisions in the Act (ss 358–367 [pt 5] and ss 423–429A [pt 7]). It is unclear whether a failure to act fairly and justly is a separate basis on which jurisdictional error can be found, where there is no breach of the relevant provisions. For further discussion see Chapter 7 – Procedural fairness and the tribunal.
[52] *MIAC v SZNVW* (2010) 183 FCR 575 at [36].

- In *SZBGF v MIMIA*[53] the applicant claimed to suffer from a nervous breakdown, hysteria and memory loss and claimed he would submit to medical examination by an independent doctor. The Tribunal did not pursue these issues and no medical examination was obtained. The Courts held that the Tribunal was not obliged to pursue the medical issue or to suggest that the applicant have tests. Rather, it was for the applicant to make his case and put before the Tribunal appropriate evidence which he had a reasonable opportunity to do.

- In *SZMSF v MIAC*[54] the Court held that there was no obligation on the Tribunal to obtain any medical evidence about the applicant on the basis that it had been made aware that the applicant had been prescribed medication for depression and stress. The evidence subsequently provided to the Court did not indicate that the applicant was so affected by the medical condition or the medication that he was unable to participate in the hearing.

- In *SZNGI v MIAC*[55] the Court held that where the Tribunal indicated it had considered the alleged difficulties facing the applicant, and weighed them against the manner in which the applicant gave his evidence, there was nothing which indicated that the Tribunal independently should have caused the applicant to have a medical examination.

- In *SZOVP v MIAC*[56] the Court held the Tribunal was not duty bound to conduct additional investigations into the mental health of the applicant as it was already on notice that she suffered from mental illness and took this into account in its dealings with her and was satisfied that she was capable of giving evidence and presenting her case at a hearing before it.

14.4.3 However, in limited circumstance where there is evidence readily available to the Tribunal that the applicant may have a condition which would affect their capacity to give evidence, the Tribunal should consider any medical reports provided and consider whether to make further inquiries.[57]

14.4.4 Where the Tribunal has considered whether to seek reports, or where reports are already available, a failure to make further enquiries or to gain additional reports or evidence does not of itself give rise to a reviewable error.[58] Essentially, the duty on the Tribunal is to consider any information provided, or decide whether to seek

[53] *SZBGF v MIMIA* [2005] FMCA 117 at [12]–[13].
[54] *SZMSF v MIAC* [2010] FMCA 22 at [74]. Upheld on appeal in *SZMSF v MIAC* [2010] FCA 585.
[55] *SZNGI v MIAC* [2009] FMCA 1032 at [18]. Undisturbed on appeal: *SZNGI v MIAC* (2010) 114 ALD 64.
[56] *SZOVP v MIAC* [2012] FCA 244.
[57] See *Prasad v MIEA* (1985) 6 FCR 155, *Azzi v MIMA* (2002) 120 FCR 48; *W389/01A v MIMA* (2002) 125 FCR 407; *NAVK v MIMIA* [2003] FCA 1389 at [19]; and *Gomez v MIMA* (2002) 190 ALR 543 at [26].
[58] *Ahmed v MIMA* (2001) 184 ALR 343 at [39]; *MIMIA v SGLB* (2004) 207 ALR 12 at [42]–[43]. In *SZQLZ v MIAC* [2012] FMCA 1 the Court applied *MIMA v SGLB* in rejecting a contention that the IMR had a duty to make further enquiries as to the applicant's mental health before making credibility findings against him. The Court held, as in *MIMA v SGLB*, the IMR was in a position, by reference to a STARTTS assessment and her own observations of the applicant at hearing, to determine whether the applicant was able to participate in the hearing. The transcript of the hearing was powerful evidence the applicant was able to participate without any apparent difficulty.

information. Once the Tribunal has turned its mind to this matter, it has discharged its obligation.

14.5 Obtaining medical reports

14.5.1 Where the issue of competency arises for consideration, if the applicant has not already submitted relevant medical evidence, the Tribunal may give an opportunity to do so by inviting the applicant to provide information from the applicant's own specialist, pursuant to ss 359(2) [Part 5] or 424(2) [Part 7].

14.5.2 In some circumstances it may also be appropriate for the Tribunal to obtain a medical report itself by arranging for the applicant to attend a specialist pursuant to ss 363(1)(d) [Part 5] or 427(1)(d) [Part 7] or under s 60.

14.5.3 Sections 363(1)(d) and 427(1)(d) empower the Tribunal to require the Secretary of the Department of Home Affairs (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.

14.5.4 Sections 363(1)(d) and 427(1)(d) are permissive, not mandatory powers. They do not impose a general duty upon the Tribunal to make inquiries,[59] and there is no legal obligation on the Tribunal to consider whether to exercise the power.[60] In *MIAC v SZGUR*[61] the High Court considered whether the Tribunal, by not acceding to an agent's request to arrange an independent medical assessment of the applicant's mental health, erred by failing to consider whether to exercise the power conferred upon it. The High Court held that s 427(1)(d) is to be exercised having regard to the statutory imperatives found in s 420 and that this power, together with other ancillary provisions, did not impose a general duty to make inquiries upon the Tribunal.[62] Even if circumstances arise where the Tribunal is bound to make inquiries, such a duty does not necessarily require the application of s 427(1)(d) [s 363(1)(d)].[63]

14.5.5 While the Tribunal may consider whether to exercise its power to obtain a medical report, as there is no obligation on the Tribunal to consider whether to exercise the power, it is unlikely to fall into jurisdictional error if it ultimately does not obtain such a report or if it does not consider obtaining a report. In *BUG16 v MICMSMA* the Court considered whether the Tribunal had erred by not considering whether to

[59] *MIAC v SZGUR* (2011) 241 CLR 594 at [19]–[20].
[60] *MIAC v SZGUR* (2011) 241 CLR 594 at [22].
[61] *MIAC v SZGUR* (2011) 241 CLR 594.
[62] *MIAC v SZGUR* (2011) 241 CLR 594 at [19]–[20]. Justice Gummow (with whom Heydon and Crennan JJ also agreed) concluded at [88]–[89] that s 427 does not oblige the Tribunal to seek a medical report and, noting the expression 'that the Tribunal thinks necessary with respect to the review' qualified the Tribunal's power, considered a medical examination to be unnecessary in the circumstances. In *SZQLJ v MIAC* [2011] FMCA 932 the Court considered whether pursuant to s 427(1)(d) the Tribunal should have obtained its own medical assessment of the applicant, however applying *MIAC v SZGUR* it concluded there was no obligation on the Tribunal to make its own inquiries or to consider the exercise of its discretion under s 427(1)(d). See also *BUG16 v MICMSMA* [2022] FCA 325 at [34] where the Court, having regard to the Court authorities, held there is no general duty on the Tribunal to require and/or cause a medical examination to be carried out.
[63] *MIAC v SZGUR* (2011) 241 CLR 594 at [22].

obtain a medical report on the appellant's physical and mental condition.[64] The appellant conceded that there was no general duty to consider whether to refer for a medical opinion, but contended that in the particular circumstances of the matter, the Tribunal was required to consider the question because the report would shed light on the appellant's ability to give reliable evidence and there was a connection between his protection claims and physical and mental injuries. The Tribunal had also earlier requested a medical report from a qualified practitioner about the appellant's competence to give evidence but did not organise a report itself. The Court, relying on *SZGUR,* held that as there is no mandatory requirement to consider exercising the discretion to obtain a medical report, the Tribunal did not fall into error by not considering whether to obtain a report on the matters raised by the appellant. The matters a decision-maker is bound to consider in making a decision are determined by the construction of the statute conferring the discretion. As there was no obligation to consider obtaining a report into the appellant's physical or mental health, it follows that, as the Tribunal was not bound to take into account whether to exercise its power to obtain a report, it did not fail to take into account a mandatory consideration.[65]

14.5.6 A report from the psychiatrist or psychologist, whether arranged pursuant to ss 363(1)(d) or 427(1)(d) or provided by the applicant's own specialist, may address the following issues:

- what is the diagnosis?
- can the applicant understand the nature of the proceedings?
- can the applicant give evidence under oath?
- can the applicant give instructions to his or her adviser?
- can the applicant present arguments in support of his or her claims?
- can the applicant understand and answer the Tribunal's questions?
- if the answer to any of the above is no; then when will the applicant be able to do so (prognosis)?

14.5.7 If a psychiatric or psychological report is obtained, it will be beneficial if the reporting specialist recounts the applicant's personal history in as detailed a fashion as possible.

14.5.8 Under s 60 of the Migration Act, if the health or physical or mental condition of an applicant for a visa is relevant to the grant of the visa, the Minister may require the applicant to be examined by a specified person at a specified reasonable time and specified reasonable place. An applicant must make every reasonable effort to be

[64] *BUG16 v MICMSMA* [2022] FCA 325 at [52]–[57]; [100]–[103].
[65] *BUG16 v MICMSMA* [2022] FCA 325 at [101]–[102].

available for and attend the examination. As the Tribunal is vested with the relevant powers of the original decision maker,[66] and the power under s 60 relates to grant of a visa, it would appear that the Tribunal may also obtain medical reports pursuant to s 60. Specifically, where the physical or mental condition of an applicant is relevant to the grant of a visa, the Tribunal may require that he or she visit and be examined by a specified qualified person to determine his or her health, physical condition or mental condition.

14.6 Guidance on conducting the hearing where competency is at issue

14.6.1 The provisions of the Migration Act must be observed when considering the requirement to take evidence from an applicant who has a psychiatric or intellectual disability. In particular ss 353 [Part 5] and 420 [Part 7][67] require the Tribunal to act according to substantial justice and the merits of the case, and ss 357A(3) [Part 5] and 422B(3) [Part 7] require the Tribunal to act in a way that is fair and just in applying the procedures for the conduct of review.

14.6.2 A person with a mental health condition or mental capacity issue may require different techniques of examination. If an applicant is suffering from a mental disability, the Tribunal may consider investigating whether family members, migration agents, health professionals or other support people can assist the applicant to give evidence. However, no rigid rules can be laid down as to how to conduct the Tribunal hearing. Rather the Tribunal is to conduct the hearing and the review generally showing that it has taken account of any mental disability affecting the applicant's capacity and taken reasonable procedural steps to enable the applicant to put his or her case.

14.6.3 The High Court in *MIMIA v SGLB* has strongly indicated that the whole conduct of the Tribunal will be examined.[68] In that case, the Court focused on what the Tribunal could reasonably do to accommodate the applicant. In holding that the Tribunal acted reasonably, the majority observed that "the Tribunal went to great lengths to accommodate the respondent and his concerns. The Tribunal postponed the hearing when requested to do so and promptly undertook the hearing when requested to do so. The Tribunal stopped the hearing when it became apparent that the respondent was agitated. It gave him an opportunity to comment on its concerns after the hearing."[69]

[66] ss 349 [pt 5], 415 [pt 7]. See the observations of the High Court in *MIAC v SZKTI* (2009) 238 CLR 489 to this effect: at [33].
[67] ss 353 and 420, as amended by the Amalgamation Act.
[68] *MIMIA v SGLB* (2004) 207 ALR 12.
[69] *MIMIA v SGLB* (2004) 207 ALR 12 at [33], [1].

Practical options for dealing with competency issues at hearing

14.6.4 When dealing with competency issues at hearing, the Tribunal may consider:

- providing a calm environment where information is presented clearly;
- breaking complex information into steps;
- taking into account possible shortened concentration spans;
- being prepared to repeat or rephrase information;
- being prepared to allow short breaks in the hearing or in evidence;
- consider taking evidence from family members, close friends or other support people if applicant is highly agitated or unable to give coherent evidence;
- allowing the applicant to have a support person at the hearing;
- consider rescheduling if there is an indication that the impairment to capacity is temporary in nature.

14.6.5 If the applicant is represented by an adviser, then the Member may be able to progress matters by discussing the issue with them in an appropriate way.

14.6.6 The Tribunal has scope to obtain evidence on the issues from people other than the review applicant, such as the visa applicant (where this differs), or other witnesses. Generally, that evidence will be given by the other person *in their own capacity*, rather than on behalf of the review applicant.

14.6.7 There may however, be circumstances where an applicant has given another person the power of attorney to act on their behalf.[70] Where an applicant is incapacitated from giving evidence themselves, the Tribunal may consider whether it is appropriate to take evidence from the attorney *on behalf of* the applicant. Whether or not this is appropriate will depend upon the terms of the power of attorney and their relevance to the issues arising in the review. For example, if the attorney is given power over limited matters, such as financial matters that are not relevant to the review, then it may not be appropriate for the Tribunal to take evidence from the attorney. By contrast, if the attorney is given very broad power, or specific power over matters such as where the applicant is to live, or who is to care for them, then the Tribunal may consider it appropriate to take evidence from the attorney where those matters are relevant to the issues arising in the review. There may even be situations where the terms of the power of attorney are such that they

[70] Whether an applicant has appointed someone with power of attorney over their affairs and whether they had capacity to do so will be findings of fact to be determined by the Tribunal. An applicant's *capacity* to give a power of attorney is not a question that is determined solely on the basis of medical evidence, but is a question for the Tribunal to determine on the totality of the evidence before it, both medical and lay: *Kumar v MIAC* [2009] FMCA 649 at [17]. See also the *Powers of Attorney Act 2003* (NSW).

allow the attorney to present the applicant's case or specifically contemplate the attorney giving evidence that is relevant to the review.

14.6.8 Although the Tribunal is not bound by the rules of evidence, where an attorney gives evidence on behalf of an applicant, he or she would only be able to give evidence in relation to those matters that are within his or her knowledge. However, depending on the terms and scope of the power of attorney, evidence from the attorney in relation to matters such as the wishes and best interests of an applicant may be taken as evidence of the applicant themselves in relation to those issues.

14.6.9 For further guidance see the MRD's Guidelines on Vulnerable Persons.[71]

14.7 Progressing the review when the applicant is not competent to give evidence

Where an applicant is temporarily incapacitated

14.7.1 In circumstances where there is evidence before the Tribunal that an applicant's incapacity is temporary in nature, the Tribunal may consider whether the hearing should be adjourned or rescheduled, and the applicant's competency reassessed after a specified period of time. In selecting a future date for hearing or reassessment, consideration should be given to any medical opinion as to the applicant's prognosis.

14.7.2 In *Applicant S296 of 2003 v MIMIA*,[72] the Court concluded that while there was no breach of s 425, the Tribunal had not complied with the requirements of procedural fairness by refusing to grant the applicant a further adjournment in circumstances where there was some indication in the medical evidence that there were fluctuations in the applicant's psychiatric illness. The Court found it relevant that the review had been on foot for some time prior to the invitation to attend a hearing, and the Tribunal had accepted that there were genuine psychiatric problems. Further, the Court had regard to the fact that as the Tribunal had made it clear that it could not find for the applicant on the basis of the written material, the appearance of the applicant would be essential to change the mind of the Tribunal member, and as it was accepted that the applicant had experienced trauma in the past, there was a 'lively issue' as to the cause of that trauma, and its effect upon his claim for a protection visa. In those circumstances, the Tribunal was required to give the applicant at least another opportunity to give oral evidence.

14.7.3 In circumstances where the Tribunal adjourns or reschedules a hearing to a later time, it will be necessary for the Tribunal to reassess the applicant's competency at that later time, having regard to any available medical opinion. Depending on the circumstances, the Tribunal may then proceed with the hearing, make a further

[71] For information regarding the operation of internal Tribunal guidelines, see Chapter 7 – Procedural fairness and the tribunal.
[72] *Applicant S296 of 2003 v MIMIA* [2006] FCA 1166.

adjournment, or proceed to complete the review without evidence from the applicant (as discussed immediately below).[73]

Where an applicant is incapacitated for the foreseeable future

14.7.4 Where the Tribunal concludes on the evidence before it that the applicant is unfit to participate in the hearing and is expected to be unfit for the foreseeable future, it may be necessary for the Tribunal to proceed to complete the review without taking evidence from the applicant. This will be a matter for the Tribunal to determine depending on the particular circumstances of the matter, including any available medical evidence.

14.7.5 Sections 360 and 425 do not deny the Tribunal the power to complete a review where the applicant is unfit to participate in a hearing, and nor is such an implication found in any other section of the Migration Act. There is a statutory obligation on the Tribunal to complete a review without undue delay, even where an applicant becomes incapacitated from participating in a hearing for the foreseeable future.[74]

14.7.6 In *SZOGP v MIAC* the Court found no error in the Tribunal's approach in proceeding to make a decision without taking oral evidence from the applicant wife in circumstances where there was medical evidence that she would not be fit to give oral evidence at a hearing.[75] The Court accepted the construction of the Migration Act that was adopted in *S296 of 2003 v MIMIA*[76] that the Tribunal is under a duty to deal with a review in a 'fair, just, economical, informal and quick' manner consistent with s 420 and therefore there will be circumstances where the Tribunal will have to make a decision without the benefit of an applicant's oral evidence.[77] Section 425 of

[73] For example, see *Ogawa v MIAC* [2011] FMCA 262 at [37] and [44] where there was conflicting medical evidence before the Tribunal as to the applicant's fitness to attend the hearing. The Court found no error in the Tribunal's decision to proceed with the hearing in the applicant's absence, noting that the applicant had been assisted in producing evidence and the applicant's migration agent was present. The fact that the circumstances did not suggest that the applicant's vulnerability would be material to the Tribunal's determination of the sole question before it (whether she was enrolled in a registered course), and that this was a matter that could not be assisted by oral testimony, meant that the applicant's capacity to contribute to the proceeding had less relevance. The Court noted that if the applicant's role had extended beyond those matters and had required her to give evidence, submit to cross-examination, or argue a point of law, her vulnerability and a medical opinion concerning it may have borne greater significance. Not challenged on appeal in *Ogawa v MIAC* [2011] FCA 1358 at [35]. Special leave to appeal from this judgment to the High Court was refused: *Ogawa v MIAC* [2013] HCASL 33.

[74] *SZOGP v MIAC* (2010) 244 FLR 139 at [57]; *SZQTU v MIBP* [2020] FCCA 1944 at [35].

[75] *SZOGP v MIAC* (2010) 244 FLR 139. In response to the Tribunal's hearing invitation, the applicant's migration agent had provided medical evidence indicating that the applicant was unfit to attend the hearing. The Tribunal sought further information including details of the expected duration of the applicant's illness and received a further report indicating that the applicant 'will not be fit' to give oral evidence at a hearing. The Tribunal formed the view that the applicant was unable to properly give oral evidence at hearing which was likely to continue into the foreseeable future and set the matter down to hear evidence from the applicant's husband. See also *Kalinoviene v MIAC* [2011] FMCA 760 where the Court found that the Tribunal's refusal of a further adjournment and its termination of the hearing where it was satisfied that the applicant would not be fit to attend a hearing at any time in the foreseeable future did not amount to a denial of procedural fairness. It was open to the Tribunal to find that the incapacity of the applicant was such that the review must take place without the benefit of further oral evidence from her. The Court held the Tribunal had power to proceed to make a decision without rescheduling a hearing in such circumstances and was not obliged to postpone completion of its review for so long as the applicant was unfit to participate in a hearing. An appeal from the judgment was dismissed: *Kalinoviene v MIAC* [2012] FCA 205.

[76] *S296 of 2003 v MIMIA* [2006] FCA 1166 at [6].

[77] *SZOGP v MIAC* (2010) 244 FLR 139 at [51]. See also *SZOVP v MIAC (No 2)* [2011] FMCA 442 at [67] where the Court made obiter comments that even if the applicant had been incapable of participating in a Tribunal hearing that would not in itself have disabled the Tribunal's review function. In such circumstances, the Tribunal would be obliged to complete its duty of review without an oral hearing. An appeal from the judgment was dismissed: *SZOVP v MIAC* [2012] FCA 244.

the Migration Act does not deny the Tribunal the power to complete its review for so long as an applicant is unfit to participate in a hearing.[78]

14.7.7 There is no requirement, or power, for the Tribunal to appoint a guardian or legal representative to appear on behalf of an incapacitated applicant. For instance, in *SZQTU v MIBP*, the first named applicant claimed to experience psychiatric illness that would affect his ability to meaningfully participate in a hearing. In seeking judicial review of the Tribunal's decision, the applicants contended that the Tribunal had erred as it ought to have appointed or arranged a litigation guardian or a lawyer to appear on behalf of the primary applicant at a hearing before the Tribunal.[79] The Court held that under s 427(6) [Part 7] of the Migration Act, the applicant was not entitled to be represented before the Tribunal by any other person, nor did the applicant request that the Tribunal exercise its discretion to allow him to be represented at the hearing.[80] The Court also held that the Tribunal does not have the power, either under the Migration Act or at general law, to order that legal representation be provided to an applicant for review before it, nor is there any provision in the Migration Act which would have entitled or permitted the Tribunal to appoint some form of tutor or litigation guardian for the applicant.[81] In any case, the Court considered that the applicant would still have been unable to meaningfully participate in the Tribunal hearing had a litigation guardian or lawyer been able to appear on his behalf.[82]

14.7.8 If the applicant is incapable of providing evidence and there are witnesses available, then the Tribunal may proceed to take evidence from those witnesses in relation to the issues that are within their knowledge. If there are no witnesses, the Tribunal will have to determine the review on the basis of whatever evidence is available, including the documents on the files and the Tribunal's research.

14.8 Medical evidence which becomes available after the Tribunal's decision

14.8.1 The objective nature of the requirement in s 425 of the Migration Act means that even if the Tribunal is unaware of an applicant's incapacity at the time of the hearing, the obligation to provide a real and meaningful invitation may be later found not to have been discharged if it can be subsequently established that the applicant was not capable of fully participating in the hearing.[83] For example, where evidence of the applicant's impaired capacity at the time of the hearing evidence is

[78] *SZOGP v MIAC* (2010) 244 FLR 139 at [48]; *SZQTU v MIBP* [2020] FCCA 1944 at [35].
[79] *SZQTU v MIBP* [2020] FCCA 1944 at [28].
[80] *SZQTU v MIBP* [2020] FCCA 1944 at [37]. Note that, in relation to a Part 5 review, s 366A permits an applicant to have another person present at the hearing to assist them, and to have that person present arguments to the Tribunal or to address the Tribunal in 'exceptional circumstances'. There is no Part 7 equivalent. See Chapter 18 – The role of the advisor at the hearing for further discussion.
[81] *SZQTU v MIBP* [2020] FCCA 1944 at [38]–[39].
[82] *SZQTU v MIBP* [2020] FCCA 1944 at [39].
[83] *MIMIA v SCAR* (2003) 128 FCR 553 at [37], [41]. In *SCAR*, the evidence of incapacity was only raised for the first time before the Court.

later supplied to a Court.[84] In *SZOGB v MIAC*, the Court found that for a breach of s 425 to be established in these circumstances, such evidence must link the psychological condition to the applicant's presentation at the hearing so that a finding can be made that the applicant was, at the relevant time, disabled to such an extent that the applicant was not able to give evidence, answer questions or make rational decisions about the conduct and presentation of the case before the Tribunal.[85] In *MIAC v SZNCR*[86] the Court found there will be no breach of s 425 if the evidence suggests that the applicant's medical condition merely interfered with his or her ability to give evidence, rather than rendering him or her unfit to do so.

14.8.2 In such cases, a Court will look to whether the decision making process was successfully impugned by matters in respect of which the decision-maker has no role.[87] A Court will be more likely to grant relief in the case of late evidence of psychological impairment where the Tribunal has given a great deal of weight to matters of demeanour, memory and consistency in coming to its adverse conclusions.[88] A Court may also consider whether the failure to make submissions in relation to the impairment was in fact related to the impairment.[89] The mere possibility that the Tribunal, had it been aware of the applicant's mental state, may have formed a different conclusion about the applicant's credibility is not sufficient to establish a contravention of s 425(1).[90]

[84] *MIMIA v SCAR* (2003) 128 FCR 553 where the Court found a breach of s 425 on the basis of evidence presented to the Court which was not before the Tribunal.
[85] *SZOGB v MIAC* [2010] FMCA 748 at [93]. In that case, the applicant had tendered to the court a psychological report, obtained after the Tribunal decision, outlining her post-traumatic stress disorder and major depression. The Court found that there was an absence of evidence within the psychological report to support the proposition that the applicant's mental and emotional state was such as to render her incapable of meaningfully participating in the hearing. The Court distinguished *MIMIA v SCAR* (2003) 128 FCR 553 on the basis that in *SZOGB,* unlike in *SCAR,* the applicant's mental and emotional state in the context of her capacity to satisfactorily answer the Tribunal's questions was squarely put to the Tribunal and the Tribunal addressed this issue and was not persuaded that it provided a satisfactory explanation for the deficiencies in her evidence. The Court also adopted the approach set out in *MIAC v SZNVW* (2010) 183 FCR 575 to reject the claim that the integrity of the s 425 invitation is subverted simply because the Tribunal was unaware that an applicant's case may have been adversely affected by mental or emotional impairment. *SZNVW* was also followed in *MIAC v SZNCR* [2011] FCA 369 where the Federal Court overturned the Federal Magistrate's finding that the Tribunal was unable to validly exercise its jurisdiction because the applicant had a mental impairment which 'interfered' with his capacity to advance his case before the Tribunal. The Federal Magistrate's finding had been based on the evidence of an expert witness who had interviewed the applicant some nine months after the hearing. See also *MZAQB v MIBP* [2017] FCCA 161 where the Court found that, although there was no direct evidence by which a psychiatrist had said that on the hearing date the applicant's mental health condition was such that she was unable to meaningfully participate in the hearing, a report written by a psychiatrist a few weeks after the hearing and provided to the Court indicated that she had been suffering from severe mental health issues, including depression, anxiety, suicidal thoughts and an intention to kill her own children, for over two years, which necessarily included the time of the Tribunal hearing. Therefore, as she did not possess the requisite capacity to participate in the hearing, the Tribunal had failed to comply with s 425.
[86] *MIAC v SZNCR* [2011] FCA 369 at [30].
[87] *MIAC v SZNVW* (2010) 183 FCR 575 at [78], [83]. This approach is consistent with the central reasoning of the High Court in *SZFDE v MIAC* (2007) 232 CLR 189 in relation to considering whether the process contemplated by s 425 has been subverted.
[88] *SZNVW v MIAC* [2009] FMCA 1299 at [64]–[65]. This decision was overturned by the Full Federal Court in *MIAC v SZNVW* (2010) 183 FCR 575 but remains a good illustration of how the Tribunal's reasoning may affect the Court's perception of whether the applicant was given a 'real and meaningful hearing'.
[89] *MIAC v SZNVW* (2010) 183 FCR 575 at [84], [86].
[90] *MIAC v SZNCR* [2011] FCA 369 at [33].

15.HEARING BY VIDEO CONFERENCE OR TELEPHONE

15.HEARING BY VIDEO CONFERENCE OR TELEPHONE[1]

15.1 Introduction

15.1.1 Sections 366(1) [Part 5 - migration] and 429A [Part 7 - protection] of the *Migration Act 1958* (Cth) (the Migration Act) provide that the Tribunal, in its Migration and Refugee Division (MRD) may allow the appearance by the applicant before the Tribunal, or the giving of evidence by the applicant or any other person, to be by telephone, closed-circuit television or any other means of communication. The Part 5 provision, unlike its Part 7 equivalent, provides in s 366(2) that when a review is public, and a person appears or gives evidence by a means allowed under s 366(1), the Tribunal must take such steps as reasonably necessary to ensure the public nature of the review is preserved. Section 365 states that oral evidence in Part 5 reviews is to be taken in public except where it is not in the public interest or is impracticable to do so.[2]

15.1.2 The intention of ss 366(1) and 429A is to broaden the range of methods the Tribunal may use to facilitate a personal appearance by an applicant or another person at a hearing.[3]

15.1.3 The taking of evidence by telephone or closed-circuit television (or video-conferencing) most commonly occurs where an applicant or witness is located overseas or some distance from a Tribunal registry.[4] Arrangements can be made for an applicant and/or a witness to attend a video-conferencing facility.

15.1.4 It is for the Tribunal Member to determine when it is appropriate to exercise its discretion to conduct a hearing by video conference or telephone.[5] An applicant has no entitlement to a hearing by video conference or telephone because he or she lives some distance from a Tribunal registry. Similarly, there is no breach of the

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958 (Cth)* (the Migration Act) and *Migration Regulations 1994 (Cth)* (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] In contrast, s 429 provides that Part 7 hearings are to be in private.
[3] In *Singh v MIAC* [2012] FMCA 634 the Court found the Tribunal fell into jurisdictional error by unlawfully requiring the applicant to attend the hearing by telephone on the basis that s 366 of the Migration Act does not entitle the Tribunal to 'impose' a hearing by telephone or video link, only to permit one if the applicant requests it. However the Court's finding appears to be inconsistent with current authority including *SZJTK v MIAC* [2008] FCA 1712 and cases there cited, and *SZNPK v MIAC* [2009] FCA 1271, to the effect that these are enabling provisions which allow the Tribunal, on its own motion, to arrange a hearing by telephone or video link.
[4] See, for example, *SZNFI v MIAC* [2009] FMCA 506 at [12], [14].
[5] *SZJTK v MIAC* [2008] FCA 1712 at [25] where the Court confirmed that s 429A [s 366, pt 5 equivalent] is an enabling provision which gives the Tribunal a discretion to allow an applicant's appearance by the means listed in the provision. See also *SZNPK v MIAC* [2009] FMCA 806 at [12], upheld on appeal in *SZNPK v MIAC* [2009] FCA 1271. In *BYT19 v MICMSMA* [2020] FCCA 1168 at [21]–[27], the Court again confirmed the Tribunal's discretionary power to conduct a hearing by video conference and held that there was no basis to find that a hearing may only be conducted by video conferencing if the applicant first consents to appear via this method.

hearing obligations in ss 360 [Part 5] or 425 [Part 7] if the Tribunal decides that it will hold a hearing remotely rather than in person, provided any relevant considerations, including whether this would compromise the applicant's right to a fair hearing, are taken into account in exercising the discretion.[6]

15.1.5 The Court has found that the Tribunal has afforded the applicant a fair hearing where it proceeded by way of a remote hearing in a number of judgments, however, in relation to telephone hearings, the Federal Circuit and Family Court in *Karki v MICMSMA* noted that 'extra care' must be taken to ensure that procedural fairness is afforded.[7]

15.1.6 In relation to telephone hearings, in *Gade v MIBP*[8] the Court found the Tribunal's decision to have a telephone hearing was not unreasonable in circumstances where the presiding member was in Sydney, the applicant had requested a hearing in Brisbane, additional cost and significant delay would have been caused by an in person hearing in Sydney, the medical evidence did not suggest the applicant was not fit to participate in a telephone hearing or that her participation would in some way be prejudiced, and the substantive issue was the same as it was before the delegate. In *Searle v MICMSMA*[9] the Court rejected the applicant's argument that he was denied procedural fairness because he could not tell whether the Member was giving consideration to his evidence and that not being able to see the Member meant he found it difficult to follow the hearing. The Court noted that the applicant did not raise with the Tribunal his concerns about not being able to follow the hearing (either before the hearing or during the hearing) and there was no evidence to suggest that the Tribunal had not considered the applicant's circumstances. The Court concluded there was no evidence the applicant had not been afforded a fair hearing because it was held by telephone.

15.1.7 In relation to video hearings, the Federal Circuit Court has confirmed that the Tribunal is permitted to allow an appearance via Microsoft Teams, and it was reasonable to have a hearing using that platform in circumstances where the matter did not turn on any assessment of the applicant's credibility or demeanour and the applicant did not object to the hearing proceeding using Microsoft Teams.[10]

[6] *SZJTK v MIAC* [2008] FCA 1712; *SZOQA v MIAC* [2011] FMCA 213, upheld on appeal in *SZOQA v MIAC* [2011] FCA 907; *WZARI v MIMAC* [2013] FCA 788; *BZAFB v MIBP* [2014] FCCA 2584; *Singh v MICMSMA* [2021] FCCA 1378 and *Sandhu v MICMSMA* [2021] FCCA 1299. Note however *SZORN v MIAC* [2010] FMCA 987 where the Court raised the issue of whether the fact that the applicant (who lived in Griffith) had filed her review application in Sydney but was offered a hearing by video conference or a hearing in person in Melbourne, breached s 425 (at [53]). Ultimately, however, the Court did not make a finding on that issue and refused the applicant's request for leave to make an amended application to pursue that ground on the basis that in the circumstances of the case there was no prejudice in the Tribunal inviting the applicant to a hearing in the terms that it did (at [62]). Another conflicting lower court authority is *Singh v MIAC* [2012] FMCA 634 where the Court found the Tribunal fell into jurisdictional error by unlawfully requiring the applicant to attend the hearing by telephone on the basis that s 366 of the Migration Act does not entitle the Tribunal to 'impose' a hearing by telephone or video link, only to permit one if the applicant requests it.

[7] *Karki v MICMSMA* [2022] FedCFamC2G 836 at [62]. The Court did not go on to clarify what extra steps might be required.

[8] *Gade v MIBP* [2015] FCCA 3425 at [17], upheld on appeal in *Gade v MIBP* [2016] FCA 1006.

[9] *Seale v MICMSMA* [2021] FedCFamC2G 94 at [57]–[64]. The Court had regard to the transcript of the Tribunal hearing and found no evidence that the applicant raised any concerns about proceeding by way of a telephone hearing and hand no evidence that he informed the Tribunal he was finding it difficult to follow the hearing. The applicant was also informed the hearing would proceed by telephone prior to the hearing.

[10] See *Singh v MICMSMA* [2021] FCCA 1378 at [65]–[71]. The hearing took place during the Covid-19 pandemic. The applicant contended that he had been unsuccessful in his review because he had a hearing using Microsoft Teams, but the Court rejected this argument holding that he was unsuccessful because he did not have an approved nomination. There was nothing

15.1.8 The hearing invitation will generally set out whether a hearing is to take place by video or telephone (or whether it will take place in person). However, the method used for a hearing is not necessarily confined to the method set out in the hearing invitation, and it appears open to the Tribunal in some circumstances to use a different method from the one specified in the hearing invitation.[11] For example, in *BIM16 v MIBP* the Court found that the Tribunal's decision to have a telephone hearing was not unreasonable where the applicant had been invited to appear by video but the hearing could not proceed by way of video-link because the video facilities malfunctioned.[12] This case turned on the particular circumstances (including that the hearing was listed for a remote hearing and proceeded by means of a remote hearing via an alternative means), that the prospect of an in-person hearing was remote, an interpreter had been arranged for the hearing, the method of communication allowed the applicants to make submissions in response to the Tribunal's questions and the Tribunal's decision clearly demonstrated the consideration of its ability to assess credit in a telephone hearing. The Court held that the ultimate question is whether the manner in which the Tribunal conducts the hearing provides the applicants a fair opportunity to present their arguments and evidence on the matters before the Tribunal.[13]

15.2 Considerations when conducting a hearing by video conference or telephone

15.2.1 In *SZJTK v MIAC*,[14] the Federal Court commented that, in exercising the discretion to allow an applicant's appearance to be undertaken by telephone, closed-circuit television, or any other means of communication, the Tribunal would generally consider whether:

- an appearance using such technology would give the applicant a fair opportunity to give evidence and present arguments

before the Court to indicate there was any issue with the way the hearing proceeded using Microsoft Teams. See also *Sandhu v MICMSMA* [2021] FCCA 1299 at [86]–[92] where the Court rejected the applicant's contention that she should have been offered an in-person hearing. The Court held that it was 'entirely reasonable' to have a hearing by Microsoft Teams in circumstances where the hearing was held during the Covid-19 pandemic and the Tribunal had regard to nature of the matter and the applicant's circumstances (including that the matter did not turn on the credibility or demeanour of the applicant, and no interpreter was required). The Court also noted that the applicant expressly indicated, when asked by the Tribunal, that she had no issues with proceeding via Microsoft Teams. The Court considered that the Tribunal was able to achieve its objective to provide a fair, just, economic, and quick review by proceeding via Microsoft Teams and that natural justice does not require a physical (in-person) hearing.

[11] *BIM16 v MIBP* [2020] FCCA 3066 at [54]. This judgment was upheld on appeal in *BIM16 v MICMSMA* [2022] FCA 453; the issue of whether the method (telephone) of the hearing was reasonable did not arise in the appeal and the Court did not consider the issue.

[12] *BIM16 v MIBP* [2020] FCCA 3066 at [68]. This judgment was upheld on appeal in *BIM16 v MICMSMA* [2022] FCA 453; the issue of whether the method (telephone) of the hearing was reasonable did not arise in the appeal and the Court did not consider the issue.

[13] *BIM16 v MIBP* [2020] FCCA 3066 at [54]. Note that the 'place' of the hearing was arguably the same (that is, the place was wherever the applicant was at the time of the hearing by telephone which would be the same place for a video hearing) and therefore the requirement under s 425A [s 360A] to give the prescribed notice period of the place of the hearing would have been satisfied. The Court did not consider this issue of notifying the applicant of the place of the hearing, or the implications of changing an in-person hearing to a telephone/video hearing or vice versa. This judgment was upheld on appeal in *BIM16 v MICMSMA* [2022] FCA 453; the issue of whether the method (telephone) of the hearing was reasonable did not arise in the appeal and the Court did not consider the issue.

[14] *SZJTK v MIAC* [2008] FCA 1712 at [26].

- its questioning of the applicant is likely to be conducted fairly and effectively
- it would be able to properly make any necessary assessment of the applicant's credibility
- it may need to put a large quantity of documents to the applicant and
- delays and costs may be caused if the appearance were not to be conducted in that way.

15.2.2 If, during the hearing, it becomes apparent that the quality of the picture and/or sound is inadequate or there are other technical difficulties that impair an applicant's ability to effectively put their case to the Tribunal, the Tribunal may consider whether to continue with a hearing in this form and whether it should be an adjourned.[15]

15.2.3 If conducting a hearing by video conference or telephone, it may on occasion take longer for the Tribunal to properly appreciate any emotional distress of an applicant or to establish a rapport (in comparison with a hearing in person). This may be particularly important in protection visa cases, including those involving sensitive gender issues, and where necessary, the Tribunal will generally take this factor into consideration.[16] The Tribunal's MRD Guidelines on Gender discuss the importance of establishing rapport and creating an open and reassuring environment to establish trust and encourage the disclosure of personal information.[17]

Oaths and affirmations

15.2.4 The giving of evidence by telephone may occur under affirmation as it would in a face-to-face hearing.[18] There is some doubt as to whether an oath may be administered where evidence is given by telephone. The Court in *Karki v MICMSMA* reasoned that the only practical option in a telephone hearing would be for an affirmation to be administered (that is, not an oath).[19]

15.2.5 In relation to a video conference, the giving of evidence may occur under oath or affirmation. In relation to taking an oath, while it is the Tribunal's practice, in face-to-

[15] See generally, *SZEFM v MIMA* [2006] FCA 78, which upheld *SZEFM v MIMIA* [2005] FMCA 1351.
[16] In *MZXFJ v MIMIA* [2006] FMCA 1465, it was held (at [48]) that the Tribunal's findings based upon the applicant's manner, style and presentation of her claims, where the hearing was conducted by video link, would indicate that the Tribunal had disregarded the Departmental gender guidelines. The Court held that the guidelines should be expressly referred to and there should be evidence that the guidelines have been followed, particularly where the nature of the hearing as a video link would be unlikely to allow the Tribunal to assess the factors referred to in the guidelines and therefore credibility. Note however Riley FM's finding in *M100 of 2004 v MIAC* (2007) 213 FLR 63 that the guidelines are not binding on the Tribunal (in this case the hearing was not by video link however). It remains appropriate, especially in video links, for the Tribunal to take the credibility and gender guidelines into account in relevant cases.
[17] See MRD Guidelines on Gender, issued July 2015 at [18] and the Department's PAM3 – Refugee and Humanitarian > Gender Guidelines > Procedures (reissued on 14 October 2016).
[18] See ss 363(1)(a) and 427(1)(a).
[19] *Karki v MICMSMA* [2022] FedCFamC2G 836 at [71]. This is presumably because the applicant may not have access to a holy book, and/or the Tribunal cannot verify whether the applicant says the oath while holding their holy book. However, while it is the Tribunal's practice, in face-to-face hearings, to make a holy book available for the giving of oaths, nothing in the Migration Act requires that this occur. If the applicant or witness does not have access to a holy book, there is no reason why he or she cannot take an oath, however, based on *Karki* an affirmation would appear to be the most appropriate option.

face hearings, to make a holy book available for the giving of oaths, nothing in the Migration Act requires that this occurs.[20]

15.2.6 Members may generally be guided by the applicant's own wishes and convictions in whether to use an oath or affirmation.

15.3 Interviews

15.3.1 Although ss 366 and 429A refer to an appearance before the Tribunal, thus picking up on the language in ss 360 and 425 for a hearing, there appears to be no restriction on an interview under ss 359B [Part 5] and 424B [Part 7] also being conducted by video conference or by telephone.

[20] If the applicant or witness does not have access to a holy book, there is no reason why he or she cannot take an oath.

16.SUMMONS

16.SUMMONS[1]

16.1 Summons to appear and/or produce documents and things

16.1.1 Under ss 363(3)(a) and 427(3)(a) of the *Migration Act 1958* (Cth) (the Migration Act), the Migration and Refugee Division (MRD) of the Tribunal has the power to summon a person within Australia to appear before the Tribunal to give evidence.

16.1.2 Sections 363(3)(b) and 427(3)(b) empower the Tribunal conducting a Part 5 or Part 7 review respectively, to summon a person to produce the documents or things referred to in the summons.[2]

16.1.3 A summons may be issued at the request of the applicant or by the Tribunal of its own volition. The decision to issue a summons is discretionary.[3] However the Tribunal does not have the power to summon a person outside of Australia for the purposes of a Part 5 or Part 7 review that is being conducted in Australia.[4]

16.2 Fees and allowances

16.2.1 Where an applicant responds to a hearing invitation notifying the Tribunal that he or she wants the Tribunal to obtain evidence from a witness, and that person is summoned to appear to give evidence, the applicant bears all fees and allowances for the expenses payable to that person for their attendance.[5] In any other case, the fees and allowances for expenses are paid for by the Commonwealth.[6]

16.2.2 No fees and allowances are payable to a person for the production of documents. The provisions for the payment of fees refer only to persons summoned to appear before the Tribunal to give evidence.[7]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] As amended by the *Tribunals Amalgamation Act 2015* (Cth) (the Amalgamation Act).
[3] In *Nguyen v MIAC* [2010] FMCA 726 at [22], the Court confirmed that the power to summons a witness is discretionary and in that case the Tribunal's failure to do so did not result in error. See also *Burton v MIAC* [2008] FCA 1464 at [25]. Note more generally the discussion of the exercise of discretionary powers in *MIAC v Li* (2013) 249 CLR 332 and *MIBP v Singh* (2014) 308 ALR 280: See Chapter 7 - Procedural Fairness and the Tribunal.
[4] ss 363(4) [pt 5], 427(4) [pt 7]. In *SZLEF v MIAC* [2008] FMCA 400 at [13], the Court confirmed that, because the Tribunal had no power to summons a witness located in China to give evidence at hearing, there could be no jurisdictional error in failing to do so.
[5] *Administrative Appeals Tribunal Regulation 2015* (Cth) (F2019C00601) reg 14(3)(a). The equivalent provisions in the Migration Act (ss 374, 436) were repealed by the Amalgamation Act.
[6] F2019C00601 reg 14(3)(b).
[7] F2019C00601 reg 14.

16.3 Service

16.3.1 A summons is generally issued in the name of the person who is to appear to give evidence or who possess the documents which are the subject of the summons. Where a summons to produce documents is issued to an organisation, rather than a natural person, the summons is addressed to 'the Proper Officer'. This enables the organisation to allocate responsibility for responding to the summons internally and avoids the need for the Tribunal to identify specific individuals when issuing a summons to produce documents. However, where the summons is for both the production of documents and requiring a person to appear, the summons would need to be addressed to the relevant individual who is required to appear before the Tribunal.

Part 5 reviews

16.3.2 For a review under Part 5 of the Migration Act, the *Migration Regulations 1994* (Cth) (the Regulations) prescribe the manner of serving a summons on a person.[8] If the person has notified the Tribunal of an address for service under reg 4.39 of the Regulations, the summons must be served by one of the methods specified in s 379A of the Migration Act.[9] If the person has not notified the Tribunal of an address for service under reg 4.39, the summons must be served either:

- by personally handing it to the person; or
- by handing it to another person who is at the person's last residential or business address known to the Tribunal, who appears to live or work there and who appears to be at least 16 years of age; or
- by dating and dispatching it, within three working days of the date of the document by prepaid post or other prepaid means, to the person's last residential or business address known to the Tribunal.[10]

Part 7 reviews

16.3.3 For a review under Part 7 of the Migration Act, there is no expressly prescribed method of service in relation to a summons. Although reg 4.39 (address for service) of the Regulations applies to both Part 5 and Part 7 reviews, the Regulations do not specify this as a method by which a summons may be served. However, s 441AA provides that if a provision of the Migration Act or the Regulations requires or permits the Tribunal to give a document to a person and the provision does not state that the document must be given by one of the methods specified in s 441A or by a method prescribed for the purposes of giving documents to a person in immigration detention, then the Tribunal may give the document to the person by

[8] reg 4.19(1)–(2).
[9] reg 4.19(3).
[10] reg 4.19(4).

any method that it considers appropriate (which may be one of the methods mentioned in s 441A).[11]

16.3.4 The methods in s 441A are:

- by handing the document to the recipient;[12]
- by handing the document to another person at the recipient's last residential or business address provided to the Tribunal by the recipient in connection with the review;[13]
- by dating the document and then dispatching it by prepaid post or other prepaid means within 3 working days of the date of the document to the last address for service or the last residential or business address, provided to the Tribunal by the recipient in connection with the review;[14] or
- by transmitting the document by fax, e-mail, or other electronic means to the last fax number, e-mail address or other electronic address provided to the Tribunal by the recipient in connection with the review.[15]

16.3.5 Some of the methods in s 441A require the recipient of the summons to have provided the Tribunal with an address 'in connection with the review'.[16] Therefore, these methods will generally only be available where the summons is directed to an applicant.

16.3.6 A document sent by a method in s 441A is deemed to have been received at the time specified in s 441C.[17] If the Tribunal determines to use a method in s 441A, the summons will therefore be deemed to have been received at the time specified in s 441C. Conversely, where the Tribunal considers it appropriate to use a method other than one in s 441A, then the deemed receipt provisions in s 441C will not apply.

16.4 Varying the terms of the summons

16.4.1 There is no provision in the Migration Act or Regulations which allows the Tribunal to vary the terms of a summons once issued. In particular, there is no power to grant an extension of time to respond to a summons.

[11] s 441AA(1).
[12] s 441A(2).
[13] s 441A(3). The other person must appear to live or work there and be at least 16 years of age: ss 441A(3)(b)–(c).
[14] s 441A(4). Note also the dispatch of documents to a carer of a minor: ss 441A(1A)–(1B), (4)(c)(iii),(6).
[15] s 441A(5). Note also the transmission of documents to a carer of a minor: ss 441A(1A)–(1B), (5)(e), (6).
[16] These methods are handing a document to a person at the recipient's last residential or business address (s 441A(3)); dispatching a document by post or other prepaid means to the last address for service or last residential or business address (s 441A(4)); and sending a document by fax, email or other electronic means (s 441A(5)).
[17] For the operation of ss 441A, 441C, see Chapter 8 - Notification by the Tribunal.

16.4.2 The Tribunal can issue a new summons which, depending upon its terms, can have the effect of revoking a previously issued one.[18]

16.5 Consequences of non-compliance with a summons

16.5.1 The Migration Act provides for specific penalties for persons who do not comply with a summons to produce a document or thing or appear to give evidence before the MRD of the Tribunal.[19]

16.5.2 A person commits an offence if he or she has been properly served with a summons and fails to comply with the summons. Such an offence attracts a penalty of imprisonment of 12 months, 60 penalty units or both.[20] However, if complying with the summons might tend to incriminate the person, the person will not commit an offence.[21]

16.5.3 For consideration of the penalties, see Chapter 30 - Penalties.

[18] Section 33(3) of the *Acts Interpretation Act 1901* (Cth) (the AI Act) provides that, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. Section 46(1) of the AI Act relevantly provides that the AI Act applies to any instrument made by an authority that is not a legislative instrument for the purposes of the *Legislation Act 2003* (Cth). It is well-established that the making of a later statutory instrument that is inconsistent with an earlier one revokes the earlier one to the extent of any inconsistency: see e.g. *Telstra Corporation Ltd v Australian Competition and Consumer Commission* (2009) 179 FCR 437, at [481].
[19] ss 370 [pt 5], 432 [pt 7].
[20] ss 370(1) [pt 5], 432(1) [pt 7], as amended by the Amalgamation Act with effect from 1 July 2015. Prior to 1 July 2015, ss 370, 371 (MRT) and 432, 433 (RRT) provided for offences in relation to the failure to comply with a summons to appear or produce documents. These provisions were repealed by the Amalgamation Act.
[21] ss 370(2) [pt 5], 432(2) [pt 7], amended by the Amalgamation Act with effect from 1 July 2015. Prior to 1 July 2015, it was not an offence if the person had a 'reasonable excuse' for the non-compliance.

17. REQUESTS TO CALL WITNESSES

17. REQUESTS TO CALL WITNESSES[1]

17.1 Introduction

17.1.1 An applicant may ask the Tribunal to take evidence from a witness under ss 361, 362 [Part 5] and 426 [Part 7] of the *Migration Act 1958* (Cth) (the Migration Act). The Tribunal may also seek to obtain evidence itself from a witness using its inquisitorial powers, such as the power to invite a person to give information (discussed in more detail in Chapter 11 Power to obtain information) or by issuing a summons to a person to give evidence or present documents (discussed in more detail in Chapter 16 Summons).

17.1.2 This Chapter deals primarily with requests from applicants for the Tribunal to obtain evidence from a witness and canvasses some issues which may arise when taking witness evidence more generally.

17.2 Requests to take oral evidence from a witness

Bridging visa refusals and cancellations – s 338(4) reviews

17.2.1 Section 362 of the Migration Act contains a particular scheme for enabling applicants who are seeking review of a bridging visa refusal or cancellation decision under s 338(4) of the Migration Act to request, when making an application for review, that the Tribunal take witness evidence. This different scheme reflects the particular time limitations for review of such decisions.[2]

17.2.2 Section 362 applies if the applicant has requested, in the approved review application form, that the Tribunal obtain oral evidence from a specified person or persons and the applicant has been invited to appear for a hearing. The Tribunal must have regard to the applicant's request but is not obliged to take evidence (oral or otherwise) from the person or persons so named.

Other reviews

17.2.3 For all other reviews, an invitation to appear before the Tribunal given under ss 360A [Part 5] or 425A [Part 7] of the Migration Act must contain a statement

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.

[2] Section 367 requires the Tribunal conducting a review under Part 5 of the Migration Act to make its decision on review, and notify the applicant of its decision, within a prescribed period in such cases. The Tribunal may, with the agreement of the applicant, extend the prescribed period. The relevant period is prescribed in reg 4.27 of the Regulations and starts when the application for review is received and ends at the end of 7 working days after the day on which the application is received.

advising the applicant that he or she may, within 7 days after being notified, give the Tribunal written notice that he or she wishes the Tribunal to obtain oral evidence from a person or persons so named.[3] This right to advise the Tribunal of potential witnesses only requires the applicant to have *dispatched* a notice within 7 days of being notified of the right; it does not require that the notice be *received* by the Tribunal within the 7 day period.[4]

17.2.4 To comply with the requirement to notify an applicant of the right to request witness evidence, there is no obligation under ss 361(1)(b) or 426(1)(b) on the Tribunal to summarise or paraphrase or to render the wording contained in ss 361(2)/426(2) into plain English.[5] Providing a specific date, by which notice might be given, which is 7 days after the deemed receipt of the hearing invitation would be sufficient. If specifying a particular date, the date specified in the invitation is to be seven days after the applicant is taken to have been notified of the hearing invitation.[6]

17.2.5 The Response to Hearing Invitation form includes a section requiring the applicant to provide information concerning the witness/es he or she wishes the Tribunal to call, including details about the evidence that the proposed witness or witnesses will give. This enables the Tribunal to determine the relevance of the evidence that may be obtained from the applicant's proposed witness or witnesses. Applicants are requested to send the Response to Hearing Invitation form within a specified time.

17.2.6 If an applicant does not give written notice within 7 days, there can be no breach of the statutory requirements in ss 361 or 426.[7] Nevertheless the Tribunal is obliged to consider, a request to take witness evidence made at another time (e.g. where it is made after the 7 day period) or in another form.[8]

[3] ss 361(2) and 426(2). In *Dowlat v MIAC* [2009] FMCA 171, the Court held that the Tribunal made a jurisdictional error by failing to comply with the statutory requirement in s 361(2) to notify an applicant that within seven days after being notified under s 361(1) the applicant could give the Tribunal written notice that the applicant wanted the Tribunal to obtain oral evidence from a person or persons named in the notice. In *SZEXB v MIMIA* [2005] FMCA 1771, the Court held that the requirement to notify the applicant of the opportunity to nominate witnesses under these sections is validly discharged after the first hearing invitation is validly given. This suggests that if the hearing is postponed or adjourned, there is no requirement to repeat this information.

[4] *SZOGI v MIAC* [2010] FMCA 390 at [30]. It is unclear whether this interpretation will be followed by other Courts.

[5] *SZLAR v MIAC* [2008] FMCA 210 at [18]. The effect of the 7 day notice period contained in s 426(2) was satisfied by giving a specific date, by which notice might be given, which was in fact 7 days after the deemed receipt of the s 425A invitation.

[6] See *Dowlat v MIAC* [2009] FMCA 171 at [26] where a hearing invitation letter generated on a Friday was not faxed until the following Monday and the date specified, calculated from the Friday, was not updated. Note that problems may arise where there is an error in the notification affecting the calculation of the deemed notification date.

[7] *AOO16 v MICMSMA* [2020] FCA 424 at [35]. The Court confirmed that there was no failure to comply with s 426A [s 361] where a request to take evidence from a witness was made outside the 7 day period (in this instance discussion about potential witnesses took place at the hearing). However, if a later request is made, the Tribunal will still need to consider that request (but not exercising the discretion won't be a breach of s 361 or 426, but may lead to a constructive failure to undertake the review). See also *Vuong v MIAC* [2009] FMCA 433 at [74]. This case also confirmed that merely bringing a witness to a Tribunal hearing, or querying whether the Tribunal required a witness's further attendance (where the witness was sworn but had not yet given evidence) is not giving *written* notice for the purpose of ss 361(2) or 426(2). See also *MZYID v MIAC* [2010] FMCA 749 at [41]–[44]

[8] *AOO16 v MICMSMA* [2020] FCA 424 at [35]–[36], [39]. If the Tribunal does not take evidence from a witness in this circumstance (i.e. a request made outside the 7 day period), the issue for a Court to determine is whether the decision to not exercise the statutory discretion to take evidence from a particular person means that the review as a whole lacks the requisite statutory character such that there could be said to be a constructive failure to exercise the jurisdiction to undertake the review. The Court noted that some relevant factors in favour of exercising the discretion are whether the witness could give evidence about a critical fact and could be easily contacted, but that this must be assessed against the review as a whole and whether it is significant to the review. See also *SZGBI v MIAC* [2008] FCA 599 at [26]; *SZOGI v MIAC* [2010] FMCA 390 at [37]; *BZAGX v MIBP* [2015] FCCA 1535.

Having proper regard to the request

17.2.7 Upon receipt of the applicant's written notice, the Tribunal must have regard to the applicant's wishes but, generally speaking, is not required to obtain evidence, orally or otherwise, from any or all witnesses so named.[9] In *SZOWT v MIAC,* for example, the Court found no error in circumstances where the Tribunal clearly considered the applicant's request, it gave reasons for its decision not to telephone the suggested witnesses and it gave the applicant the opportunity to provide further written evidence from any witness.[10] In *SZUIJ v MIBP*[11] the Tribunal also demonstrated a proper regard to the request by declining to hear from the witnesses only after it had confirmed that the issue they intended to speak about was not a matter on which the review would ultimately turn and that their evidence would not be different from what they had already provided in written statements.

17.2.8 The Tribunal takes care not to mislead the applicant into believing that the oral evidence will be taken if it will not.[12]

17.2.9 In *SZJQN v MIAC,*[13] the Tribunal agreed to take oral evidence from a witness but upon attempting to contact that witness by telephone was unable to get through. No further arrangements were made to take oral evidence from that witness but email correspondence containing evidence from him was subsequently submitted to the Tribunal by the applicant's advisor. In the circumstances, the Court found no error as no promises were made by the Tribunal to contact the witness and the applicant was clearly not led to expect that it would happen at some future time.

17.2.10 When determining whether to take evidence from a witness, the Tribunal should consider the request in light of the evidence provided throughout the review. Making a decision to not take evidence early in the review may indicate that the Tribunal has not given real and genuine consideration to the request, in particular where it was not clear at the point the Tribunal made its decision whether the witnesses could have provided evidence which would have affected the review. Waiting until the end of the hearing to determine the request would make clear that the Tribunal has not closed its mind as to the corroborative evidence that could be provided by a witness.[14]

[9] ss 361(3) and 426(3). See *SZUIJ v MIBP* [2016] FCCA 247 at [56] which was upheld on appeal: *SZUIJ v MIBP* [2016] FCA 1574 at [76]; special leave to appeal to the High Court was dismissed: *SZUIJ v MIBP* [2017] HCASL 92. In *MIMA v Katisat* [2005] FCA 1908, the Court, while acknowledging that these provisions impose no duty on the Tribunal to accede to an applicant's request, indicated that the Tribunal must have genuine regard to the applicant's request and the decision to proceed without the witness's evidence must be made fairly.
[10] *SZOWT v MIAC* [2011] FMCA 540 at [43]. An appeal from this judgment was dismissed: *SZOWT v MIAC* [2012] FCA 192.
[11] *SZUIJ v MIBP* [2016] FCCA 247 at [57]. Upheld on appeal: *SZUIJ v MIBP* [2016] FCA 1574 at [77]; special leave to appeal to the High Court was dismissed: *SZUIJ v MIBP* [2017] HCASL 92.
[12] *SZNCQ v MIAC* [2009] FMCA 491.
[13] *SZJQN v MIAC* (2009) 111 ALD 449.
[14] *AYX17 v MIBP* [2018] FCAFC 103 at [4], [65]–[69] where the Full Federal Court found no error in the Tribunal adopting a cautious approach, where it waited until after it had conducted the entire hearing, questioned the appellant and evaluated his evidence, before deciding not to call the two nominated witnesses (the Tribunal had expressed some preliminary views on the request early in the hearing, it did not reach a concluded view). The Court considered the timing of the Tribunal's decision on whether to call witnesses at a hearing can be highly material to whether the Tribunal has given real and genuine consideration to the request.

Exercise of the discretion

17.2.11 Whether or not the Tribunal is required to hear oral witness evidence will depend upon a range of circumstances including the issue upon which oral evidence is said to be required and the wider statutory and factual context in which the issue has arisen.[15] For example:

- *SZGBI v MIAC* – where the Tribunal declined to take oral evidence on certain matters, because they were not in issue, but invited witnesses to provide written evidence on certain other matters which were in issue, the Court found the Tribunal was entitled by s 426(3) not to take oral evidence, and had a general power to receive the written evidence in the manner it did.[16]

- *SZHUG v MIAC* – the Court accepted the Tribunal was entitled to decline to take evidence from the applicant's father in Malaysia for the reasons it gave.[17] The applicant had indicated that the father was being monitored by authorities and the Tribunal was not prepared to contribute to any risk to the applicant or his father by contacting the father directly. The Tribunal noted that the applicant had ample opportunity to present evidence from the father in documentary form but had not. The Court held that the potential risk to the applicant and/or his father was a relevant consideration in considering whether to obtain the evidence requested.[18]

- *SZNCQ v MIAC* – the Court found that it was open to the Tribunal to form the view that it would not be appropriate for it to exercise its power to ask questions of witnesses by telephone, in the absence of a witness statement or other indicator of the nature of the evidence they would give.[19]

- *Vuong v MIAC* – the Court found no error in the Tribunal declining to take evidence from an offshore visa applicant.[20]

- *Chen v MIAC* – the Full Federal Court found no error in the Tribunal's failure to take evidence from witnesses where the applicant's migration agent had confirmed that their evidence was confined to matters already referred to in written declarations provided to the Tribunal.[21] Similarly, in *BLO15 v MIBP*[22] the

[15] *VJAF v MIMIA* [2005] FCAFC 178 at [22] and *NAQS v MIMIA* (2004) 137 FCR 30 at [29]. See also *SZNHJ v MIAC (No.2)* [2012] FMCA 809 where the Court rejected the applicant's claim that the Tribunal erred by not contacting three witnesses in circumstances where he had provided letters in support written by them and had nominated at least one of them as a potential witness pursuant to s 426(2). The Tribunal had engaged in a consideration of that request, but in any event was subsequently advised that the nominated witness was no longer available, and had already accepted the letters were authentic, and would also be confirmed by those persons if contacted: at [48]–[53]. An appeal from this judgment was dismissed: *SZNHJ v MIAC* [2012] FCA 1349.
[16] *SZGBI v MIAC* [2008] FCA 599 at [34].
[17] See also *SZLEF v MIAC* [2008] FMCA 400, where the Tribunal did not take evidence from a nominated witness who was located in China.
[18] *SZHUG v MIAC* [2008] FMCA 732 at [14]–[15].
[19] *SZNCQ v MIAC* [2009] FMCA 491.
[20] *Vuong v MIAC* [2009] FMCA 433.
[21] *Chen v MIAC* [2011] FCAFC 56. The Court distinguished *MIMIA v Maltsin* (2005) 88 ALD 304 on the basis that no notice had been given under s 361(2) and the Tribunal had accepted the evidence of the witnesses. The Court found the Tribunal had specifically turned its mind to the nature of the evidence the witnesses would give and had given real and genuine consideration to whether the witnesses should be called. See also *SZUIJ v MIBP* [2016] FCCA 247 at [68]–[70] where there was no error in the Tribunal's refusal to take evidence from three witnesses at the hearing where two of them had previously

applicant did not give notice under s 426A but did orally request the Tribunal to take evidence from a witness during the hearing. Having tried, but failed, to take the evidence over the telephone because a suitable interpreter was not available, the Tribunal did not deny the applicant procedural fairness in circumstances where a statutory declaration from the witnesses was subsequently received and the Tribunal was still prepared to accept the possibility of the applicant's claim being true even though it was inconsistent with the witnesses' evidence.

- *SZVBB v MIBP* – The Federal Court found no error in the Tribunal's refusal to take evidence from the applicant's family members overseas because of its concerns regarding the applicant's own evidence which was so significantly discredited that claims made by witnesses in other countries purporting to corroborate what he had said would not have persuaded the Tribunal that he had given a credible account.[23]

- *SZUTN v MIBP* – the Tribunal was unable to contact a witness on a mobile telephone number provided, and refused to call the witness on the applicant's mobile phone on the grounds that this may interfere with the Tribunal's recording equipment. At the Tribunal's invitation, the applicant produced a further written statement from the witness. The Court held that it was not established that there was no valid reason for the Tribunal's refusal to use the applicant's mobile phone. In any event, there was nothing to suggest that the witness would have said anything beyond what was in his statement, and therefore the applicant was not denied any opportunity to present evidence and arguments in relation to the issues under review.[24]

- *AWA15 v MIBP* – the Tribunal declined to obtain oral evidence from the applicant's brother on the basis that the Tribunal would not be able to verify the identity of the witness over the telephone, and it would not find the brother's

provided written statements on a matter already accepted. The Tribunal had waited until after it confirmed the witnesses had nothing to say beyond what was in their written statements before declining to take their evidence, and the applicant's migration agent did not revisit the request during the hearing and made no further attempts to call oral evidence from the one witness who had not provided a written statement. Upheld on appeal: *SZUIJ v MIBP* [2016] FCA 1574 at [77]; special leave to appeal to the High Court was dismissed: *SZUIJ v MIBP* [2017] HCASL 92.

[22] *BLO15 v MIBP* [2016] FCCA 423. Importantly, it was evident that the Tribunal had also considered the request within the statutory declaration that the witness be given permission to present oral evidence in support but there was no indication what further matters beyond the content of the statutory declaration that the witness could provide or any important or obvious questions that the Tribunal could have put to the witness in order to have properly considered their evidence (at [46]–[49]). Upheld on appeal: *BLO15 v MIBP* [2017] FCA 1092 at [40]–[42]; special leave to appeal to the High Court was dismissed: *BLO15 v MIBP* [2018] HCASL 13.

[23] *SZVBB v MIBP* [2015] FCA 1414. Note however the Court's comments in *obiter* at [41] and [46] that in many cases it would not be open to refuse to obtain oral corroborating evidence on the sole basis of an assertion that the evidence could not affect the Tribunal's assessment of the applicant's credibility and that unless the case was clear, declining to obtain oral evidence on the sole basis that the evidence could not possibly assist the Tribunal may be regarded as unreasonable. See also *SZRGT v MIAC* [2012] FMCA 948 where the Court found no error in the Tribunal's refusal to contact the applicant's mother in China where it gave cogent reasons for not doing so, including: the potential risk of disclosing information about the protection visa application to someone in the home country; that it could not verify to whom it would be speaking; that, even if it did speak to the applicant's mother, it could not be assured she was providing independent evidence; and, in any event, a consistent account of the claimed events by the applicant's mother would not have overcome the Tribunal's credibility concerns regarding the applicant. Contrast again however with the Federal Court's *obiter* comments in *SZVBB* at [34]–[38] that the Tribunal could be no more certain of a witness's identity from a written statement than it could from hearing oral evidence and that if the possibility of video or telephone interception was no more than speculative it would be capricious or unreasonable to refuse to obtain oral evidence on the basis of that speculation.

[24] *SZUTN v MIBP* [2015] FCCA 727.

evidence 'useful'. The Tribunal instead requested a written statement from the appellant's brother. The Court held that the Tribunal erred in declining to obtain oral evidence from the applicant's brother because the reasons provided were, in the circumstances, illogical. This was because the Tribunal was prepared to accept written evidence from the brother, which itself would have to be verified. The Court reasoned that the problem of verifying identity arises both in respect of written evidence and oral evidence given by telephone. In addition, the Tribunal could not have known the usefulness of the information without hearing and considering it. However, the Court found the error was not a jurisdictional error as it did not adversely affect the Tribunal's consideration of the applicant's brother's written statement.[25]

- *AYX17 v MIBP* – the Full Federal Court found that issues with verifying the identity of witnesses when taking evidence by telephone will not, of itself, provide a sufficient justification to refuse to take such evidence, as some of these concerns can be alleviated by using internet-based forms of communication such as Skype or FaceTime. In such circumstances, the reliability, identity and other features of a proposed witness will generally need to be established through questioning.[26]

- *AOO16 v MICMSMA* – the Federal Court found it was not legally unreasonable for the Tribunal not to take evidence from the appellant's brother in Australia in circumstances where she claimed to have been harmed in her home country for being a lesbian and she hadn't brought her brother to the hearing as a witness. The Court accepted that it could be expected that she would have brought her brother if he could corroborate her account of events in her home country, with the conclusion being open that the brother did not know what occurred in the home country and therefore his evidence would not be of probative value.[27] The Court also found the proposed corroboration of the appellant's evidence by her parents in her home country would be of limited significance and not critical given credibility findings it had made , such that there was no error in not taking evidence from her parents.[28] In such circumstances, there was no unreasonableness or constructive failure to exercise jurisdiction.[29]

- *DGS18 v MICMSMA* – the Court found no error in the Tribunal declining to take evidence from the applicant's parents where the applicant submitted that their parents would confirm what was in their written statement before the Tribunal.[30] The Tribunal considered that their oral evidence if accepted in full, would not be conclusive proof as to the genuineness of 'court documents' which was an issue

[25] *AWA15 v MIBP* [2018] FCA 604 at [57]–[59].
[26] *AYX17 v MIBP* [2018] FCAFC 103 at [54] and [90].
[27] *AOO16 v MICMSMA* [2020] FCA 424 at [40]–[42].
[28] *AOO16 v MICMSMA* [2020] FCA 424 at [56]–[61]. In addition, the appellant argued that the Tribunal had failed to consider contacting her parents as it made an express finding about not taking evidence from her brother but not her parents, however, the Court held that the Tribunal's approach reflected the Tribunal's view of the difference in significance of the evidence they could give (i.e. the parents' evidence would not be of significance given its credibility concerns about the appellant, and the brother was not aware of events in the home country because she would have brought him to the hearing if he could be expected to speak to her experiences in the home country).
[29] *AOO16 v MICMSMA* [2020] FCA 424 at [66].
[30] *DGS18 v MICMSMA* [2020] FCCA 1973 at [80]

on review.[31] The Court noted that the Tribunal's refusal to call the parents was not 'arbitrary' or 'capricious' as the Tribunal accepted the parent's written statement and considered what was clearly identified to be their substantive evidence in written form such that Tribunal was not deprived of an opportunity to consider the parents' corroborative evidence.[32]

- *BGN19 v MHA* – the Court found no error in the Tribunal's refusal to take oral evidence from the applicant's father where the applicant had submitted that his father had provided false documents for the applicant's prior student visa application. The Tribunal found the applicant's father would not give an independent, reliable corroboration of the applicant's claims and so it would place little weight on the father's evidence.[33]

- *CDK16 v MIBP* – in contrast, the Court found that the Tribunal's exercise of the discretion not to obtain witness evidence from any of the witnesses put forward (except one) was unreasonable in circumstances where the Tribunal didn't obtain oral evidence because it was not 'necessary' and the Court considered the witness evidence could have resulted in the Tribunal making a different finding on some claims.[34] The Court proceeded on the basis that the witnesses could have spoken to critical factual matters, and those factual matters became the subject of findings which, in turn, determined the Tribunal's attitude to the credibility of the appellant on those matters. The Court considered that the Tribunal was required to form a view about the credibility of the appellant's evidence and taking oral evidence from the witnesses might have assisted the Tribunal with the facts going to the credibility of the appellant's evidence, such that testing those matters with witnesses might have resolved the Tribunal's concerns and led to a different finding on the claims.[35] The Court concluded that the Tribunal's decision lacked an evident and intelligible justification.[36]

- *MZYID v MIAC* –the Court held that the Tribunal failed to have proper regard to a request to contact an overseas witness by telephone.[37] The Tribunal unsuccessfully attempted to contact the witness in writing to seek confirmation of the telephone number, and ultimately rejected the written witness statement as a forgery. In this case, the Court appeared to place significant weight on the fact that the applicant's agent, a solicitor and officer of the Court, had indicated that she had spoken to the witness at the nominated telephone number.[38]

[31] *DGS18 v MICMSMA* [2020] FCCA 1973 at [76].
[32] *DGS18 v MICMSMA* [2020] FCCA 1973 at [79]–[82].
[33] *BGN19 v MHA* [2019] FCCA 1757 at [71]. The Court concluded that the decision to not accept the father's evidence was not one which no reasonable decision maker would have made.
[34] *CDK16 v MIBP* [2020] FCA 1837 at [266].
[35] *CDK16 v MIBP* [2020] FCA 1837 at [257].
[36] *CDK16 v MIBP* [2020] FCA 1837 at [266]. The Court considered that the Tribunal's 'wholas bolas' rejection of witness statements on the basis they were not reliable in combination with its decision to not accept oral evidence from the witnesses lacked an evidence and intelligible justification.
[37] *MZYID v MIAC* [2010] FMCA 749 at [39].
[38] *MZYID v MIAC* [2010] FMCA 749 at [37].

Is there a need to give reasons for not taking requested evidence?

17.2.12 If the Tribunal decides not to take evidence from the witness, it is recommended that the decision record contain an indication that consideration was given to the applicant's request.[39] Where the Tribunal does not give reasons for the exercise of a discretionary power, it will be left to a court to draw an inference as to whether there was an 'evident and intelligible justification'.

17.2.13 In *CZBH v MIBP* the Court found the Tribunal's decision not to obtain the applicants' fathers' oral evidence was legally unreasonable in circumstances where the Tribunal did not explain why it refused to take oral evidence, there were cogent reasons for the Tribunal to obtain oral evidence, there was no obvious practical difficulty for the Tribunal in obtaining the oral evidence and the oral evidence was relevant and potentially important because acceptance of the evidence would have bolstered the applicants' credibility. [40]

Consequences of a failure to have proper regard to a request

17.2.14 A failure to have proper regard to a request to take oral witness evidence can constitute jurisdictional error if it results in procedural unfairness to the applicant.[41] In *MIMIA v Maltsin*, the Full Federal Court found that the Tribunal committed jurisdictional error by failing to accord procedural fairness and by breaching s 361(3) by failing to have genuine regard to the applicant's request for witnesses to present evidence.[42] In that case, the Tribunal had not called all the witnesses present at the hearing because there was insufficient time that day. The Court noted that the Tribunal gave the applicant the impression that those witnesses might be called on another day. They were not. The Tribunal then made adverse findings on questions connected to the uncalled witnesses' intended testimony.

[39] *SAAD v MIMA* [2002] FCA 206. In *SZNCQ v MIAC* [2009] FMCA 491 the Court found no error where a full explanation of the Tribunal's decision not to take witness evidence was not found within the statement of reasons, but sufficient emerged to point to a consideration of relevant discretionary matters in relation to the potential taking of evidence.
[40] *CZBH v MIBP* [2014] FCA 1023.
[41] *MIAC v SZIZO* (2009) 238 CLR 627.
[42] *MIMIA v Maltsin* (2005) 88 ALD 304. *VWRE v MIMA* [2006] FMCA 430 followed *Maltsin* and confirmed that the Tribunal must give a proper and fair consideration to the request to call witnesses at a hearing. The applicant in *VWRE* requested the Tribunal to take evidence from a witness who it was claimed could refute adverse evidence obtained by the Department. Written correspondence from the witness was also submitted with the form. The Tribunal did not take evidence from the witness at the hearing but supplied a copy of its draft decision to the applicant for written comment. In response, the applicant again requested the Tribunal to take evidence from the witness. In affirming the delegate's decision, the Tribunal stated that it 'placed significant weight' on the 'implausibility' of the written correspondence provided by the witness. Although not referred to, s 422B [s 357A] applied in this case, and the error could be described as a misapplication of s 426(3) [s 362(2)]. *Maltsin* was also applied in *SZBXR v MIMA* (2005) 228 ALR 541. See also *SZOGI v MIAC* [2010] FMCA 390 at [37]. In *Chen v MIAC* [2011] FCAFC 56 the Court distinguished *Maltsin* on the basis that in *Chen*, no notice had been given under s 361(2), and the Tribunal had accepted the written evidence of the witnesses, to find that there was no error in the Tribunal's decision not to take oral evidence from the witnesses. In *SZRPQ v MIAC* [2013] FCCA 200, the Court, citing *Maltsin*, found that the question for the Court was whether the Tribunal genuinely considered the request to obtain evidence from the applicant's mother and friend, bearing in mind such matters as the importance of the evidence and the sufficiency of other evidence given in the case. The Court found no error in the Tribunal declining to obtain evidence from them, as other evidence given was sufficient, the Tribunal accepted the evidence that the mother and friend were expected to give, and it was clear that the Tribunal gave genuine consideration to the request. See also *AYX17 v MIBP* [2017] FCCA 2233. Upheld on appeal in *AYX17 v MIBP* [2018] FCAFC 103 at [68]–[69] in which the Full Federal Court found that the Tribunal had given genuine consideration to the request in accordance with the principles in *Maltsin*, where it had waited until the end of the hearing before deciding whether to take evidence from the two nominated witnesses. The Court found it was not unreasonable for the Tribunal to decline to take evidence from the two witnesses where the Tribunal had accepted the claim that was going to be supported by the evidence of the two witnesses, had expressed substantial concerns about the appellant's credibility at the hearing and considered the witnesses' evidence could not redeem that position.

Can an applicant put themselves forward as a witness?

17.2.15 The terms of ss 361, 362 and 426 do not expressly exclude an applicant naming themselves as a witness, however the preferred construction is that these provisions about witnesses do not apply to an applicant's wish to give evidence themselves.[43] Instead, an applicant is invited to appear before the Tribunal under s 360 [Part 5] or 425 [Part 7].[44] In *DNK17 v MICMSMA*, the Court held it would be inconsistent with the requirement in s 425(1) to invite an applicant to appear to give evidence if the Tribunal could decline to take such evidence because the Tribunal had regard to an applicant's wish to give evidence but exercised its discretion not to allow the applicant, as a witness, to give evidence.[45] Accordingly, the Court held that the Tribunal did not err when it did not consider whether to take evidence from the applicant themselves in circumstances where the applicant did not attend the scheduled hearing and the Tribunal exercised its discretion to make a decision on the review pursuant to s 426A(1A).[46]

17.3 Requests to obtain written evidence

17.3.1 For Part 5 reviews, s 361(2A) allows the applicant to give a written notice to the Tribunal requesting it to obtain *written evidence* from a person or persons named in the notice or obtain other written material relating to the issues arising in relation to the decision under review. No equivalent provision exists for reviews under Part 7 of the Migration Act. It should be noted that none of the provisions available under s 361 apply in relation to the review of decisions to refuse or cancel bridging visas for applicants held in detention.[47]

17.3.2 As with a request to take oral evidence from a witness, refusing to obtain written evidence from named persons or other written material requested by an applicant under s 361(2A), without proper regard to the request, will also constitute jurisdictional error if it results in a denial of procedural fairness.[48]

17.3.3 However, the Tribunal has a general power to *receive* written witness evidence submitted by an applicant, or other person, at any time during the course of the review.[49] Such evidence can be submitted in any form and must be considered and, if relevant, taken into account by the Tribunal.

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[43] *DNK17 v MICMSMA* [2022] FedCFamC2G 26 at [79]. While the judgment considered s 426, the reasoning would equally apply to ss 361 and 362. The applicant did not attend the Tribunal hearing and the Tribunal made a decision on the review pursuant to s 426A(1A).
[44] *DNK17 v MICMSMA* [2022] FedCFamC2G 26 at [84].
[45] *DNK17 v MICMSMA* [2022] FedCFamC2G 26 at [84].
[46] *DNK17 v MICMSMA* [2022] FedCFamC2G 26 at [85]. The Court rejected the applicant's contention that the response to hearing invitation form amounted to a notice given to the Tribunal under s 426 for the Tribunal to obtain evidence from a person, being himself, and that the Tribunal acted unreasonably by failing to have regard to the notice and/or failing to take evidence from the applicant as a witness, or failing to call the applicant to make inquiries or give evidence.
[47] s 361(4).
[48] *MIAC v SZIZO* (2009) 238 CLR 627. See also *Lewis Jr v MHA* [2018] FCCA 3310 at [3]–[4] where the absence of reasons in the Tribunal's decision regarding the applicant's written request under s 361(2A) to obtain written material relating to his convictions in Australia led the Court to find that the request had not been considered as required under s 361(3), which was a jurisdictional error.
[49] *SZGBI v MIAC* [2008] FCA 599 at [26].

17.4 Taking oral evidence from a witness

17.4.1 Usually, when an applicant asks the Tribunal to take oral evidence from a witness, that person will attend the Tribunal hearing with the applicant or the applicant will supply a telephone number at which the witness can be contacted. Sections 366 [Part 5] and 429A [Part 7] permit the Tribunal to take evidence from a witness by telephone, closed circuit television or any other means of communication.[50]

17.4.2 The Tribunal has general powers under the Migration Act to require a witness to take an oath or affirmation and administer an oath or affirmation to that person.[51]

17.4.3 A witness is not entitled to be represented before the Tribunal in the Migration and Refugee Division (MRD) by any other person.[52]

17.4.4 If a witness appearing before the Tribunal requires an interpreter, the Tribunal may have a statutory or procedural fairness obligation to provide adequate and competent interpreting services to that person.[53]

17.4.5 No person appearing before the Tribunal is entitled to examine or cross-examine any other person appearing before the Tribunal to give evidence.[54] In relation to a Part 7 review, however, *SZEQH v MIAC* confirms that the Tribunal retains a discretion to permit examination or cross-examination to occur if appropriate.[55] No equivalent discretion arises under Part 5 because of the operation of s 363A, which provides that if a provision in Part 5 states that a person is not entitled to do something, the Tribunal has no power to permit the person to do that thing.

17.5 Expert witnesses

17.5.1 Generally, the procedures and considerations which apply to the taking of evidence from lay witnesses apply equally to expert witnesses. The MRD of the Tribunal is not bound by the rules of evidence which may apply in other tribunals or courts.[56]

17.5.2 Different issues may arise when considering how to treat expert evidence in the Tribunal's decision on the review. In a review, it is for the Tribunal to make relevant findings of fact. While the Tribunal is not bound to accept the opinions of an expert witness as true, it must have regard to any relevant evidence he or she gives. Occasionally, an expert will give an opinion or express a view on the facts of a case, which he or she is not qualified to give. However, in relation to matters on which the expert is qualified to give an opinion, the expert's qualifications in giving the opinion will be a relevant consideration that must be taken into account.

[50] See also *AYX17 v MIBP* [2018] FCAFC 103 at [54] where the Full Federal Court considered that s 429A conferred a broad power on the Tribunal in relation to the mode of taking evidence and that this power was ample to accommodate any modern form of communication including using internet-based forms of communication such as Skype or FaceTime.
[51] ss 363(3), 427(3).
[52] ss 366B, 427(6)(a).
[53] See ss 366C, 360, 427(7), 425. See also *Perera v MIMA* (1999) 92 FCR 6.
[54] ss 366D, 427(6)(b).
[55] *SZEQH v MIAC* (2008) 172 FCR 127.

17.5.3 In *Fuduche v MILGEA*[57] the applicant had applied for a special needs relative visa on the basis that his sister had a severe psychiatric condition arising from her horrific childhood experiences. The delegate, whose decision was under review, formed the view that, notwithstanding the supporting evidence given by a psychiatrist on this issue, the sister would be able to cope without her brother remaining in Australia. The Court commented that where, upon a medical issue, medical science is unable to offer a conclusion on the probabilities, it may sometimes be open to a lay decision-maker to rely on ordinary human experience in order to bridge the scientific gap to a practical decision. But where medical science offers an answer, it is simply not rational for a lay person to brush that answer aside in favour of some theory of her or his own. The delegate's own want of expertise on the issue upon which the medical evidence touched was found to be a relevant consideration, which the delegate was bound to take into account but did not.

17.5.4 In *Zakinov v Gibson* a psychologist purported to give an opinion about whether the applicant held a conscientious objection to military service and the Court considered that such an enquiry was within the ordinary fact finding skills of the Tribunal, and that there was no need for the Tribunal to defer to the opinion of a psychologist.[58]

17.5.5 Similarly, in *MZXTT v MIAC*[59] a psychiatric report which had been presented to the Tribunal did not simply express the proper psychiatric opinion that the applicant suffered from anxiety and depression but also purported to explain why the applicant had not previously raised the claims of torture. While the Court commented that in general, the Tribunal should not substitute its own lay opinion for an expert opinion on a matter that is properly the subject of an expert opinion, it noted the report presupposed that the applicant had been tortured as he claimed and it presupposed that the applicant had not previously given a coherent narrative account of his experiences. Against that, the Tribunal was entitled to draw on its own knowledge of the entirety of the case and its own knowledge of the account that the applicant had given. The Tribunal was entitled to consider that the applicant's claims of torture lacked detail, that his explanation of why he was tortured was inadequate and that he had sought to add a very significant aspect to his claims after it was made clear to him that his existing claims were ill founded.

17.5.6 The Tribunal has published a guideline titled 'Persons giving expert and opinion evidence' (the Guideline).[60] However, this Guideline is not intended to apply to reviews in the MRD. The Guideline appears on the AAT's website under a hearing 'All divisions (other than the Migration & Refugee Division)'. It focuses on some processes for review which are not applicable to reviews in the MRD.[61] Occasionally, representatives and applicants refer to the Guideline in relation to

[56] ss 353 and 420, as amended by the *Tribunals Amalgamation Act 2015* (Cth).
[57] *Fuduche v MILGEA* (1993) 45 FCR 515.
[58] *Zakinov v Gibson* [1996] FCA 696.
[59] *MZXTT v MIAC* [2008] FMCA 1007.
[60] at [1.7].
[61] For example, the Guideline refers to s 37 documents. Section 37 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) provides for the lodging of material documents to the Tribunal by the decision maker. However, s 24Z of the AAT Act provides that Part IV of the Act, which details the process for reviews conducted under the AAT Act including s 37, does not apply to MRD (noting there are two exceptions which do apply to MRD Reviews: ss 25 and 42).

reviews in the MRD. The Tribunal may have regard to it, but it is not binding or enforceable. It wouldn't be open to the Tribunal conducting a review in the MRD, for example, to require strict compliance with the Guideline and reject expert evidence, such as a report or opinion, if it doesn't comply with the Guideline. Requiring strict compliance with the Guideline would be inconsistent with ss 353 [Part 5] and 420 [Part 7], which provide that is not bound by technicalities, legal forms or rules of evidence; and shall act according to substantial justice and the merits of the case. Requiring strict compliance would also appear to be inconsistent with ss 358 [Part 5] and 423 [Part 7], which provide that a review applicant may give the Tribunal a written statement [Part 5] or statutory declaration [Part 7] in relation to any matter of fact that they wish the Tribunal to consider and written arguments relating to issues arising in relation to the decision under review, as such written documents may include an opinion from an expert. Relevant to reviews in the MRD, the Guideline explains that a person giving expert evidence has an overriding duty to provide impartial assistance to the Tribunal and is not an advocate for an applicant or any other party to a proceeding.[62]

[62] at [3.1].

18. THE ROLE OF THE ADVISER AT THE HEARING

18. THE ROLE OF THE ADVISER AT THE HEARING[1]

18.1 Introduction

18.1.1 The legislative scheme governing the Migration and Refugee Division (MRD) of the Tribunal gives only a limited role to advisers at the Tribunal hearing.

18.1.2 The statutory provisions relating to representation differ between a Part 5-reviewable decision (migration) and a Part 7-reviewable decision (protection). These differences are discussed in more detail below.

18.2 Part 5 (migration) hearings

18.2.1 An applicant appearing before the Tribunal in relation to a Part 5-reviewable decision (migration) is entitled to have another person present to *assist* him or her, although the assistant is not entitled to present arguments or address the Tribunal unless the Tribunal is satisfied that, because of exceptional circumstances, the assistant should be allowed to do so.[2] 'Exceptional circumstances' is not defined in the *Migration Act 1958* (Cth) (the Migration Act), but will depend on the individual circumstances of the case.

18.2.2 Except as provided above, an applicant is not entitled to be *represented* by another person, although he or she may engage a person to assist or represent him or her otherwise than while appearing before the Tribunal.[3]

18.2.3 Persons other than the applicant are not entitled to assistance from or representation by, another person while appearing before the Tribunal at a hearing.[4]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] ss 366A(1), (2). There is no entitlement to have a particular person present as an assistant. In *Hossain v MIAC* [2009] FMCA 1100, the Court held that the wording of s 366A(1) implies a right to bring an assistant to a hearing scheduled by the Tribunal, but not an unconstrained right to a hearing with an assistant in attendance. Where an applicant lacked an assistant when first attending a hearing, if the relevant formalities in relation to the hearing invitation were complied with and if the applicant can be seen to have enjoyed the opportunity promised by s 360(1), s 366A does not give an individual right to appear with an assistant at a second hearing: at [42].
[3] ss 366A(3), (4).
[4] s 366B(1).

18.3 Part 7 (protection) hearings

18.3.1 Under s 427(6) [Part 7] of the Migration Act, a person appearing before the Tribunal in relation to a Part 7-reviewable decision (protection) *to give evidence* (including the applicant) is not entitled to be represented before the Tribunal by any other person,[5] or to examine or cross-examine any other person appearing before the Tribunal to give evidence.[6] However, the rules of procedural fairness and the hearing obligation in s 425 may in some circumstances require an applicant to be represented (see below).

18.3.2 The Migration Act does not confer a right to have a person present to 'assist' an applicant appearing before the Tribunal in a Part 7 review, which is given to applicants appearing before the Tribunal in a Part 5 review under s 366A.[7]

18.4 Representation at hearing

18.4.1 The absence of representation at a hearing, of itself, would not normally give rise to unfairness or jurisdictional error.[8] For example, in *SZNSF v MIAC* the Federal Court held that whilst s 427 does not exclude the power of the Tribunal to permit a migration agent to be present during a hearing, the Migration Act does not give rise to any expectation that the Tribunal will adjourn the hearing due to the unavailability of an applicant's representative.[9]

18.4.2 However, in *Rathor v MIBP*,[10] where the Tribunal denied the applicant's request for a postponement of the hearing because his adviser was unavailable, the Federal Circuit Court held that while the Tribunal's reasons for refusing to reschedule the hearing were not unreasonable in the sense described in *MIAC v Li,*[11] the exercise of the Tribunal's discretion miscarried because it did not give weight to the statutory code of procedure binding the Tribunal of which the hearing opportunity is a critical part.[12] The Court further held that attendance of an applicant and their assistant as permitted by s 366A [Part 5] should be assumed to serve a real purpose and that it is not a legitimate reason to refuse a request because the Tribunal is of the view that the attendance of the assistant would be pointless.[13] The Court did not consider the effect of s 357A [s 422B] or s 366A(2) [no Part 7 equivalent] in its reasons. Section 366A(2) provides that the assistant is not entitled to present arguments to the Tribunal, or to address the Tribunal, unless it is satisfied there are exceptional circumstances.

18.4.3 It appears that in some circumstances, natural justice or compliance with s 360 or 425 may require that an applicant be allowed to be represented at the hearing.

[5] s 427(6)(a).
[6] s 427(6)(b).
[7] *AFD16 v MIBP* [2020] FCA 964 at [114]; *SZQCN v MIAC* [2011] FMCA 606 at [31].
[8] *MZYBN v MIAC* [2008] FMCA 1719 at [21].
[9] *SZNSF v MIAC* [2010] FCA 266 at [18].
[10] *Rathor v MIBP* [2014] FCCA 10.
[11] *MIAC v Li* (2013) 249 CLR 332.
[12] *Rathor v MIBP* [2014] FCCA 10 at [25].
[13] *Rathor v MIBP* [2014] FCCA 10 at [36].

18.4.4 In *WABZ v MIMIA*, Hill J noted that s 427(6) relates only to persons giving evidence and is silent on the right of persons appearing before the Tribunal to present arguments.[14] While noting that s 427 placed 'a considerable obstacle in the way of any suggestion that procedural fairness requires in every case that an applicant be represented by a lawyer or other agent',[15] French and Lee JJ held that s 427(6) may have displaced the common law rules of agency but not the rules of procedural fairness, which may, in some circumstances, require an applicant to be represented.

18.4.5 The Court in *WABZ* considered the legislative scheme as it stood prior to the introduction of ss 357A and 422B ['Exhaustive statement of natural justice hearing rule' in both Part 5 and Part 7]. Subsequent authority on the effect of those provisions has also left open the question of to what extent ss 357A/422B have removed the rules of procedural fairness as far as representation before the Tribunal is concerned.

18.4.6 In *MIMIA v Lay Lat*, which dealt with s 51A [ss 357A/422B departmental equivalent], the Court noted that the Codes of Procedure in the Migration Act were intended to 'provide comprehensive procedural codes which contain detailed provisions for procedural fairness but which exclude the common law natural justice hearing rule'.[16] However, in *Saeed v MIAC*, the High Court concluded that the scope of the exclusion of procedural fairness by s 51A [ss 357A/422B departmental equivalent] was to be considered having regard to the text of the provision itself (s 51A) and the provisions interacting with it.[17]

18.4.7 In *SZEQH v MIAC*,[18] Dowsett J considered the effect of s 422B [Part 7], as interpreted by *Lay Lat* on the right of a person to cross examine witnesses at a hearing. His Honour held that to the extent that *WABZ* established that failure to permit cross-examination may constitute a denial of procedural fairness amounting to jurisdictional error, it was no longer good law, although the Tribunal nevertheless retained discretion to permit such action.[19] His Honour was not required to consider the more general question of whether a denial of representation in some circumstances would still amount to a jurisdictional error.

18.4.8 In *MZXJV v MIAC*, the Court, while not expressly considering s 427, appeared to suggest that *some* function was retained by representatives at hearings, by concluding that where a migration agent appears on behalf of an applicant and is wrongly excluded then the preferable course would be for the hearing to be

[14] *WABZ v MIMIA* (2004) 204 ALR 687 at [109]. Note however, that this was a pre-s 422B case, and the Court expressly did not consider s 422B [s 357A]. The Court held that the requirements of procedural fairness did not confer entitlements upon those affected by the exercise of statutory power. Rather they operated as necessary conditions upon the validity of its exercise: at [67]-[68].
[15] *WABZ v MIMIA* (2004) 204 ALR 687 at [67].
[16] *MIMIA v Lay Lat* (2006) 151 FCR 214 at [66].
[17] *Saeed v MIAC* (2010) 241 CLR 252 at [34], [56]. The Court found that the common law rules of procedural fairness did not operate in respect of s 57 [provision of adverse information] but only to the extent of the matters s 57 itself dealt with.
[18] *SZEQH v MIAC* (2008) 172 FCR 127 at [30].
[19] *SZEQH v MIAC* (2008) 172 FCR 127 at [30].

temporarily adjourned so that the agent can be located and return to the Tribunal, rather than for the hearing to continue without the agent.[20]

18.4.9 In *BQQ16 v MIBP,* the Court found that the Tribunal was incorrect to give a submission of the applicant's representative no weight because it was not given in evidence (i.e. it was not given under oath or affirmation). While the Tribunal had informed the representative that he could not give evidence, and the representative confirmed that he did not wish to do so, the Tribunal was still required to take into account what the representative said.[21] On appeal, the Federal Court found it was open to the Tribunal to give no weight to the submissions by the applicant's representative, as the phrase 'no weight' was an observation that the submissions were considered but carried no evidentiary weight.[22]

18.4.10 Following *WABZ* and in the absence of clear judicial authority on the effect of ss 357A and 422B on any 'right' of representation at a tribunal hearing, it appears an applicant may be allowed representation except where there are cogent reasons against this occurring. Furthermore, the obligation to give an applicant a real and meaningful opportunity to give evidence and present arguments in s 360 or 425 may require an applicant to be represented in certain circumstances.

18.4.11 Considerations relevant to the question of whether representation is required may include:[23]

- the applicant's capacity to understand the nature of the proceedings and issues;[24]
- the applicant's capacity to understand and communicate effectively in the language used by the Tribunal;
- the legal and factual complexity of the case;
- the importance of the decision to the applicant's liberty or welfare.

18.4.12 While an applicant may require a representative in some circumstances, it does not mean that the Tribunal cannot direct the conduct of the hearing, including when and how the representative is to participate. It means that in most cases it is appropriate to allow an applicant's representative to be present and to take some part in the proceedings in order for the Tribunal's obligations in s 360 or 425 to be met.[25] The appropriate conduct of the hearing will depend on the particular circumstances of

[20] *MZXJV v MIAC* [2007] FMCA 964 at [57]. However, this case did not address the statutory scheme and the issues surrounding a hearing under Part 7 being 'in private'.
[21] *BQQ16 v MIBP* [2019] FCCA 1829 at [46]–[54]. However, the Court found that Tribunal's error in giving the representative's submission no weight did not indicate that the Tribunal failed to fulfil its function of giving the applicant an opportunity to be heard (as it had in fact asked the applicant about the issue the representative was attempting to raise).[22]*BQQ16 v MICMSMA* [2021] FCA 427 at [45]–[47].
[22]*BQQ16 v MICMSMA* [2021] FCA 427 at [45]–[47].
[23] *WABZ v MIMIA* (2004) 204 ALR 687 at [69]. See Chapter 14 – Competency to give evidence for discussion of the conduct of hearings where the applicant's competency is in issue.
[24] *AFD16 v MIBP* [2020] FCA 964 at [114]–[117]. The Court observed that it may be unreasonable in some circumstances to refuse to permit a representative to appear at and participate in a hearing, or to refuse to consider such a request, where, for example, the applicant was incapable by reason of psychiatric illness of making submissions on their own behalf. However, in *AFD16* the Court found no error in the Tribunal seeking to limit the representative's participation in the hearing only so that it could ask questions of the applicant directly without the representative's contribution. In reaching this view, the Court also took into account that the Tribunal had told the representative early in the hearing that it would give them an opportunity to clarify any matter after the applicant had given evidence, and such an opportunity was given.
[25] See generally *MZXJV v MIAC* [2007] FMCA 964.

the case, having particular regard to what assistance the applicant may require to ensure the Tribunal discharges its obligation to afford a real opportunity to appear before it. Participation may include the representative suggesting to the Tribunal any other issues that should be raised with the applicant. The representative may also indicate to the Tribunal if the applicant does not understand the questions.

18.4.13 In determining whether the applicant has had an opportunity to be heard on the issues arising in relation to the decision under review, a representative's understanding of matters raised at a hearing does not equate to the applicant having understanding of such matters.[26]

18.4.14 For more information on the role of migration agents see Chapter 32 – Representatives and the Tribunal.

[26] *NAQF v MIMIA* [2003] FCA 781 at [37] in which the Court held that s 366A does not have the effect that, for natural justice purposes, any understanding of an assistant is deemed to be the understanding of the applicant.

19.THE ROLE OF OBSERVERS AT THE HEARING

19.THE ROLE OF OBSERVERS AT THE HEARING[1]

19.1 Introduction

19.1.1 The position in relation to observers at hearings in the Migration and Refugee Division (MRD) of the Tribunal differs between Part 5 (migration) reviews and Part 7 (protection) reviews. Hearings in relation to Part 7-reviewable decisions must be in private[2] whereas hearings in relation to Part 5-reviewable decisions are required to be in public.[3]

19.2 Part 7 (protection) hearings

19.2.1 The Tribunal is required to hold hearings of Part 7-reviewable decisions in private.[4] However, certain persons other than the applicant may still be permitted to attend the hearing while retaining its 'private' nature. What is required is for those attending the hearing to be 'persons whose presence is reasonably required for purposes of or in connection with the performance of the Tribunal's functions'.[5] Examples of persons generally permitted to attend would include migration agents, other representatives[6] and interpreters, while members of the general public, the media and acquaintances of members or staff generally would not be.

19.2.2 Whether the presence of a person at a Tribunal hearing would cause the hearing not to be 'in private' is to be determined on a case by case basis, bearing in mind that the purpose of s 429 is to protect the applicant from a risk of reprisals if evidence given, or allegations made, during the hearing were made public. Applicants should feel uninhibited in presenting their cases to the Tribunal.[7]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] s 429.
[3] s 365.
[4] Section 429 does not prevent or oblige the Tribunal to arrange a concurrent hearing in circumstances where two applicants have made separate applications and did not request that the other be called as a witness in their own case: *SZNTF v MIAC* [2010] FMCA 4 at [26].
[5] *SZAYW v MIMIA* (2006) 230 CLR 486 at [25]. See, for example, *SZNXP v MIAC* [2010] FMCA 195 at [11] where the Court found that the presence of a migration agent/solicitor would fall neatly within *SZAYW* even if the applicant had not clearly indicated his consent.
[6] See Chapter 18 – The role of the adviser at the hearing for a discussion of the role of advisers in hearings in the MRD of the Tribunal.
[7] *SZAYW v MIMIA* (2006) 230 CLR 486 at [25]. The protective purpose of s 429 was noted in *SZIME v MIAC* [2007] FCAFC 10 at [6]. In *SZQZR v MIAC* [2013] FCA 69, the Court considered the Tribunal's decision to refuse the applicant's request to take

Types of observers

19.2.3 In *SZAYW v MIMIA*, interpreters, security officers, necessary administrative staff and witnesses were listed as 'obvious examples' of the types of persons reasonably required to be present.[8] The presence of these persons would not generally breach the requirement of privacy in s 429. However, in each case the Member conducting the hearing must assess whether the presence of a person, such as a guard from a detention services provider, is reasonably required for the purposes of or in connection with the performance of the Tribunal's functions.[9] The following classes of persons may also meet the description of persons 'reasonably required' for, or in connection with, the performance of the Tribunal's functions.

Friends and relatives

19.2.4 The Tribunal generally permits friends and relatives to attend to provide support to applicants, so long as they take no active part in the hearing. Where applicants bring with them a large number of such people, the Member may determine how many friends or relatives are necessary for this purpose.

Note-takers

19.2.5 The applicant's registered migration agent may sometimes be accompanied by a note-taker. Provided that the note-taker does not otherwise participate in the hearing, their presence would be permissible and a matter for the Member to determine.

Trainees, observers and similar persons

19.2.6 Occasionally other persons may be invited to observe a hearing by the Tribunal. This may include persons who are present for training purposes. In *SZIME v MIAC,*[10] the Full Federal Court held that the continued presence of an interpreter at a hearing for training purposes was reasonably required and legitimate as it was plainly in the interests of the due administration of the Tribunal's function that there be competent interpreters available to it. The opportunity for some further exposure to the processes of the Tribunal and its procedures was a legitimate connection with the performance of the Tribunal's functions. In the Court's view, while a request for

oral evidence by telephone from Colombia on the basis that it was not satisfied that it could ensure that the telephone call would remain confidential or private for the purposes of s 429. In granting an extension of time for the applicant to file a notice of appeal, Griffiths J observed at [42]–[44] that the Tribunal is not explicitly constrained by s 429 in the exercise of its power under s 424(2) to seek any information that it considers relevant in the review.

[8] Although the Court observed that 'privacy may require the exclusion of witnesses when they are not giving evidence': *SZAYW* v *MIMIA* (2006) 230 CLR 486 at [25].

[9] *SZAYW v MIMIA* (2006) 230 CLR 486 at [25]; *SZQCV v MIAC* [2011] FMCA 984 at [36]. An appeal from the judgment was dismissed: *SZQCV v MIAC* [2012] FCA 441. See also *SZUVX v MIBP* [2015] FCCA 1520 at [26] and [28], which was upheld on appeal in *SZUVX v MIBP* [2016] FCA 301.

[10] *SZIME v MIAC* [2007] FCAFC 10 at [12].

consent from the applicant would be appropriate and courteous, an absence of such a request did not of itself mean that the hearing was not 'in private'.[11]

19.2.7 Where observers are external to the Tribunal, the hearing officer will seek the permission of the applicant. The applicant's consent is recorded in writing and placed on file. It is intended that the note record that the applicant was told who would be attending, in what capacity and for what purpose.

Members and Officers of the Tribunal

19.2.8 Members and officers of the Tribunal may also attend a hearing, for example for training purposes, without infringing the privacy obligation. While not essential, the applicant's consent may be sought and recorded in the same way as for other people. This is to ensure that the applicant does not feel inhibited when appearing before the Tribunal.

Confidentiality

19.2.9 Although s 66 of the *Administrative Appeals Tribunal Act 1975* (Cth) prevents the disclosure of certain information by current and former Tribunal members, officers, members of staff, and interpreters, no similar prohibition exists for persons who are not officers, members or interpreters disclosing information they have obtained at a hearing.[12] Where such persons attend the hearing and are not associated with the applicant, a confidentiality undertaking should be completed by the observer. Examples of persons who fall into this category include overseas visitors from similar immigration, administrative or other tribunals, academics, researchers or students.

19.2.10 If it is in the public interest to do so, the Tribunal may also make a direction pursuant to s 440 of the *Migration Act 1958* (Cth) (the Migration Act) restricting disclosure of any evidence given before the Tribunal, or any information or contents of any document given or produced to the Tribunal.

19.2.11 For further discussion on the disclosure of information, see Chapter 31 - Restrictions on disclosing and publishing information.

[11] *SZIME v MIAC* [2007] FCAFC 10 at [12].
[12] For the MRD, these prohibitions apply to information received on or after 1 July 2015. For information received prior to 1 July 2015, ss 377 and 439 provide for a general prohibition on the disclosure of information received about a person except for certain purposes. Transitional provisions apply in respect of information or documents obtained prior to 1 July 2015: *Tribunals Amalgamation Act 2015* (Cth) sch 9 item 15BB. Additionally, s 66A of the *Administrative Appeals Tribunal Act 1975* (Cth) appears to allow these provisions to continue to apply to information received by the MRT or RRT before 1 July 2015.

19.3 Part 5 (migration) hearings

19.3.1 In contrast to Part 7 reviews, oral evidence taken by the Tribunal when reviewing a Part 5-reviewable decision from a person appearing before it must, subject to the two exceptions below, be taken in public.[13] The exceptions are:

- where the Tribunal is satisfied that it is in the public interest to do so, it may direct that particular oral evidence, or oral evidence for the purposes of a particular review, be taken in private,[14] or
- where the Tribunal is satisfied that it is impracticable to take particular oral evidence in public.[15]

Where the Tribunal decides it is in the public interest that oral evidence be taken in private, this decision is generally recorded either in writing on the file or on the audio record of the hearing.

19.3.2 In *Zeng v MIAC*,[16] the Court considered the requirement for evidence to be taken in public. In this case, the Tribunal had conducted the hearing with the door locked for access from outside. The Court found that a hearing is conducted in public if members of the public have a right to attend and observe the hearing which is '*reasonably and conveniently exercisable'*. The Court noted that a member of the public could have knocked, moved the door handle, asked an officer or done something similar to gain entry to the room. The need to take such a step was not so inhibiting that the hearing was effectively conducted in private.[17]

19.3.3 Where the Tribunal has allowed the giving of evidence by telephone, closed circuit television or any other means, and the review is in public, the Tribunal is to take such steps as are reasonably necessary to ensure the public nature of the review is preserved.[18] For example, a speakerphone or visible monitor can be used.

19.3.4 Hearings of a Part-5 reviewable decision held using Microsoft Teams are also required to be public (subject to the exceptions above). To enable public attendance at a hearing using Microsoft Teams, a list of hearings to be held each day is published on the AAT Website (usually by 5:00pm on the preceding business day) and members of the public may email the relevant registry to request to attend a hearing after which instructions on how to join will be sent to them. The Member may end a person's attendance at a Microsoft Teams hearing if the Member

[13] s 365.
[14] s 365(2).
[15] s 365(3). The Tribunal may also give directions as to the persons who may be present when oral evidence is given privately: s 365(4).
[16] *Zeng v MIAC* [2007] FMCA 169. However, the Court found it unnecessary to determine whether the Tribunal had breached s 365 in this case on the basis that it found, applying *SZAYW v MIMIA* (2006) 230 CLR 486, that the applicant had waived his rights in relation to any breach by failing to raise the question of the hearing not being conducted in public during the hearing or, at the latest, before the Tribunal's decision was handed down.
[17] *Zeng v MIAC* [2007] FMCA 169 at [115].
[18] s 366.

decides to hold all or part of the hearing in private (where an exception to the public nature of the hearing applies).[19]

[19] See, 'Members of the public attending AAT hearings', *Administrative Appeals Tribunal* (webpage) <http://aat.gov.au/members-of-the-public-attending-aat-hearings>. In addition to the Member exercising the discretion to conduct a hearing in private (s 365), they may also terminate a member of the public's attendance at a Microsoft Teams hearing if that person disturbs the hearing or the technology becomes unstable (although if the technology becomes unstable, the hearing is likely to be adjourned until the technology is restored).

20. THE ROLE OF THE INTERPRETER AT THE HEARING

20. THE ROLE OF THE INTERPRETER AT THE HEARING[1]

20.1 Introduction

20.1.1 Most hearings in the Migration and Refugee Division (MRD) of the Tribunal use an interpreter engaged by the Tribunal to assist with communication between the Tribunal, the applicant and witnesses. The Tribunal is generally required to provide an interpreter where the applicant is not sufficiently proficient in English to present their case. A failure to provide interpreting of an adequate standard may result in a failure by the Tribunal to comply with its statutory obligations in ss 360 [Part 5 - migration] and 425 [Part 7 - protection] of the *Migration Act 1958* (Cth) (the Migration Act) to give the applicant an opportunity to present arguments and give evidence before it. For Part 5 reviews (migration), this may also result in a failure by the Tribunal to comply with its obligation in s 366C of the Migration Act to appoint an interpreter where an interpreter has been requested, unless it is satisfied that the applicant is sufficiently proficient in English. There is no Part 7 (protection) equivalent to s 366C(1) and (2).[2]

20.1.2 The Tribunal aims to ensure that interpreters are accredited at Professional Interpreter level with the National Accreditation Authority for Translators and Interpreters (NAATI).[3] The Professional Interpreter level was formerly known as Level 3. However, it may not always be possible to find a qualified interpreter at this level (e.g. in some rarely required languages). Where it is not possible to obtain a Professional Interpreter, the member will determine how they wish to proceed.

20.1.3 To minimise the risk of interpreting problems, the applicant should advise the member immediately if they experience any difficulty communicating with the interpreter during the hearing. The Tribunal also generally reminds the applicant at the start of a hearing that they should advise the member of any interpreting difficulties as they occur (and not wait until the end of the hearing).

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] However, the Tribunal's discretionary power under s 427(7) [pt 7] of the Migration Act to provide an interpreter combined with the s 425 [pt 7] hearing obligation means the Tribunal, in conducting a Part 7 review, must provide an interpreter if an applicant is not proficient in English.
[3] A failure to provide an interpreter accredited at this level will not of itself give rise to error. In *SZHEW v MIAC* [2009] FCA 783 at [91], the Court found that lack of NAATI accreditation is insufficient to found jurisdictional error, although it may bear upon the drawing of inferences about the adequacy of interpretation.

20.2 Role of the interpreter

20.2.1 The role of the interpreter is to interpret. It is not to translate documents at the hearing or to give evidence as to language. In general, the applicant should be asked to provide translations of documents in languages other than English.[4] However, there may be situations where it is appropriate to have the applicant identify those relevant part(s) of an untranslated document on which he or she relies or have the applicant read aloud the relevant parts, with the assistance of the interpreter.[5]

20.2.2 There may also be some situations where a formal translation may not provide further assistance. The Court in *MZYJW v MIAC*[6] found in circumstances, where the Tribunal had regard to evidence in untranslated documents, had discussions with the applicant at the hearing about those untranslated documents and did not ultimately reject the bare propositions contained in those untranslated documents, that the absence of a formal translation did not advance the applicant's case.

20.2.3 The interpreter is not used as an expert to provide an opinion about matters such as the accent, dialect or language of the applicant.

20.3 Does the applicant have a right to an interpreter?

20.3.1 The legislative provisions relating to interpreters differ between Part 5 (migration) reviews and Part 7 (protection) reviews. The substantive obligations are, however, essentially the same.

Part 7 (protection) reviews

20.3.2 There is no express statutory obligation requiring the Tribunal conducting a Part 7 review to provide the applicant or any witness appearing before the Tribunal with an interpreter. However, s 427(7) [Part 7] states that if a person appearing before the Tribunal to give evidence is not proficient in English, the Tribunal may direct that communication with that person during their appearance proceed through an interpreter. Even though this section is expressed in discretionary terms (i.e. 'may')

[4] In *SZLSW v MIAC* [2008] FMCA 498, the Federal Magistrates Court took the view that there is no general obligation that the Tribunal obtain translations for foreign language documents given to it by an applicant: at [36]. Furthermore, there was no denial of procedural fairness where the procedures of the Tribunal, which had been explained to the applicant and his agent, drew clear attention to the need for documents in a language other than English to be translated: [41]. For further discussion on the Tribunal's use of documents in foreign languages, see Chapter 9 – Giving and receiving documents by the Tribunal. In *MZYJW v MIAC* [2011] FMCA 534 the Court acknowledged that not all applicants will have the resources to be able to provide certified translation and in some languages it may be difficult to find a translator who is certified at the appropriate level to be able to do that translating. The Court was of the view this did not prevent other evidence being given or at the very least an applicant outlining the importance of that evidence to the Tribunal and requesting that the Tribunal obtain a translation if need be.

[5] See *SZLSW v MIAC* [2008] FMCA 498, where the gist of what the applicant wished to draw from some untranslated newspaper articles was put to the Tribunal at the hearing. The interpreter confirmed that the articles contained the information asserted by the applicant. Similarly in *SZLCL v MIAC* [2008] FCA 1379 the Court held there was no error in the Tribunal asking the interpreter to interpret an Indonesian article provided by the applicant at hearing, or in the Tribunal proceeding to ask the interpreter some questions about the article. The exchange between the Tribunal and the interpreter was no more than a clarification of the translation that had been given, and the substance of that had been put to the applicant: at [27].

[6] *MZYJW v MIAC* [2011] FMCA 534.

the Federal Court has held that when the Tribunal has before it a putative refugee who does not speak English, it is required to ensure that an interpreter is present.[7] However, the Tribunal is not required to provide an interpreter of the applicant's choosing.[8]

20.3.3 A failure to provide an interpreter in these circumstances may deny the applicant an opportunity to give evidence and present arguments and result in a breach of the hearing obligation in s 425.

Part 5 (migration) reviews

20.3.4 There is a statutory obligation to provide an interpreter to a person appearing before the Tribunal in a migration matter under Part 5 in certain circumstances. A person appearing before the Tribunal to give evidence may ask the Tribunal to appoint an interpreter for the purpose of communication between the Tribunal and that person. The Tribunal must comply with that request unless it considers that the person is sufficiently proficient in English.[9] Even in circumstances where a person has not made a specific request for an interpreter, the Tribunal must appoint one if it considers that the person is not sufficiently proficient in English.[10] As with the Part 7 reviews, the Tribunal is not required to provide an interpreter of the applicant's choosing.

20.4 The requisite standard of interpreting

20.4.1 The desirable standard of interpreting cannot be defined precisely, but may be considered with reference to criteria such as continuity, precision, accuracy,

[7] *Perera v MIMA* (1999) 92 FCR 6 at [20], *VWFY v MIMIA* [2005] FCA 1723. The Court held at [8] that without an interpreter an applicant would effectively be stripped of his or her rights to appear and give evidence. The use of the term 'may' in s 427(7) of the Migration Act does not suggest that the Tribunal has a discretion to appoint an interpreter but should be understood as the grant of authority to appoint an interpreter. See, however, *MZYJW v MIAC* [2011] FMCA 534 where the Court was not persuaded that the applicant was unable to put his case before the Tribunal in cicumstances where he never sought an interpreter, was present with a migration agent who never sought to intervene and request an interpreter or adjournment of the hearing and where the transcript of the hearing demonstrated on the applicant's part a clear understanding and level of responsiveness that could only come with sufficient understanding of English.

[8] In *SZQUH v MIAC* [2012] FMCA 534 in circumstances where the applicant requested a particular interpreter, the Court held there was nothing in the legislation to compel the Tribunal to provide an interpreter of the applicant's choosing. The Court held that the provision of an interpreter is at the discretion and direction of the Tribunal and is directed to addressing any lack of proficientcy in English on the part of the applicant. This judgment was upheld by the Federal Court on appeal: *SZQUH v MIAC* [2012] FCA 1265. Special leave to appeal from this judgment to the High Court was refused: *SZQUH v MIAC* [2013] HCASL 50.

[9] ss 366C(1), (2). A failure to comply with s 366C (i.e. to provide an interpreter) may give rise to jurisdictional error where the outcome could have been different if an interpreter had been provided. In *Yarach v MICMA* [2022] FedCFamC2G 868 the Court found that the Tribunal erred by not providing an interpreter for part two of a Tribunal hearing (where one had been requested, and provided for part one of the hearing). The Court held that there was a realistic possibility that the outcome could have been different in this matter if an interpreter had been provided for part two of the hearing, as it was not a matter which turned on a single fact and it was not a matter where there was only one decision open to the Tribunal (such that it would not have mattered what the applicant said at part two of the hearing). In *Pannu v MIAC* [2007] FCA 152 the Federal Court agreed that a breach of s 366C would be a jurisdictional error. In that case, although the applicant had requested an interpreter and none was sworn in, the Court was not satisfied that there was a breach of s 366C as there was no evidence that the applicant was disadvantaged by the absence of the interpreter, nor did she complain during the hearing, nor could any meaningful error of understanding be identified in the transcript: at [11]. Similar to *Yarach*, see *Shrestha v MIAC* [2013] FMCA 32 where the Court found jurisdictional error where the Tribunal failed to provide an interpreter and where it was the applicant's uncontested evidence that she had not understood aspects of the hearing. As the applicant had requested an interpreter in her response to hearing invitation (although she had not identified the language required), and, unlike in *Pannu*, as the Tribunal had not taken steps to establish whether or not her command of English was sufficient, the Court was unwilling to draw an inference that an interpreter was not needed because she had completed studies in English or becuase she or her agent did not object at hearing.

[10] s 366C(3).

impartiality, competence and contemporaneousness. In *SZKJM v MIAC*, the Federal Magistrates Court found that a realistic appreciation of the role of an interpreter at a hearing must allow some latitude in relation to such matters.[11]

20.4.2 Although a perfect interpretation may not always be possible or necessary, it should be sufficiently accurate so as to convey the idea or concept being communicated.[12] In *Perera v MIMA*, for example, the Court stated that whilst the interpretation at a Tribunal hearing need not be at the very highest standard of a first-flight interpreter, the interpretation must, nonetheless, express in one language, as accurately as that language and the circumstances permit, the idea or concept as it has been expressed in the other language.[13]

20.4.3 While some minor interpreting errors may not affect the validity of the Tribunal hearing or decision,[14] jurisdictional error may result either from a standard of interpretation so inadequate that the applicant was effectively prevented from giving evidence; or interpreting errors which are material to the conclusions of the Tribunal adverse to the applicant.[15] However, questions of fact and degree are involved, and a qualitative assessment must be made of the Tribunal hearing as a whole.[16]

20.4.4 Poor interpreting may affect not only specific factual findings, but also the Tribunal's impression of the applicant's credibility generally. As Kenny J said in *Perera v MIMA*:

> A witness whose answers appear to be unresponsive, incoherent, or inconsistent may well appear to lack candour, even though the unresponsiveness, incoherence or inconsistencies are due to incompetent interpretation. … It may well be that, by resting its findings as to credit on answers that were poorly interpreted, the Tribunal failed to take advantage of its opportunity to see and hear the witness…[17]

[11] *SZKJM v MIAC* [2008] FMCA 23 at [15].
[12] *SZGWN v MIAC* (2008) 103 ALD 144 at [21], citing *Gaio v The Queen* (1960) 104 CLR 419 at 433 and *WACO v MIMIA* (2003) FCR 511 at [66].
[13] *Perera v MIMA* (1999) 92 FCR 6. In *SZOBN v MIAC* [2010] FCA 1280, North J stated that that judgment should be read in light of the academic criticism in A Hayes and S Hale, "Appeals on Incompetent Interpreting" (2010) 20 *Journal of Judicial Administration* 119, at p.127 which argues that Kenny J's reasons 'demonstrate a lack of understanding of the meaning of accurate interpreting and of the consequences of subtle changes to the original speaker's intention and style, as well as the content'. North J did not however elaborate on this point and did not provide any guidance as to what the test of adequate interpretation ought to be.
[14] See *SZHEW v MIAC* [2009] FCA 783 at [76]. See also *Park v MIAC* [2009] FMCA 7 at [37], *BZAAA v MIAC* [2011] FMCA 131 at [13]–[15], upheld on appeal: *BZAAA v MIAC* [2011] FCA 447, and *SZOYU v MIAC* [2012] FMCA 316.
[15] In *Applicant P119/2002 v MIMIA* [2003] FCAFC 230 at [17] and [22] Mansfield and Selway JJ, adopted the test that inadequate interpretation will be established where (a) the applicant is effectively prevented from giving evidence; or (b) the errors were material to the conclusions of the Tribunal adverse to the applicant. See also *Perera v MIMA* (1999) 92 FCR 6 at [45], *SZMJQ v MIAC* [2009] FMCA 1068, *MZYHO v MIAC* [2010] FMCA 795, *SZOBN v MIAC* [2010] FCA 1280, *WZAPM v MIAC* [2013] FCCA 266, *SZSEI v MIBP* [2014] FCA 465 and *MZZPE v MIBP* [2014] FCCA 1990 and *WZAUB v MICMSMA* [2019] FCCA 2749 at [88].
[16] *SZOBN v MIAC* [2010] FCA 1280. In *SZRMQ v MIBP* (2013) 219 FCR 212, the Full Court found that the IMR had not failed to afford the applicant procedural fairness due to intermittent errors in the interpretation at the hearing. While the Tribunal is not bound by this decision, it is of interest for the principles summarised by each of their Honours for determining whether the misinterpretation was of such a character as to deny the applicant a fair process, particularly a fair hearing or proper opportunity to be heard. Allsop CJ , for example, noted that the question is not whether there is 'a precise causal link between any irregularity and an adverse result, but to assess whether the decision-making process…was fair': at [10].
[17] *Perera v MIMA* (1999) 92 FCR 6 at [49]; see also *SZGWN v MIAC* (2008) 103 ALD 144.

20.4.5 In *DVO16 v MIBP; BNB17 v MIBP* the Court also recognised the impact interpretation can have on assessments of an applicant's demeanour, impression and credibility, commenting that "extreme caution that should be exercised…before making, or accepting, adverse demeanour findings based upon an audio recording of an interview that involved interpreted evidence".[18] While this judgment relates to an IAA review, the same caution would appear to apply to Tribunal reviews. The Court noted that empirical studies show that decision-makers may struggle to distinguish between the words and demeanour of an interpreter and those of the person being interpreted; in particular the Court noted that credibility assessments of an applicant can be effected by an interpreter's voice, dress, mannerisms, linguistic competence, age, race and gender.[19] Issues with making credibility assessments when using an interpreter are also compounded by cultural issues that may not be known to the decision maker, such as whether direct responses to questions are considered appropriate, or whether certain topics may cause extreme discomfort when discussed, in the particular culture.[20]

20.4.6 A departure from an acceptable standard of interpreting may also result in the applicant not having been given the opportunity to appear before the Tribunal to give evidence pursuant to the hearing obligation s 425(1) or 360(1).[21] A breach will be established if the interpretation before the Tribunal is so incompetent that it prevents the applicant from effectively giving evidence or presenting arguments in relation to the dispositive issues in the review.[22] In *M175 of 2002 v MIAC*,[23] for example, Gray J found that the Tribunal's reliance on the interpreter's incorrect interpretation had the effect of depriving the applicant of the opportunity to give the evidence that the applicant wished to give. This meant that the applicant was denied a fair opportunity to succeed and resulted in a breach of s 425(1).[24] An applicant may also be denied an opportunity to give evidence if defects in translation lead the Tribunal away from a course of questioning which, if followed,

[18] *DVO16 v MIBP; BNB17 v MIBP* [2021] HCA 12 at [54]–[56]. This judgment relates to an IAA decision where the adverse credibility findings were based on an audio recording of a Departmental interview. However, the Court's reasoning appears to also be applicable to a hearing conducted by the Tribunal.
[19] *DVO16 v MIBP; BNB17 v MIBP* [2021] HCA 12 at [54].
[20] *DVO16 v MIBP; BNB17 v MIBP* [2021] HCA 12 at [54].
[21] *MIMIA v SCAR* (2003) 128 FCR 553 at [37], *M175 of 2002 v MIAC* [2007] FCA 1212; *Long v MIMA* (2000) 106 FCR 183; *W284 and W285 v MIMA* [2001] FCA 1788; *Perera v MIMA* (1999) 92 FCR 6; *Appellant P119 of 2002 v MIMA* [2003] FCAFC 230 at [17]; and *WAIZ v MIMIA* [2002] FCA 1375, where Carr J held that the failure to properly interpret a crucial question relating to the applicant's fear on return had effectively prevented the applicant from giving evidence in relation to a matter of considerable significance. This had led the Tribunal to commit an unwitting jurisdictional error.
[22] *Perera v MIMA* (1999) 92 FCR 6 at [38]. See also *SZLMN v MIAC* [2009] FMCA 582. In *SZQWE v MIAC* [2012] FMCA 292 the Court found no error in circumstances where an interpretation service was provided for an IMR interview but, with the agreement of the applicant and his advisor, it was stopped during a legal discussion of the meaning of a particular social group. The Court found that both the applicant and his advisor had agreed to proceed in this manner and the applicant's evidence was responsive and coherent in that he plainly disagreed with the position put to him that he was not at risk of persecution.
[23] *M175 of 2002 v MIAC* [2007] FCA 1212.
[24] *M175 of 2002 v MIAC* [2007] FCA 1212 at [51]. See also *AFP20 v MICMSMA* [2022] FCA 375 at [19]–[29], [34] in which the Court found that the Tribunal had misunderstood the applicant's evidence as the result of an interpretation error, where aspects of the applicant's oral evidence had been omitted, leading the Tribunal to make adverse findings about the truthfulness of the applicant's evidence. The Tribunal had asked how the applicant had obtained documents from the police in support of his claims. The applicant said he had a friend in the police and 'had asked him over the phone' for the documents but the interpreter omitted the applicant's reference to asking for the report 'over the phone'. The Tribunal then asked the applicant the means of communication by which he had requested the documents, where the applicant replied that he had received the documents 'through email'. The Tribunal then asked for a copy of the email he had sent to request the documents, and the applicant repeated his earlier answer that he had asked for the documents 'over the phone'. As a result of this error, the Tribunal made adverse credibility findings about the applicant's oral evidence about how he had obtained the police report finding it to be 'inconsistent', 'seemingly improvised' and an 'unreliable' account. The Court concluded that the applicant had not received a fair hearing as contemplated by s 425.

would have yielded answers favourable to the applicant[25] or are material to adverse conclusions reached against the applicant.

20.4.7 In many cases, it will not be apparent to the Tribunal that the standard of interpreting during the course of the hearing is deficient. The Tribunal generally takes into account the interpreter's qualifications, any statement by the interpreter as to his or her capacity or experience, any indication from the interpreter or the applicant that interpretation is beyond the particular competence of the interpreter. The course of the evidence may also be indicative of any problems, including the coherence or responsiveness of answers to questions asked, the consistency of one answer with another and the rest of the case sought to be made and, more generally, any evident confusion in exchanges between the Tribunal or the applicant and the interpreter.[26]

20.4.8 The standard of interpretation may also be adversely affected if there are technical difficulties in conducting a hearing by video link and telephone. Difficulties in communication affecting the standard of interpretation may also occur if the interpreter is in a different location from the applicant or Tribunal member.[27]

20.4.9 If there are any doubts about the quality of the interpreting, the member may confirm during the hearing if the applicant is satisfied with the level of interpreting being provided.[28] The applicant and, where applicable, their adviser may also inform the Tribunal of any concerns about the interpreting at the earliest possible opportunity. If the standard of interpreting is considered to be unsatisfactory, the Tribunal may consider whether to adjourn and reschedule with another interpreter. In *SZGYM v MIAC*,[29] the Court found that the Tribunal had committed a jurisdictional error by proceeding with the hearing where the interpreter had expressed doubts about the correct dialect of the applicants. the Federal Court was satisfied that by proceeding with the available interpreter, instead of adjourning to arrange for a different interpreter, the Tribunal had denied the applicant procedural fairness.[30]

20.5 Proceeding without an adequately qualified interpreter

20.5.1 In some cases, it may not be possible to locate an interpreter accredited by NAATI at any level in the applicant's preferred language.[31] While the use of an interpreter

[25] *SZOBN v MIAC* [2010] FCA 1280. In that case, North J found that, had the defects in interpretation not occurred, the Tribunal might not only have formed a different view about the applicant's knowledge of Christianity, but would almost certainly have pursued more details about the applicant's knowledge by further questioning (at [31]–[33]).
[26] *Perera v MIMA* (1999) 92 FCR 6 at [37], [41].
[27] For example, in *WZAUB v MICMSMA* [2019] FCCA 2749 at [22] the Court noted in *obiter* that having the Tribunal and interpreter in one location, the applicant in another, and the representative in a third location may result in difficulties and error. However, the Court acknowledged the need for the Tribunal to do this from time to time, given resourcing constraints.
[28] See *SZDKB v MIAC* [2007] FMCA 174 at [30].
[29] *SZGYM v MIAC* [2007] FCA 1923.
[30] *SZGYM v MIAC* [2007] FCA 1923 at [36]–[37]. This was despite the Tribunal suggesting to the applicants that questions could be repeated or they could raise difficulties as the hearing progressed: at [20]. Compare however with *SZQSP v MIAC* [2012] FMCA 890 where the Tribunal was plainly aware of some difficulty with the interpretation
[31] Note that there is no obligation to provide an interpreter in the applicant's 'mother tongue' or preferred dialect, provided the interpreter in fact used provides a standard of interpretation sufficient to comply with the Tribunal's statutory and procedural fairness obligations: *SZHEW v MIAC* [2009] FCA 783 at [93]. See also *SZLZJ v MIAC* [2009] FMCA 341 at [56]. In *SZQNC v*

who is not NAATI accredited will not of itself indicate a failure to provide an adequate standard of interpreting,[32] the Tribunal proceeds with caution in these cases.

20.5.2 If there is no fully satisfactory solution to the absence of a qualified independent interpreter, then the Tribunal may follow 'second best' procedures, including by exploring the assistance that may be given by the friends and relatives of the applicant,[33] or by using audio-link with a qualified interpreter from overseas or interstate.[34] Each difficult situation is considered in its particular circumstances.

20.5.3 Where a hearing has proceeded in the absence of a qualified interpreter the Tribunal takes into account the possibility that the interpretation may have been deficient before relying on matters such as any perceived evasiveness, unresponsiveness to the Tribunal's questioning or failure to give detailed answers, in weighing the applicant's evidence.

20.5.4 If, having exhausted its options, no interpreter can be found, the Tribunal may consider it appropriate to proceed through the use of written submissions.

20.5.5 In some cases, an applicant may indicate that he or she is happy to proceed in English without an interpreter. If the Tribunal chooses to conduct the hearing in this way, the member actively considers whether the applicant's English is sufficiently proficient to enable him or her to meaningfully give evidence and arguments on the issues arising in the review as required by s 360 or 425. In *SZLMN v MIAC*,[35] the Tribunal was unable to find an interpreter in the applicant's preferred language, Xhosa. The hearing proceeded in English and the Court found the Tribunal had breached s 425 because the applicant did not have the necessary proficiency in English to communicate with and comprehend the Tribunal to, not simply tell her story, but to present evidence and arguments in relation to dispositive issues. While speaking slowly and repetition on the part of the Tribunal might be helpful, this could not and did not address all comprehension difficulties and could not facilitate the giving of evidence and arguments on matters of some complexity, such as obstacles to relocation and the availability of state protection.

20.6 Refusal by applicant to accept particular interpreter

MIAC [2012] FMCA 190 the difficulty before the Court was that while the interpreter was NAATI accredited in Korean, there was some difficulty given dialect differences between the interpreter and the applicant. The Court found that Korean interpreters with an understanding of the applicant's Chinese-Korean dialect were rare, if not non-existent, in Australia and as a result it gave the applicant the opportunity to adjourn the hearing so that he could bring a friend to Court. When the applicant declined this opportunity, the Court hearing proceeded on the basis that if the applicant or the interpreter had difficulty they would so indicate to the Court. The Court noted that as is the case before the Tribunal, a fair hearing does not require the perfect level of interpretation. The standard is one of an adequate interpretation, such that the applicant is not deprived of the opportunity to know the case against him and to be able to communicate his case.

[32] *SZGWM v MIMA* [2006] FMCA 1161 at [20] and *SZHEW v MIAC* [2009] FCA 785 at [91].

[33] See *WZARY v MIBP* [2013] FCCA 1516 where there was no available interpreter in the applicant's language during proceedings before the Court, and the Court proceeded by addressing a friend of the applicant who spoke English and Fuqing, who then addressed another friend of the applicant who spoke only Fuqing and that friend interpreted to the applicant.

[34] *SZLPN v MIAC* [2008] FMCA 1434 at [5], *MZXAR v MIMA* [2006] FMCA 1926 at [83].

[35] *SZLMN v MIAC* [2009] FMCA 582.

20.6.1 While the Tribunal makes every effort to be sensitive to cultural and other issues which may affect applicants' ability to give evidence, the Tribunal is not obliged to accede to an applicant's requests for an interpreter of a particular faith.[36] However, there are some instances where not using an interpreter of a particular type requested by an applicant may result in the Tribunal denying the applicant an opportunity to meaningfully participate in the hearing. For example in *COU15 v MIBP*, the applicant requested a Coptic Christian interpreter as she was unable to give evidence freely about her claims to be persecuted by extremist militant Muslim males through a Muslim male interpreter, The Court held that the applicant was not given a fair opportunity to present her evidence and that a different interpreter might have made a difference to the outcome of the review if she had been able to speak more freely.[37] The Court considered that the request for a different interpreter was an adjournment request, and that it was an unreasonable exercise of the Tribunal's power to refuse the adjournment and locate a different interpreter in these circumstances.[38] By way of contrast in *Toscano v MIMA*,[39] the applicant, a Bangladeshi national, requested a Bangladeshi and non-Muslim interpreter on the 'Response to Hearing Invitation' form. The applicant objected to the interpreter provided as he was a Muslim. The Tribunal refused to adjourn the matter further and the applicant declined to give evidence. The Court held that there was no error in the Tribunal's approach. The interpreter was merely the medium for the interchange between the Tribunal and the person appearing before it. The Tribunal was under no obligation to accommodate the prejudices of an individual, although in some cases it might be prudent to take them into account. In this case, there was no argument as to the technical competence of the interpreter and no suggestion that the applicant objected on any rational basis.

20.7 Curing a defect in interpreting

20.7.1 Depending upon the nature and extent of the errors, it is possible in some circumstances to rectify errors in interpreting by way of written submissions to the Tribunal after the hearing, or the provision of a corrected transcript accepted by the Tribunal as accurate.[40] However, the Court has held that not all errors can be rectified this way, and a further oral hearing may be required.[41]

20.7.2 In *SZGWN v MIAC*, for example, the Court found that the incorrect interpretation of questions asked by the Tribunal could not be cured by the provision of a transcript.[42] The Court held that the correct questions were never asked because they were poorly interpreted and it could not be assumed what the applicant's

[36] *Saha v MIMA* [2001] FCA 530; *Toscano v MIMA* [2002] FCA 941.
[37] *COU15 v MIBP* [2018] FCCA 838 at [42]–[43], [52].
[38] *COU15 v MIBP* [2018] FCCA 838 at [58]–[60].
[39] *Toscano v MIMA* [2002] FCA 941.
[40] *SZGWN v MIAC* (2008) 103 ALD 144 at [30]. See also *SZGSI v MIAC* [2008] FMCA 1649 at [68]–[70] where a corrected transcript was provided and the Tribunal expressed some reservations about the transcript. The Court found no breach of s 425 as no significant failings in interpretation were shown and the Tribunal acknowledged the deficiencies that the applicant brought to its attention.
[41] *SZGWN v MIAC* (2008) 103 ALD 144 at [30].
[42] *SZGWN v MIAC* (2008) 103 ALD 144 at [36].

answers would have been if this had not occurred. The Court also opined that the negative impression in the mind of the Tribunal member conveyed by an applicant's answers, incorrectly interpreted, was difficult, if not impossible, to eradicate after the hearing.[43]

20.7.3 Where a hearing is affected by interpreting errors and the Tribunal holds a further hearing that is not affected by interpreting errors, the Tribunal relies on the evidence given at the further hearing only. If the Tribunal does rely on evidence at the first hearing affected by interpreting errors, the decision may be affected by jurisdictional error.[44]

20.8 Conflict of interest

20.8.1 Interpreters take an oath or affirmation at the hearing that they will interpret the proceedings to the best of their skills and abilities and that they will maintain confidentiality. Interpreters are also bound by the Migration Act[45] and the *Administrative Appeals Tribunal Act 1975* (Cth)[46] which prohibit the divulging of information or documents.

20.8.2 Interpreters must be objective and impartial in carrying out their duties. There should be no conflict of interest. To ensure that is the case, the Tribunal:

- does not employ as an interpreter any person who is also a registered migration agent;
- does not engage the services of an interpreter who is employed by a foreign government in any capacity;
- does not engage as an interpreter anyone whom an applicant has specifically requested by name; and
- does not employ as an interpreter anyone who has a financial or personal interest in the business of a migration agent, or a financial or personal association with the applicant, his or her adviser, or any of his or her witnesses.

20.8.3 As the Tribunal does not use the name of the applicant when making a booking for an interpreter, the interpreter may not be aware of a potential conflict of interest until

[43] *SZGWN v MIAC* (2008) 103 ALD 144 at [37].
[44] *SZLDY v MIAC* [2008] FMCA 1684 at [107]–[112]. The Tribunal's first hearing took place with an interpreter who needed to leave and the hearing was adjourned to another date with a different interpreter. The Court accepted there were significant interpreting problems in relation to the first hearing and found the Tribunal relied upon evidence from the first hearing in reaching its adverse credibility findings. In these circumstances, the fact that the second hearing was not affected by interpreting errors did not overcome the breach of s 425 having regard to the hearing as a whole.
[45] ss 377(1)(d) and 439(1)(d) in relation to information received prior to 1 July 2015. Note: ss 377 and 439 were repealed by the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act) with effect from 1 July 2015. However transitional and savings arrangements mean that those provisions continue to apply after 1 July 2015 in relation to information or documents obtained prior to 1 July 2015: Amalgamation Act sch 9 item 15BB.
[46] s 66 of the *Administrative Appeals Tribunal Act 1975* (Cth) in relation to information received on or after 1 July 2015.

the time of the hearing or interview. If such a case arises, it is expected that the interpreter inform the member at the commencement of the interview or hearing.

20.8.4 If an interpreter believes that for any other reason he or she is in a position of conflict of interest, the Tribunal must be informed immediately.

20.9 Code of ethics

20.9.1 There is a *Code of Ethics* developed by the Australian Institute for Interpreters and Translators (AUSIT).

21. MINORS BEFORE THE TRIBUNAL

21.MINORS BEFORE THE TRIBUNAL[1]

21.1 Capacity to lodge application

21.1.1 The *Migration Act 1958* (Cth) (the Migration Act) does not prevent children from applying for visas, whether as part of a combined application or in their own right. Section 45 of the Migration Act provides that a non-citizen who wants a visa must apply for a visa of a particular class. 'Non-citizen' is defined to mean a person who is not an Australian citizen.[2] Any non-citizen, whether a minor or not, can therefore apply for a visa. Section 46 of the Migration Act, which specifies the requirements for making a valid visa application, also does not preclude the making of an application by a minor.[3] Similarly, there are no age restrictions on applying for review of a Part 5-reviewable decision (migration) or a Part 7-reviewable decision (protection).

21.1.2 Parents in their capacity as guardians of infant children have the power under common law to make decisions on behalf of the child, including immigration decisions, provided the child does not have competence to make the decision.[4]

21.1.3 In practice, an application for a visa or review will often be made on behalf of a child by a parent or guardian.[5] The Tribunal facilitates this by allowing their application forms to be signed by a parent or guardian, in circumstances where a review applicant is under the age of 18.

21.1.4 In cases where the form is signed or the application otherwise made by a child directly, a question may arise as to the factual capacity (as opposed to legal capacity) of the child to make the application. Factual capacity could be an issue for a very young child (i.e. whether he or she is capable of comprehending the nature of such an application).[6] The invalidity of the application for want of substantial

[1]Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] s 5(1).
[3] *Al Raied v MIMA* [2001] FCA 313 at [36]. See further [37]–[39].
[4] *Re: Woolley; ex parte applicants M276/2003 by their next friend GS* (2004) 225 CLR 1 at [102]–[104]. See also *SZTZA v MIBP* [2014] FCCA 2316 at [19], [21].
[5] In *SZLSM v MIAC* (2009) 176 FCR 539 at [24] the Court found there was no provision in the Migration Act which overrides the common law principle that a guardian may be characterised as acting for his or her children where his or her conduct warrants such a characterisation. The applicants' father had clearly adopted the role of a guardian by signing the application form, corresponding with the Tribunal and giving oral evidence on their behalf and the Tribunal was entitled to treat his actions as the actions of the applicants. In *SZKDB v MIAC* [2007] FMCA 1036 at [28]–[30] the Court found that an application brought by a mother for herself and her infant daughter should be treated as if the mother was the guardian of her child.
[6] *Jaffari v MIMA (No 2)* (2001) 113 FCR 524 at [37]–[38]. In *WAIK v MIMIA* [2003] FMCA 33 the Court rejected a submission that the protection visa application was invalid because the Minister should have appointed a guardian for an applicant who was alleged to be a minor at the time the application was made. Raphael FM held (at [15]) that even if it were found that the applicant was both underage and did not have the necessary mental capacity to represent himself the steps that would have to be taken to assist him would consist of appointing a migration agent to represent him. As a migration agent was appointed there was no utility in having the matter remitted to the Tribunal to fully investigate whether in fact the applicant was a minor at the time of application. That judgment was set aside on appeal (*MIMIA v WAIK* [2003] FCAFC 307), but the Full Federal Court left open the issue of the validity of the application.

compliance with the prescribed or approved form may also be relevant in circumstances where an application is made by a minor personally.

21.2 Notification and the giving of documents to minors

21.2.1 For documents given on, or after, 5 December 2008, the Migration Act and *Migration Regulations 1994* (Cth) (the Regulations) make special provision for notification of minors.[7]

21.2.2 Where the Tribunal is required to give a document to an applicant who is a minor in accordance with ss 379A [Part 5 migration] or 441A [Part 7 protection], the Tribunal may use the methods mentioned in ss 379A(4), (5) and ss 441A(4), (5) to dispatch or transmit the document to the last known address of a 'carer of the minor'.[8] A 'carer of the minor' is an individual who is at least 18 years of age,[9] and who a member or an officer of the Tribunal reasonably believes has day-to-day care and responsibility for the minor; or works in or for an organisation that has day-to-day care and responsibility for the minor and whose duties, whether alone or jointly with another person, involve care and responsibility for the minor.[10] If the Tribunal gives the document to a carer of a minor, the document is taken to have been given to the minor, however, this does not prevent the Tribunal giving the minor a copy of the document.[11]

21.2.3 Likewise, where the Tribunal is *not* required to give a document in accordance with ss 379A or 441A they may give the document to an applicant who is a minor by giving it to an individual who is at least 18 years of age if a member or an officer of the Tribunal reasonably believes that the individual has day-to-day care and responsibility for the minor, or the individual works in or for an organisation that has day-to-day care and responsibility for the minor and the individual's duties, whether alone or jointly with another person, involve care and responsibility for the minor.[12]

21.2.4 The Tribunal may not give a document to a carer of a minor if the minor is included in a combined review application to which s 379EA or 441EA applies.[13]

21.2.5 It would also not be permissible for the Tribunal to give any document to a carer of an applicant who is a minor, if that applicant has notified the Tribunal of another

[7] *Migration Amendment (Notification Review) Act 2008* (Cth) (No 112 of 2008) and *Migration Amendment Regulations 2008 (No 8)* (Cth) (SLI 2008 No 237). For documents given prior to 5 December 2008, the Migration Act and Regulations did not distinguish between minors and other applicants in relation to decision notification or the giving of documents. The Tribunal was legally obliged to address correspondence to the applicant, unless the Tribunal was notified of an authorised recipient. Where no authorised recipient was appointed, and the minor was unaccompanied or very young, giving such documents directly to the minor gave rise to the practical difficulty of whether the minor would have understood what he or she was being told. See *Jaffari v MIMA (No 2)* (2001) 113 FCR 524 at [41]; *WACB v MIMA* (2002) 122 FCR 469 at [22].
[8] ss 379A(1A), 441A(1A).
[9] ss 379A(1A)(a), 441A(1A)(a).
[10] ss 379A(1A)(b), 441A(1A)(b), as amended by the *Tribunals Amalgamation Act 2015* (Cth).
[11] ss 379A(6), 441A(6).
[12] ss 379AA(2), 441AA(2).
[13] ss 379EA [pt 5] and 441EA [pt 7] provide that where two or more persons apply for a review of a decision together, documents given to any of the applicants in connection with the review are taken to be given to each of them. Where ss 379EA or 441EA apply, ss 379AA(2A), 379A(1B), 441AA(2A) and 441A(1B) do not apply.

person who is their authorised recipient for the purposes of s 379G or 441G and to whom the Tribunal must give any document.[14]

21.3 Representation

21.3.1 Minors will often be represented in a review by their parent or guardian. Where a parent or guardian holds him or herself out as acting as the representative for an applicant who is a minor, the Tribunal is entitled under the common law and the Migration Act to treat those actions of the parent or guardian undertaken on behalf of the applicant as the actions of the applicant.[15]

21.3.2 In *SZQRD v MIAC* the Court briefly considered the Tribunal's obligations to minors who are not infants and attend the hearing with their parents.[16] The Court held that whilst the children were not infants, they were not of an age where procedural fairness would require that they be asked to give evidence where their interests were being protected by their father.

21.3.3 In *WZARJ v MIAC* the Federal Circuit Court considered the requirements of natural justice where a 15 year old applicant's father acted as the lead spokesman for the applicant and his brothers during the hearing.[17] The Court found the Tribunal had not breached the rules of natural justice by putting its doubts about the applicant's account of events directly only to his father, given that his father had acted as the lead spokesman, and the Tribunal's doubts were put to the applicants in their presence.

21.3.4 In some cases, an applicant who is a minor may be so disadvantaged by his or her youth such as to make it impossible for the Tribunal to conduct a real and meaningful hearing except through an adult who is actively representing the applicant's interests.[18]

21.3.5 There may also be cases in which the Tribunal will consider it is unable, because of the young age of the applicant, to conduct a proper hearing unless and until the

[14] See e.g. *Khan v MIBP* [2017] FCCA 3112 at [18]–[21] in the context of similarly worded ss 494B(5) and 494D, which concern notifications by the Department. Upheld on appeal: *Khan v MIBP* [2018] FCA 627 at [33].
[15] In *SZLSM v MIAC* (2009) 176 FCR 539 at [24], the Court found there was no provision in the Migration Act which overrides the common law principle that a guardian may be characterised as acting for his or her children where his or her conduct warrants such a characterisation. The applicants' father had clearly adopted the role of a guardian by signing the application form, corresponding with the Tribunal and giving oral evidence on their behalf and the Tribunal was entitled to treat his actions as the actions of the applicants. In *SZSHV (as Litigation Guardian for SZSHW) v MIBP* [2013] FCCA 1784, as the infant applicant's father was her common law guardian, the Tribunal was found to have discharged its obligation under s 424AA when it put adverse information to her father for comment. Upheld on appeal: *SZSHY v MIBP* [2014] FCA 212.
[16] *SZQRD v MIAC* [2012] FMCA 163 at [32]. The Court held it had not been established that the children were not given an opportunity to speak as there was no evidence that the children requested to give evidence or were hindered in so doing, or that either parent requested that the children give evidence or that such requests were not adhered to.
[17] *WZARJ v MIAC* [2013] FCCA 232 at [22]. Undisturbed on appeal: *WZARJ v MIBP* [2013] FCA 1318.
[18] See *AZAEF v MIBP* (2016) 240 FCR 198 which concerned a six year old minor's independent protection assessment. In that case, Griffiths J at [99] accepted that the requisite notice and opportunity to comment did not need to be given to the applicant personally but that procedural fairness principles did require that the requisite notice and opportunity be given either to her legal guardian or migration agent. It was further held that procedural fairness required, at the least, that the assessor inform the applicant's migration agent of the adverse view which had been formed regarding the applicant's half-brother's credibility and of the rejection of much of his evidence (per White J at [128]).

applicant has received independent legal advice.[19] In such cases, the Tribunal may postpone or adjourn the hearing to enable this to occur. In *WZAOT v MIAC* the Federal Magistrates Court did not dismiss the possibility that in certain circumstances the appointment of a separate representative for a child applicant might be necessary, but noted that there is no express legislative power to do so.[20] On appeal, the Federal Court in *WZAOT v MIAC* confirmed that there is no automatic requirement for the Tribunal to appoint an independent representative for an applicant who is a very young child and found that in the circumstances of that case, there was nothing to suggest that the Tribunal erred by not doing so.[21]

21.4 Guidance on procedures

21.4.1 Hearings involving minors are conducted in an informal, relaxed and flexible manner.[22] The Tribunal attempts to ensure that the child is comfortable and composed, can maintain concentration and understands the questions, particularly where answers suggest a misunderstanding.

21.4.2 The Tribunal can take sworn or unsworn evidence from a child. In determining the competency of a minor to give evidence members may be guided, but are not bound, by the rules of evidence.[23] The rules of evidence that apply in federal courts have been codified in the *Evidence Act 1995* (Cth) (Evidence Act). The Evidence Act states that, except as provided by that Act, every person is competent to give evidence.[24] However, a person who is competent to give evidence about a fact is not competent to give sworn evidence about it if the person is incapable of understanding that he or she is under an obligation to give truthful evidence.[25] In federal courts, persons who do not understand the obligation of an oath may give unsworn evidence if the court has told him or her that it is important to tell the truth, to inform the court if she or he does not know or cannot remember answers to questions, to agree with statements believed to be true and not be pressured into agreeing with statements believed to be untrue.[26] Accordingly, before taking evidence from a minor, depending on his or her age, the Tribunal generally determines if the minor understands the nature of an oath or affirmation to tell the truth and if the child is able to communicate evidence.

[19] *Odhiambo v MIMA* (2002) 122 FCR 29 at [94]. In *SFTB v MIMIA* (2003) 129 FCR 222, the Full Federal Court applied *Odhiambo* and did not accept that the Tribunal was in error merely because it failed to ensure that the appellant was represented before it. In a joint judgement it stated at [28] that '[a]ny claim of procedural injustice must be supported by reference to the actual circumstances of this case and the conduct of the hearing before the Tribunal. In those circumstances the appellant's age, the paucity of his education and his psychological state are highly relevant.' *Odhiambo* was also cited with approval by the Full Federal Court in *AZAEF v MIBP* (2016) 240 FCR 198 per Besanko J at [48].
[20] *WZAOT v MIAC* [2012] FMCA 841 at [29]–[36].
[21] *WZAOT v MIAC* (2013) 211 FCR 543. See also *DZAD1 v MIAC* [2013] FMCA 39 where the Court noted that there is no statutory obligation for the appointment of a litigation guardian in the administrative process before the IMR or the RRT and found that in the circumstances of the case the applicant, a minor, was fit to participate in the IMR process: at [64]–[65].
[22] In *DZADO v MIAC* [2013] FMCA 1 the Court expressed concerns about the IMR's failure to follow Departmental guidelines on unaccompanied minors. The Court noted that the Department had acted appropriately by interviewing the applicant with his older brother present and that the IMR, having proceeded on the basis that the applicant was a minor, should have done the same, or should have made arrangements for an observer to be present in accordance with Departmental guidelines: at [96]. See also *DZAD1 v MIAC* [2013] FMCA 39 at [53].
[23] ss 353, 420.
[24] *Evidence Act 1995* (Cth) (Evidence Act) s 12(a).
[25] Evidence Act s 13(3).
[26] Evidence Act s 13(5).

21.4.3 The Tribunal also generally makes an assessment as to what evidence a minor is able to provide and the best way to elicit that evidence from the minor. This is consistent with s 13(2) of the Evidence Act which provides that a witness may be competent to give evidence about other facts if not competent to give evidence about a particular one. Section 13(1) of the Evidence Act provides that a person is not competent to give evidence about a fact if, for any reason, she or he is incapable of understanding, or communicating a reply to, a question about the fact and that incapacity cannot be overcome. In this regard, the experience of members within the Tribunal highlights the need to be sensitive to the minor's age, level of education, intelligence and any torture/trauma suffered.

21.4.4 Children may not be able to present evidence with the same degree of precision as adults and may manifest their fears differently from adults. The Tribunal takes into account that apparent inconsistencies, vagueness or unresponsiveness in a minor's evidence may not necessarily be an indicator of unreliability but may arise due to misunderstandings between the Member and the child.

21.4.5 For further information regarding children giving evidence, see the MRD Guidelines on Vulnerable Persons and Chapter 14 – Competency to give evidence.[27]

21.5 United Nations guidance on evidence from minors in Protection (Part 7) cases

21.5.1 The *United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (the *Handbook*) offers some general guidance in relation to taking evidence from minors which may be useful in hearings of protection visa reviews.[28] The *Handbook* draws a distinction between children and adolescents.

21.5.2 The *Handbook* suggests that where a child is unaccompanied, his or her degree of mental maturity needs to be determined and it is suggested that 'the services of experts conversant with child mentality', be enlisted.

21.5.3 The *Handbook* states that the circumstances of the parent(s) and other family members will have to be taken into account, including their situation in the child's country of origin. If there is reason to believe that they wish the child to be outside the country of origin because of a well-founded fear of persecution, then the child may be presumed to have such a fear.

21.5.4 The *Handbook* considers that persons 16 years old or over 'may be regarded as sufficiently mature to have a well-founded fear of persecution'. However, the *Handbook* stresses that these are guidelines only and 'a minor's mental maturity

[27] For information regarding the operation of Tribunal guidelines, see Chapter 7 – Procedural fairness and the Tribunal (in particular, 'Gender, cultural and vulnerable person considerations').
[28] United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (Reissued 2019) at [213]–[219].

must normally be determined in the light of his personal, family and cultural background'.

21.6 Minors as witnesses

21.6.1 The Tribunal carefully considers whether it is necessary to take evidence from minors as witnesses, having regard to the maturity and age of the child.[29] If evidence is taken, it is done with care and with consideration of the age of the witness.

21.7 *Immigration (Guardianship of Children) Act 1946* (Cth)

21.7.1 The Minister is obliged in certain circumstances to act as the guardian for minors, or to appoint a custodian.[30] Section 6 of the *Immigration (Guardianship of Children) Act 1946* (Cth) (Guardianship of Children Act) provides that the Minister shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child. The role of the Minister as guardian in these circumstances was considered in *Jaffari v MIMA (No 2)* where the Court suggested in *obiter* that the Minister's role as a statutory guardian did not affect his or her function as decision-maker in relation to granting visas to non-citizen children.[31] In *Kurd (a pseudonym) v MICMSMA*, the Court noted that where the Minister has been appointed the legal guardian of a child by virtue of the Guardianship of Children Act, it is not the case that all decisions made in exercising any of their powers under the Migration Act which impact the child asylum seeker must put the child's best interests at the forefront of their considerations.[32] In this instance, the Minister had lifted the s 46A bar to allow the applicant to apply for a temporary protection visa and the applicant contended that a bar lift of this nature breached the Minster's duty under the Guardship of Children Act by not allowing him to apply for a permanent visa. The decision to lift the bar was a decision made by the Minister in their capacity as Minister responsible for the administration of the Migration Act, not in their capacity as guardian, and accordingly the Minister was entitled to make the bar lift decision in the manner in which it was made.[33]

21.7.2 A conflict would arise were the Minister to act as guardian for the purpose of advancing visa applications or initiating reviews of decisions made under those applications. The Court indicated that such a dual role was not intended by the Guardianship of Children Act. In practice the Minister does not adopt such a direct

[29] Note however *AZAEF v MIBP* (2016) 240 FCR 198 in which White J at [130] rejected the Minister's submission that a six year old would not have been capable of providing more information to an Independent Protection Assessor regarding their protection claims, observing that "the law now has considerable experience of persons who are skilled in the questioning of children outside a court environment obtaining reliable information from children…particularly so in the child sex abuse context and family law context" and that the Assessor's perfunctory questioning of the minor had not exhausted the information the minor could have provided.
[30] ss 6, 7 *Immigration (Guardianship of Children) Act 1946* (Cth).
[31] *Jaffari v MIMA (No 2)* (2001) 113 FCR 524 at [35]–[36].
[32] *Kurd (a pseudonym) v MICMSMA* [2022] FedCFamC2G 317 at [36]–[43].
[33] *Kurd (a pseudonym) v MICMSMA* [2022] FedCFamC2G 317 at [43].

role, and does not lodge review applications on an applicant's behalf to the Tribunal.

22. RESCHEDULING OR ADJOURNING THE HEARING

22.RESCHEDULING OR ADJOURNING THE HEARING[1]

22.1 Introduction

22.1.1 A hearing may need to be adjourned or rescheduled due to a request by an applicant or because the Tribunal is unable to proceed for a variety of reasons.

22.1.2 The words 'adjourn', 'postpone' and 'reschedule' are sometimes used interchangeably in the legislation and case law. Sections 363(1)(b) [Part 5] and 427(1)(b) [Part 7] of the *Migration Act 1958* (Cth) (the Migration Act), provide the Migration and Refugee Division (MRD) of the Tribunal with the power to 'adjourn' a review from time to time. However, no specific procedure for 'adjourning' or 'rescheduling' a hearing is prescribed by the Migration Act or *Migration Regulations 1994* (Cth) (the Regulations). The word 'postpone' is usually used when a scheduled hearing that is yet to commence is deferred to a later date or time, although the word is not used in Parts 5 or 7 of the Migration Act or in the Regulations.

22.1.3 The meaning of the word 'adjourn' was considered in *SZEFM v MIMIA*:[2]

> *'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).*

22.1.4 Courts have since used the word 'adjourn' in both senses, that is: when the Tribunal has deferred a hearing that has already commenced to a later date; and when the Tribunal has deferred a scheduled hearing that is yet to commence.[3]

22.1.5 The granting of an adjournment is a discretionary power, but one which must be exercised reasonably and by reference to the facts and circumstances of the individual case. A failure to properly consider a request for an adjournment or an unreasonable refusal to grant an adjournment may, in certain circumstances, amount to a failure to give the applicant the opportunity to appear before the Tribunal as required by s 360(1) or 425(1) resulting in a jurisdictional error.[4] In considering whether or not it is reasonable to adjourn or postpone a hearing, the

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *SZEFM v MIMIA* [2006] FCA 78 at [12].
[3] See *MIMIA v SZFML* (2006) 154 FCR 572; *SZFLT v MIMA* [2006] FMCA 1763; and *SZCZX v MIMA* [2006] FMCA 786.
[4] *MIAC v Li* (2013) 249 CLR 332.

Tribunal's acts in accordance with its statutory duty to act in a way that is fair and just.[5]

22.1.6 In exercising its discretionary power, the Tribunal is bound by procedural fairness.[6] This may involve putting the applicant on notice of an issue relevant to the decision to adjourn or proceed with the review. However, such an obligation may not arise where, in all of the circumstances, an applicant ought fairly to have understood that reason for the refusal.[7]

22.2 Requests to postpone a hearing

22.2.1 If the Tribunal receives a request to postpone a scheduled hearing, careful consideration is given to the circumstances of the case and any reasons or explanation put forward by the applicant.[8] The Member may decide that more evidence is required to support the request.[9] If the Member decides to give the applicant time to produce such evidence, the period stipulated is to be reasonable in the circumstances and cannot extend past the scheduled hearing date.

22.2.2 The decision on postponement is to be made and notified before the scheduled hearing.[10] A decision on postponement is made by the Member and notified to the applicant.[11] In the case of late requests for postponement, applicants should be

[5] ss 357A(3), 422B(3). In *Ortiz v MIAC* [2011] FCA 1498 the Court found the Tribunal's failure to grant an adjournment was neither reasonable nor fair and just in circumstances where the applicant had commenced parenting order proceedings in the Family Court in order to satisfy the exception in cl 820.221(3)(b)(ii) but the Tribunal was of the view it was under no obligation 'to await the outcome of the proceedings indefinitely'. The Court held the Tribunal did not comply with either ss 357A(3) or the then 353(1) of the Migration Act and as a result it constructively failed to exercise jurisdiction. In *MIAC v Li* (2012) 202 FCR 387 the Full Federal Court found that the Tribunal's refusal of an adjournment gave rise to a jurisdictional error, not only because the applicant was denied a reasonable opportunity to present her case as required by s 360, but also because Tribunal had not discharged its core statutory function of reviewing the decision in a way which is 'fair' pursuant to the then ss 353, and 357A(3). On appeal in *MIAC v Li* (2013) 249 CLR 332 while the High Court did not endorse the opinion of Greenwood and Logan JJ in the Court below that the directions in the then ss 353, and 357A(3) provide substantive grounds of review, both the plurality and Gageler J made it clear that those provisions do inform the statutory procedural requirements.

[6] *MIBP v Singh* [2017] FCA 1297 at [39] where the Federal Court considered that any substantive obligation imposed by s 357A(3) would be the same as that which would exist had s 357A not been enacted, i.e. it assumed there was an obligation to give procedural fairness in relation to an adjournment decision under s 363(1)(b) (equivalent to s 427(1)(b)).

[7] See for example *MIBP v Singh* [2017] FCA 1297 at [51] where the Federal Court held that there was no error in the Tribunal forming the view that the review applicant had not been honest about his reason for seeking an adjournment to undertake an IELTS test for applicants with special needs, and on this basis it refused a subsequent request without seeking further comment from the applicant. Overturning the judgment at first instance (*Singh v MIBP* [2016] FCCA 3343), the Federal Court held that, in all of the circumstances, the review applicant ought fairly to have understood from the outset of the review process that upon making multiple requests for further time to sit the IELTS test, the genuineness of his stated purpose in seeking each adjournment would be in issue, and to this extent the Tribunal had not failed to discharge its obligation to afford the review applicant procedural fairness.

[8] See, for example, *SZNLF v MIAC* [2009] FMCA 847 at [112].

[9] In *Farook v MIAC* [2011] FMCA 940, the Court found no error with the Tribunal proceeding to a decision in circumstances where the Tribunal granted a provisional adjournment on the condition that it received, by a certain date, a medical report stating the applicant was not well to participate in the hearing and the applicant did not satisfy the condition. The Court appeared to accept that it is permissible to grant a provisional adjournment on conditions and found that the conditions set by the Tribunal were not unreasonable in all the circumstances of the case. The case turns on its facts and the Court's reasons suggest that imposing unreasonable conditions might result in a miscarriage of the discretion to adjourn.

[10] Where an applicant requests a postponement shortly before the hearing (e.g. the day of, or the day before), the Tribunal may refuse the request shortly before the hearing and this will need to be communicated to the applicant close to the time of the scheduled hearing. This is due to the short period in which an applicant will have given the Tribunal to make a decision on the request. However, if an applicant requests a postponement well before the hearing, the Tribunal will attempt to communicate its decision on the request in advance of the hearing date. In this circumstance, notifying the decision on the day of hearing or after the date of hearing may lead to the conclusion that the Tribunal has not afforded the applicant an opportunity to attend the hearing because the time for hearing had lapsed or almost lapsed while the applicant was awaiting a decision on adjournment.

[11] In *VSAF v MIMIA* [2004] FCA 1270 the Court noted that the Tribunal did not take either of these courses of action, both of which the Court considered to be reasonable actions for the Tribunal to take.

prepared to attend the hearing in the event a postponement is refused.[12] Oral notification of a refusal to postpone may suffice,[13] although if there is sufficient time, notification of the refusal is generally confirmed in writing.

22.2.3 There is no statutory obligation to record the Tribunal's reasons for not granting a postponement. However, this is commonly done in a letter to the applicant or in the decision record. This will demonstrate that proper consideration was given to the request and all relevant circumstances taken into account.[14]

22.2.4 If a request for a postponement is properly refused by the Tribunal and the applicant does not attend the scheduled hearing, ss 362B(1A) and 426A(1A) empower the Tribunal either to proceed to make a decision on the review without taking further action to allow or enable the applicant to appear before it[15] or to dismiss the application without any further consideration of the application or information before the Tribunal.

Relevant factors for consideration

22.2.5 Whilst each case will turn upon its own facts, some of the matters which may be relevant in considering requests for a postponement include:

- the whole history of the proceedings;[16]
- whether the amount of extra time sought is reasonable, having regard to the statutory direction that the Tribunal conduct its review in a manner which '*is fair, just, economical, informal and quick*';[17]
- what reasons have been put forward by the applicant to indicate a need for a postponement;[18]
- if a postponement is sought to obtain further information or documents, whether they are likely to be forthcoming, whether the applicant had a fair

[12] In *SZUWM v MIBP* [2016] FCA 92, the applicants requested the hearing be postponed the day before they were scheduled to appear. The Court at [34]-[38] held that as they had repeatedly been advised by the Tribunal that if they did not appear the Tribunal may proceed to determine the application, they were not entitled to assume that the hearing had been adjourned in accordance with their request in the absence of notification from the Tribunal to that effect.
[13] *SZNPB v MIAC* [2010] FCA 61 at [35].
[14] In this regard, it should be noted that the outcome in *MIAC v Li* (2013) 249 CLR 332 turned heavily on the facts of the case and in particular the significance of the material the applicant was seeking to provide and the lack of express consideration by the Tribunal in its decision of the reasons for the adjournment request in circumstances where there appeared good reason to accede to it.
[15] *Mulla v MIMA* [2001] FCA 934. See also Chapter 23 – Making a decision without a hearing.
[16] *MZAHC v MIBP* [2016] FCCA 340. The Tribunal was aware that an earlier Tribunal's decision had been quashed by the Court because of apprehended bias and that the applicant, terrified from her first experience before the Tribunal, was requesting more time to obtain evidence so as to be better prepared. Looked at from the perspective of the history of the proceedings, the Tribunal's insistence that she attend the hearing and take her chances for an opportunity to provide further documents during the course of the hearing, or at a further hearing, was arbitrary and legally unreasonable (at [57]-[74]).
[17] See *NBMB v MIAC* (2008) 100 ALD 118 at [14] and *Bandi v MIAC* [2010] FMCA 365 at [32]. See also *MIAC v Li* (2013) 249 CLR 332 where while not endorsing the view of the Full Federal Court in *MIAC v Li* (2012) 202 FCR 387 that the Tribunal was required to discharge its core statutory functions of reviewing the decision in a way which is 'fair' pursuant to the then ss 353, and 357A(3), both the plurality of the High Court and Gageler J made it clear that those provisions do inform both what may be considered as reasonable and the statutory procedural requirements.
[18] See *Naeem v MIBP* [2018] FCCA 2722 at [25]–[27], *SBLF v MIAC* (2008) 103 ALD 566 and *SZKAI v MIAC* [2008] FMCA 1049 (Barnes FM, 23 July 2008).

opportunity to provide the relevant information or documents already, and the significance of the information or documents to the applicant;[19]

- whether the applicant is likely to be able to advance their case with the benefit of the requested postponement, for example, by seeking legal advice;[20]

- in some rare circumstances, whether there is a related matter before the courts in relation to a Tribunal decision that, if remitted to the Tribunal due to jurisdictional error, would affect the outcome of the current review.[21]

22.2.6 The following cases are illustrations of how courts have addressed Tribunal considerations of requests for postponements, with the current leading authority on postponing or adjourning being the High Court case of *MIAC v Li*.[22]

- In *MIAC v Li*, the Tribunal refused an adjournment where the applicant had sought a review of an unsuccessful skills assessment with the relevant assessing authority and was waiting upon the review outcome. The Tribunal considered that the applicant had been provided with enough opportunities to present her case and therefore proceeded to make its decision. The High Court held that the Tribunal must not arbitrarily exercise it discretion whether or not to grant an adjournment but rather must do so by reference to the facts and circumstances of the individual case and in a manner which is reasonable and that has regard to the statutory purpose of s 360. The Court did not endorse the problematic Full Federal Court reasoning in *MIAC v Li*[23] which had held that the Tribunal was required to discharge its core statutory functions of reviewing the decision in a way which is 'fair' pursuant to the then ss 353[24], and 357A(3), however both the plurality and Gageler J made it clear that those provisions do inform what may be considered as reasonable and the statutory procedural requirements.

- In *MIBP v Singh*,[25] where the Tribunal had granted an initial adjournment to receive the results of IELTS tests from the applicant but then refused a subsequent adjournment request for a remark of the test, the Full Federal Court applied *MIAC v Li* to unanimously find that the Tribunal erred by not

[19] See *MIAC v Li* (2013) 249 CLR 332; *Manna v MIAC* [2013] FCA 400; *NBMB v MIAC* (2008) 100 ALD 118 at [14]; *MZYNE v MIAC* [2011] FMCA 761.
[20] See *SZQEB v MIAC* [2011] FMCA 974 at [36] where the Court found it could not be said the Tribunal erred in failing to postpone a hearing in circumstances where a person acting for the applicant's agent had requested a postponement of the hearing but the applicant had then clearly indicated in a subsequent telephone call that he wanted 'to attend without his lawyer' and he did in fact then participate in the hearing.
[21] See for example *MIBP v Mohammed* [2019] FCAFC 49 at [74]–[79] where the Court found that it was legally unreasonable for the Tribunal to affirm the refusal of a permanent partner visa when the application for review in relation to the associated temporary partner visa had not been validly determined, notwithstanding that the Tribunal might have reasonably thought that the temporary partner review had been validly determined (the decision to affirm the temporary partner visa was found to be affected by jurisdictional error *after* the decision to affirm the permanent partner visa was made).
[22] *MIAC v Li* (2013) 249 CLR 332.
[23] *MIAC v Li* (2012) 202 FCR 387.
[24] ss 353 [pt 5] and 420 [pt 7 equivalent] were amended by *the Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act) with effect on and from 1 July 2015. The Tribunal's stated objective of providing a mechanism of review that is fair, just, economical, informal and quick was removed and in its place, a new s 2A of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) sets out that in addition to being fair, just, economical, informal and quick [s 2A(b)], the Tribunal must provide a mechanism of review that is accessible, proportionate to the importance and complexity of the matter and promotes public trust and confidence on decision making.
[25] *MIBP v Singh* (2014) 308 ALR 280.

giving the adjournment request any independent, active consideration and by not asking itself how long the re-mark would take. Of particular interest is the Full Court's comments that *MIAC v Li* is not a 'factual checklist' to be followed and applied in determining whether there has been a legally unreasonable exercise of a discretionary power, rather the determination of legal unreasonableness is invariably fact dependent and will require careful evaluation of the evidence before the court, including any inferences which may be drawn from that evidence, and the particular context and circumstances before the Tribunal.[26]

The Full Court's emphasis on the lack of intelligible justification *in the reasons given by the Tribunal* for the decision to refuse the adjournment request and its tentative view that the 'intelligible justification' must lie within those reasons, are arguably at odds with the High Court's reasoning in *MIAC v Li*. Nevertheless, bearing in mind that the exercise of the adjournment power must be informed by the particular circumstances, the judgment illustrates the importance of demonstrating 'active' consideration of an adjournment request, having regard to all relevant factors including the reasons for the request, and further, that it may often be prudent to record detailed reasons for refusing such a request, either in the decision itself or by way of a file note.[27] Where the Tribunal does not give reasons, it will be left to a court to draw an inference as to whether the request was actively considered and/or whether the refusal was justified in the factual context presented.[28]

- In *BKQ16 v MIBP*,[29] the appellant requested an adjournment to find a new representative in circumstances where the Tribunal scheduled a second hearing 10 months after the first hearing after the matter was reconstituted to a different member. The appellant had been represented by a firm engaged under the Immigration Advice and Application Assistance Scheme (IAAAS) at the first hearing, however, the firm ceased representation of the appellant a week before the second hearing. The Tribunal refused the appellant's request on the basis the second hearing was only to discuss issues arising out of the first hearing and a postponement would result in further delays. The Federal Court held that these matters were irrelevant to the postponement discretion. The Court noted that the Tribunal's reasons showed no engagement with the effects and consequences of reconstitution on the appellant (such as that it appeared the review was starting again and that this may lead to more

[26] For further cases that provide an illustration of circumstances found to amount to the unreasonable exercise of a discretionary power following *MIAC v Li,* see *Brar v MIBP* [2014] FCCA 2616 relating to the Tribunal's decision not to grant the applicant an adjournment to provide further documents; *Siddique v MIBP* [2014] FCA 1352 relating to the Tribunal's refusal to adjourn a hearing to enable the applicant to undertake a further language test; *Kumar v MIBP* [2014] FCCA 2780 relating to the Tribunal's refusal to adjourn the review to allow the applicant more time to organise his enrolment in a course of study; and *AZADQ v MIBP* [2014] FCCA 2623 relating to the Tribunal's refusal to allow the applicant further time to obtain a translation of a potentially corroborative letter.
[27] For example, in *Haque v MIMAC* [2013] FCCA 1275 and *MZZJT v MIMAC* [2013] FCCA 1507 distinguished *MIAC v Li,* both of the Courts commented on the clearly articulated reasons in the Tribunal's decisions for refusing the adjournment requests.
[28] See *Duggal v MIBP* [2015] FCCA 1630, a PIC 4020 case concerning the Tribunal's refusal to summons a witness, which provides an example of the Court considering for itself the justification or intelligibility of the refusal, where no reasons were given by the Tribunal.
[29] *BKQ16 v MIBP* [2019] FCA 40 at [50], [66]–[68].

material in which the Tribunal could find discrepancies which could be used against the appellant). The Court found that no Tribunal acting reasonably would fail to appreciate that the appellant would benefit from representation in the circumstances and that the Tribunal should have enquired why the IAAAS provider had ceased to act for the applicant. However, in making these findings the Court assumed the Tribunal has knowledge of how representatives are assigned to applicants under the IAAAS, an initiative administered by the Commonwealth government, and did not suggest the Tribunal has a general duty to enquire whether, or ensure that, an applicant has representation.

- In *Rathor v MIBP,*[30] the Tribunal denied the applicant's request for a postponement of the hearing because his adviser was unavailable. While the Federal Circuit Court found the Tribunal's reasons for refusing to reschedule the hearing were not unreasonable in the sense described in *MIAC v Li,* the Court held that the exercise of the Tribunal's discretion miscarried because it did not give weight to the statutory code of procedure of which the hearing opportunity is a critical part. The Court further held that attendance of an applicant and their assistant as permitted by s 366A should be assumed to serve a real purpose and that it was not a legitimate reason to refuse a request because the Tribunal was of the view that the attendance of the assistant would be pointless. *Rathor v MIBP* does not stand for the proposition that it would never be permissible to refuse to postpone a hearing where the representative is unable to attend, when considering a request for adjournment.[31] The Tribunal has regard to the importance of the statutory framework including particularly the applicant's right to a hearing and to be assisted at the hearing.

- In *CZR20 v MICMSMA*,[32] the applicant requested an adjournment to seek the assistance of a legal representative. The applicant was in immigration detention and was to appear via video-link. The applicant (via a friend) expressed that he was finding it difficult to obtain legal assistance due to the COVID-19 pandemic and that it was critical he had adequate representation in part because he had a mental disorder that would affect his ability to participate in the hearing. The Tribunal refused the adjournment. The applicant again requested an adjournment one day before the hearing, and the Tribunal informed him that his request was refused and that he would be given another opportunity at the beginning of the hearing to discuss the mental health reasons for the adjournment. This request made at the hearing was also refused. In setting out the reasons for the refusal, the Tribunal said it could not indefinitely delay a matter involving an applicant who was detained, and that it would be mindful of his mental health condition in the conduct of the hearing. The Court held that it was unreasonable to refuse the applicant's

[30] *Rathor v MIBP* [2014] FCCA 10.
[31] The Court in *Rathor v MIBP* [2014] FCCA 10 did not consider the effect of s 357A [s 422B] or 366A(2) [no pt 7 equivalent] in its reasons.
[32] *CZR20 v MICMSMA* [2021] FCCA 199.

request given he suffered from a very severe psychiatric condition and that the Tribunal ought to have appreciated that the lack of representation at the hearing would have placed him in such a position of substantial disadvantage as to render the conduct of a hearing unfair,[33] and that he needed legal representation to enable his claims for protection properly presented.[34] The Court held that a Tribunal acting reasonably would have appreciated the difficulties then experienced by litigants due to COVID-19 restrictions, and ought to have also appreciated that a person with severe psychiatric disabilities would have been even more adversely impacted than able-bodied litigants of sound mind. The Court also took into account the fact that the Tribunal did not consider the medical evidence already on file (which was provided in support of his protection claims) when considering the medical reasons for request (in refusing the request the day before the hearing, the Tribunal incorrectly stated it did not have medical evidence on file of the applicant's condition).[35] The Court also considered the fact that it was it was the first time the matter had been listed for hearing and noted it was not a case of 'enough is enough', referring to matters where applicants have a history of seeking adjournments prior to hearing.[36] In the circumstances, the Court concluded that the refusal of the adjournment application was both legally unreasonable and one lacking an evident and intelligible justification.

- In *MIBP v SZSNW*,[37] the Full Court considered the operation of legal unreasonableness in the sense discussed in *MIAC v Li* in the context of Independent Merits Review, with a majority of the Court finding that the Reviewer's rejection of the applicant's contention that he had previously made a claim of sexual assault was in error. While the Court accepted that legal unreasonableness was involved, the judgments reflect a different approach to the scope and operation of unreasonableness, with a majority finding that it operates only on the exercise of statutory powers or discretions.

- In *Sandhu v MIBP*,[38] the principle of legal unreasonableness, in the *MIAC v Li* and *MIBP v Singh* sense, was also applied in the context of PIC 4020. In that case, the post-hearing adjournment request made by the applicant for the purpose of applying for a second skills assessment was refused by the Tribunal because it had formed the view the applicant did not meet PIC 4020(1) and this finding would not be affected by a new skills assessment. As the Court considered this was a necessary process in order for the applicant to make submissions that PIC 4020(1) be waived on the basis of her ability to employed as a cook was a compelling circumstances affecting the interests of Australia, and the Tribunal was aware that the skills assessment process had already commenced and was expected to have been completed in a relatively

[33] *CZR20 v MICMSMA* [2021] FCCA 199 at [18].
[34] *CZR20 v MICMSMA* [2021] FCCA 199 at [26].
[35] *CZR20 v MICMSMA* [2021] FCCA 199 at [16].
[36] *CZR20 v MICMSMA* [2021] FCCA 199 at [27].
[37] *MIBP v SZSNW* [2014] FCAFC 145.
[38] *Sandhu v MIBP* [2015] FCCA 711 at [49], [55], [58]–[64].

short period of time, it was held legally unreasonable for the Tribunal to have refused that request.

- In *Zhoory v MIBP*,[39] the Court considered that a refusal of a request for further time to provide additional evidence to establish a non-judicially determined claim of family violence amounted to an unreasonable exercise of the discretion in s 363(1)(b) [s 427(1)(b)].

- In *Naeem v MIBP*,[40] the Court considered it was legally unreasonable for the Tribunal to make its decision to affirm a delegate's decision to cancel a Temporary Work (Skilled) (Subclass 457) visa without waiting for the Minister to make a decision on a nomination approval application, in circumstances where the Minister had indicated five weeks earlier that the nomination application was progressing and a decision would be made as quickly as possible. This judgment suggests that where a related event is to be forthcoming and the delay is entirely in the hands of the Minister and was outside the control of the applicant, it may be unreasonable to proceed without waiting for the outcome.

- In *Pop v MICMSMA*,[41] the Tribunal did not grant an extension of time to await the outcome of an assurance of support (AoS) application with Centrelink,[42] and also refused a request to postpone the hearing. The Court, following *MIAC v Li*, found that had the Tribunal undertaken a considered examination of all of the information before it, the only fair, just and reasonable outcome was for it to grant the extension of time requested. In concluding that the Tribunal ought to have adjourned the review pursuant to s 363(1)(b) until the AoS issue was resolved, the Court reasoned that the applicant was legally represented, and matters had been progressed expeditiously on behalf of the applicant by his lawyers leading up to the Tribunal hearing, which meant that the continued legal representation of the applicant would not have delayed the grant or refusal of the AoS application.

- In *Mohammed v MICMA*,[43] the Court held that the Tribunal acted unreasonably by refusing an adjournment request made during a hearing in a Student matter concerning whether the applicant satisfied the financial capacity requirements. The applicant had previously requested that the hearing be postponed because he would be overseas and caring for an ill relative, the Tribunal refused this request and notified the applicant that the hearing would instead be conducted by telephone. Four days prior to the hearing, the applicant said he would return to Australia to attend in person. At the in-person hearing, the applicant said he had provided what evidence he could (including a bank statement showing funds he claimed to have brought back from his home country) but needed more time to submit further

[39] *Zhoory v MIBP* [2015] FCCA 2699.
[40] *Naeem v MIBP* [2018] FCCA 2722 at [25]–[27].
[41] *Pop v MICMSMA (No 2)* [2020] FCCA 1437 at [30]–[35].
[42] The AoS was an outstanding document required for the grant of the visa and formed the scope of the review for the Tribunal.

evidence. The Tribunal refused the request on the basis that the applicant had been given more than two weeks' notice that the hearing would take place. The decision was affirmed three days after the hearing. The Court held that the refusal was, in the circumstances of this matter 'plainly unjust'.[44] The Court referred to the fact that the applicant had made the review application over a year prior to the hearing and had not heard from the Tribunal during this time, and noted that this was the first hearing of the matter. The Court also placed weight on the applicant's efforts to return to Australia ostensibly to obtain the information, and that he only had a few days between returning and the scheduled hearing. Importantly, the Court considered it relevant that the Tribunal had accepted, or not doubted, that the applicant had been caring for an ill relative, and that the applicant had therefore attempted to obtain the information during a challenging period of his life.[45] Contextually, this made the Tribunal's decision to refuse the adjournment unreasonable.

- In *Kumar v MICMSMA*,[46] the Tribunal put to the applicant that their Confirmation of Enrolment had lapsed under s 359AA [s 424AA] and the applicant asked for an adjournment of a week to seek further enrolment, which was refused because the Tribunal considered the hearing had been set down for 'quite some time'.[47] The Confirmation of Enrolment lapsed shortly before the hearing (one business day), and the applicant had not yet received their results to see whether they had passed the course. The Court found that the applicant, in all of the circumstances and looking at the matter objectively, was owed the opportunity, given the lapse in enrolment had only just occurred one business day before, to get another Confirmation of Enrolment.[48] The Court found that it was legally unreasonable not to grant an adjournment and that it was not open to the Member to insist on proceeding in the circumstances that it did.[49] In reaching its finding the Court noted that if the applicant had failed the course and wished to obtain the diploma, they would have to complete it again by obtaining another Confirmation of Enrolment, and so further time was required.[50]

22.2.7 A number of judgments have also distinguished *MIAC v Li*. For example:

- In *MIBP v Haq*,[51] the Full Federal Court considered the role of the Tribunal's reasons in assessing legal unreasonableness, with a majority of the Court finding that it was not legally unreasonable for the Tribunal to refuse to adjourn the hearing and defer making its decision where its reasons disclosed an intelligible and rational justification. In this case, the justification being that even if the postponement request was granted, it was uncertain if and when

[43] *Mohammed v MICMA* [2022] FedCFamC2G 687 at [69]–[76].
[44] *Mohammed v MICMA* [2022] FedCFamC2G 687 at [73].
[45] *Mohammed v MICMA* [2022] FedCFamC2G 687 at [69]–[70].
[46] *Kumar v MICMSMA* [2022] FedCFamC2G 593.
[47] *Kumar v MICMSMA* [2022] FedCFamC2G 593 at [13].
[48] *Kumar v MICMSMA* [2022] FedCFamC2G 593 at [20].
[49] *Kumar v MICMSMA* [2022] FedCFamC2G 593 at [27].
[50] *Kumar v MICMSMA* [2022] FedCFamC2G 593 at [20].
[51] *MIBP v Haq* [2019] FCAFC 7 at [51]–[52].

the applicant would be able to place himself in a position to satisfy the requirements for the visa based on his oral evidence at hearing.

- In *Singh v MIAC*,[52] the Court found no error in the Tribunal's decision not allow the applicant more time to procure a necessary Certificate of Enrolment (CoE) in circumstances where the delegate had made very clear to the applicant the significance of his failure to produce a current CoE, the Tribunal's invitation to hearing had specifically asked the applicant to provide a current CoE at least two days before the hearing, there was no explanation as to why an up-to-date CoE had not been obtained and nor had the applicant asked that the Tribunal hearing be adjourned or suggest that something was happening in respect of the CoE which would justify an adjournment.

- In *Gazi v MIAC*,[53] the Court also found no error in the Tribunal's decision to refuse a further adjournment, in circumstances where the applicant had not made his request because he needed more time to secure supporting documentation which would be available shortly, and where the Tribunal had already offered the hearing take place by telephone and neither the applicant nor his medical evidence suggested that he could not participate by telephone or that there was some feature of his case that dictated a physical appearance by him was essential.

- On appeal in *MIBP v Pandey*,[54] the Court found that the Tribunal's decision in that case to refuse an adjournment so that the applicant could obtain a CoE was, whilst 'borderline…, not outside the range of possible, acceptable outcomes'. In this case, the applicant had been put on notice in advance of the hearing that she was required to produce a CoE and that the Tribunal would require 'good reason' to grant additional time, and the applicant was pursuing the review in respect of a student visa application whereas she had completed all her courses and was no longer enrolled as a student but was pursuing a Subclass 457 visa.

- Similarly, in *Thapaliya v MIAC*,[55] the Court distinguished *MIAC v Li* on the basis that there no evidence to suggest that a satisfactory IELTS test score was 'just around the corner'. Not only had the Department made it clear to the applicant that it required this evidence and had given him a fixed date to provide it, the Tribunal had also made this clear to the applicant prior to the

[52] *Singh v MIAC* [2013] FCA 669. See also *Khan v MIMAC* [2013] FCCA 1527. See also *Prajapati v MIBP* [2014] FCCA 2035 where the Tribunal refused to grant the applicant further time to provide evidence of financial capacity for a student visa in the form of a loan he intended to obtain. The Court approved the Tribunal's exercise of discretion, drawing a distinction between the circumstances in the authorities of *MIAC v Li* (2013) 249 CLR 332 and *MIBP v Singh* (2014) 308 ALR 280 and this case which did not concern a request for adjournment to allow time for certain consequences, flowing from an enterprise already begun, to be resolved.
[53] *Gazi v MIAC* [2013] FCA 1094.
[54] *MIBP v Pandey* [2014] FCA 640 at [51]–[52].
[55] *Thapaliya v MIAC* [2013] FCCA 456 at [31]–[32].

hearing, and when the applicant failed to provide it at hearing, the Tribunal granted two further extensions of time to allow for it.[56]

- In *Franco v MIBP*,[57] the Court distinguished *MIAC v Li*, on the basis that the Tribunal received no request to refrain from making a decision for a specific purpose and that it was incumbent upon the applicant to at least satisfy the Tribunal that he still pressed his skills assessment application and considered it to be evidence that he still sought to place before the Tribunal.

- *MIAC v Li* was also distinguished in *SZSLI v MIAC*[58] where the Tribunal refused a protection visa applicant's request for an adjournment in order for him to obtain photographs and documents from his family. The Federal Circuit Court held the applicant needed to satisfy the Tribunal his claims for protection were such that the protection visa must be granted; that there was no comparable explanation as to how the photographs and documents would assist the Tribunal in reaching the requisite level of satisfaction such as to mandate the grant of a protection visa, and there was nothing presented to show that the photographs and documents could have persuaded the Tribunal such that the visa must be granted.[59]

- In *Hossain v MIBP*,[60] the Court held the Tribunal's refusal of an adjournment was not unreasonable. In this case the Tribunal had given reasons for its refusal in its decision record and in those circumstances the Court's view[61] that the Court must focus on the Tribunal's actual reasoning, is consistent with *MIBP v Singh*.[62] However, to the extent that his analysis suggests that a Court can only look at the written reasons, it does not appear to accord with those authorities, or *Chava v MIBP*[63] where it was held that where an explanation is not found in the written reasons, as in that case, a Court will examine the outcome, in the circumstances revealed by the evidence, rather than any express reasons given for the way in which the adjournment power was exercised. *Hossain v MIBP* in contrast indicates that where reasons for refusing an adjournment are not given in the decision record, there is a risk of a Court finding that the refusal lacked an intelligible justification. On appeal the Federal Court noted that where Tribunal has given reasons, it is in those reasons to which a supervising court should look in order to understand why

[56] See also *Samurailatpam v MIBP* [2013] FCCA 2352 where the Court found no error in circumstances where there was no evidence the applicant had sat, passed or was awaiting results of an IELTs test at [9]–[10].
[57] *Franco v MIBP* [2013] FCCA 1723.
[58] *SZSLI v MIAC* [2013] FCCA 500 at [38]–[58].
[59] For further cases that distinguished Li on its facts, see *Kumar v MIAC* [2013] FCCA 1440; *Pakala v MIBP* [2014] FCCA 145; *Kaur v MIBP* [2014] FCCA 161; Sav*sani v MIBP* [2014] FCCA 213, undisturbed on appeal in *Savsani v MIBP* [2014] FCA 479 and special leave to appeal from this judgment to the High Court was refused: *Savsani v MIBP* [2014] HCATrans 217; *Singh v MIBP* [2014] FCCA 703; *SZSTS v MIBP* [2014] FCCA 744, undisturbed on appeal in *SZSTS v MIBP* [2014] FCA 1031; *Chava v MIBP* [2014] FCA 313; *Wei v MIBP* [2014] FCCA 753; *Sarker v MIBP* [2014] FCCA 2693; *SZTHQ v MIBP* [2014] FCA 1231 and *Pathak v MIBP* [2014] FCCA 2778.
[60] *Hossain v MIBP* [2015] FCCA 413.
[61] Reiterating what his Honour had said in *Kumar v MIBP* [2014] FCCA 2780.
[62] See also as an example *MIBP v Pandey* [2014] FCA 640 and *Kaur v MIBP* [2014] FCA 915.
[63] *Chava v MIBP* [2014] FCA 313.

the power was exercised as it was and held that the 'intelligible justification' is to be found within the reasons explicitly or implicitly.[64]

- In *Chhetri v MIBP*,[65] a request for adjournment was refused in circumstances where a nomination had previously been refused and a decision on a new nomination application by the same employer for the same occupation had not yet been decided and the Court found this was a relevant matter to take into account.

- In *SZTVU v MIBP*,[66] the Court held the Tribunal had regard to a number of considerations which were logically and rationally relevant to the question of whether or not to allow the adjournment and together provided an intelligible and evident justification for the decision. The Court found that it was only logical the concern not to keep an applicant in detention for longer than reasonably necessary was given greater weight where the delay may be extended.

22.2.8 The courts have, at times, applied the principles in *MIAC v Li* broadly. For example, in *Haque v MIBP*[67] the Court found the Tribunal acted unreasonably because it misunderstood the factual basis for the applicant's request for an adjournment. In *BVZ15 v MIBP*,[68] the decision to refuse an adjournment was held to be unreasonable because there was no discernible consideration of the applicant's circumstances which included being in detention and unable to read the primary decision or have had it translated to them. Although these are novel applications of the *MIAC v Li* principles, they do not broaden their scope.

22.2.9 The following cases are illustrations of how courts addressed Tribunal considerations of requests for postponements prior to *MIAC v Li.* These cases are consistent with the principles contained therein and reinforce that the question of whether the Tribunal has acted reasonably in refusing a request for an adjournment will depend on the particular facts and circumstances of a case.

- In *Manna v MIAC*,[69] the Court found the Tribunal did not err in deciding to refuse the applicant further time to submit an IELTS test. The Tribunal's decision record made it clear that it considered the circumstances surrounding the request for an extension of time. In the context of the applicant having submitted her application for a skilled visa over three years ago, and having booked and undertaken several language tests, it was reasonably open to the Tribunal to decide that it was not appropriate to delay its decision any further.

[64] *Hossain v MIBP* [2015] FCA at [25].
[65] *Chhetri v MIBP* [2015] FCCA 3101 at [12].
[66] *SZTVU v MIBP* [2015] FCA 1449 at [35].
[67] *Haque v MIBP* [2015] FFCA FCCA 1765.
[68] *BVZ15 v MIBP* [2016] FCCA 343 at [94]–[111].
[69] *Manna v MIAC* [2012] FMCA 28 at [59]. The judgment was upheld on appeal to the Federal Court in *Manna v MIAC* [2013] FCA 400 which, although decided immediately prior to *MIAC v Li*, appears consistent with the principles contained therein.

- In *Rahman v MIAC*,[70] the Court also found the Tribunal did not err in deciding to refuse the applicant further time to submit a skills assessment in circumstances where the Tribunal had already granted very lengthy periods of extension. The Court commented that the discretion in s 363(1)(b) to adjourn the review from time to time must be exercised consistently with the terms and objects of the legislation. It found that the Tribunal was entitled to consider that in order to comply with the requirement in the then s 353(1)[71] to make the decision quickly, which was as important as the other requirements in that provision, there would have to be an end to the continued extensions of time.[72]

- In contrast, the Court in *Ortiz v MIAC*,[73] was of the view that the Tribunal's failure to grant an adjournment was not fair and just in circumstances where the applicant was awaiting a determination of proceedings in the Family Court of Australia relating to the very type of parenting order which would enable him to meet the requirements of the Regulations. The Court found with regard to the then s 353(1) that the objective of providing a review mechanism that is 'fair, just, economical, informal and quick'[74] is cast in the conjunctive, not the disjunctive, and none is more important than the other. The Court held 'to decide a review application quickly to the detriment of doing so fairly and justly is to make no lawful decision at all'.[75]

- Further, in *MIAC v Tran*,[76] the Court found that the Tribunal could not have reasonably concluded that there would be any inordinate delay in the applicant providing the information that had been requested, and it must have understood that if it refused the adjournment the applicant would not have been able to satisfy all of the criteria for the visa. The Court's reasoning also suggests that when considering a request for adjournment it may be desirable to seek further relevant information from the applicant such as the length of time sought.

[70] *Rahman v MIAC* [2012] FMCA 334.
[71] ss 353 [pt 5] and 420 [pt 7 equivalent] were amended by *the* Amalgamation Act with effect on and from 1 July 2015. In its place, a new s 2A of the AAT Act now sets out the Tribunal's objective of providing a mechanism of review that is fair, just, economical, informal and quick.
[72] The judgment was upheld on appeal in *Rahman v MIAC* [2012] FCA 1312. See also *Thakore v MIBP* [2014] FCCA 2792 where the Court found that, in considering whether to exercise its discretion under s 363(1)(b) [s 427(1)(b)] to adjourn the review, it was justifiable for the Tribunal to consider whether the applicant had provided a reasonable explanation as to why he was unable to attend the scheduled hearing, in light of the then ss 353(1) and 420(1) [now s 2A(b) of the AAT Act] requirement that, in carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, and quick.
[73] *Ortiz v MIAC* [2011] FCA 1498.
[74] ss 353 [pt 5] and 420 [pt 7 equivalent] were amended by *the* Amalgamation Act with effect on and from 1 July 2015. In its place, a new s 2A of the AAT Act now sets out the Tribunal's objective of providing a mechanism of review that is fair, just, economical, informal and quick.
[75] Note however that *Ortiz v MIAC* [2011] FCA 1498 was considered more recently in *De Abreu v MIBP* [2017] FCCA 279 at [65]–[70] which similarly concerned the Tribunal's refusal of an application for an adjournment where the applicant claimed that a maintenance proceeding was underway. The Court held that the Tribunal was entitled to come to the view that the maintenance proceeding was commenced as a delay tactic and that it was far from certain that it would succeed. Distinguishing *Ortiz*, the Court held that the Tribunal was under no misconception about the purpose of the maintenance proceeding and the finding that it was a delay tactic was open to it, given the timing of the commencement of those proceedings and the statutory objectives.
[76] *MIAC v Tran* [2011] FCA 1445.

- In *SZQUP v MIAC*,[77] the Court commented on the Tribunal's lack of fairness in refusing a request for time to make submissions on country information discussed at hearing. The Court's comments echoed concerns about refusals of adjournments in cases such as *MIAC v Tran*[78] and *Ortiz v MIAC*,[79] however, in contrast to those cases, the Court did not find jurisdictional error.

Requests for postponement on medical grounds

22.2.10 If a postponement is sought due to the applicant's illness and a medical certificate is produced, while the certificate will be considered carefully, the Tribunal is not bound to postpone it simply because a certificate has been provided.[80] Where no medical certificate is provided, there will generally be nothing untoward or unreasonable about the Tribunal seeking medical evidence to substantiate a claim that an applicant cannot attend a hearing in a particular way for medical reasons.[81] Regardless of whether or not a medical certificate is provided, the Tribunal takes all relevant considerations into account in considering the exercise of its discretion.[82] The following cases illustrate the principle:

- In *Mohammad S Hossain v MIMA*,[83] a fax with an attached medical certificate stating that the applicant was suffering from bronchitis and fever, and was 'unfit for work' for three days, was received the day before the scheduled hearing. The Tribunal spoke to the applicant by phone and advised him that it intended to proceed with the hearing the next day at which time it would assess the applicant's ability to continue the hearing. The applicant said that he was still sick, that he could not come to the hearing and asked for a postponement. The applicant, who could speak English fluently, could not describe his symptoms in any detail and he told the Tribunal to speak to his doctor. The Tribunal telephoned the doctor who advised that the applicant was well enough to attend a hearing. The Tribunal telephoned the applicant's number twice that day and again the next morning, but was advised that the applicant was out. The applicant failed to appear at the hearing and did not contact the Tribunal. In the circumstances of this case, it was held by the Court that the Tribunal had not failed to invite the applicant to appear before the Tribunal to give evidence in accordance with s 425(1) and that the

[77] *SZQUP v MIAC* [2012] FMCA 276.
[78] *MIAC v Tran* [2011] FCA 1445.
[79] *Ortiz v MIAC* [2011] FCA 1498.
[80] *SZNLF v MIAC* [2009] FMCA 847 at [116]. In *Khan v MIAC* [2010] FMCA 383 at [30]–[31], the Court found no error in the Tribunal's decision to refuse a request for an adjournment in circumstances where two prior requests had been agreed to, the medical certificate stated that the applicant's condition 'may' prevent him attending a hearing, the Tribunal had indicated in writing its concerns to the applicant that the doctor's statement was not unequivocal, the applicant was aware that a hearing was proceeding and provided no further medical evidence.
[81] *Farook v MIAC* [2011] FMCA 940 at 47.
[82] For example, see *Khadka v MIBP* [2014] FCCA 1461 where the applicant had hand-delivered an adjournment request on the morning of the scheduled hearing claiming that he had a medical appointment that day and provided a referral letter from a doctor which stated he had presented with severe anxiety, depression, insomnia and stress. The Tribunal refused the postponement request as it was not satisfied he was unable to attend the hearing, especially as he had personally hand-delivered the postponement request. The Court found no error in the Tribunal's approach.
[83] *Mohammad S Hossain v MIMA* [2000] FCA 842. For further discussion of capacity to participate in a hearing, see *NAHF v MIMIA* [2002] FMCA 193 and *WAFS v MIMIA* [2002] FCAFC 287.

Tribunal was entitled to proceed to determine the review without taking further action to allow the applicant to appear before it.[84]

- In *SZUWM v MIBP*,[85] the applicant husband and wife's agent wrote to the Tribunal requesting the hearing be postponed because they were 'sick'. The request was accompanied by a medical letter for the wife that she had an appointment later that same day; and a separate medical letter for the husband that he was suffering from a 'medical condition' and would be unfit for 'normal work' for a period of three days. As the applicants' agent had authored the postponement request and invited the Tribunal to contact him with any questions, the Court found no error in the Tribunal requesting further medical information from their agent and not from the applicants or their doctors. Furthermore, as they had been repeatedly informed that if they did not appear the Tribunal may proceed to determine the application, they were not entitled to assume that the hearing had been adjourned in accordance with their request in the absence of notification from the Tribunal to that effect.

- In *MZXTA v MIAC*,[86] the Tribunal refused to grant a request for a further postponement on the basis that it had not received evidence from a qualified medical practitioner setting out the medical basis for the applicant being unfit to attend a hearing, what treatment he was receiving and the prognosis for his recovery. The applicant had provided a psychologist's report. However, the Tribunal found that the psychologist was not a medical practitioner and that the repeated failure to provide, and requests for more time to provide, the relevant medical information were delaying tactics. The Court held that this conclusion was properly open to the Tribunal and was not unreasonable. Furthermore, it found that there was no obligation on the Tribunal to embark on an open ended inquiry as to the fitness of the applicant to appear.

- In *Kaur v MIBP*,[87] the applicant advised she would not take part in the scheduled hearing because she was pregnant. The Tribunal responded that it would conduct the hearing by telephone, but that it would not postpone the hearing without medical evidence she was unable to participate in a telephone hearing of only a short duration. A medical certificate confirming her pregnancy and due date was provided, and she again sought an adjournment, however this was again refused. Whilst the applicant subsequently participated in the hearing by telephone, it was contended before the Court that she was in great pain during the hearing and unable to have dealt with her case. The Court found this case 'different to the decision in *Li*', finding no error in the Tribunal's exercise of its discretion to refuse the adjournment

[84] *Mohammad S Hossain v MIMA* [2000] FCA 842 at [23].
[85] *SZUWM v MIBP* [2016] FCA 92 at [34]–[38]).
[86] *MZXTA v MIAC* [2008] FMCA 1201 at [12].
[87] *Kaur v MIBP* [2014] FCCA 830 at [45]–[52]. Whilst the Court at [45] noted that the only relevant evidence which could have justified an adjournment would have been evidence that the applicant was in the process of obtaining documents, details or other evidence to confirm she had sat the appropriate English test in the two years prior to her visa application as cl 485.215 and reg 1.15C at that time required, the applicant never suggested she was in the position to obtain that evidence nor was it ever provided.

where the only medical evidence provided confirmed she was pregnant, not that she was in any way incapacitated.

- By way of contrast, in *Singh v MIAC*[88] the Court found the Tribunal breached s 360 of the Migration Act in circumstances where the hearing was initially adjourned as the applicant was medically unfit to appear and his agent had been called overseas on an emergency, but a further request for an adjournment with medical evidence was declined on the basis that the applicant had had ample time to find a new agent, and because the Tribunal was willing to conduct a '20 minute telephone hearing' with the applicant and no medical evidence had been provided that he was medically unfit for that purpose.

- In *SZOLM v MIAC*,[89] the Court, in determining whether the Tribunal had breached its procedural fairness obligations by requesting that the applicant provide a medical certificate over the Christmas period and on a day when the Tribunal would be closed, considered whether there had been any practical consequences flowing from the request. As there was no evidence that the applicant could not have obtained a medical certificate within the relevant period, the Court concluded that the deadline by which the applicant was required to submit the certificate was not so brief that he was denied an effective or adequate opportunity to put material before the Tribunal which it could have taken into account when exercising its discretion whether to adjourn.[90] The Court further held that the fairness of the period in which the certificate was to be supplied is to be tested by whether the applicant was denied a hearing, rather than by whether the Tribunal was open for business on a particular day.[91]

- In *MZAHI v MIBP*,[92] the Court found that an 'unfit for normal work' medical certificate was not an adequate justification for an adjournment in circumstances where the medical certificate did not indicate that the applicant would be unable to meaningfully participate in a hearing of a few hours.

22.2.11 If a postponement is refused and, upon commencement of the hearing there are indications that the applicant may not be fit to take part, the Tribunal considers the applicant's capacity to continue and assess whether he or she is in a position to do so bearing in mind the obligation to provide a 'real and meaningful' invitation. Where there are indications the applicant may not be in a position to properly give

[88] *Singh v MIAC* [2012] FMCA 634.
[89] *SZOLM v MIAC* [2011] FMCA 305.
[90] *SZOLM v MIAC* [2011] FMCA 305 at [74]–[75]. The Tribunal had rescheduled the applicant's hearing to 23 December 2008 following receipt of a medical certificate. On that day, the applicant's representative advised the Tribunal that the applicant was in hospital and unable to attend, and the Tribunal indicated that it would proceed to a decision if a medical certificate was not received by the end of 29 December 2008, a day on which the Tribunal office would be closed. The Court had regard to the fact that the applicant did not say that he could not get a medical certificate in the period specified.
[91] *SZOLM v MIAC* [2011] FMCA 305 at [76]. The question of deadlines which fall on a day when a registry is closed was also raised in *SZOXA v MIAC* [2011] FMCA 298 at [22]–[24] in relation to the filing of an application for judicial review over the Christmas period, but the Court did not find it necessary to resolve.
[92] *MZAHI v MIBP* [2015] FCCA 2708.

evidence and present arguments, the Tribunal may consider it appropriate to adjourn the hearing to a later date or time. The following cases are examples:

- In *Kalinoviene v MIAC*[93] the Tribunal rescheduled the hearing to take place three months later than originally planned due to the applicant's medical condition. The applicant requested a further adjournment which was refused in light of her circumstances and in the absence of any information that her son, also an applicant before the Tribunal, was unfit to attend the scheduled hearing. The applicant attended the hearing and after a short discussion, the Tribunal terminated the hearing as she was unfit to give evidence. The Court held it was open to the Tribunal to find the incapacity of the applicant was such that the review must take place without the benefit of further oral evidence from her. The Court concluded the Tribunal had power to proceed to make a decision without rescheduling a hearing in such circumstances and was not obliged to postpone completion of its review for so long as the applicant was unfit to participate in a hearing.

- In *SZRTY v MIAC,*[94] the Tribunal rescheduled the hearing so as to conduct it via telephone due to evidence that the applicant had had tuberculosis. The applicant confirmed he would attend via telephone, did not make any request to adjourn the hearing, attended the hearing via telephone and did not complain to the Tribunal that he was having any difficulties in presenting his evidence. The Court found that the evidence did not indicate that the applicant was unable to properly conduct himself.

22.2.12 The Tribunal's obligation by virtue of ss 360 and 425 to provide a 'real and meaningful' invitation to appear exists whether or not the Tribunal is aware of the actual circumstances that would defeat that obligation.[95] For further discussion, see Chapter 14 – Competency to give evidence in relation to Competency.

Requests for postponement on other grounds

22.2.13 An applicant may also request the hearing be postponed for non-medical reasons including, for example, that their representative of choice is unavailable or that they require more time to prepare for their case. The courts have confirmed that there is no general obligation to postpone or adjourn a hearing to enable a particular

[93] *Kalinoviene v MIAC* [2011] FMCA 760. An appeal from the judgment was dismissed: *Kalinoviene v MIAC* [2012] FCA 205.
[94] *SZRTY v MIAC* [2013] FCCA 696. Upheld on appeal: *SZRTY v MIBP* [2013] FCA 1170.
[95] In *MIMIA v SCAR* (2003) 128 FCR 553, the applicant produced before the Full Federal Court a psychologist's report that stated that the applicant's father had died four days before the Refugee Review Tribunal hearing and the applicant was not in a state fit to be interviewed. There was no evidence that the Tribunal was aware of the death of the applicant's father or the effect on the applicant. The Court held that s 425 imposes an objective requirement on the Tribunal and that the applicant did not receive a fair hearing as required by the Migration Act. There is little that a Tribunal could do in circumstances such as *SCAR*. The principle in *SCAR* is relevant where the Tribunal is completely unaware of circumstances that have affected the opportunity to give evidence and can be distinguished from circumstances where the Tribunal is aware of, and properly considers, a claimed inability to attend or participate in a hearing. See *SZLBE v MIAC* [2008] FCA 1789 where the applicant failed to attend the scheduled hearing and wrote requesting a further hearing claiming she was unwell on that day, but providing no medical evidence. The Tribunal did not accept the applicant's letter established she was unable to attend and proceeded to decision. Although the Court found on the evidence provided to it that the applicant was unfit to attend the hearing on the scheduled date, it held there was no failure to give a real or meaningful invitation as there was no miscarriage of the s 426A discretion and the Tribunal had properly considered the request to reschedule.

witness to appear. In *NBMB v MIAC*, the Federal Court confirmed that s 425 does not confer upon an applicant a unilateral right to secure an adjournment of proceedings so that some particular evidence of a witness is in fact available.[96] The Court held that so long as an applicant is given a meaningful opportunity to 'give evidence and present arguments', even if it is not the particular evidence which an applicant may prefer, there is no breach of s 425.[97] In *MIAC v Li*[98] however the plurality of the High Court found that it was necessary for the Tribunal to have considered whether the applicant considered she had presented her case, in the context of the statutory purpose of s 360, and erred in refusing her request where it did not appear to have done so.

22.2.14 Similarly, the Tribunal has no general obligation to postpone a hearing to enable the applicant to appear at a different place to that scheduled. The place at which an applicant is to appear is to be determined at the discretion of the Tribunal. However, in some cases, where an applicant has indicated that he or she is unable to appear at the scheduled place, for example, because of he or she is financially unable to travel, the Tribunal may consider the request and in particular whether an applicant would be denied a meaningful opportunity to present his or her case if the request is refused.[99]

22.3 Rescheduling a hearing

22.3.1 From time to time, the Tribunal may have to reschedule a hearing for its own reasons (for example, due to the unavailability of an interpreter or member).[100] Alternatively, a hearing may need to be rescheduled at the applicant's instigation. There is no impediment to the Tribunal rescheduling a hearing[101], although there

[96] *NBMB v MIAC* (2008) 100 ALD 118 at [22]; applied in *Burnett v MIAC* [2010] FMCA 61.
[97] *NBMB v MIAC* (2008) 100 ALD 118 at [22]. See also *Bandi v MIAC* [2010] FMCA 365 at [30]–[34], where the Court held that it was not unreasonable or irrational for the Tribunal not to have adjourned the hearing to enable an applicant to sit a further English test and it was open to the Tribunal to consider that the applicant had been given abundant opportunities to obtain successful test results.
[98] *MIAC v Li* (2013) 249 CLR 332 at [79].
[99] In *SZLLY v MIAC* (2009) 107 ALD 352, the applicants who lived in Griffith contacted the Tribunal on the evening before the hearing claiming they could not attend a hearing in Sydney because of financial hardship. They did not attend the hearing. The Tribunal did not accept that the cost of travel was a valid reason for rescheduling and organising a video hearing from Griffith but as the applicants wished to attend, a new hearing was scheduled in Sydney. On the day of the rescheduled hearing the applicants faxed the Tribunal stating that because of their financial position they were unable to attend the hearing. The Federal Court found that the Tribunal had failed to give the applicants a real and meaningful invitation to appear under s 425(1). Compare with *SZLJK v MIAC* [2008] FCA 1204, where the Tribunal offered the applicants a hearing by video link from Griffith police station. The Tribunal, in its written invitation, indicated that if a preference were expressed to attend a hearing in person in Sydney that could be arranged. No such request was made and the applicant claimed to have attended at the Tribunal's Sydney address. The applicant did not speak to any member of the Tribunal's staff that day in respect of his having attended by mistake at the wrong place nor did he make any contact with the Tribunal to draw to the Tribunal's attention the error which he had made in relation where the hearing was to be held. The Court found no error in the manner in which the Tribunal conducted its proceedings.
[100] In *SZJXP v MIAC* [2008] FCA 755, the applicant contended that the Tribunal Member should have adjourned the hearing because the Member was unwell. The Court found that no application was made by the applicant for the proceedings to be adjourned, no suggestion from the Member that it was necessary for the proceedings to be adjourned or stood over and no other evidence to suggest that the Tribunal Member was so unwell that he was not able to entertain the evidence and arguments being presented. All that the Member said was 'I have lost my voice'. The applicant was not denied an effective opportunity to be heard.
[101] In *SZQLJ v MIAC* [2011] FMCA 932 the Court was of the view that it was strongly arguable that the technical requirements of ss 425 and 425A applied with respect to an initial hearing invitation but not to a resumption. It noted that even if it was wrong, as the then RRT, unlike the then MRT, was not required to deny an applicant a hearing opportunity because of a non-provision of requested information, the Tribunal was entitled to proceed with a resumed hearing notwithstanding a failure by the applicant to provide requested medical information prior to the resumption of the hearing. An appeal from the judgment was dismissed: *SZQLJ v MIAC* [2012] FCA 456.

are considerations relating to the notification of the rescheduled time. These are discussed below.

Notification requirements for rescheduled hearings

22.3.2 Where a hearing is rescheduled, the Tribunal must comply with the Migration Act and its procedural fairness obligations to ensure that the applicant is given a proper opportunity to appear before the Tribunal to give evidence and present arguments.

22.3.3 There are however no statutory notification requirements for the *rescheduling* of a hearing. In *Ogawa v MIAC*, the Federal Court held a rescheduled hearing does not involve a fresh invitation for the purposes of s 360(1) [s 425(1)], and that as the prescribed period of notice was given in respect to the hearing initially scheduled to take place, it did not need to be again given in respect of a rescheduled hearing notice.[102] In that case, the Tribunal cancelled the scheduled hearing as the applicant was unfit to attend, it then rescheduled the hearing a considerable amount of time after the initial scheduled hearing, giving the applicant nine days' notice of the rescheduled hearing.

22.3.4 *Ogawa v MIAC* provides Federal Court authority in respect of the construction and application of ss 360A and 425A of the Migration Act and confirms the *obiter* comments of the Full Federal Court in *MIMIA v SZFML*,[103] which involved a rescheduled hearing that had been postponed at the instigation of the Tribunal due to difficulties in obtaining an interpreter. The Court found that rescheduling the hearing, to later that day or to another day, involved an implied incidental power akin to the power to adjourn a hearing, and therefore only reasonable notice needed be given. The Court observed that it was open for the Tribunal, in the conduct of a hearing, to adjourn it from time to time. Section 427(1)(b) [363(1)(b)] provided an express authority to adjourn a hearing, but in the Court's view there was also an implied incidental power to adjourn or reschedule the hearing to give practical effect to the Tribunal's obligation to provide a hearing.[104] Whilst the invitation to appear could be compromised by rescheduling the hearing to another date on 'unreasonably short notice', there was no requirement to apply the minimum prescribed period of notice prescribed for the purpose of s 425A [s 360A].[105] The Court noted that no distinction should be drawn between the rescheduling of a hearing at the applicant's request, and that done at the Tribunal's instigation.[106] The Court's refusal in *Ogawa v MIAC* to distinguish *SZFML* on the

[102] *Ogawa v MIAC* [2011] FCA 1358 at [31]–[35]. Special leave to appeal from this judgment to the High Court was refused: *Ogawa v MIAC* [2013] HCASL 33. See also *Mohammed v MICMSMA* [2021] FedCFamC2G 268 which applied *Ogawa* at [65].
[103] *MIMIA v SZFML* [2006] FCAFC 152.
[104] *MIMIA v SZFML* (2006) 154 FCR 572 at [7], [76]–[83].
[105] *MIMIA v SZFML* (2006) 154 FCR 572 at [82].
[106] *MIMIA v SZFML* (2006) 154 FCR 572 at [83]. Previously, it had been established that the Tribunal was not required to give the prescribed period of notice where the hearing was rescheduled at an applicant's request: *SZDQO v MIMIA* (2005) 144 FCR 251, *SZBAZ v MIMIA* [2004] FMCA 790, *SZEXB v MIMIA* [2005] FMCA 1771, *SZKTM v MIAC* [2008] FMCA 215 at [31], *SZHDC v MIAC* [2006] FMCA 133 at [24] and *SZLLY v MIAC* [2008] FMCA 1086 at [46]–[51], but was required where the Tribunal rescheduled the hearing of its own motion: see *SZFKF v MIMIA* [2005] FMCA 1152, followed in *SZCDH v MIMIA* [2006] FMCA 78; *SZEGU v MIMIA* [2005] FMCA 1023; *SZAZY v MIMIA (No 2)* [2005] FMCA 1635. Another distinction had also previously been drawn in the case law between the rescheduling of a hearing that had already commenced and the rescheduling of a hearing that was yet to commence. E.g. in *SZEFM v MIAC* [2006] FCA 78 the Tribunal rescheduled the video

facts is noteworthy - in *SZFML* the hearing was rescheduled on the eve of the hearing, whereas the rescheduling in this matter took place some considerable time after the initial scheduled hearing.

22.3.5 *SZFML* was also applied in *Hossain v MIAC*[107] which confirmed that the only implicit obligation upon the Tribunal is to give reasonable notice in the circumstances for rescheduled hearings and not deny an applicant the opportunity under s 360(1) or 425(1) to participate in the hearing in a real and meaningful manner. Accordingly, the Tribunal need not issue a new invitation specifying the full prescribed period provided the notification obligations under s 360A or 425A had been met in relation to the initial invitation. Further, the Court in *Mohammed v MICMSMA*[108] also followed *SZFML* and *Ogawa*, confirming that the Tribunal is not required to give the prescribed period of notice again where a hearing is rescheduled.

22.3.6 Even prior to *SZFML,* a similar approach had been adopted in several different contexts, including where the Tribunal rescheduled a hearing for a later time on the day specified in the initial hearing invitation. For example, in *SZCZX v MIMIA*,[109] prior to the scheduled hearing, the Tribunal wrote to the applicant rescheduling the hearing to a later time on the same day. The Court held that the failure to give the prescribed period of notice was not a jurisdictional error. Similarly, in *SZGUM v MIMA*, the Court found that the Tribunal had utilised its power to adjourn the hearing under s 427(1)(b) where the hearing was deferred to a time later on the same day, the applicant attended the subsequent hearing and did not complain about the change of time.[110] The Court found there was no evidence of any prejudice to the applicant and it would not be appropriate to grant relief.

22.3.7 In *SZEFM v MIMIA,*[111] the Tribunal rescheduled the video hearing after experiencing difficulties with video equipment. The Court held that as the second hearing date was an adjournment, pursuant to s 427(1)(b), there was no prescribed period for notification of the adjourned hearing date.

hearing after experiencing transmission difficulties. The Court held that as the second hearing date was an adjournment, pursuant to s 427(1)(b) there was no prescribed period for notification of the adjourned hearing date. Following *SZFML*, it appears this distinction is of little significance.

[107] *Hossain v MIAC* [2009] FMCA 1100 at [36]. See also *SZNSN v MIAC* [2009] FMCA 1193 at [23].

[108] *Mohammed v MICMSMA* [2021] FedCFamC2G 268 at [65]. The Court also stated that the prescribed period of notice is not required to be given again where a further hearing is required. However, this was in the context of the Tribunal rescheduling a hearing and not where it had concluded the hearing but at a later point decided another hearing is required. For discussion of requirements where a further hearing is required, see below.

[109] *SZCZX v MIMIA* [2006] FMCA 786.

[110] *SZGUM v MIMA* [2006] FMCA 1419.

[111] *SZEFM v MIMIA* [2006] FCA 78, which upheld the judgment of Nicholls FM in *SZEFM v MIMIA* [2005] FMCA 1351.

22.3.8 Where the hearing is not rescheduled (i.e. it is cancelled and the applicant informed they'll be given a new hearing date at a later time), it is likely to be considered a fresh hearing, particularly where there has been a long gap between the cancellation and the notification of the new hearing date. In such circumstances, a notice of invitation to hearing must allow for the prescribed notice period as required by ss 360A(4) and 425A(3). See Chapter 12 – Review of files and duty to invite the applicant to a hearing for information about the prescribed period.

'Reasonable' notice

22.3.9 In *Ogawa v MIAC,* the Federal Court held that although s 360A and 425A do not expressly impose any requirement as to the amount of time that is to be given in respect to a rescheduled hearing, it is implicit that reasonable notice is required.[112] The determination of what constitutes 'reasonable notice' involves an objective determination and any assessment must necessarily be made by reference to the facts and circumstances of each individual case.[113] The Federal Court in *Ogawa v MIAC* provided a non-exhaustive list of factors that may be relevant to an assessment of whether a period of notice is 'reasonable':[114]

- the period '*prescribed*' for the giving of notice in respect to any initial proposed hearing date;
- the complexity of any legal and factual issues to be canvassed at the rescheduled hearing;
- any opportunity previously extended to an applicant to assemble factual materials in support of any claims made and any opportunity to marshal such legal arguments in support of those claims;
- any need to obtain further materials or evidence that may not have been available in time for the initial scheduled hearing;
- whether the opportunity previously extended to an applicant to prepare any claim to be advanced was prejudiced or rendered nugatory for reasons peculiar to an applicant or by reason of changed circumstances;
- any assessment by the Tribunal member as to the adequacy of the period of notice given.

[112] *Ogawa v MIAC* [2011] FCA 1358 at [35]. Special leave to appeal from this judgment to the High Court was refused: *Ogawa v MIAC* [2013] HCASL 33. See also *Mohammed v MICMSMA* [2021] FedCFamC2G 268 which applied *Ogawa* at [66].
[113] In *SZQCQ v MIAC* [2011] FMCA 733 the applicant requested that his hearing scheduled for 14 February 2011 be rescheduled as he was receiving medical treatment from 7 February 2011 to 21 February 2011. The Tribunal wrote to the applicant on 18 February 2011 advising that it had agreed to the request and that the hearing had been rescheduled to 7 March 2011. The Court found the Tribunal did not fall into jurisdictional error in the manner in which it invited the applicant to a hearing and rescheduled the hearing. In the circumstances of this case, six days' notice of the adjourned hearing was a reasonable period of notice. This was upheld on appeal in *SZQCQ v MIAC* [2011] FCA 1385.
[114] *Ogawa v MIAC* [2011] FCA 1358 at [37]. This non-exhaustive list is a useful illustration of factors regarded as relevant on the facts of this case. Special leave to appeal from this judgment to the High Court was refused: *Ogawa v MIAC* [2013] HCASL 33.

22.3.10 The following cases provide examples of where the courts have considered the reasonability of the Tribunal's notice:

- In *Mohammed v MICMSMA*[115] the Court held that giving 13 days' notice was not unreasonably short. The Court reasoned that the first hearing invitation was provided to the applicant 23 days prior to the scheduled hearing, which exceeded the prescribed notice period. The second hearing invitation was then provided to the applicant one day short of the prescribed notice period and could not be considered unreasonably short.[116]

- In *SZSIW v MIAC*,[117] the Court rejected the applicant's argument that a hearing invitation which gave three days' notice, only two of which were business days, was unreasonable for that reason. While the Court observed that, 'as a general proposition, it was difficult to see many circumstances in which a period of three days would constitute reasonable notice', Nicholls J found that the three days' notice given was reasonable in the particular circumstances of that case, which included: the applicant having already attended a 3 ½ hour hearing which had only ended because the interpreter had another commitment; the applicant having been put on notice that she would receive a letter notifying her of the date of the resumption of the hearing and which she specifically asked the Tribunal to send to a particular address which she had provided at that time; and the applicant, in her own evidence to the Court, having not been 'diligent' in collecting letters from her preferred location notwithstanding there had been a previous resumed hearing invitation which she had also not collected but in relation to which she had subsequently contacted the Tribunal to request that it be rescheduled for a second time.

- In *SZHJK v MIAC,*[118] the applicant faxed a medical certificate to the Tribunal on the day of the scheduled hearing indicating he would be unfit for work until two days after the scheduled hearing. The Tribunal faxed a letter back to the applicant's adviser on the day of the scheduled hearing indicating that it had rescheduled the hearing to three days after the scheduled hearing. The Court found that by sending the notice of the rescheduled hearing by fax and setting the hearing for a time after the expiry of the dates on the medical certificate, the Tribunal provided the applicant with reasonable notice of the rescheduled hearing.[119]

[115] *Mohammed v MICMSMA* [2021] FedCFamC2G 268.
[116] *Mohammed v MICMSMA* [2021] FedCFamC2G 268 at [67].
[117] *SZSIW v MIAC* [2013] FCCA 499. Compare with *SZHDC v MIAC* [2008] HCATrans 355 however, which was remitted by consent following a concession by the Minister that the Tribunal did not provide reasonable notice of a rescheduled hearing. The applicant had faxed a medical certificate saying he was suffering from a viral infection on the day before the scheduled hearing date of 14 July 2005. The Tribunal postponed the hearing until 12pm on 20 July 2005 and advised him by express post on 15 July 2005. There were only two full business days between date of notice and date of hearing and the applicant did not check the post box until after the hearing date.
[118] *SZHJK v MIAC* [2007] FMCA 722.
[119] *SZHJK v MIAC* [2007] FMCA 722 at [19].

- In *BZAAA v MIAC*[120] a hearing had been scheduled to take place in Brisbane but the applicant mistakenly attended the Tribunal in Sydney. It was agreed between the Tribunal, the applicant's advisors and the applicant that the hearing would be rescheduled to take place in Brisbane the following day. The Court held that the fact that the applicant had engaged in and settled upon the rescheduled hearing date (and subsequently attended the hearing) evidenced the fact that the rescheduled date presented him with a real and meaningful invitation to attend, and as such the period of notice was reasonable.[121]

- In contrast, the Tribunal was found not to have given the applicant 'reasonable' notice of an adjourned hearing in *SZLPN v MIAC*.[122] In that case, it became clear after a hearing had commenced that the applicant spoke a different dialect to the interpreter and they were having trouble communicating. The Tribunal sought to adjourn the hearing until the next day to enable a new interpreter to be engaged. While the applicant was still at the Tribunal's premises, a Tribunal officer informed him, through a friend, of the new time and day for the hearing. The applicant did not attend the adjourned hearing. Upon applying for judicial review, the applicant claimed he had felt compelled to agree to the new time, his friend who translated for him was not available and there was nobody else who could help him travel to the hearing. The Court concluded that in the circumstances, including those known to the Tribunal as well as the subjective and other circumstances of the applicant unknown to the Tribunal, the adjourned hearing was not reasonably appointed. In view of the applicant's particular language and cultural barriers, a reasonable period would have been one which was sufficient to allow him to make arrangements to be accompanied by an appropriate assistant who could communicate with the Tribunal.

22.3.11 In situations where the Tribunal sends notice of a resumed hearing to the applicant by prepaid post, they will be deemed to have received it 7 working days after the date of the letter.[123] While it may generally be preferable for a hearing not to be rescheduled within that 7-day deemed receipt period, it may, in certain circumstances, still be considered reasonable to so having regard to all the circumstances of the particular case. If the Tribunal notifies the applicant orally, by hand or by fax, a shorter period may also be sufficient.

22.3.12 There is no statutory requirement that notice of a rescheduled hearing be given in writing.[124] However, the Tribunal will generally give notice in writing which ensures there is evidence of the notice. Provided the invitation is clear as to the time and

[120] *BZAAA v MIAC* [2011] FMCA 131.
[121] *BZAAA v MIAC* [2011] FMCA 131 at [16]–[19], upheld on appeal: *BZAAA v MIAC* [2011] FCA 447 at at [20]. In *SZOLM v MIAC* [2011] FMCA 305 the applicant was unable to attend the hearing for medical reasons and the Tribunal rescheduled the hearing to the following day. The applicant had given evidence that his failure to attend the adjourned hearing was because his agent had advised him not to. The Court commented at [64] that the rescheduling of a hearing to another date cannot be for an 'unreasonably short notice', but held that the short notice in this case did not deny the applicant an effective or adequate opportunity to attend the hearing, or cause him any prejudice, as the length of notice given by the Tribunal had nothing to do with the applicant's failure to attend.
[122] *SZLPN v MIAC* [2008] FMCA 1434.
[123] see ss 379C(4), 441C(4).
[124] *Hossain v MIAC* [2009] FMCA 1100 at [36].

place for a rescheduled hearing, an invitation may not be rendered ineffective by reason of an immaterial mistake in the content of that invitation.[125]

22.4 Inviting an applicant to a further hearing

22.4.1 Where the Tribunal has completed a hearing and at some later point in time schedules a further hearing, there may be some question as to whether the further hearing is an adjournment pursuant to s 363(1)(b) or 427(1)(b) or whether it is a fresh hearing requiring compliance with the notification obligations in ss 360A or 425A.

22.4.2 It cannot be said with certainty precisely when it is necessary to give the full period of notice for a further hearing. The proper characterisation of the further hearing will depend on the circumstances of the case and what occurred at the previous hearing. In some circumstances where there has been some break in the sequence of events following the Tribunal's original discharge of its obligation to invite the applicant to a hearing, the Tribunal may give the full prescribed period of notice.[126] Alternatively, where the Tribunal has closed the hearing with the advice that the 'matter is adjourned' (meaning the review is not completed) it is unlikely the full period of notice will be required if another hearing is scheduled.

22.4.3 The full period of notice is generally given in the case of further hearings scheduled after a matter has been remitted for reconsideration from the courts or where the Tribunal is otherwise reconstituted due to the unavailability of the original Member.

[125] *SZNSN v MIAC* [2009] FMCA 1193 at [19].
[126] See *SZFLT v MIMA* [2006] FMCA 1763 at [63]. Note that although this judgment post-dated the Full Federal Court decision in *MIMIA v SZFML* (2006) 154 FCR 572, Nicholls FM did not consider it.