FEDERAL MAGISTRATES COURT OF AUSTRALIA

SBWD v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 1156*

MIGRATION – Application for review of Refugee Review Tribunal – failure to give further hearing after issues of language and psychiatric difficulty not constituting jurisdictional error – Tribunal's misapprehension of "systematic" conduct as used in s.91R of the *Migration Act* a jurisdictional error.

Migration Act 1958, ss.91R , 414, 422B, 424, 424A, 425, 476, 477

Craig v The State of South Australia [1995] HCA 58
Plaintiff S157 of 2002 v Commonwealth of Australia (2003) 211 CLR 476
Lay Lat v Minister for Immigration and Multicultural Affairs [2006] FCAFC 61
Antipova v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 584
Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 221 CLR 1
Minister for Immigration v Haji Ibrahim (2000) 204 CLR 1
SJVD & Ors v Minister for Immigration & Anor [2007] FMCA 817

Applicant:	SBWD
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	ADG144 of 2006
Judgment of:	Lindsay FM
Hearing date:	10 July 2007
Date of Last Submission:	10 July 2007
Delivered at:	Adelaide
Delivered on:	20 July 2007

REPRESENTATION

Counsel for the Applicant:	Mr Ower
Solicitors for the Applicant:	Bourne Lawyers
Counsel for the Respondents:	Mr Tredrea
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) A writ of certiorari issue directed to the second respondent quashing the decision of the second respondent made on 27 April 2006 in matter N0653132.

(2) A writ of mandamus issue directed to the second respondent requiring the second respondent to determine according to law the review of the decision of the delegate of the first respondent dated 7 February 2006 in file reference CLF2005/78102.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT ADELAIDE

ADG144 of 2006

SBWD
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an Amended Application filed on 25 September 2006 in which the applicant seeks an order for review pursuant to s.476 of the *Migration Act 1958* (the "Act"). The application is in the usual "show cause" form prescribed by the Rules of the Court.

2. The application was brought within time (see s.477 of the Act).

3. The application seeks orders for review of a decision of the Refugee Review Tribunal (the "Tribunal") made on 26 April 2006. That decision was itself a review of a decision of the delegate of the Minister for Immigration and Citizenship to refuse the applicant a protection visa.

4. This is a matter that was argued before Federal Magistrate Morcombe on 20 October 2006 but which, because of that Federal Magistrate's illness, was to be re-heard by me. The re-hearing took place on 10 July 2007. By consent of the parties, through their legal representatives, the

transcript of the hearing before Federal Magistrate Morcombe was read into the evidence and each of the counsel adopted the submissions they had made before Federal Magistrate Morcombe and augmented them with further oral submissions.

5. Protection visas are granted to persons who satisfy the Minister that they are refugees to whom Australia owes obligations under the Refugee's Convention and Protocol. In this case the applicant, who is a citizen of Nigeria, says that he is at risk of persecution on account of his religious affiliation (Christian) and because he is a member of a Yoruba-based political group, O'Odua People's Congress (the "OPC").

6. The decision of the Tribunal is a privative clause decision according to s.474 of the Act and is final and conclusive unless it can be demonstrated to have been vitiated by jurisdictional error. Jurisdictional error is a concept best explained in the High Court decision *Craig v The State of South Australia* [1995] HCA 58. In the context of applications under the Act it is best explained in the High Court decision of *Plaintiff S157 of 2002 v Commonwealth of Australia* (2003) 211 CLR 476.

7. Because it bears a great deal of significance in relation to the applicant's arguments before the Court I set out s.425 of the Act:

> *(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.*
>
> *(2) Subsection (1) does not apply if:*
>
> *(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or*
>
> *(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or*
>
> *(c) subsection 424C(1) or (2) applies to the applicant.*
>
> *(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.*

8. The applicant gave evidence at the hearing before the Tribunal. He did so by way of video-link from the Baxter Detention Centre on 6 March 2006. He had a migration agent present and representing him at that hearing. He did not have an interpreter. During the oral hearing the Tribunal raised certain inconsistencies with the applicant between his account in the documents filed in support of his claim and in his oral evidence.

9. Pursuant to its obligations under s.424A of the Act, the Tribunal advised him in writing of the concerns it had.

10. The applicant's agent wrote to the Tribunal on 17 March 2006 to say that he was arranging for the applicant to see a psychiatrist and raised for the first time the possibility that the applicant was suffering from post-traumatic stress disorder. The applicant made further written submissions on 31 March 2006 and included a psychiatric assessment from a Dr Jureidini. That assessment is dated 24 March 2006. Dr Jureidini had interviewed the applicant by video-link on 24 March 2006. The report said that the applicant met the criteria for diagnosis of post-traumatic stress disorder and raised issues about whether the applicant's English-language skills were sufficient to enable him to engage the discussions necessary to promote his claim. The letter from the applicant's representatives of 31 March 2006 also enclosed a letter from Sister Anne Higgins, who was a chaplain at the Baxter Detention Centre. She was present with him at the oral hearing on 6 March 2006 (although her letter mistakenly, I assume, refers to her being present on 10 March 2006). She also raises questions about the applicant's abilities to speak and respond to questioning in English.

11. The adviser's letter of 31 March 2006 was the first time that the English language issue had been raised. The letter sought a further oral hearing before the Tribunal at which the applicant would have the assistance of a Yoruba interpreter.

12. The Tribunal refused the application for a further hearing (whether that be taken as a refusal to convene a second hearing or to extend the first hearing). In refusing that application the Tribunal noted that the applicant had no difficulty in speaking in English and responding to questions in English at the hearing on 6 March 2006, nor had the matter been raised in the applicant's previous dealings with

representatives of the Minister. The Tribunal formed the view that the relevant issues had been dealt with at the oral hearing and in the s.424A letter. The decision not to hold a further hearing was communicated to the applicant on 4 April 2006 and affirmed in the decision record. The Tribunal then went on in the decision record to refuse the application for review, essentially for credibility reasons. I do not propose to set out those reasons, save where they are relevant to the determination of the grounds raised in the Amended Application.

13. Federal Magistrate Morcombe received at the hearing conducted by him, over the objection of the Minister's legal representatives, an affidavit of the applicant's legal representative, which annexed a further report of Dr Jureidini, ie. one prepared for the purpose of the hearing before Federal Magistrate Morcombe, and an affidavit of Sister Higgins. Both counsel agreed that I should receive those affidavits in evidence before me.

14. The first ground of review alleges that the mental condition of the applicant as described by Dr Jureidini, coupled with his problems with English, meant that the Tribunal did not provide a real and meaningful invitation to the applicant in accordance with s.425 of the Act. Mr Ower, for the applicant, placed significant reliance upon the decision of the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v SCAR* (2003) 128 FCR 553. That was a case relating to an asylum seeker whose evidence at the oral hearing the Tribunal found to be vague and inconsistent. The Full Court says at [33]:

> *Pursuant to s.425 of the Act, the Tribunal is under a statutory obligation to issue an invitation to the applicant to attend a hearing. That indicates a legislative intention that an application is to have an opportunity to attend an oral hearing for the purpose of giving evidence and presenting argument. The invitation must not be a hollow shell or an empty gesture …*

15. Then at [37] examples of given where the Tribunal should be taken to not have complied with s.425 of the Act. The Full Court say:

> *They also include circumstances where the fact or event resulting in unfairness was not realised by the Tribunal. For example, circumstances such as where the applicant was invited to attend and did attend before the Tribunal, but was effectively precluded*

from taking part because he could not speak English and a translator was not provided or was inadequate.

16. The Full Court make it clear in that decision that a failure to comply with s.425 of the Act is a jurisdictional error. Ultimately the Court found that the Tribunal did not extend a meaningful invitation to the asylum seeker and that he did not receive the fair hearing required by the Act and so fell into jurisdictional error.

17. Mr Tredrea, for the first respondent, referring to *SCAR* as the high-water mark in terms of the obligations of the Tribunal in s.425 of the Act, sought to distinguish it from the case before us. I will come to those distinguishing features in a moment. He directed my attention to the invitation extended to the applicant. The invitation gave him the opportunity to ask for an interpreter, which he did not take up, and gave him an opportunity, which he did take up, to be accompanied by a solicitor and a friend. Neither the applicant nor his solicitor nor the friend raised any issue at the oral hearing as to the applicant's difficulties with language.

18. He then emphasised that the Tribunal, in fact, turned its mind to the question of whether a further hearing should be conducted (see CB at 132.8 - 133.3).

19. Mr Tredrea emphasises that the s.424A letter, which was forwarded by the Tribunal to the applicant, is an important indicator of whether or not a real hearing eventuated pursuant to the s.425 invitation. Absent from the facts of this case are the circumstances present in *SCAR* of the applicant being informed of the death of his father shortly before the hearing and his being unprepared for it. Mr Tredrea says that Dr Jureidini's assessment of the state of the applicant at the oral hearing falls well short of the serious handicaps described in *SCAR*. In Dr Jureidini's first letter (24 March 2006) he says this as to the applicant's own account of his state at the oral hearing:

> *The description of (the applicant's) experience in the interview is consistent with him having had a panic attack. Certainly he has significant anxiety symptoms but on the basis of the history available to me, I cannot be sure whether he has a panic disorder.*

20. Dr Jureidini's diagnosis of a post-traumatic stress disorder does not assist us in terms of an evaluation of the applicant's state of mind at the hearing. It is a diagnosis of his general condition.

21. Dr Jureidini's second report (annexed to Ms Eaton's affidavit) says this about the applicant's state at the hearing before the Tribunal:

> *I read the transcript of the RRT hearing of 10 March 2006.* (Again I think this should be a reference to 6 March 2006.) *Obviously a transcript does not communicate fully about Mr John's mental state during the tribunal* (sic). *I can find no evidence of his being in a state of panic during the RRT but because of the limitations of the transcript nor can I exclude it. The description in Sister Higgins' affidavit at point 10 is certainly consistent with the state of panic.* (Dr Jureidini is in fact referring to point 12 of Sister Higgins' affidavit).

22. The Full Court in *SCAR* made a great deal of what it regarded as the facts found by the primary judge that the asylum seeker in that case was (albeit unknown to the Tribunal) not in a fit state to represent himself and what it said was "unchallenged" (see [40]) evidence of the psychologist in the case that the asylum seeker was in no condition to "handle" the interview, by which was meant the oral hearing.

23. In this case the evidence is much more ambiguous. Nothing was put to the Tribunal at the oral hearing to indicate the applicant was labouring under any difficulty and there is nothing conclusive about Dr Jureidini's opinions based as they are upon the applicant's own account of his state at the hearing and his reading of the transcript and of Sister Higgins' affidavit. Sister Higgins' affidavit does not take the matter materially any further. I agree with Mr Tredrea that it is difficult to construe all we know of the circumstances of the oral hearing in a way which suggests that the applicant was not extended a meaningful invitation in terms of s.425 of the Act. His difficulties arising out of the oral hearing relate more to the Tribunal's rejection of his account rather than any inability or incapacity on his part to articulate it at the hearing.

24. I understand ground one of the application to be a "stand alone" point not bound up with the more general procedural fairness points made in grounds two and three. Those latter grounds have especial difficulties

in light of s.422B of the Act. Nevertheless, I am unable to find a jurisdictional error arising out of the way in which the Tribunal apprehended and discharged its obligations pursuant to s.425 of the Act.

25. Ground two alleges that the Tribunal acted in breach of the rules of natural justice by failing to grant the further (or as Mr Ower would prefer me to express it, the more extended) hearing. It is said that the Tribunal failed to give the applicant a reasonable opportunity to answer the matters raised in the applicant's agent's letter of 31 March 2006 and its enclosures.

26. The difficulty with any argument that relies on a denial of procedural fairness is the existence of s.422B of the Act. Section 422B(1) provides:

> *This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.*

27. Controversy attended, and to some extent still attends, the meaning of this section. The differing decisions of individual Justices of the Federal Court are set out in [61] of the judgment of the Full Court of the Federal Court in *Lay Lat v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 61. That same decision determines that s.51A of the Act and what the Court describes as the *"corresponding provisions of s.357A and s.422B"* (see [60]) were intended to provide comprehensive procedural codes which contained detailed provisions for procedural fairness but which exclude the common law natural justice hearing rule. The Court comes to that conclusion having regard especially to the Explanatory Memorandum and Second Reading Speech which introduced the relevant amendments to the Act.

28. True it is that the decision does not deal with s.422B specifically and regarded the intention to exclude the common law rule in the case of s.51A as "especially plain". It is also true that Gray J in *Antipova v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 584 makes trenchant criticism of the Full Court decision in *Lay Lat* and observed at [96] that the remarks as to the effect of ss.51A,

357A and 422B were *"clearly obiter"* because the Full Court had determined that there had been no denial of procedural fairness in the circumstances of that particular case.

29. But whether the reference to s.422B in *Lay Lat* is obiter dicta or not, it is a considered judgment of the Full Court of the Federal Court and requires my respectful consideration.

30. Mr Ower says if I am against him on his narrower s.425 point (and I am) that I could form the view that there is no provision in Division 4 which deals with the argument relating to mental illness and inability to properly participate in a hearing (and that therefore the exhaustive statement problem does not arise). But that approach was specifically rejected in *Lay Lat*. At [69] – [70] the Full Court say:

> *Counsel for the respondent submitted that the words "in relation to the matters it deals with" mean that the decision-maker must, in each case, consider whether there is an applicable common law rule of natural justice and then examine the provisions of subdivision AB to see whether it is expressly dealt with.*
>
> *We reject that submission. As was said in VXDC at [31], the decision-maker is likely to be a person without legal qualifications. Parliament could not have intended that "the uncertainties of the common law rules were in some unspecified way and to some unspecified extent, to survive".*

31. Mr Ower asked Federal Magistrate Morcombe, as he asks me, to deal with the procedural fairness argument before considering the implications relating to such an argument of s.422B of the Act in case the applicant wishes to agitate an attack upon *Lay Lat* in an appellate context. That is not, in the circumstances of this particular case, an invitation I propose to take up. In my view the argument founded on the procedural fairness submission is not one open to this Court to accept.

32. Ground three is an argument of a procedural fairness kind but one that is arguably dealt with by Division 4 of Part 7 of the Act. The suggestion is that the Tribunal failed in its duty pursuant to s.414 of the Act to conduct a review of the decision of the delegate of the Minister by not allowing further evidence and argument at a second or extended hearing to deal with the matters raised in the applicant's agent's letter

of 31 March 2006. Reliance for this argument was placed upon the decision of the High Court in *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1. *NAFF* was an unusual set of circumstances, the most critical of which was the circumstance of the Tribunal's statement at the conclusion of the oral hearing that it proposed to raise certain matters with the applicant to ask for further information and that it then failed to do so. As the High Court says at [43]:

> *The Tribunal member at one important stage had the impression that there might be a benefit for the applicant in the review as a whole in having a further opportunity to answer her questions in writing on the subject of detention; she never explained why that impression was wrong or whether it had changed; it is thus a likely inference that the impression was sound. Hence the applicant's deprivation of the Tribunal member of that opportunity is a breach of procedural fairness going to jurisdiction.*

33. Mr Ower candidly acknowledges that those indications of the Tribunal's subjective state of mind are absent from this case. This case is one that suggests that the Tribunal acted wrongly in ignoring the psychiatrist reports and the evidence of Sister Higgins in not granting a further or extended hearing. To the extent that the argument is simply a procedural fairness argument, see *Lay Lat*. To the extent that it specifically relies upon s.414 of the Act, I am not persuaded that by failing to take the view urged upon it by the applicant's agent as to the significance of the medical and other evidence constituted by all that was sent under cover of the letter of 31 March 2006 and granting a further or extended hearing, that the Tribunal fell into jurisdictional error. The Tribunal gives its reasons why it does not think that any purpose would be served in a subsequent hearing and they indicate that the matters relevant to the determination of the issue have been considered. It is not to the point to ask whether or not I would have come to a different view. Nothing said by the Tribunal in relation to this topic is indicative of it misunderstanding its obligations pursuant to s.414 of the Act.

34. We come to the last point agitated on behalf of the applicant (I say "last" because both before Federal Magistrate Morcombe and I, Mr Ower abandoned reliance upon ground five of the Amended

Application). This point relates to a passage to be found at the conclusion of that part of the Tribunal's reasons which deals with the issue of fear of persecution on the grounds of religion.

35. The Tribunal had this to say:

> *The Tribunal is satisfied that there is no concerted and systematic attempt by Nigerian Muslims as a whole to eliminate Christians. Indeed, some of the communal violence evident in recent years in some parts of Nigeria has been initiated by Christians. There is evidence that some senior Muslim clerics have joined with their Christian counterparts to appeal for peace or to work on committees aimed at ameliorating the situation. The Tribunal finds that religious violence in Nigeria is random and sporadic in nature and, therefore, not "systematic". Section 91R of the Act requires that, in order for harm to constitute "persecution", it must be systematic. Therefore, the religious violence that erupts from time to time, does not meet the definition of "persecution". Therefore, the applicant does not have a well-founded fear of persecution for reasons of his Christian religion.*

36. The complaint is that this demonstrates that the Tribunal has fallen into jurisdictional error in failing to properly understand its obligations pursuant to s.91R of the Act. That section provides that the relevant provisions of the Refugee's Convention and Protocol do not apply in relation to the persecution referred to therein unless:

> *(c) the persecution involves systematic and discriminatory conduct.*

37. The use of the expression 'systematic' in the context of decisions relating to Refugee Review Tribunal determinations was the subject of wide-ranging judicial consideration before the Act was amended to include s.91R in its present form for which see the discussion of the concept of systematic conduct in the decision of McHugh J in *Minister for Immigration v Haji Ibrahim* (2000) 204 CLR 1 at [88] – [101]. His Honour has this to say at [99] and [100]:

> *It is an error to suggest that the use of the expression "systematic conduct" in either* Murugasu *or* Chan *was intended to require, as a matter of law, that an applicant had to fear organised or methodical conduct, akin to the atrocities committed by the Nazis in the Second World War. Selective harassment, which discriminates against a person for a Convention reason, is*

> *inherent in the notion of persecution. Unsystematic or random acts are non-selective. It is therefore not a prerequisite to obtaining refugee status that a person fears being persecuted on a number of occasions or "must show a series of co-ordinated acts directed at him o her which can be said to be not isolated but systematic" [Mohamed v Minister for Immigration and Multicultural Affairs (1998) 83 FCR 234 at 242]. The fear of a single act of harm done for a Convention reason will satisfy the Convention definition of persecution [Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 at 430] if it is so oppressive that the individual cannot be expected to tolerate it so that refusal to return to the country of the applicant's nationality is the understandable choice of that person.*
>
> *Given the misunderstanding that has arisen from using the term "systematic conduct", it is probably better to refrain from using it in a Convention context. But if it is so used, those who use it should make it clear that they are referring to "non-random" acts; otherwise, they run the risk of making a legal error.*

38. All that it there said in understanding the use of the expression 'systematic' in the context of such applications remains pertinent to the consideration of the use of the same expression in s.91R.

39. Mr Ower says that it follows from this that because conduct is random in the sense that one could not predict where or when the persecution was going to occur or is sporadic or disorganised does not entail that it could not be systematic. This aspect of the matter is demonstrated by the decision of Cameron FM in *SJVD & Ors v Minister for Immigration & Anor* [2007] FMCA 817. In that case His Honour was dealing with a claim by a Bangladeshi citizen for asylum on the basis of political persecution on account of his membership of the BNP Party. The applicant had given an account of a single incident wherein he was riding home in a rickshaw through an area where an Awami League meeting had taken place and in which he and his wife were set upon by members of that League. The Tribunal had found that he was *"at the wrong place at the wrong time and the attack on him was an isolated incident"* and therefore not satisfied that the incident amounted to systematic and discriminatory conduct.

40. Although Cameron FM ultimately was not satisfied that the Tribunal erred in its assessment of whether the applicant was at risk of a real chance of suffering similar attacks in the future and found that the

Tribunal had not fallen into jurisdictional error, he found that it had fallen into an error in relation to this aspect of the matter. He said at [18]:

> *Although the event in question was fortuitous and, indeed, isolated, as the Minister has submitted, the conduct towards the applicant was not random or unsystematic in the sense of being non-selective. The fact that the applicant and his wife were in the wrong place at the wrong time, as the Tribunal described it, was a random chance but the treatment which was meted out to the applicant was not random. It was specifically directed towards him by his political opponents because he was their political opponent. To this extent, the Tribunal erred in finding that the conduct in question was not systematic and discriminatory.*

41. Mr Ower says that religious violence must always inferentially involve systematic treatment. I am not certain that I would go so far as to accede to that proposition but I am concerned about the way in which the Tribunal dealt with the issue of religious persecution. It should be borne in mind that the persecution complained of in this case is not state-sanctioned persecution but persecution that the state is unable to afford protection against.

42. In the passage cited above the Tribunal finds *"that religious violence in Nigeria is random and sporadic in nature and, therefore, not 'systematic'"*. What does the Tribunal mean when it uses the word 'random' in this context? It will be recalled that McHugh J in *Ibrahim* eschewed use of the expression 'systematic conduct' except if it is made clear that the reference is to 'non-random' acts; inferentially random acts can be taken to be non-systematic. But the discussion preceding that passage in *Ibrahim* makes it clear that His Honour was referring to non-random acts in the sense of non-selective acts: an act would be random if it was not deliberate or premeditated or intended. Is this the sense in which the Tribunal has used the word 'random'? Some clue is given in a passage that precedes the passage presently being examined at CB 135.5:

> *The Tribunal makes no findings on whether or not the applicant's uncle, at that man's family were killed in religious riots in Jos. It is entirely possible that this did occur but the Tribunal is satisfied that, if it did, it was as a result of random violence which is discussed in greater detail below.*

43. The "greater detail below" can only be the reference to the country information or to the passage presently subject to consideration. The only other passage which follows is one which deals with the state protection issue.

44. The applicant's account of the religious violence in Jos which he says led to the death of his family members appears at CB 124/125.

45. This suggests to me that the Tribunal is using the expression as a synonym for the other word it uses in the passage presently subject to consideration, ie. 'sporadic'. In this sense the Tribunal's characterisation of the religious violence in Nigeria as "random and sporadic" is, if not tautologous, then, at least, a pleonasm.

46. Mr Tredrea is concerned that we do not lose sight of the fact that in the relevant passage the Tribunal is not dealing with the applicant's specific situation but is discussing the concept of religious violence in Nigeria more generally. He emphasises the detailed consideration given at CB 134 – 135 to the claims of the applicant as to religious persecution. The applicant is specifically disbelieved as to what he says happened to him in Jos. Serious concerns arose at the oral hearing as to his knowledge of information expected to be common knowledge to Christians in Jos, concerns which were not allayed by the information convened to the Tribunal by a religious Sister, who wrote to the Tribunal on the applicant's behalf. These are important matters to bear in mind in evaluating this argument and I do so.

47. However, the concerns I have as to the Tribunal's evaluation of the nature of religious violence in Nigeria is amplified by the way in which the Tribunal seemed to think that its categorisation of the religious violence as "random and sporadic" (the former word being used in the sense we have discussed), *entailed* (my emphasis) a finding that religious violence "that erupts from time to time", does not meet the definition of persecution. The issue is dealt with by the Tribunal in a manner suggestive of syllogism: religious violence in Nigeria is random and sporadic; s.91R requires that the persecution be systematic; therefore the religious violence alleged cannot amount to Convention-related persecution and the application must fail. The problem is the first premise. Religious violence which erupts from time to time might yet be systematic. Perhaps the Tribunal would have

rejected the claim as to religious persecution in any event, without recourse to this faulty process of reasoning. If it had been avoided perhaps the credibility findings on this issue relating to the applicant would have led to a rejection of his claim as to persecution in any event. It is difficult to know, especially as the Tribunal has expressed itself with such emphasis and certitude in these concluding remarks on this topic of systematic conduct. The conclusion is one that the Tribunal regards as axiomatic and that cannot be right. If the Tribunal were not labouring under this misapprehension it presumably would have regarded it as important to make a finding as to whether the applicant's family members were killed during religious violence in Jos. From the Tribunal's point of view, presumably, this task was unnecessary because it was something that only arose "from time to time". This connotes an understanding of the word 'systematic' very close to the regular or methodical sense of the word identified in *Ibrahim* as erroneous.

48. This misapprehension can be taken, I infer, to have affected the Tribunal's consideration of the issue of state protection as well. In all of the circumstances but especially having regard to the manner in which the Tribunal has applied its understanding of s.91R of the Act, the error must be taken to be jurisdictional.

49. I would allow the review.

I certify that the preceding forty-nine (49) paragraphs are a true copy of the reasons for judgment of Lindsay FM

Associate: Ms N. Julius

Date: 20 July 2007