# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*MZXPO v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 1484*

MIGRATION – Refugee Review Tribunal – s.425 – whether applicant must be challenged orally for an issue to be adequately identified – whether issue can be identified by a s.424A letter issued by the Tribunal as previously constituted.

*Migration Act 1958*, ss.422, 424A, 425

*Abebe v Commonwealth of Australia* (1999) 197 CLR 510
*Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576
*Chey v Minister for Immigration and Citizenship* [2007] FCA 871
*Liu v Minister for Immigration & Multicultural Affairs* (2001) 113 FCR 541
*Re Ruddock; Ex parte Applicant S154/2002* (2003) 201 ALR 437
*SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs & Anor* (2006) 231 ALR 592
*SZBYR & Anor v Minister for Immigration and Citizenship & Anor* (2007) 235 ALR 609
*SZGGT v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 435
*WAIX v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 896

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| Applicant: | MZXPO |
| First Respondent: | MINISTER FOR IMMIGRATION & CITIZENSHIP |
| Second Respondent: | REFUGEE REVIEW TRIBUNAL |
| File number: | MLG 283 of 2007 |
| Judgment of: | Riley FM |
| Hearing date: | 21 August 2007 |
| Date of last submission: | 21 August 2007 |
| Delivered at: | Melbourne |
| Delivered on: | 6 September 2007 |

**REPRESENTATION**

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| Counsel for the Applicant: | Cam Truong |
| Solicitors for the Applicant: | Goz Chambers Lawyers |
| Counsel for the First Respondent: | Richard Knowles |
| Solicitors for the First Respondent: | DLA Phillips Fox |

**DECLARATION**

The decision of the second respondent made in matter 060581250 is unlawful, void and of no force and effect.

**ORDERS**

(1) There be an order in the nature of certiorari bringing in to court and quashing the decision of the second respondent in matter 060581250 handed down on 13 February 2007.

(2) There be an order in the nature of prohibition prohibiting the respondents from giving effect to that decision.

(3) There be an order in the nature of mandamus requiring the second respondent to rehear and determine, according to law, the applicant's application for review of the decision of the delegate of the first respondent that was made on 25 February 2005.

(4) The first respondent pay the applicant's costs fixed in the sum of $5,000.

# FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

## MLG 283 of 2007

**MZXPO**
Applicant

And

**MINISTER FOR IMMIGRATION & CITIZENSHIP**
First Respondent

**REFUGEE REVIEW TRIBUNAL**
Second Respondent

# REASONS FOR JUDGMENT

## Background

1. The applicant is a 31 year old male citizen of Nigeria. He arrived in Australia on 13 December 2003 and applied for a protection visa. A delegate of the first respondent refused the application. The Refugee Review Tribunal affirmed the delegate's decision. However, the Tribunal's original decision was set aside by consent. The Tribunal was reconstituted and again affirmed the delegate's decision. The applicant now seeks judicial review.

## Issues

2. The applicant says that the decision of the reconstituted Tribunal is invalid because:

a) contrary to s.425 of the *Migration Act 1958* ("the Act"), the applicant had not been alerted to four issues on which the decision turned; and

b) contrary to s.424A of the Act, he was not given notice of two items of information.

## Claims

3. The applicant said that:

a) he was born in Nigeria on 3 May 1976 of Igbo ethnicity;

b) while studying at university for his diploma of religion he was introduced by a friend to the Movement for the Actualisation of the Sovereign State of Biafra ("MASSOB");

c) he joined MASSOB in March 1999 and participated in a protest on 3 February 2003 at a market called Nkwo Nnewi;

d) he was one of 18 people who were arrested and tortured by the police;

e) they were released on the basis that they would report at Nkwo daily until charges were laid against them;

f) about a week after the protest, two of the people who had been arrested were shot dead by the police who claimed the protesters were armed robbers and about three days after that incident, two brothers were shot dead by fake armed robbers;

g) it was apparent that MASSOB members who were detained during the protest were being killed and the applicant's parents arranged for him to leave the country;

h) he went to Hong Kong in May 2003 but was unable to seek protection there as Hong Kong is not a signatory to the Refugee Convention; and

i) if he returned to Nigeria he would not be given a fair trial but would be killed mysteriously like his colleagues.

## The reconstituted Tribunal's decision

4. The Tribunal did not accept that the applicant was a truthful or credible witness. The Tribunal did not accept that the applicant was a member of MASSOB or had been involved in MASSOB activities. The Tribunal was not satisfied that the applicant had a well founded fear of persecution for any reason under the Refugee Convention.

## The s.425 grounds

5. The applicant's first ground as stated in the amended application filed on 23 August 2007 with leave after the hearing is that:

> *The Tribunal in arriving at the Tribunal's decision failed to comply with its obligations under section 425 of the* Migration Act *in that it did not identify to the applicant issues critical to the decision which was not apparent from its nature or the terms of the statute under which it was made and advise of any adverse conclusion which had been arrived at which was not obviously open on the known material and the failure to do so, constituted a jurisdictional error.*
>
> *PARTICULARS*
>
> *(b) The Tribunal did not challenge what the applicant said, express any reaction to what he said, or invite him to amplify on each of the following issues (i) the applicant's lack of knowledge of the MASSOB organization (ii) the genuineness of the MASSOB membership card (iii) why no charges were laid against the applicant when he was arrested in February 2003 or why he was released if he was of adverse interest to authorities (iii) The applicant's inconsistent evidence given to the delegate in relation to the number of persons allegedly killed by police following the protest in February 2003.*
>
> *(c) Each of the above issues was critical to the decision and led to adverse conclusions being arrived at which was not obviously open on the known material.*

6. This ground relies on the majority judgement in *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs & Anor* (2006) 231 ALR 592, particularly at paras.10, 11, 12, 26 to 36 and 43. In essence, the High Court said in *SZBEL* that the Tribunal's obligation under

s.425 of the Act to invite the applicant to give evidence and present argument on the issues arising in relation to the decision under review required that those issues be identified and disclosed to the applicant. The High Court said further that the issues would be adequately identified for the purposes of the review if they were identified in the delegate's reasons for decision.

## (a) Expectation the applicant would know more about MASSOB

7. The first issue the applicant said was not identified by the Tribunal was, "the applicant's lack of knowledge of the MASSOB organization". The reconstituted Tribunal said at page 22 of its decision that:

> *The applicant knew that the MASSOB organization is an organization which seeks to advocate an independent Biafran state by peaceful means and had some knowledge of its symbols and the name of its leaders. After reviewing the press reports from Nigeria I would expect that these are matters of common knowledge in Nigeria particularly in the south east states where MASSOB activities generally take place. However the applicant knew little of the detail which I would have expected if he had been an active member of MASSOB and had participated in its meetings or protest activities as claimed.*

8. There can be no doubt that one of the issues on which the reconstituted Tribunal's decision turned was that the applicant demonstrated less detailed knowledge of MASSOB than the Tribunal expected. However, this is a matter that the delegate also relied upon in her reasons for decision. At page 8 of those reasons, the delegate said:

> *The applicant's knowledge of MASSOB was vague and lacking important detail.*

9. Nevertheless, the applicant argued that the issue of the level of the applicant's knowledge of MASSOB had not been adequately raised because the delegate had not actually challenged the applicant about his level of knowledge during the interview with her. This argument was based on the notes of the delegate's interview with the applicant that appear at page 41 of the court book. However, the notes appear to only record the matters said by the applicant rather than the questions put by the delegate. I am not satisfied on the basis of the delegate's

notes, which is the only evidence relied upon, that the delegate did not actually challenge the applicant about the level of his knowledge of MASSOB.

10. In any event, in *SZBEL*, the High Court said at [36] that:

> *...unless the tribunal tells the applicant something different, the applicant would be entitled to assume that the reasons given by the delegate for refusing to grant the application will identify the issues that arise in relation to that decision.*

That is, subject to anything the Tribunal might say, the issues before the Tribunal are identified by the delegate's reasons for decision rather than by the matters that the delegate may or may not have questioned the applicant about. The delegate's reasons identified the applicant's lack of knowledge about MASSOB as an issue in the proceeding. Even if the delegate did not ask the applicant questions about the issue, it was an issue made clear in the delegate's reasons for decision. Accordingly, this ground is not made out.

## (b) The applicant's MASSOB membership card was fabricated

11. The second issue the applicant said was not identified by the Tribunal was, "the genuineness of the MASSOB membership card". The reconstituted Tribunal said at page 22 of its reasons for decision:

> *The applicant had provided a membership card dated 12 January 2003 and a photocopy of a letter dated 20 August 2006 said to be from a MASSOB leader stating that the applicant was a member of the organization. …*
>
> *The applicant attended a departmental interview on 17 February 2005. At the interview the delegate questioned the applicant about whether he had any evidence of membership of MASSOB. The applicant's advisor stated that the applicant had destroyed materials showing evidence of his membership but would try to get verification from MASSOB leadership as to his membership. After the interview the applicant provided the membership card dated 12 January 2003 and when it was put to him that this was inconsistent with earlier evidence he had given that he had destroyed his MASSOB material he claimed that his brother had found the card when searching through his belongings. The address given on the card was also inconsistent with earlier evidence given to the department and when this was put to him he*

> *claimed that the address was a communal address for zone identification. A later explanation given was that the address was only a transient address (less than 12 months) and the department did not ask for this information.*
>
> *I do not accept the explanation for the inconsistencies between the card and other evidence. I do not accept the card or copy of the card as evidence of the applicant's membership of MASSOB. I consider that after the department interview the applicant arranged to have a false card produced solely to support his claims of membership of MASSOB.*

12. It is clear that the Tribunal's view that the applicant's membership card was fabricated was part of its reason for affirming the delegate's decision. The membership card was not provided to the delegate. The applicant had told the delegate that he had destroyed all of his MASSOB documents so that he would not get into trouble when departing Nigeria.

13. However, the Tribunal as first constituted sent the applicant a letter dated 21 September 2005 which stated the following:

> *Either of matters (sic) discussed in the preceding two paragraphs could lead the Tribunal to doubt that the membership card, a copy of which was enclosed with your lawyer's letter of 14 September 2005, was genuinely issued to you by MASSOB. … [Some other matters] could lead the Tribunal to conclude that the card was not genuinely issued to you by MASSOB.*

14. The applicant responded with a statutory declaration made by him on 4 October 2005. He gave an explanation for the matters raised by the Tribunal which it did not accept. In its first decision, handed down on 1 November 2005, the Tribunal found at page 17 of its reasons for decision that the membership card had not been "genuinely issued to the applicant by MASSOB."

15. The hearing before the reconstituted Tribunal took place nearly a year later, on 28 August 2006. At page 27 of the transcript of that hearing, the following exchange occurred:

> *Tribunal: Okay. Did you have a membership card at MASSOB?*
>
> *Applicant: Certificate I have, which you've got.*

*Tribunal: You sent a copy to the Tribunal?*

*Applicant: Yes.*

16. Otherwise, the Tribunal does not appear to have dealt directly with the question of the membership card. However, at page 29 of the transcript, the Tribunal asked a number of times if the applicant thought that anything had not been covered at the hearing. Omitting the replies, the Tribunal said:

> *Is there anything else you wanted to tell me that you think we haven't covered in talking about your application? …*
>
> *What I mean is, is there anything then that we haven't covered today. Is there anything else that I haven't asked you about that you think is important? …*
>
> *Why don't we do this. Why don't I ask your adviser if there's anything he wants to put to me, and, while he is doing that, you can think if there's anything else?...*
>
> *Remember that the documents that you've submitted there have to be sent up in the mail. So if there's something you forget, you can perhaps talk to your adviser and he can send a fax up. …*
>
> *So if there's anything you think we have missed - all right? …*

17. After the hearing before the Tribunal on 28 August 2006, the Tribunal sent the applicant a letter dated 20 October 2006 under s.424A of the Act, inviting the applicant to comment on certain information, including information about the membership card, as follows:

> *Information given at the departmental interview held on 17 February 2005 suggests that you destroyed your MASSOB membership card before you left Nigeria. On 14 September 2005 you provided a MASSOB membership card with the date of issue as "12/1/2003" and endorsed with an address which was not consistent with the address given in your application for a protection visa.*

18. The Tribunal went on to say that the information:

> *...may indicate that you have fabricated evidence to strengthen your refugee claims. The Tribunal may form the view that you are not a truthful witness on some or all of the material aspects of your claims.*

19. The applicant argued that the post hearing invitation under s.424A of the Act did not satisfy the Tribunal's obligations under s.425 of the Act because the right to an oral hearing was superior to a right to give written comments. The applicant also argued that the Tribunal's invitation during the hearing to add anything else did not satisfy the Tribunal's obligation to formulate the issues and give a hearing on them. The applicant relied in this context on the decision of Kenny J in *Chey v Minister for Immigration and Citizenship* [2007] FCA 871 at [34] where her Honour said:

> *Further, I accept that appellant's submission that this defect was not cured by the Tribunal's addressing a general invitation to Mr Chey at the conclusion of the hearing to add anything further that might occur to him. The timing and context made it clear enough that the Tribunal was not inviting Mr Chey, through his interpreter, to give any further evidence. Moreover, unless the Tribunal had identified what it saw as the issues arising, there was nothing that the appellant might usefully add, either at or after the hearing.*

20. The applicant argued further that the identification of the issue of the fabrication of the membership card by the Tribunal as first constituted was irrelevant because its decision was invalid and it was as if the whole process before the first Tribunal had not existed. The applicant argued that the Tribunal was required to challenge the applicant's version of events during the hearing.

21. The first respondent argued that, although the Tribunal's first decision was held to be invalid, there was nevertheless only one Tribunal and its processes must be viewed as a whole. This was made clear, in the respondent's submission, by s.414 and s.415 of the Act which indicate that there is only a single review by the Tribunal regardless of whether there are two or more hearings or two or more Tribunal members sequentially involved in the review. The first respondent argued that the review of the delegate's decision by the Tribunal had been commenced but not completed until the Tribunal as reconstituted gave its decision.

22. The first respondent referred to the decision of Black CJ, Hill and Weinberg JJ in *Liu v Minister for Immigration & Multicultural Affairs* (2001) 113 FCR 541. In that case, the Tribunal member who had originally constituted the Tribunal conducted a hearing but resigned

before making a decision. The reconstituted Tribunal, without conducting a further hearing, relied on the record of the proceedings as conducted by the previously constituted Tribunal and affirmed the delegate's decision. The Full Court found that the reconstituted Tribunal's course of action was authorised by s.422 of the Act. That section provided that, if a member who constituted the Tribunal ceased to be available, the Principal Member must direct another member to constitute the Tribunal for the purpose of finishing the review, and, in that case:

> *...the Tribunal as constituted in accordance with the direction is to continue to finish the review and may, for that purpose, have regard to any record of the proceedings of the review made by the Tribunal as previously constituted.*

23. The Full Court in *Liu* said that, in the circumstances under consideration, the reconstituted Tribunal did not need to conduct a new hearing but could rely on the record of the Tribunal as previously constituted and said more particularly at [40]:

> *The phrase "continue to finish" simply requires the reconstituted Tribunal to undertake what remains to be done in the review without interrupting the process, while picking up and carrying on the steps that have already been taken.*

24. The first respondent also relied upon the decision of Nicholson J in *WAIX v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 896. At [24], his Honour said that the setting aside of a conviction meant that it was void *ab initio*, but that was not the case in relation to a tribunal decision. At [25], his Honour said that the setting aside of a Tribunal decision did not affect the reasons for that decision, and a subsequent Tribunal could have regard to those reasons and the account of the applicant's claims that they contained.

25. The first respondent argued that the Tribunal was not required to challenge the applicant during the course of the hearing on each issue, and referred to [187] of *Abebe v Commonwealth of Australia* (1999) 197 CLR 510 where it was said that Tribunal proceedings are inquisitorial and the Tribunal is not a contradictor. Rather, it is for the applicant to advance whatever case he wishes.

26. Additionally, the first respondent relied on [58] of *Re Ruddock; Ex parte Applicant S154/2002* (2003) 201 ALR 437, where Gummow and Heydon JJ, with whom Gleeson CJ agreed, said that the Tribunal was not required "to have pressed the prosecutrix more than it did about the rape claim". Their Honours said an inquisitorial Tribunal hearing did not require the "detailed and forceful style of questioning" often used in cross examination in criminal proceedings and did not require the Tribunal to "prompt and stimulate an elaboration which the applicant chooses not to embark on."

27. In my view, based on *Liu* and *WAIX*, the invalidity of the first decision made by the Tribunal did not invalidate the whole process undertaken by the Tribunal from the time the application was made to it until the time its first decision was handed down. On the contrary, the notice sent by the Tribunal on 21 September 2005 effectively and validly alerted the applicant to the issue of whether his MASSOB membership card was a fabrication. That notice was received by the applicant and he responded to it long before the hearing before the reconstituted Tribunal occurred. There can be no doubt that the applicant was put on notice by the Tribunal that an issue in the proceeding was whether his MASSOB membership card was a fabrication.

28. The applicant's argument that it was necessary for the Tribunal to actually question and challenge the applicant about the genuineness of the membership card in the course of the second Tribunal hearing was based on the statement at [43] of *SZBEL* that:

> *The Tribunal did not challenge what the appellant said. It did not say anything to him that would have revealed to him that these were live issues.*

29. However, immediately before that statement, the High Court said:

> *...the Tribunal did not identify these aspects of his account as important issues.*

30. I understand the decision in *SZBEL* to require 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.

31. It is true that an opportunity to give oral evidence is in many respects superior to an opportunity to give written evidence. However, the applicant was asked repeatedly towards the end of the second hearing before the Tribunal whether he considered that all of the issues had been covered and whether there were any other matters that he wanted to address. This case is distiguishable from *Chey*, because, in the present matter, the Tribunal had in fact alerted the applicant to the relevant issue before the hearing.

32. It is well established that it is not for the Tribunal to make out an applicant's case for him. Provided that the Tribunal has identified the issues arising on the review, it is for the applicant to advance whatever evidence or argument he wishes in support of his claim: *Abebe*. It is not necessary for the Tribunal to put matters to an applicant in the style of a cross examination: *Applicant S154/2002* at [55] to [58].

33. In my view, the Tribunal's letter of 21 September 2005 adequately alerted the applicant to the issue of whether his membership card was genuine or fabricated and it was then for the applicant to say what he wished about the matter. The Tribunal during the second hearing gave the applicant a number of opportunities to address any other matters that he wished. In the circumstances, the ground is not made out.

## (c) The lack of charges

34. The third issue the applicant says he was not alerted to was, "why no charges were laid against the applicant when he was arrested in February 2003 or why he was released if he was of adverse interest to authorities".

35. The delegate and the Tribunal as first constituted both relied on the fact that there were no media reports of the alleged protest on 3 February 2003 to disbelieve the applicant's claims to have been a member of MASSOB and arrested following a protest. However, the reconstituted Tribunal said at page 23 of its decision:

> *… I do accept that it is possible that some incidents may not be reported for a variety of reasons unrelated to deliberate suppression of particular content. Therefore, I do not consider that the absence of a report is significant, on its own, however*

*when taken with the other problems that I have identified with the applicant's evidence I consider it supports my finding that the applicant was not involved in a protest activity in Nnewi on 3 February 2003.*

*I also found that the applicant's account of what occurred after he claimed he was arrested was implausible. Despite claiming that he had been arrested by Nigerian police and mistreated in detention after a MASSOB protest he stated that he was released after 24 hours and asked to report on a daily (or weekly) basis although no charges were ever laid against him. He did not explain why no charges were laid against him at the time of the arrest or why he was released if he was of adverse interest to authorities. Further he claimed that after this incident he remained living at his home in Nnewi for about 3 months before he left Nigeria even though he had obtained a passport without restriction in August 2002, had organized employment in Hong Kong in November 2002 and obtained authority to enter Hong Kong in March 2003.*

36. The presently relevant aspect of the applicant's account that the Tribunal found implausible was that he claimed to be of continuing interest to the authorities even though he was released 24 hours after his arrest and no charges were ever laid against him. In saying that the applicant had not explained these matters, the Tribunal was simply recording that as a fact. However, the passage highlights that, if the issue had been drawn to his attention, the applicant might have been able to explain why he thought he was still of interest to the authorities.

37. The delegate did not rely on the absence of charges as a reason for rejecting the protection visa application. Rather, in forming the view that the applicant was not a member of MASSOB and had not participated in any protests, the delegate relied on:

a) the fact that the alleged protest in February 2003 was not reported in the Nigerian media;

b) the applicant's knowledge of MASSOB being vague and lacking in important detail;

c) the inconsistencies about how often the applicant had to report to the police; and

d) the fact that the applicant continued to reside at his usual address.

38. The issue of the implausibility of the applicant continuing to be of interest to the authorities even though he was released after 24 hours and not charged was not included in any of the letters sent by the Tribunal to the applicant. Those letters were sent prior to the hearing before the reconstituted Tribunal on 10 August 2005, 31 August 2005 and 21 September 2005 and after that hearing, on 20 October 2006.

39. Nor did the Tribunal as first constituted allude to that issue. The Tribunal as first constituted did not conduct an oral hearing. In its reasons for decision, the Tribunal, as first constituted relied on:

a) the membership card not being genuine;

b) inconsistencies in the number of people allegedly killed by the police;

c) the absence of independent evidence confirming that there was a protest in Nnewi in February 2003; and

d) the fact that the applicant had actively been seeking to travel to Hong Kong as early as 1 November 2002.

40. At the hearing before the reconstituted Tribunal, the following exchange occurred:

*Tribunal: And were charges ever laid against you?*

*Applicant: Not really, because I escaped.*

*Tribunal: So when ---*

*Applicant: After – sorry?*

*Tribunal: Where did you escape to?*

*Applicant: I escaped to Hong Kong.*

41. When the applicant was asked if charges had been laid against him he offered an explanation for no charges being laid. That explanation was that he had escaped to Hong Kong. The applicant did not go to Hong Kong until about three months after his alleged arrest in February 2003. However, as the Tribunal noted, the applicant "did not explain why no charges were laid against him **at the time of the arrest** or why he was released if he was of adverse interest to the authorities."

(emphasis added) The fact that the applicant was released after 24 hours without charge but still claimed that he was of interest to the authorities remained an issue for the Tribunal.

42. The applicant argued that the Tribunal as reconstituted relied on the lack of charges. The applicant noted that the Tribunal as reconstituted had not, unlike the delegate and the earlier Tribunal, relied largely on the absence of media reports. The applicant said that the transcript showed that the lack of charges had not been addressed in a way that alerted the applicant to the lack of charges being an issue. The applicant referred to [43] of *SZBEL* where the High Court noted that the Tribunal in that case had not challenged what the appellant said. The applicant pointed out that findings of implausibility were at the heart of the decision in *SZBEL*. The applicant argued that the lack of charges was part of the Tribunal's reason for decision. The applicant argued that the decision rested on an unstated assumption that people who are arrested ought to be charged. In the applicant's submission, the Tribunal considered that the absence of charges was an issue and the Tribunal should have asked the applicant to explain that circumstance.

43. The first respondent in written submissions on this issue said that:

> *[4.26] The applicant was clearly on notice that his knowledge of MASSOB was a matter relevant to the Tribunal's assessment of the credibility of his claimed membership or involvement with the organisation.*
>
> *[4.27] He was also on notice that his account of events following his claimed arrest was likely to be the subject of the Tribunal's scrutiny.*
>
> *[4.28] The applicant complains that, without warning him, the Tribunal reached an adverse assessment of his evidence that, after his arrest, he was released without charge [see CB 270.9]. This was not "an issue" as that term is used in subsection 425(1) of the Act. This was merely an aspect of the applicant's evidence about events after his claimed arrest that the Tribunal found he had not satisfactorily explained. The Tribunal was not required to make the applicant's case for him. [Footnote:* Abebe v Commonwealth *(1999) 197 CLR 510 at [187].]*

> *[4.29] In any event, the applicant was clearly aware that the Tribunal had doubts that he had ever been arrested in connection with MASSOB activities [see, for example, CB 165-166].*
>
> *[4.30] Even if the Tribunal did not put to the applicant its concerns about this aspect of his evidence (which the first respondent does not concede)[footnote omitted] it could not have affected the Tribunal's decision because it had already found that he was not a MASSOB member or supporter and had not been involved in a protest on 3 February 2003 leading to his arrest.*
>
> *[4.31] In this regard, it is important to recall that the delegate had not found that she was not satisfied the applicant had "participated in protests as he claims". The Tribunal's assessment of the applicant's evidence does not therefore constitute any significant departure from the issues arising in relation to the delegate's decision.*

44. The first respondent argued in oral submissions that the applicant was well and truly on notice that his credibility was in issue, that his membership of MASSOB was in issue and that his participation in protests was in issue. The first respondent argued that the Tribunal was not satisfied that the applicant had participated in the alleged protest on 3 February 2003 and that this finding made it unnecessary for the Tribunal to make any statement at all about the absence of charges arising from the alleged protest. The first respondent argued that the applicant was inviting the court to analyse the Tribunal's reasons with an eye keenly attuned to error. The first respondent also argued that in *SZBEL*, the issues under consideration were at a higher level of generality than the supposed issue relied on in the present case. The first respondent said that in *SZBEL*, the High Court gave nationality as an example of an issue, whereas, in the present case, the applicant relied on a detail of evidence.

45. In my view, the applicant was not given any notice that the Tribunal might not believe that he was not a member or supporter of MASSOB for the reason that he was released without charge. Merely asking whether the applicant had been charged did not alert the applicant to the view the Tribunal might take of that fact. In terms of *Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, the view the Tribunal might take of the absence of charges was not obvious

in circumstances where neither the delegate nor the Tribunal as first constituted had made any mention of the absence of charges.

46. I do not accept the first respondent's submission that the Tribunal's statement about the lack of charges was a throw away line that the Tribunal did not need to mention as it had already decided that the applicant did not participate in the alleged protest on 3 February 2003. In the first full paragraph at page 23 of its reasons, the Tribunal said that it did not accept that the applicant was a member or supporter of MASSOB. The Tribunal then went on to give its reasons for that conclusion.

47. The first reason was that the applicant's evidence about the protest lacked detail. The Tribunal then considered whether the lack of references in the media to the protest on 3 February 2003 would lead it to conclude that the protest did not occur. In the passages set out at paragraph 35 above, the Tribunal considered that there could be various reasons for a protest not being mentioned in the media and concluded that the absence of media references by itself was not significant. However, the Tribunal went on to say that the absence of media references to the alleged protest, "when taken with the other problems I have identified with the applicant's evidence … supports my finding that the applicant was not involved in a protest activity in Nnewi on 3 February 2003." The Tribunal then turned to the problems it had identified in the applicant's evidence. They were the alleged arrest and release without charge and the fact that the applicant had organised employment in Hong Kong in November 2002, and had authority to enter Hong Kong in March 2003, but did not leave Nigeria until May 2003.

48. In these circumstances, it cannot be said that the absence of charges was not part of the reason for decision and it cannot be said that the Tribunal had already separately decided that the applicant was not a member or supporter of MASSOB. The absence of charges was one of the reasons the Tribunal gave for not accepting that the applicant was a member or supporter of MASSOB.

49. I do not accept the first respondent's argument that the absence of charges was not an issue within the meaning of s.425 of the Act but merely an item of evidence. This argument is reminiscent of the

distinction that is sometimes drawn between the integers of a claim and the evidence in support of the integers of a claim. However, in my view, there is no parallel. I note that the High Court in *SZBEL* at [37] gave nationality as an example of an issue within the meaning of s.425 of the Act. However, the particular issues that the High Court said the Tribunal in *SZBEL* had failed to notify the applicant of were issues that arose in the intricate detail of the applicant's account. Accordingly, there is no reason to suppose that an issue within the meaning of s.425 of the Act must be a matter as major and fundamental as nationality.

50. Whether a matter is an issue within the meaning of s.425 depends on whether the decision turned in part or in whole on that matter. In the present case, the Tribunal's reasons for not believing the applicant was a member or supporter of MASSOB turned in part on the absence of charges. Accordingly, the absence of charges was an issue within the meaning of s.425 of the Act.

51. I do not accept the first respondent's argument that it was sufficient that the applicant was on notice that the Tribunal might not accept that he was a member of MASSOB or that he had participated in a protest. The Tribunal gave particular reasons for not accepting these claims and it was those reasons that identified the issues within the meaning of s.425 of the Act.

52. In relation to the first respondent's reference to the s.424A letter dated 20 October 2006 that appears at court book 165 to 166, I note that this letter was sent after the Tribunal hearing. Accordingly, it was incapable of alerting the applicant to the issue of the absence of charges prior to the oral hearing. However, I do not need to decide whether a post hearing s.424A letter satisfies s.425 because the letter did not mention the absence of charges.

53. For these reasons, in my view, the Tribunal failed to alert the applicant to an issue on which the decision turned. The Tribunal thus failed to comply with s.425 of the Act and accordingly fell into jurisdictional error.

## (d) The inconsistent evidence about numbers killed

54. The fourth issue the applicant says he was not alerted to was, "the applicant's inconsistent evidence given to the delegate in relation to the number of persons allegedly killed by police following the protest in February 2003".

55. The reconstituted Tribunal said at page 24 of its decision:

> *The applicant gave inconsistent evidence in his written statement to the department and at departmental interview. The inconsistencies could be explainable by a misunderstanding of the question asked at interview or a misunderstanding of the answers. However when taken together with the other difficulties in the information provided by the applicant I consider that the inconsistencies support my finding that the applicant has not given truthful evidence on material aspects of his claim. At hearing and in his written statement the applicant claimed that he was required to report daily to the police pending anticipated charges to be laid against him. In his interview with the delegate he claimed that he was required to report once a week. He also gave inconsistent evidence on the number of persons allegedly killed by police following the protest in February 2003.*

56. In the delegate's reasons for decision, nothing was said about any inconsistency in the number of people allegedly killed following the protest in February 2003. However, in a s.424A letter dated 31 August 2005, the Tribunal said:

> *Your oral evidence to the Department on 17 February 2005 was not entirely consistent with your written claims. For example, in your oral evidence, you said that one person was killed on the way to report to police, whereas, in your statutory declaration, you said two were killed. … These contradictions could lead to Tribunal to conclude that your claims do not represent your actual experiences ….*

57. At page 17 of its reasons for decision, the Tribunal as first constituted noted that inconsistency, and at page 18, relied on the inconsistency as part of the reason for not accepting that there was a protest in Nnewi on 3 February 2003.

58. However, during the hearing before it, the reconstituted Tribunal did not mention the discrepancy in the claims about the number of people

killed. On this basis, the applicant argued that the applicant was not notified that the discrepancy in the number of people allegedly killed was an issue for the reconstituted Tribunal.

59. In my view, for the reasons previously given, the identification of the inconsistency as an issue in the s.424A letter dated 31 August 2005 was sufficient to alert the applicant to the issue. There is only one Tribunal and notice given by the Tribunal as it was previously constituted carries over to the reconstituted Tribunal. Accordingly, this ground is not made out.

## The s.424A grounds

60. The second ground of review in the amended application filed on 23 August 2007 is:

> *The Tribunal in arriving at the Tribunal's decision failed to afford procedural fairness to the applicant in that it did not provide the applicant with information required under section 424A of the* Migration Act, *and the failure to do so, constituted a jurisdictional error.*
>
> *PARTICULARS*
>
> *(a) The Tribunal did not provide the applicant with the following information prior to the hearing or prior to the Tribunal's decision being handed down: (i) the applicant's lack of knowledge about the MASSOB organization (**the lack of knowledge information**); (ii) information concerning why no charges were laid against the applicant at the time of his arrest in February 2003 (**the lack of charges information**);*
>
> *(b) Each of the lack of knowledge information and the lack of charges information would be the reason, or part of a reason, for affirming the decision under review.*
>
> *(c) Neither the lack of knowledge information nor the lack of charges information was provided by the applicant to the Tribunal for the purposes of falling in one of the exceptions in section 424A(3).*

61. With certain exceptions, s.424A of the Act requires the Tribunal to give the applicant particulars of any information that the Tribunal considers

would be the reason, or a part of the reason, for affirming the decision that is under review.

62. The applicant relied on the decision of Rares J in *SZGGT v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 435 to say that an omission can be information within the meaning of s.424A. However, that case was dealing with a different point, namely, the failure of an applicant to mention at an early stage a claim that is made at a later stage.

63. The first respondent relied on the High Court's decision in *SZBYR & Anor v Minister for Immigration and Citizenship & Anor* (2007) 235 ALR 609 at [18] where it was said that:

> ... *Finn and Stone JJ correctly observed in* VAF v Minister for Immigration and Multicultural and Indigenous Affairs *that the word "information" [Footnote omitted]*
>
> > does not encompass the tribunal's subjective appraisals, thought processes or determinations ... nor does it extend to identified gaps, defects or lack of detail or specificity in evidence or to conclusions arrived at by the tribunal in weighing up the evidence by reference to those gaps, etc.

64. In view of that authority, it cannot be said that the lack of detail or the lack of an explanation constitutes information within the meaning of s.424A. These are clearly matters that fall within the notion of "identified gaps … or lack of detail or specificity in evidence". Accordingly, this ground is not made out.

## Conclusion

65. As one of the grounds in this case has been made out, and as there are no discretionary considerations to the contrary, the application must be allowed with costs.

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**I certify that the preceding sixty-five (65) paragraphs are a true copy of the reasons for judgment of Riley FM**

Associate: Melissa Gangemi

Date: 6 September 2007