FEDERAL MAGISTRATES COURT OF AUSTRALIA

S142 OF 2003 v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 582*

MIGRATION – RRT decision – Bangladeshi fearing persecution by Awami League – mistake by Tribunal when considering family history – failure to address refugee claim actually made – reference by Tribunal to recent change of government – failure of procedural fairness – eighteen months' delay in commencing judicial review proceeding – relief not refused.

Acts Interpretation Act 1901 (Cth), s.8
Federal Court Rules (Cth), O.51A r.5
Federal Magistrates Act 1999 (Cth), s.43(2)(b)
Federal Magistrates Court Rules 2001 (Cth), rr.1.05(2), 21.02(2)(c)
Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.417, 422B, 474, 477, 483A, 486A
Migration Legislation Amendment (Judicial Review) Act 2001 (Cth)
Migration Litigation Reform Act 2005 (Cth), Sch.1 cl.41

Applicants M160/2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 195
Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 222 ALR 411
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576
Gararth v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 316
Kioa v West (1985) 159 CLR 550
Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal (2002) 190 ALR 601
NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2) (2004) 144 FCR 1
Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476
Re Commonwealth of Australia; Ex parte Marks (2000) 177 ALR 491
Re Minister for Immigration & Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57
SAAP v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 215 ALR 162
SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs [2006] HCA 63
SZELA v Minister for Immigration & Anor [2005] FMCA 1068
SZHFW v Minister for Immigration [2006] FMCA 86
SZHFW v Minister for Immigration & Multicultural Affairs [2006] FCA 480

Applicant:	APPLICANT S142 OF 2003
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG2294 of 2005
Judgment of:	Smith FM
Hearing date:	30 March 2007
Delivered at:	Sydney
Delivered on:	30 March 2007

REPRESENTATION

Counsel for the Applicant:	Mr C Jackson
Solicitors for the Applicant:	Kazi & Associates
Counsel for the First Respondent:	Mr M Izzo
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) The name of the first respondent is amended to "Minister for Immigration and Citizenship".

(2) The second and third respondents are removed from the proceeding, and the Refugee Review Tribunal is joined as second respondent.

(3) A writ of certiorari issue directed to the second respondent, quashing the decision of the second respondent handed down on 30 October 2001 in matter N98/23154.

(4) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for

review of the decision of the delegate of the first respondent dated 16 April 1998.

(5) The first respondent pay the applicant's costs, other than those incurred by reason of the application for vacating the listing on 1 March 2007, as agreed or taxed in accordance with Federal Court Rules O.62.

(6) Further to order 2 made on 1 March 2007, order that the first respondent's costs ordered therein shall be as agreed or taxed in accordance with Federal Court Rules O.62.

(7) Pursuant to r.21.02(2)(c), refer the costs referred to in orders 5 and 6 for taxation under O.62.

(8) Liberty to any party to apply for further orders in relation to costs.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG2294 of 2005

APPLICANT S142 OF 2003
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. This proceeding has a long history commencing with the filing of a draft order *nisi* in the High Court of Australia on 17 April 2003. It seeks orders by way of judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") dated 9 October 2001 and handed down on 30 October 2001. The Tribunal affirmed a decision of a delegate made on 16 April 1998, refusing to grant the applicant a protection visa.

2. The Tribunal's decision is a decision to which s.474 of the Migration Act applies, and, as interpreted by the High Court, relief is not available unless the Tribunal's decision was affected by jurisdictional error.

3. The proceeding was remitted by Heydon J on 22 October 2003 to the Federal Court of Australia. It remained there until 5 August 2005, when Emmett J transferred the matter to the Federal Magistrates Court. The matter which his Honour transferred came within Federal Court Rules O.51A r.5(1), which provides that unless a contrary order is made, an application for an order *nisi* is to be considered on a final basis, i.e., on whether the applicant is entitled to orders absolute. When the matter reached my docket, I considered that O.51A r.5(1) continued to apply, since no order under sub-r.(2) had been made and these rules applied in this Court pursuant to *Federal Magistrates Act 1999* (Cth), s.43(2)(b) and *Federal Magistrates Court Rules 2001* (Cth), r.1.05(2). A contrary view was not put to me by either party, and it is therefore necessary for me today to address whether the applicant has made out a final entitlement to writs of certiorari and mandamus.

4. This Court has jurisdiction to receive the transferred matter and deal with it on that basis, by reason of its jurisdiction at that time held under s.483A of the *Migration Act 1958* (Cth) ("the Migration Act"), which was the Federal Court's jurisdiction under s.39B of the *Judiciary Act 1903* (Cth). The repeal of that jurisdiction does not affect the continuance of this proceeding (see Sch.1 cl.41 of the *Migration Litigation Reform Act 2005* (Cth), and *Acts Interpretation Act 1901* (Cth), s.8).

5. After it reached my docket, the proceeding was given a hearing date within the range which I was then appointing. There was then a need for the hearing to be adjourned, due to the late instructing of the applicant's present legal representatives, and the late raising by the Minister of an issue of delay. The issue of delay does not concern the many years in which the matter has been sitting in a backlog of migration cases in various courts, but concerns the applicant's delay between the handing down of the Tribunal's decision and his commencing the present proceeding in the High Court of Australia in April 2003. I shall deal with this issue, after addressing whether the applicant has established jurisdictional error affecting the Tribunal's decision.

6. The applicant arrived in Australia in March 1998, and on 2 April 1998 he lodged an application for a protection visa. It was accompanied by

a typed response to questions inviting him to explain why he sought protection in Australia so that he did not have to return to his country of nationality, Bangladesh. In answer to the question *"Why did you leave that country?"*, the applicant said:

> *My life was in danger because of my political involvement with the "Bangladesh Freedom Party", the party which was responsible for the dramatic change in politics in Bangladesh in 1975. The party which achieved further victory by unseating the so called "father of the nation" Sk. Mujibur Rahaman and gave rescued the nation from an autocrat. Since I joined with the party in late 1994 I faced many problems with our main opposition party called "Bangladesh Awami League" the party which believes in the late Mujibur Rahman's ideology and its sole claim of liberation in 1971 from Pakistan. It is openly known to everyone and to all media that this Awami League targeted the Freedom party as their arch enemy, accusing Freedom party as the killer of democracy in Bangladesh.*

Country information before the Tribunal further explained the animosity felt by the Awami League to members of the Freedom Party, in particular, towards a group of its members who were responsible for the murder of Sheikh Mujibur.

7. The applicant did not claim to be part of that group, but claimed that if he returned to Bangladesh he would be jailed without trial because *"the current party in power, the Awami League again would bring more false charges against me like before to finish my political career for ever"*. He also said: *"at present the Awami League is in power which is my main fear that anytime I could be killed or put in jail for uncertain period on false charge without a fair trial"*.

8. In answer to a question *"Why do you think they will harm/mistreat you if you go back?"*, the applicant gave three pages of explanation, which commenced with a family history:

> *The party I belonged to was a legitimate party and used to practice all the political activities in all over Bangladesh under the name "Bangladesh Freedom Party". From the very beginning it is openly accused by the Awami League and they named the party as the "Killers party". They fully blamed our party for the fall of their government in 1975. They also blamed our party as the fundamentalist and terrorist which is totally*

false. They never accepted us as a legal political party and always blamed us as the "B" team of The Bangladesh Jamayt e Islam. They want to say this is the new form of Jamayt e Islam and "the same scam in different name". My family and parents were always against Awami leagues and their ideology, ie the way they want to establish the democracy which was not acceptable to us. That's why in my fathers political life he had also struggled a lot with the Awami league, because he was a dedicated member and organising secretary of Muslim league in our local area, [location]. For that reason my father was also accused by the then Awami government as a collaborator with the Pakistani invaders. They threw him in jail in 1973 with out any trial for uncertain period under the Special Act and even they did not follow any judicial procedure in my fathers case. Until the coup in August 1975 he was even badly treated in jail like a Jews concentration camp at war time. They did not treat him as a political convict. By the grace of god he was released from jail after the fall of Awami reign. My father was the witness of Awami leagues all nuisance since 1967 and the genocide they did after liberation. From my childhood I have been listening all of those from my father. Later on which influenced in my mind and convinced me to stand always against Awami league. As a result my political sacrament of initiation commenced with the B.N.P, the party those who are always against with Awami league. Even then I was not that much involved with the B.N.P. (Jatiyatabadi Chatradal, student wing of the B.N.P) but even then I had to suffer a lot. Many times I was attacked by Awami hooligans and once they made my father nearly crippled in 1989. After a long while in 1988 the Awami league brought a charge against my father and my uncle by accusing them as "Rajakar" (helper of Pakistani invaders in 1971). They take revenge on their enemies as if they are in power. That time their degree of terrorism increased to such a level that a number of occasions I was compelled to go in to hiding. Those periods of hiding and mental torture are still in my nightmares. In late 1996 once my business was vandalised and fully destroyed by the Awami hooligans. I did not dare to report it to the respective authorities. As my party itself is in trouble and passing a crucial time during Awami regime I could not expect that much support and protection from them but still many times I was assisted and comfort by my colleagues and well-wishers. Otherwise I would have been killed a long time ago.

9. The applicant then referred to his own history of joining the Bangladesh Freedom Party in 1994 as an ordinary member, and of suffering the vandalising of his restaurant and extortion demands by

Awami League supporters. He referred to becoming more involved in party activities at the district level, and said that Awami hooligans *"openly tried to harass me and always pointed their finger towards me"*. He said that in August 1995 he had been appointed as organising secretary of a suburban branch of the party, and *"gradually I became Awami's target and my life fell in big danger"*. In a later part of his response, the applicant referred to the death of his uncle, but did not explain the circumstances in which that occurred.

10. No supporting material was presented to the delegate, nor eventually to the Tribunal, other than a confirmation of the death of his father which occurred after the applicant had left Bangladesh.

11. A delegate refused the application on 16 April 1998. In his reasons, the delegate referred to the Awami League forming government after elections in 1996, but said that he had been *"unable to find evidence that the Awami League is persecuting members of the Freedom Party"*. The delegate also said that *"even if the events described by the applicant were to have occurred, there is no reason to find that the applicant would face any significant risk of harm amounting to persecution should he return"*, pointing to reports of a *"fair and independent judiciary"*. The delegate also thought the applicant *"could reasonably be expected to relocate to another part of Bangladesh"*.

12. In his appeal to the Tribunal which was lodged on 11 May 1998, the applicant maintained his claim that *"any one belongs to the Freedom party are still unsafe and live in continuous fear in Bangladesh"*. He did not refer to any claims based on his family history.

13. The applicant attended a hearing before the Tribunal to which he was invited on 21 June 2000. A transcript of the hearing is in evidence. It is agreed between counsel that nowhere in the course of the hearing was the applicant asked to explain, nor did he volunteer any further information concerning, his family history in which his father also had incurred the enmity of the Awami League. The Tribunal questioned the applicant only about his claims related to his membership of the Freedom Party, but I do not read any of the applicant's responses as disclaiming a possible interpretation of his visa application as raising

claims based on membership of his family unit. This is an issue I shall address further below.

14. It is also common ground between counsel, in relation to another issue raised by the present application, that the applicant was not asked questions, nor did he volunteer speculations, as to the position he would face if he returned to Bangladesh after a change of government in which the Awami League ceased to be in government. Such an event had not occurred at the time of the hearing.

15. Nor had the Awami League lost government before the Tribunal sent a letter to the applicant in April 2001. This apologised for the delay in finalising the decision and said: *"the decision will be finalised in the next few weeks"*. The letter invited any new information to be presented by an indicated date, and said:

> *Attached to this letter is independent evidence that arrived subsequent to your hearing, which will be given consideration when preparing the decision. The Tribunal may also refer to relevant newsworthy political incidents that have occurred recently, such as further developments in the case of the Sheikh Mujibur murder trials; an example is attached.*

16. The attachments to this letter included a cable from the embassy in Dhaka which, *inter alia*, contained the statements:

> *THE AWAMI LEAGUE CLAIMS THAT IT IS KEEN TO CRACK DOWN ON ALL FORMS OF LAWLESSNESS INCLUDING POLITICALLY MOTIVATED VIOLENCE. … THE AWAMI LEAGUE EXERCISES SUFFICIENT CONTROL OVER ITS OWN MEMBERS AND OVER THE POLICE TO BE ABLE TO CONTROL VIOLENCE AGAINST THE OPPOSITION, BUT THAT IT MAY NOT ALWAYS USE ITS POWERS TO DO SO.*

17. The applicant responded with the assistance of his migration agent in a letter dated 21 May 2001. This addressed the material which had been forwarded by the Tribunal. It included the submission:

> *I on behalf of the applicant would urge you to consider my client's claim in the light of current Bangladeshi politics and the most vulnerable organisation the F.P's position in Bangladesh political arena.*

18. The Tribunal did not hand down its decision until 30 October 2001, by which time a change of government in Bangladesh had occurred. The Tribunal referred to information about this at the start of its recounting of the *"Claims and Evidence"*. It said:

> *The applicant was born in 1967. He claims that his grandfather had been imprisoned by the Awami League (AL) in 1973 for two years for allegedly conspiring with Pakistan, and had indoctrinated him from his youth on the failings of the AL. The applicant had grown up strongly opposed to the AL. [The AL took power in Bangladesh in 1996 from the Bangladesh Nationalist Party (BNP) and government until August 2001 when it stepped aside according to the law to make way for a caretaker government to usher in a general election. In October 2001, the BNP won the election by a landslide (Zia to Become Bangladesh PM*, BBC News Online*, 7 October 2001).]*

19. It will also be noted that the Tribunal made an error of fact when referring to the applicant's claims, in that the applicant had claimed that his father and not his grandfather had been imprisoned in 1973. The Tribunal otherwise accurately identified the contents of the applicant's claims.

20. Under the heading *"Findings and Reasons"*, the Tribunal repeated its mistake when considering the applicant's claimed family history. This mistake gives rise to a ground of review which I shall address further below. The Tribunal said:

> *I accept that the applicant had grown up with a strongly critical view of the Awami League (AL) which had jailed his grandfather for two years in the early 1970s for being on Pakistan's side in the Bangladesh's fight for independence from Pakistan. I accept that the applicant's grandfather had suffered harm in the form of imprisonment for his political beliefs and that the family might have suffered hardship and discrimination at the time. However, I am not satisfied that the applicant was, or would be, subject to persecution over his family history. There is no independent evidence that supports a claim that second- and third- generation descendants of those who supported the losing side in the independence war faced discrimination or hardship amounting to persecution in the 1980s and 1990s, or in the future.*

21. In its further findings in relation to the applicant's claims, the Tribunal accepted *"that the applicant had, after a short spell in the Bangladesh*

Nationalist Party (BNP), joined the Freedom Party (FP) and that he is seen as being affiliated with the latter party". It also accepted that he had *"become organising secretary of the FP's youth wing in his local suburb"*. Later, it said:

> *I am prepared to accept, however, that in the circumstances peculiar to Bangladeshi politics (of this, more below) the applicant had at times during his political career been harassed and threatened by thugs belonging to opposing parties such as the AL. It is credible that he had been attacked on occasion by AL thugs and that at least on one occasion his business had been vandalised. I also accept that the applicant had had at least one false charge laid against him by political opponents.*

22. Notwithstanding these findings, the Tribunal also said:

> *I am not satisfied that the applicant had faced or will face persecution from the Awami League (AL). Independent evidence does not support a claim that the AL persecuted people such as the applicant simply over support for the FP.*

The Tribunal referred to material which suggested to the Tribunal that the Awami League was only concerned with *"bringing to court a group of individuals considered responsible for the assassination of a former national leader and members of his family and other officials"*. It said: *"independent evidence does not support the applicant's claim that FP members/leaders uninvolved with the 1975 murders are under any particular or sustained threat from the AL"*. Notwithstanding its findings that the applicant had encountered attack by Awami League thugs, it said:

> *Nevertheless, I find that the applicant does not have to seek protection under the Convention in another country in relation to such harm (whether or not it amounts to persecution) but can obtain protection from the authorities and institutions of Bangladesh.*

It referred to evidence of *"random violence … experienced by all the parties"*, but appears not to have thought that this was covered by the Refugees Convention. Its reasoning in this respect is unclear, but is not the subject of a ground of review. Its reasoning in relation to another finding was similarly unclear:

Thus if the applicant, an FP member active in his party's student and youth movements, had been attacked in various melees and had both offered and received harm during his political career, I am not satisfied that such incidents in themselves demonstrate that he has been persecuted for his political beliefs or is the target of persecution. Rather, I find that the harm he has experienced is part of the general pattern of pervasive violence affecting all parties.

23. The Tribunal also made a finding:

> *I am not satisfied that people such as the applicant lack adequate, reasonable protection at home in relation to such harm. The authorities of Bangladesh are keen to stop such violence and have demonstrated willingness and ability to do so.*

24. The Tribunal referred to country information, preceding the loss of government by the Awami League, which it thought supported that opinion. It also suggested an obscure qualification, when saying:

> *I accept that some political activists would continue to fall through this net and face harm over their political opinion or activities. I find that even in such cases, there is protection available within Bangladesh.*

The Tribunal referred to various pieces of information concerning activity in the courts of Bangladesh, and suggested that the courts *"can be relied upon to provide protection for those like the applicant who claim to be falsely charged"*.

25. At the end of the Tribunal's *"Findings and Reasons"*, it provided the following summary of all its conclusions:

> *In summary, therefore, I am not satisfied that the applicant faced, or faces persecution simply for holding a political opinion supportive of the FP. The FP operates legally. The applicant is not one of the small group of FP leaders who have been targeted by the AL authorities over involvement in a set of political murders in 1975, and I am not satisfied that the AL has any significant adverse interest in him as a minor youth leader of an insignificant party.* ***I consider that the incoming BNP government will continue to extend a hand of friendship and support to the FP as it has done in the past****. I accept that in the rough-and-tumble of Bangladeshi politics, this applicant faces as much risk as a militant of any party of being harmed by rival*

activists in sporadic bouts of violence. However, there is tough legislation and the stated intention of the previous AL executive and the police to curb political violence and to protect possible victims such as he, and the courts of Bangladesh are resolute in protecting victims of politically-motivated crime. ***In the light of all this,*** *I am not satisfied that the applicant has a well-founded fear of persecution in Bangladesh such that he is owed protection under the Convention in Australia.* (emphasis added)

26. The grounds relied upon today by counsel for the applicant are set out in an amended draft order *nisi*:

Ground 1.

1. The third respondent denied the applicant natural justice.

Particulars.

1.1 The third respondent should have put to the applicant country information which was adverse to the applicant's case, because it contained information that the government of Bangladesh had changed. The change of government was a critical issue upon which the case turned.

Ground 2.

2. The third respondent failed to comply with a mandatory provision of the Migration Act 1958 (Cth) (section 425), in failing to invite the applicant to attend, give evidence and present arguments in relation to issues arising out of the decision under review.

Particulars.

2.1 The only hearing which the applicant was invited to was not a hearing in relation to the issues arising out of the decision under review, because a critical issue arising out of the decision under review, by the time of the decision of the third respondent, was the change of government in Bangladesh.

Ground 3.

3. The third respondent failed to take into account a relevant consideration (in other words, failed to consider an integer of the applicant's case) in failing to consider his claim that he was a first generation descendant of the losing side in the

Bangladeshi independence war, and was at risk of harm by reason of that descendance.

Particulars.

3.1 The third respondent failed to consider this matter as a result of the third respondent's mistake of fact on this point, mistakenly considering that it was the applicant's ***grandfather****, not father, who was the protagonist referred to in ground three.* (emphasis in original)

Denial of natural justice

27. Counsel for the applicant principally relied on Ground 1, which he presented as relying upon the well-established obligation on an administrative decision-maker to give an applicant an opportunity *"to deal with adverse information that is credible, relevant and significant to the decision to be made"* (see Brennan J in *Kioa v West* (1985) 159 CLR 550 at 629, cited by McHugh J in *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [140], and in *Applicant VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 222 ALR 411 at [15]-[17]). This obligation was not excluded in the present case, since s.422B was inapplicable.

28. The applicant's counsel referred to the evidence obtained by the Tribunal, shortly prior to its decision, that the BNP had won an election by a landslide thereby removing the Awami League from power in Bangladesh as being information falling within this principle. It was common ground that the Tribunal did not present this information to the applicant and invite his comments upon its implications. It also appears to be clear on the chronology of the hearing and the proceedings before the Tribunal, that he was not afforded an opportunity to comment upon this information even if it was notorious, since the change of government did not occur until after the final date before which the applicant was told to submit any further comments or material.

29. Counsel argued that the present case was indistinguishable from the High Court cases of *Miah*, and *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* (2002) 190 ALR 601 at [30], [64],

[137]-[139], [234]-[236], and compare [275] and [292] to [301], in which the High Court found a breach of the *Kioa* principle by reason of a failure of the Tribunal to give the applicant an opportunity to comment upon information adverse to their refugee claims, which consisted of information about a significant change of government in the applicant's home country. I accept this submission.

30. The Minister's counsel sought to distinguish these cases. He argued that the Court should not conclude that the present information about the change of government in Bangladesh was inherently *"credible, relevant and significant"* to the Tribunal's determination of the applicant's refugee claims, and that the reasoning actually followed by the Tribunal pointed against this. He referred me to the first point in the Tribunal's reasoning where it directly referred to the change of government. This occurred in the following paragraph:

> *The applicant has said that he had never been persecuted by the BNP. Given this, there is no basis on which I can be satisfied that he faces persecution in the future by the BNP now that that party has gained power in the October 2001 general election. Neither does independent evidence support any such scenario given that the BNP, when previously in power, did not harm the FP and in fact protected the FP from the consequences of criminal actions in relation to the murders of Sheikh Mujibur Rahman, his family members and colleagues (sources of independent evidence on the FP cited below). The FP freely contested the 1996 elections when the BNP was in power. In the light of all this, I am not satisfied that the applicant faces persecution from the BNP for supporting the FP.*

Counsel for the Minister pointed out that this addressed an issue which was hypothetical and which had not been expressly raised by the applicant, that is, whether he would face any risk of harm from a BNP government or from the BNP party. So much of his submissions may be accepted.

31. However, the Tribunal also expressly referred to the change of government in its concluding summarising paragraph, which I have extracted above, in the sentence where it said: *"I consider that the incoming BNP government will continue to extend a hand of friendship and support to the FP as it has done in the past"*. That point was but one of the Tribunal's points referred to in that paragraph, but its

conclusion was that *"in the light of all of this, I am not satisfied that the applicant has a well-founded fear of persecution in Bangladesh"*.

32. In my opinion, the Tribunal in fact did take into consideration and use adversely against the applicant the recent information about the change of government, when assessing his claims to fear persecution at the hands of members of the Awami League if he returned to Bangladesh.

33. Moreover, in the context of the claims presented by the applicant to the extent that they were accepted by the Tribunal, and in the context of country information that was before the Tribunal, in my opinion, it would not have been open to the Tribunal to have arrived at a conclusion without considering the implications of the change of government. This was information which, in my opinion, was undoubtedly *"credible, relevant and significant to the decision to be made"* by the Tribunal on the applicant's refugee claims. As *Applicant VEAL* points out at [17], the test of *"credible, relevant and significant information must be determined by a decision-maker before the final decision is reached"*, and the court on judicial review must assess whether the duty to afford an opportunity to comment upon the information was wrongly withheld at the point of time where the decision-maker had the information, and could not dismiss it for good reason from its consideration. It is apparent in the present case that the Tribunal would not have been able to have so treated the information about the change of government in Bangladesh.

34. Counsel for the Minister sought to isolate the information entirely from the matter considered by the Tribunal, by suggesting that the Tribunal's findings about adequate State protection from institutions of justice provided an independent basis for the Tribunal's conclusions. However, I am unable to read the Tribunal's reasoning as in fact being independently based, with the requisite confidence that the breach of procedural fairness was immaterial in the present case.

35. As I have indicated, the Tribunal's reasoning has obscurities and difficulties in its discussion of the risk faced by the applicant at the hands of authorities in Bangladesh at a time when the Awami League was still in power, and its conclusion which I have referred to above does appear to draw added strength from the change of government. I am therefore not satisfied that the failure of procedural fairness which I

have found was immaterial to the decision arrived at by the Tribunal. I therefore consider that this ground has been established.

36. Ground 2 presented what essentially was the same failure of procedural fairness, but through the perspective recently offered by the High Court in *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] HCA 63. Since I have upheld the first ground, I do not think I need to examine the arguments in this area closely.

37. In *SZBEL*, the High Court cited with approval the Full Court decision in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591. It said:

> *32 In* Alphaone *the Full Court rightly said:*
>
> > *"It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard.* ***That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues*** *and to be informed of the nature and content of adverse material." (emphasis added by the High Court)*

38. In the present case, the duties requiring the Tribunal to afford the applicant the opportunity to address the significance of the change of government to his refugee claims, and to draw to his attention adverse material concerning that change, were really two sides of the same coin. The applicant was not given a fair opportunity to deal with that matter, and I consider that he was denied procedural fairness.

Mistaken consideration of a claim

39. Ground 3 addresses the mistake made by the Tribunal, which was repeated when it made its finding that *"I am not satisfied that the applicant was, or would be, subject to persecution over his family history"*.

40. It is clear from the Tribunal's sentence explaining this conclusion: *"there is no independent evidence that supports a claim that second- and third- generation descendants of those who supported the*

losing side in the independence war faced discrimination …", that the Tribunal's reference to the applicant's grandfather and not to his father was not just a mere slip of the pen. I conclude that the Tribunal therefore failed to appreciate that the applicant presented a history of persecution of a more immediate family member, when assessing the risk to the applicant by reason of family membership.

41. It is common ground between counsel that a mistake by the Tribunal which caused it to fail to address a claim in the terms actually presented would be a jurisdictional error under principles discussed in *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [52] and following. The issue between counsel was whether, in fact, the applicant did "raise" a claim to fear persecution by reason of his family relationship with his father and his father's suffering at the hands of the Awami League.

42. Counsel for the applicant argued that the applicant's visa application did raise that issue, and that the Tribunal's separate consideration of a risk of persecution *"over his family history"* has confirmed that it was raised by that material.

43. Counsel for the Minister submitted that in fact the applicant had not raised a separate claim to fear persecution by reason of the persecution of his father and his being a member of his father's family. He argued that the Tribunal's discussion addressed a false issue, comparable with its consideration of the false issue of whether the applicant would face persecution by the BNP. Counsel for the Minister relied upon the statement in *NABE* at [62]: *"whatever the scope of the Tribunal's obligations it is not required to consider criteria for an application never made"*.

44. *NABE* suggests that it is a matter for the Court itself to determine the ambit of the Tribunal's jurisdictional obligation to address claims which *"clearly arise from the materials before it"* even where they are not *"articulated"*. However, I do not consider that the Court should ignore the fact that the Tribunal has thought that the material before it raised an issue requiring attention. It is part of the Tribunal's function to perform that analysis, and it should not be discouraged from identifying bases of refugee eligibility which it perceives to have been raised by a narrative presented to it by an applicant such as the present.

I therefore would give some weight to the Tribunal's view of the claims raised by the applicant.

45. Although I have some doubts whether the applicant in fact did present his father's situation as a separate basis for claiming to be a refugee, or as an element in his fear of political persecution directed personally at him, I have concluded that the Tribunal was addressing a claim required to be addressed, when it made the present mistake of fact. The Tribunal's reference to *"second- and third- generation descendants"* suggests that the mistake must have been material to its assessment, and I cannot be confident that this was an immaterial mistake in that context. I therefore would also uphold Ground 3.

Entitlement to relief

46. For the above reasons, the applicant has made out an entitlement to writs of certiorari and mandamus, but I must address the further question whether relief should be withheld under the discretion held by a court exercising powers comparable with the constitutional jurisdiction of the High Court.

47. The applicant's explanation for the period of delay between receiving the Tribunal's October 2001 decision and commencing the present proceeding in April 2003 was briefly set out in an affidavit:

> *1. In November, 2001, a letter from the Refugee Review Tribunal arrived together with a decision, and the letter said that the Tribunal had refused my application for a protection visa.*
>
> *2. I went to my migration agent at the time, Mr. Boni Amin, and as a result of what he told me, I filed an application in the Federal Court to review the decision of the Tribunal. I filed the application within 30 days of my receiving the notice of decision.*
>
> *3. Some time in 2002, I am not sure when, I had a conversation with Mr Amin which included the following;*
>
> *He said something like;*

> *"You will not win your case in the Federal Court. If you lose in the Federal Court, you will have to pay the government's costs. You will have to pay $5,000."*
>
> 4. *As a result of what he told me, I discontinued the proceedings. I don't have any paperwork from the Federal Court proceedings.*
>
> 5. *Within 30 days, I filed an application asking the Minister to consider my case under section 417, with some help from a friend.*
>
> 6. *In 2003, I received a letter from the Minister telling me that he did not intend to consider exercising his power under section 417.*
>
> 7. *I then went and saw Mr Kazi, who was working at that time for Morgan Ardino & Co, Solicitors. About a week later, he prepared this application to the High Court and it was filed in the High Court when it was prepared.*

48. Counsel for the Minister did not seek to cross-examine the applicant about his affidavit, and did not present any evidence from the files of the Department concerning the earlier court case or the application to the Minister under s.417.

49. He relied on the summary of principles given by McHugh J in *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 215 ALR 162 at [80]:

> *[80] The issuing of writs under 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. Discretionary relief may also be refused if the applicant has in fact suffered no injustice, for example, because the statutory law compels a particular outcome.* (citations omitted)

50. He argued that the period of nearly 18 months was "unwarranted" within references to delay in the authorities, and also that the applicant's conduct in discontinuing a judicial review proceeding and

then pursuing a non-judicial remedy under s.417 was conduct "*inconsistent with the application for relief*".

51. As to whether the period of delay was unwarranted, the authorities do not clearly point to the present period of delay necessarily being characterised in those terms. Much longer periods have been addressed in cases where relief has been refused, such as my decision in *SZHFW v Minister for Immigration* [2006] FMCA 86, which was upheld by Madgwick J in *SZHFW v Minister for Immigration & Multicultural Affairs* [2006] FCA 480, where I extracted passages from relevant authorities. These included statements by McHugh J in *Re Commonwealth of Australia; Ex parte Marks* (2000) 177 ALR 491 which suggest that the court should consider the public interest in decisions of public officials being addressed promptly where their validity was challenged. *Marks* was, however, a case where an extension of a time limit was required.

52. In the present case, time limits were applicable in relation to privative clause decisions under provisions introduced by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) shortly before the Tribunal made its present decision. Section 486A imposed an inflexible 35 day period on applications to the High Court, and s.477 imposed 28 day periods on applications to the Federal Court and this Court. These time limits were considered to be effective, and were upheld in the Federal Court during the period which I am now considering. It was also held in the Federal Court at that time, that s.474 very considerably narrowed the grounds of judicial review.

53. It was only when the High Court handed down *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 on 4 February 2003, that both misconceptions were revealed. It was then apparent that the time limit was ineffective for an application based on alleged jurisdictional error, and that the grounds of judicial review for jurisdictional error were not confined by s.474. I have referred to the uncertainty prevailing after October 2001 and during 2002 in my judgment in *SZELA v Minister for Immigration & Anor* [2005] FMCA 1068 at [61]. In my opinion, it is appropriate for me to consider the applicant's present explanation for his actions in that context.

54. Although the exact content of the legal advice the applicant was given *"some time in 2002"* has not been explained, it is reasonable to assume that it was influenced by the then prevailing views of the law in relation to judicial review of migration decisions. I am therefore not persuaded that the discontinuance of the applicant's earlier proceeding should be treated as conduct disentitling the applicant from seeking the relief now being sought on the grounds which have been presented.

55. Nor am I persuaded that the period of delay should be treated as unwarranted in all the circumstances shown before me. In *Miah*'s case, the High Court was clearly of opinion that the pursuit of a Ministerial discretionary decision might afford sufficient explanation for delays in seeking to challenge a refugee decision by way of judicial review (see [106]-[107], [152] and [219]). In the Federal Court, the significance of pursuing entitlements under s.417 rather than through judicial review has been the subject of differing opinions. They were discussed by Finkelstein J in *Applicants M160/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 195. At [8] his Honour suggests that the pursuit of alternative means to obtaining redress may provide good reason for obtaining extensions of time in judicial review proceedings. His Honour did not find persuasive opinions of other Judges suggesting that an application under s.417 should not be so treated. A more recent decision of Wilcox J in *Gararth v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 316 considered that the seeking of a discretionary decision from a Minister did provide a sufficient explanation for a *"delay of two years in seeking constitutional relief"*.

56. In my opinion, considering all the authorities that I have referred to above, as well as those which I discussed in *SZHFW* (supra), I have not been persuaded that relief should be withheld in the present case. I consider that the interests of justice are properly served by the applicant being given the opportunity to have his claims addressed according to law by the Refugee Review Tribunal. I therefore propose to make the orders sought.

I certify that the preceding fifty-six (56) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 20 April 2007