FEDERAL MAGISTRATES COURT OF AUSTRALIA

NAGG OF 2002 v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 84*

MIGRATION – Review of decision by Refugee Review Tribunal – whether the Tribunal had regard to information that was part of the reason for affirming the decision under review being information that was not excluded from the obligations of s.424A(1) of the *Migration Act 1958* (Cth) – whether the applicant's delay of more than three years in seeking constitutional writ relief in respect of the decision of the decision of the Refugee Review Tribunal is unwarrantable.

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.417; 424A(1); 477; pt.8 div.2

Craig v South Australia (1995) 184 CLR 163
SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 2
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 24
R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust.) Ltd (1949) 78 CLR 389
Re Commonwealth of Australia; Ex parte Marks (2000) 177 ALR 491
Applicants M160/2003 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) FCA 195
Applicant A2 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2003) FCA 576
Applicant M29 of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs (2003) FCA 1266
M211 of 2003 v Refugee Review Tribunal [2004] FCAFC 293
SZGPZ v Minister for Immigration and Multicultural Affairs [2006] FCA 683

Applicant:	APPLICANT NAGG OF 2002
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	SYG1949 of 2005

Judgment of:	Emmett FM
Hearing date:	17 November 2006
Date of last submission:	17 November 2006
Delivered at:	Sydney
Delivered on:	16 February 2007

REPRESENTATION

The Applicant appearing on her own behalf

Counsel for the Respondent:	Mr J. Smith
Solicitors for the Respondent:	Mr I. Muthalib, Blake Dawson Waldron

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG1949 of 2005

APPLICANT NAGG OF 2002
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Part 8 Division 2 of the *Migration Act 1958* (Cth) ("**the Act**") for judicial review of a decision of the Refugee Review Tribunal ("**the Tribunal**") dated 4 March 2002 and handed down on 27 March 2002.

2. The applicant was born on 26 March 1978 and claims to be a citizen of the Ukraine ("**the Applicant**").

3. The Applicant arrived in Australia on 2 March 2000, having legally departed from Borispil, Kiev on a passport issued in her own name and a visa issued on 4 February 2000.

4. On 14 April 2000, the Applicant lodged an application for a protection (Class XA) visa with the Department of Immigration and Multicultural and Indigenous Affairs ("**the Department**") under the Act.

5. The Applicant claimed to be an active member of the regional branch of the Ukraine Communist Party and claimed persecution by the Security Service of the Ukraine ("**SBU**") for her involvement with the Communist Party. The Applicant claimed that she worked actively during the last Ukrainian Presidential election and commenced an investigation into the falsification of the election results. The Applicant claimed that she was told that the SBU had commenced a false criminal case against her because of her activity in collecting evidence of the alleged falsification. The Applicant claimed that the law enforcement authorities in the Ukraine would only protect the President's regime.

6. On 29 June 2000, a Delegate of the First Respondent refused the Applicant's application for a protection visa on the basis that the Applicant is not a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

The Tribunal review process

7. On 24 July 2000, the Applicant lodged an application for review of the Delegate's decision by the Tribunal. In support of her review application she provided a statement that, essentially, identified her disagreement with the findings of the Delegate's decision. In particular, the Applicant disagreed with the Delegate's finding that, due to her low profile within the Communist Party, she would not be targeted by the Government authorities.

8. On 24 July 2000, the Tribunal acknowledged receipt of the Applicant's application for review and invited her to send any documents or written evidence as soon as possible. The letter informed the Applicant that, if the Tribunal could not make a decision in her favour, she would be asked to come to a hearing of the Tribunal to give oral evidence and present arguments. The letter also informed the Applicant that the Tribunal had asked the Department to send a copy of its documents about her case to the Tribunal. The letter went on to say that, when the Department's documents were received by the Tribunal, the Tribunal would look at those papers, along with any other evidence on the Tribunal file, to determine whether it could make a decision in the Applicants favour.

9. On 11 December 2001, the Tribunal wrote to the Applicant inviting her to attend a hearing on 1 February 2002. The letter informed the Applicant that the Tribunal had looked at all the material relating to her application but was not prepared to make a favourable decision on that information alone. The letter enclosed a response to hearing invitation form which it requested the Applicant complete and return to the Tribunal by 27 December 2001. The letter informed the Applicant that, if she did not attend the hearing and a postponement is not granted, the Tribunal may make a decision on her case without further notice. The letter also invited the Applicant to send any new documents or written arguments that she would like the Tribunal to consider.

10. On 20 December 2001, the Tribunal received the response to hearing invitation form completed by the Applicant, indicating that the Applicant did wish to attend the hearing.

11. However, on 26 January 2002, the Tribunal received a letter from the Applicant's migration agent acknowledging that the Applicant had indicated that, whilst the Applicant had earlier wished to come to a hearing, the migration agent had received instructions on 26 January 2002 that the Applicant no longer wished to come to hearing. The letter went on to say that the Applicant consented to the Tribunal proceeding to make a decision on the review without taking any further action to allow or enable the Applicant to appear before it.

The Tribunal decision

12. In proceeding with its review, the Tribunal noted that it had written to the Applicant on 11 December 2001 inviting her to attend a hearing. The Tribunal also noted the correspondence from the Applicant's advisor resulting in the advisor's letter, dated 26 January 2002, informing the Tribunal that the Applicant did not wish to attend the scheduled hearing. The Tribunal noted that the Applicant did not in fact attend the scheduled hearing. The Tribunal was satisfied that it had discharged its obligations to provide the Applicant with an opportunity to give oral evidence and present arguments before it and that the opportunity had been declined.

13. No complaint is made by the Applicant that the Tribunal did not comply with the statutory regime relevant to inviting the Applicant to attend the hearing. The Tribunal's decision to proceed with its review, without taking any further steps to invite the Applicant to attend the hearing to give evidence and present arguments, was made in compliance with its statutory duty and is without error.

14. The Tribunal noted that it had before it the Department's file, which included the Applicant's protection visa application and written submissions in support of that application.

15. The Tribunal also noted that, when the Applicant applied for a business visa to come to Australia, she had informed the Department that she was a member of the political party the People's Movement of Ukraine ("**RUKH**") and held a position in the RUKH secretariat. The Tribunal noted that, in her business visa application, the Applicant stated she was attending a conference in Australia to meet with representatives of the Australian Federation of Ukrainian Organisations. The Tribunal noted that a letter in support of the Applicant was provided by the RUKH.

16. The Tribunal had regard to independent country information identified by it in its decision. Included in that information, the Tribunal noted that RUKH was the second largest party in the parliament and that it was formed in 1988 as the Ukrainian People's Movement for Restructuring. The Tribunal noted that it was the main coalition of forces opposed to the Communist Party in 1988 – 1991 and became a political party in 1993.

17. The Tribunal noted that, in her application to the Department for a protection visa, the Applicant stated she was a member of the Communist Party of the Ukraine. The Tribunal noted the particulars of her claims as disclosed in that document.

18. The Tribunal stated that the Applicant travelled to Australia on a passport from the Ukraine and therefore assessed her claims against the Ukraine as her country of nationality.

19. The Tribunal noted independent country information that disclosed that the SBU had interfered indirectly in the political process through

criminal and tax investigations of politicians, journalists and influential businessmen. However, the Tribunal stated that it was not of the view that the Applicant was a politician, journalist or an influential businessman.

20. The Tribunal noted that, according to independent information, opposition parties are allowed to exist in the Ukraine, although the Presidential elections were acknowledged by international observers to have a number or irregularities.

21. The Tribunal was not satisfied that:

    i) The Applicant was persecuted by the government for her involvement with the Communist Party and its investigations of the falsifications of the elections results;

    ii) The Applicant was informed there was a false criminal case against her and she would be prosecuted on her return to the Ukraine;

    iii) there had been serious mistreatment or any concerted or systematic harassment of the Applicant for reason of her membership of the RUKH Party or her membership of the Communist Party, nor for her involvement in its activities.

22. The Tribunal stated that "*without further information*" it was unable to make any concluded findings in respect of any of the claims made by the Applicant. Having considered the Applicant's claims and the material before it, the Tribunal concluded that the Applicant's "*claims were so general and lacking in detail that the Tribunal was unable to establish the relevant facts".*

The amended application

23. The Applicant sought to rely on the grounds identified in an amended application filed on 29 November 2005, and on written submissions filed on 23 October 2006. The alleged grounds in the amended application are as follows:

    "1. The Tribunal put forward several reasons to justify its decision. Firstly the Tribunal found that I am 'neither a

politician, journalist or an influential businessman'. Therefore it did not accept that I had a real chance of suffering persecution at the hands of the SBU (Ukrainian Security Service), now or in the reasonably foreseeable future.

2. It is unclear why the presiding member did not regard me as a politician. In my application for a protection visa I stated that I had been a member of the Communist Party of the Ukraine and had been involved in investigation into falsification of the election result. Given my active role in the Communist Party of the Ukraine I believe that I am a politician.

3. The information referred to by the Tribunal did not suggest that only 'prominent or influential politicians' had a real chance of persecution at the hands of the Ukrainian authorities.

4. According to definition of a politician 'a politician is a person who is active in a party politics' (wordnet.princeton.edu/perl/webwn); or 'a politician is an individual involved in politics' (en.wikipedia.org/wiki/Politician); or 'one who is actively involved in politics' (http://www.answers.com/politician).

5. Clearly the presiding member was simply unaware of (or misconstrued) the term 'politician'.

6. It follows that the Tribunal failed to consider an aspect of my claim, exceeded its power, and thus committed a jurisdictional error.

7. I wish to refer to (Craig v South Australia (1995) 184 CLR 163 per McHugh, Gummow and Hayne JJ at 179). His Honour accepted that the Tribunal exceeded its power, and thus committed a jurisdictional error, as it identified a wrong issue, asked itself a wrong question, ignored relevant material, relied on irrelevant material and made erroneous findings in a way that affected the exercise, or purported exercise, of the Tribunal's power.

8. Furthermore, I am of the view that before making the decision, pursuant to s.424A(1) of the Migration Act 1958, the Tribunal was to provide me with the mentioned information (namely that I was not a politician), to ensure that I understood the relevance of this information and to give me the opportunity to comment on it.

9. I am aware that the failure to give particulars to the applicant, to ensure that the applicant understand the relevance of it and to

give him an opportunity to comment on it is in breach of s.424A(1) and constitutes a jurisdictional error.

10. Similarly the Tribunal failed to give me the opportunity to comment upon its finding in relation to 'false criminal case against me'.

11. I wish to note that the information concerned was about me (not about a class of persons etc.). Hence, notwithstanding whether I was given an opportunity to oral evidence (there were compelling reasons for me not to come to the hearing), the Tribunal was not entitled to make its decision without giving me the opportunity to comment on information, which was the reason to affirm the delegate's decision."

24. The complaints made by the Applicant in her amended application and in her written submissions largely seek to cavil with the conclusion of the Tribunal. To the extent that they seek merits review, this Court is unable to undertake such a process.

25. **Grounds 1 to 5** of the amended application do not disclose any ground capable of review.

26. Accordingly, grounds 1 to 5 are rejected.

27. **Ground 6** states that the Tribunal failed to consider an aspect of the Applicant's claim, exceeded its power and thus committed jurisdictional error. The particulars provided in support of that ground are paragraphs 1 to 5 which are simply disagreements with the findings of fact made by the Tribunal.

28. Accordingly, ground 6 is rejected.

29. The Applicant did not press **Ground 7** of the amended application, being no more than a reference to *Craig v South Australia* (1995) 184 CLR 163.

30. **Grounds 8** appears to complain about the Tribunal's failure to be satisfied that she was a politician and s.424A(1) of the Act compelled the Tribunal to give that information to the Applicant for comment. However, the Tribunal was doing no more than expressing its lack of satisfaction about whether or not the Applicant was a politician. The reason for the lack of satisfaction was the inadequacy of the material

before it to satisfy the Tribunal that the Applicant was a politician. That conclusion was open to the Tribunal on the material before it and for which it provided reasons. In any event, whilst the Applicant claimed to be a member of a political party, however, did not assert in her claims that she was a politician.

31. Accordingly, ground 8 is not made out.

32. **Ground 10** is also misconceived in the same way as ground 8. The Tribunal was doing no more that expressing its failure to be satisfied about the Applicant's claims of being involved in false charges on the basis of the inadequacy of the material before it. .Again, that conclusion was open to the Tribunal on the material before it and for which it provided reasons.

33. Accordingly, ground 10 is not made out.

34. **Grounds 9 and 11** do not disclose any error capable of review.

35. Accordingly ground 9 is not made out.

36. To the extent that the Applicant's written submissions purport to disclose further grounds of review, they appear to complain that the Tribunal did not give reasons for rejecting the Applicant's claims. As is apparent from these reasons above, the conclusion of the Tribunal that the Applicant's claims were so general and lacking in detail that the Tribunal was unable to establish the relevant facts, was a conclusion open to it on the evidence and material before it.

37. The Applicant did not press the complaint in her written submissions that the Tribunal's decision was affected by apprehended bias.

38. Accordingly, none of the grounds relied upon in the amended application are made out.

Tribunal's use of information in earlier business visa application

39. The Tribunal identified the independent information to which it had regard. In particular, the Tribunal had regard to information about the RUKH party and that it is the second largest political party in the Ukraine and is opposed to the Communist Party. The Tribunal stated

that *"when applying for a business visa to come to Australia the applicant informed the Department she was a member of RUKH, holding a position in the Secretariat. She was attending a conference in Australia to meet with representatives of the Australian federation of Ukrainian organisations. A letter of support was provided by RUKH."*

40. There is no mention by the Applicant of any association by her with the RUKH party in any documents provided by her to the Tribunal for the purposes of its review. The information about the Applicant's involvement with the RUKH party appears to come from an application made by the Applicant at an earlier time for a business visa.

41. At the hearing, the Court raised a question as to whether or not reference by the Tribunal to information contained in a business visa application about the Applicant's membership of the RUKH party gave rise to an obligation under s.424A(1) of the Act. The Court Book did not contain a copy of the business visa application or the letter of support by the RUKH party referred to by the Tribunal in its decision. Moreover, as stated above, there was nothing in the relevant documents in the Green Book to suggest that the Applicant's business visa application and letter of support were given to the Tribunal by the Applicant for the purposes of the Tribunal's review. For that reason, the hearing was adjourned for 4 weeks to allow the parties to obtain copies of the documents.

42. At the adjourned hearing, a copy of the Applicant's business visitor visa application, signed by the Applicant and dated 3 February 2000, was annexed to the affidavit of Angela Louise Radich, sworn 29 November 2006, and read by the First Respondent. It confirmed the information referred to by the Tribunal in its decision (see paragraph 39 above in these Reasons).

43. Counsel for the First Respondent submitted that the information about the Applicant's membership of the RUKH party did not form part of the Tribunal's reason for affirming the decision under review. Counsel for the First Respondent submitted that the Tribunal did no more than note the information on her business visa application but made it clear that *"without further information"*, it was unable to make any findings about the Applicant's claim of persecution by the government for her involvement with the Communist Party and its investigation into the

falsification of the election results. In those circumstances, the First Respondent submitted that the information did not form part of the Tribunal's reason for affirming the decision under review.

44. A second reference by the Tribunal to the Applicant's membership of RUKH appears in the following context:

> *"I do not accept that there has been serious mistreatment or any concerted or systematic harassment of the applicant for reason of her membership of the RUKH party or her membership of the Communist Party…"*

The First Respondent submitted that the Tribunal's decision makes it clear that this reference by the Tribunal to such information was only in relation to the possibility of a further claim of feared persecution. The First Respondent submitted that the Tribunal was doing no more that considering whether the Applicant had a well founded fear of persecution either because of her involvement with the Communist Party or because of her membership of the RUKH party.

45. However, the Tribunal's failure to accept that the Applicant was persecuted as alleged is in the following context:

> *"Without further information from the Applicant I do not accept she was persecuted by the government for her involvement with the Communist Party and its investigation into the falsification of the election results. Nor do I accept she was informed that there was a false criminal case against her and she will be persecuted on her return to Ukraine.* ***I note that in her business visa application to the Department she stated she was a member of RUKH and provided documents to support her claim*** (emphasis added)*"*.

46. A fair reading of the Tribunal's words in the last sentence of the above quotation, commencing "*I note*", lead to the inference that the Tribunal was of the view that the Applicant's involvement with the RUKH party is inconsistent with the Applicant's claim of a fear of persecution from the government by reason of her involvement with the Communist Party. The inconsistency arises where the Tribunal, in the Findings and Reasons section of its decision, refers to the fact that independent information disclosed that the RUKH party was also opposed to the Communist Party and that the Applicant had also been a member of the

RUKH party, according to the information contained in the Applicant's earlier filed business visa application.

47. As stated above, the information about the Applicant's membership of the RUKH party was not information given to the Tribunal by the Applicant for the purposes of its review.

48. Moreover, in context, the language used by the Tribunal in the last sentence in the quotation in paragraph 45 above, in context, makes it clear that the Applicant's claim in her business visa application about being a member of RUKH was supported by documents. However, her claim of a fear of persecution arising out of her involvement with the Communist Party is limited to her bare assertions.

49. In other words, the Tribunal makes the distinction in its decision that, "*without further information*", it did not accept her claims about persecution because of her involvement in the Communist Party. In the context of that conclusion the Tribunal notes that in her business visa application she makes a claim that was supported by documents (albeit that the documents were not able to be provided to this Court by either party, despite and adjournment to do so). Because the documents are not before this Court, the Court otherwise accepts the statement by the Tribunal that the documents supported the Applicant's application for a business visa. .

50. It is plain that the Tribunal was aware of, and refers to, the Applicant's involvement with the RUKH party (at least at the time of her business visa application) and that the RUKH party opposed the Communist Party. To be involved with both the Communist Party (as claimed by the Applicant in her protection visa application) and the opposing RUKH party (as referred to by the Tribunal) is inconsistent, where those parties are opposed to each other.

51. The Tribunal stated that it "*did not accept that there had been serious mistreatment or any concerted or systematic harassment of the applicant for reason of her membership of the RUKH party or her membership of the Communist Party nor for her involvement in its activities*". The Tribunal reached that conclusion in the context of its regard to the Applicant's claim of persecution by reason of her involvement with the Communist Party and the information in the

Applicant's business visa application that she was a member of the RUKH party. The clear inference from that conclusion is that the Tribunal considered whether the Applicant may have suffered serious mistreatment by reason of her involvement with the Communist Party in circumstances where she had also been a member of the RUKH party.

52. The Tribunal's decision discloses a consciousness of the existence of supporting documents for her business visa application whereas her, application for a protection visa is not supported by documents. The awareness by the Tribunal of this difference would appear to be information to which the Tribunal had regard as part of its reason for affirming the decision under review. The relevance of information is not limited to whether the information leads to a positive factual finding based on its terms (*SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2 at [223]).

53. In the circumstances, the information about the Applicant's membership of the RUKH party, as disclosed in her business visa application, was information used by the Tribunal as part of its reason for affirming the decision under review. Accordingly, the Tribunal was obliged, pursuant to s.424A(1) of the Act to give that information to the Applicant for comment.

54. In the circumstances, the Tribunal breached its obligations under s.424A(1) of the Act, thereby committing a jurisdictional error.

Applicant's explanation for delay

55. The First Respondent contended that this Court ought not to grant discretionary relief to the Applicant because of the unreasonable and unwarranted delay by her of more that 3 years in seeking judicial review of the Tribunal's decision.

56. One commences such consideration in the light of the proposition that, in the event that a decision of the Tribunal is invalid for want of procedural fairness, in the absence of any delay, waiver, acquiescence or unclean hands on the part of the Applicant, there is no reason to withhold discretionary relief. However, delay is certainly a ground upon which constitutional writ relief may be refused. (*SAAP v Minister*

for Immigration and Multicultural and Indigenous Affairs [2005] HCA 24 ("***SAAP***")at [84] and [211]; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust.) Ltd* (1949) 78 CLR 389). McHugh J in *SAAP* at [80] observed:

> *"The issuing of writs s 75(v) of the Constitution and s 39B of the Judiciary Act is discretionary. Discretionary relief may be refused under s 39B if the conduct of the party is inconsistent with the application for relief. It may be inconsistent, for example, if there is delay on the part of the applicant or the applicant has waived or acquiesced in the invalidity of the decision or does not come with clean hands."*

57. In considering the delay by the Applicant of 3 years in filing an application for judicial review of the Tribunal's decision by this Court and the importance of finality of administrative decisions, I have regard to the comments of McHugh J in *Re Commonwealth of Australia; Ex parte Marks* (2000) 177 ALR 491 ("***Ex parte Marks***") at 495 in which he said the following:

> *"Where an applicant seeks the issue of constitutional or prerogative writs, a further factor must be considered. Those writs are directed at the acts or decisions of public bodies or officials, and the public interest requires that there be an end to litigation about the efficacy of such acts or decisions. In that respect, the present case, although important to the applicant, is not as important as many other cases."*

The nature of constitutional writ relief, as referred to by McHugh J in *Ex parte Marks,* makes it clear that one must consider the public interest in there being efficacy in public acts, decisions and judgments which cannot be allowed to become "*hostage of an applicant's search for favourable legal advice"* (*Ex parte Marks* at 496).

58. At the heart of the exercise of any judicial discretion must be consideration of the overall interests of justice.

59. The Tribunal's decision is dated 4 March 2002. The decision was handed down on 27 March 2002. On 6 March 2002, the Tribunal wrote to the Applicant and her migration agent inviting them to attend the handing down. On 27 March 2002, the Tribunal wrote to the Applicant and her agent notifying them of the decision and advising them of the strict time limits that apply for the filing of an application for judicial

review of the Tribunal's decision. Section 477 of the Act provides that any application for judicial review be filed within 28 days of notification of the decision.

60. On 22 July 2005, the Applicant filed an application in this Court for judicial review and an affidavit sworn by her on 22 July 2005. The Applicant read the affidavit at the hearing before this Court in support of her application.

61. There was no objection by the First Respondent to the affidavit and the Applicant was not cross examined on its contents. Accordingly, I accept the evidence of the Applicant contained in her affidavit. Relevantly, I accept that the Applicant's migration agent filed an application for judicial review after 4 March 2002, without informing the Applicant, which was then withdrawn, discontinued or dismissed without the Applicant's knowledge. I accept that the Applicant gave birth in August 2003. I accept that the Applicant received and followed advice from her migration agent to the effect that she should make an application to the Minister pursuant to s.417 of the Act.

62. On 20 June 2003, the Applicant wrote to the Minister seeking his intervention. On 9 March 2004, the Ministerial Intervention Unit sought further information from the Applicant. On 4 April 2005, the Applicant responded to the 9 March 2004 letter, explaining that it had been sent to the incorrect address and had only just been received. The Applicant stated in her affidavit that she was notified in June 2005 that her application under s.417 of the Act had been refused.

63. Authorities have differed in consideration of the effect of s.417 applications upon delay by applicants in seeking judicial review (*Applicants M160/2003 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) FCA 195; *Applicant A2 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) FCA 576 (von Doussa J); *Applicant M29 of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) FCA 1266 (Weinberg J); the Full Court decision in *M211 of 2003 v Refugee Review Tribunal* [2004] FCAFC 293; and *SZGPZ v Minister for Immigration and Multicultural Affairs* [2006] FCA 683 at [17]-[28]).

64. However, in the case before this Court the unchallenged evidence is that, in writing her s.417 letter, the Applicant sought, obtained and followed legal advice. It would appear from her affidavit that she had a legal adviser acting on her behalf, even if she was not aware of the steps being taken by the adviser, immediately following notification to her of the Tribunal decision.

65. Moreover, the unchallenged evidence is that, after receiving the Minister's response to her s.417 letter, the Ministerial Intervention Unit wrote to the Applicant some 10 months later at an the incorrect address seeking further information. The Applicant gave unchallenged evidence that because the Minister's letter was sent to the incorrect address, it did not reach her until shortly before she wrote her letter of response, dated 4 April 2005. Upon being informed in June 2005 that her s.417 request had been refused, she filed her application in this Court on 22 July 2005.

66. In the circumstances, I find that the Applicant has provided an explanation for her delay which is neither unreasonable nor unwarranted. In the circumstances, the overall interests of justice would not be served by a denial to the Applicant of the constitutional writ relief sought by her.

Conclusion

67. The decision of the Tribunal is affected by jurisdictional error and is therefore not a privative clause decision. Accordingly, the Tribunal's decision should be remitted to the Tribunal for determination according to law.

I certify that the preceding sixty-seven (67) paragraphs are a true copy of the reasons for judgment of Emmett FM

Associate: S. Kwong

Date: 15 February 2007