FEDERAL COURT OF AUSTRALIA

SZMYO v Minister for Immigration & Citizenship [2011] FCA 506

Citation:	SZMYO v Minister for Immigration & Citizenship [2011] FCA 506
Appeal from:	SZMYO v Minister for Immigration & Citizenship [2011] FMCA 963
Parties:	**SZMYO v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 1 of 2011
Judge:	**GILMOUR J**
Date of judgment:	17 May 2011
Catchwords:	**MIGRATION –** appeal against dismissal of application to review Refugee Review Tribunal decision affirming denial of protection visa – Tribunal sent a letter pursuant to s 424A of the *Migration Act 1958* (Cth) inviting the appellant to respond – appellant requested a full record of the Airport Interview – Tribunal provided a paraphrased summary of the airport interview – whether there was denial of procedural fairness – whether the Tribunal ought to have executed its power to initiate an investigation under s 427(1)(d) of the Act.
Legislation:	*Migration Act 1958* (Cth) ss 116, 424A, 424B, 424C, 425, 427(1)(d)
Cases cited:	*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 *Bushell v Repatriation Commission* (1992) 175 CLR 408 *Chen v Minister for Immigration & Multicultural Affairs* (2000) 106 FCR 157 *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28 *M164/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) FCAFC 16 *Minister for Immigration & Citizenship v SZGUR* (2011) 273 ALR 223 *Minister for Immigration & Citizenship v SZIAI* (2009) 259 ALR 429 *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* (2004) 78 ALJR 992 *Percerep v Minister for Immigration & Multicultural*

Affairs (1998) 86 FCR 483
Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Applicants S134/2002 (2003) 211 CLR 441
SAAP v MIMA (2005) 215 ALR 162
SZNKO v Minister for Immigration & Citizenship (2010) 267 ALR 35
WAGP v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 151 FCR 413

Date of hearing:	22 February 2011
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	78
Counsel for the Appellant:	Mr L Karp
Solicitor for the Appellant:	Teleo Lawyers Pty Ltd
Counsel for the Respondents:	Ms L Clegg
Solicitor for the Respondents:	Clayton Utz

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1 of 2011**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZMYO** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**GILMOUR J**
DATE OF ORDER:	**17 MAY 2011**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders of the Federal Magistrates Court made on 13 December 2010 be set aside.

3. In lieu thereof there be orders that:

   (a) The matter be remitted to the Refugee Review Tribunal, differently constituted, to be heard and determined according to law;

   (b) The first respondent pay the applicant's costs to be taxed if not agreed.

4. The first respondent pay the appellant's costs of the appeal to be taxed if not agreed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1 of 2011**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZMYO** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**GILMOUR J**
DATE:	**17 MAY 2011**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 This is an appeal from a judgment of a Federal Magistrate of 13 December 2010 dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal) delivered on 26 May 2009, affirming a decision of a delegate of the Minister for Immigration and Citizenship to refuse to grant a protection visa to the appellant.

Background

2 The appellant is a citizen of Nigeria. He arrived in Australia on 11 July 2008 on a Subclass 416 (Special Program) Visa. The appellant had previously travelled to Australia on this visa, arriving on 23 December 2007 and departing on 7 February 2008.

3 On his second arrival at Sydney International Airport, the appellant was interviewed by an Immigration Inspector (Inspector) from the Department of Immigration (the Airport Interview). An audio recording of this interview was made. The Inspector questioned the appellant as to the purpose of his visit to Australia. During the course of the interview, the Inspector determined that sponsorship of the appellant's visa had been withdrawn and a decision was made to cancel the visa pursuant to s 116 of the *Migration Act 1958* (Cth) ("the Act"). The appellant was then taken to Villawood Immigration Detention Centre.

4 On 28 July 2008 the appellant lodged a protection visa application with the Department of Immigration and Citizenship.

5 The appellant claimed it was not safe for him to return, as he feared persecutory harm for being a Christian. Particularly, he claimed that he feared harm from his father who wanted him to join a "secret cult", of which his father was the leader. He also claimed to fear harm from his step-brother who he said was another member of a "cult" as well as being involved in the Movement for the Emancipation of the Niger Delta (the Niger Delta Group). The appellant claimed that he feared that because he is a Christian, his family want to harm him.

6 The appellant detailed an incident of violence in September 2001, when, he said, his step-brother attacked him with a machete and a bottle. Following the attack, the appellant claimed to have reported his step-brother to police who detained him for one month, and then released him after charging him with attempted murder. The appellant claimed that his father had threatened to kill him, if his step-brother was sent to gaol. For this reason the appellant said that he did not further pursue the charge against his step-brother.

7 The appellant claimed that if he was returned to Nigeria, he would continue to face persecution as he had inherited from his father a special power to evangelise and do "good things". As the appellant claimed:

> I want to become a Pastor and evangelise so I am seen as their enemy.

8 A delegate of the first respondent reviewed the appellant's application for a protection visa. The delegate accepted that the appellant was in danger of being killed by his father, his step-brother or their followers, but concluded that they were not "authorities" in Nigeria. Instead, the delegate viewed this to be an instance of private harm and therefore not within the scope of definition of a refugee under the Convention relating to the Status of Refugees: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331.

9 In addition, the delegate considered independent country information and found that the Nigerian government was able to provide effective protection to its citizens. As such, the delegate concluded that there was no real chance that the appellant would face persecution if he were to return to Nigeria.

10 Accordingly, the delegate refused the application on 18 August 2008.

The First Tribunal Hearing

11 On 22 August 2008, the appellant lodged an application for merits review of the delegate's decision with the Tribunal (the First Tribunal).

12 The First Tribunal, by letter dated 26 August 2008 addressed to his migration agent, invited the appellant to attend a hearing (the First Tribunal Hearing). The First Tribunal Hearing occurred on 5 September 2008 at which the appellant gave oral evidence. The First Tribunal, by letter to the appellant's migration agent, dated 8 September 2008, pursuant to s 424A of the Act invited comment from the appellant in relation to certain information by 15 September 2008. By facsimile letter dated 15 September 2008, the appellant's migration agent provided a detailed response to the First Tribunal but requested a one week extension to provide additional information. The First Tribunal refused this request. In any event, this additional information was provided by the migration agent by facsimile letter to the First Tribunal dated 16 September 2008. On 17 September 2008, the First Tribunal wrote to the migration agent inviting the appellant to appear before it again on 26 September 2008, in order that he might give oral evidence.

13 During this hearing the First Tribunal discussed with the appellant a range of matters, including his movements in the period of 1996 to 2008 between Lagos, Uyo, Port Harcourt and Australia and his associated claims of harm suffered or feared. The First Tribunal's decision record sets out in detail the appellant's claims, the evidence submitted by the appellant to the delegate and the evidence that the appellant gave at the First Tribunal hearing.

14 After considering the appellant's claims, the First Tribunal reached the conclusion that the appellant did not have a well founded fear of persecution for a Convention reason in Nigeria. The First Tribunal found that the appellant's evidence was not credible, as it was inconsistent, incomplete, embellished or otherwise fabricated.

15 Amongst other things, the First Tribunal had regard to the appellant's ability to live and raise a child in Port Harcourt without adverse attention between 2005 and mid 2007. This was held to be inconsistent with his claims to have feared harm in Nigeria. The First

Tribunal concluded that the appellant could safely relocate within Nigeria and that sufficient protection was available in Nigeria. The First Tribunal handed down its decision on 21 October 2008.

16 On 24 November 2008, the appellant sought review of the First Tribunal's decision by the Federal Magistrates Court. On 9 March 2009, the Federal Magistrate ordered by consent that the First Tribunal's decision be set aside and that the matter be remitted to the Tribunal for determination according to law.

The Second Tribunal Hearing

17 By letter dated 26 March 2009, the appellant was invited to appear before a second, differently constituted Tribunal (the Tribunal).

18 On 2 April 2009, the Tribunal sent the appellant a letter pursuant to s 424A of the Act inviting comment or response to information which it considered may form the reasons or part of the reasons for affirming the decision under review. The Tribunal referred to the fact that the appellant had not sought protection during his first visit to Australia as well as the delay in his subsequent return. The Tribunal also referred to the Airport Interview and suggested that there were inconsistencies between his account at the Airport Interview and claims detailed in his protection visa.

19 The appellant by his advisor replied on 20 April 2009, claiming that, during his first visit to Australia, he did have a fear of persecution and disclosed this to his sponsors, the Net Ministry. He further claimed that he returned to Nigeria because the Net Ministry had organised for him to do so, not because it was safe. The appellant's advisor requested a copy of the full record of the Airport Interview, including "the actual questions asked and the actual recorded responses" by the appellant.

20 The Tribunal responded to the request with a letter dated 20 April 2009. Attached to the letter was a copy of the Inspector's Report dated 16 April 2008 (the Airport Interview Report) which was a paraphrased summary of the Airport Interview.

21 On 4 May 2009, the appellant and his migration agent attended the hearing and gave oral evidence to the Tribunal.

22 The hearing commenced with questions from the Tribunal about the matters raised in the s 424A letter. This was followed by oral evidence from two witnesses, called by the appellant. The witnesses both stated that they had known the appellant for about six months, considered that he was of good character and that he had a genuine fear of persecution.

23 The Tribunal found that the appellant did not have a well-founded fear of persecution in Nigeria for a Convention reason, and affirmed the decision under review.

24 The Tribunal concluded that the appellant was not a credible witness because the appellant's account of events had differed significantly as between the Airport Interview and his later protection visa application. These differences caused the Tribunal to identify a number of inconsistencies. For instance, the Tribunal concluded that at the Airport Interview the appellant said that his fear was directed only to his family and that he had no other issues returning to Nigeria. However in his protection visa application, he stated that he feared persecution from other groups, including his father's and step-brother's cults and the Niger Delta Group.

25 The Tribunal also found that the harm purportedly suffered by the appellant was recounted by him with greater seriousness and severity as his application for a protection visa progressed. An example of this was identified by the Tribunal in this way. At the Airport Interview the appellant spoke of the harm he faced on return to Nigeria and characterised this as being "family problems". Later, in his protection visa application and before the Tribunal, the appellant built upon this claim to include mention of cults, special powers and the Niger Delta Group. The Tribunal found that these factors were not mentioned at the Airport Interview. The inconsistencies in the appellant's claims together with his apparent embellishment, led the Tribunal to conclude that the appellant's evidence was fabricated in order to support his application.

26 The Tribunal accordingly concluded that it did not accept that cult members had ever harmed or threatened to harm the appellant. The only instance of harm accepted by the Tribunal was the 2001 attack, which it held arose from a family dispute and was not motivated by any Convention-related reason.

Federal Magistrates Court

27 On 28 September 2009, the appellant applied to the Federal Magistrates Court for review of the Tribunal's decision. The application was amended on 8 June 2010. In the amended application, the appellant claimed that:

> 1. The Tribunal failed to consider claims and information given by the applicant at his interview at Sydney International Airport on 11 July 2008.
>
> **Particulars**
>
> (a) That the step brother who attacked him in 2002 (or 2001) belonged to a cult or gang.
> (b) That the applicant's statement that he had no issues returning to Nigeria was qualified by words to the effect "other than the events that [he had previously] described".
> (c) That there had been repetitions of the attack upon in 2002 (or 2001) and that is why he stayed in other states of Nigeria.
> (d) That he was not returning voluntarily, but because of the situation at hand – that he did not have any say.
>
> 2. The Tribunal failed to ask a question that were required of it were to fulfil the exercise of its jurisdiction.
>
> **Particulars**
>
> (a) Whether the cults to which the applicant's step brother and father belonged could be characterised as religions.
>
> 3. The Tribunal erred in its interpretation and application of Article 1A(2) of the Refugees Convention.
>
> **Particulars**
>
> (a) Failure to correct interpret and apply the causal nexus between the applicant's fear of persecution and the Convention ground of religion.
> (b) Error in finding that such nexus had to be with "the applicant's religion per se."

28 In support of these grounds, the appellant sought to file in the Federal Magistrates Court an affidavit deposed by Robert Liu of 11 June 2010. This affidavit annexed a partial transcript of the Airport Interview and an exhibit which was an audio recording of the Airport Interview. The first respondent contended, and the Federal Magistrate accepted, that the recording and the transcript should not be admitted into evidence as they were irrelevant. His Honour further concluded that even if regard was had to the transcript and audio recording, that no material difference could be found between that putative evidence and the Airport Interview Report that was before the Tribunal, to substantiate the claims in the first ground.

29 The Federal Magistrate considered the second ground of the application, which was that the Tribunal did not properly consider whether the cults that the appellant's family members belong to constituted a 'religion'. However, his Honour held that this complaint was *"putting the cart before the horse"* and that as the Tribunal had found that there was no factual basis to the appellant's claims, it was not necessary to consider the subsequent question of whether there was a nexus between purported incidents and a Convention ground.

30 The third ground of the application was also dismissed. This ground sought to take issue with the Tribunal's finding that any claim of persecution on grounds of an applicant's religion, had to pertain to the "applicant's religion per se". However, his Honour found that the Tribunal's reasoning was not affected by its view of the nexus between the claims and a Convention ground. Instead the Tribunal's decision was based on a finding that the appellant's claims lacked credibility. His Honour said that the Tribunal's decision ought to be read holistically, and that a holistic reading of the Tribunal's decision did not reveal error of a kind that would invalidate the decision.

31 The Federal Magistrate held that none of the grounds revealed jurisdictional error.

Appeal to this Court

32 The appellant filed a notice of appeal on 5 January 2011. On 22 February 2011, the appellant filed an amended notice of appeal. The amended notice of appeal contains the following grounds:

> 1. The Court Below erred in refusing leave to file a Further Amended Application alleging that the decision of the second respondent was affected by a breach of natural justice.
>
> 2. The Court Below erred in not admitting into evidence the affidavit of Robert Liu, made on 11 June 2010 the annexure thereto (which was a partial transcript of an interview between the Appellant and two officers of the Department of Immigration and Citizenship), and the exhibit thereto (which was an audio tape of that hearing).
>
> 3. The Court below erred in finding that decision of the Refugee Review Tribunal (the Tribunal) was not infected by a breach the requirements of procedural fairness.
>
> **Particulars**
>
> (a) Error in finding that in the circumstances of this case, the failure of

the Tribunal to consider information given by the appellant in an audio recording of his interview with officers of the Department of Immigration and Citizenship at Sydney Airport on 11 July 2008, entailed a breach of the requirements of procedural fairness.

Further Particulars

That information was:

(i) That the step brother who attacked him in 2002 (or 2001) belonged to a cult or gang.
(ii) That the applicant's statement that he had no issues returning to Nigeria was qualified by the words to the effect "other than the events that [he had previously] described".
(iii) That there had been repetitions of the attack upon him in 2002 (or 2001) and that is why he stayed in other states of Nigeria.
(iv) That he was not returning the Nigeria voluntarily, but because of the situation at hand – that he did not have any say.

4. The Court Below erred in finding that the Tribunal was not required to consider claims and information given by the appellant at his interview at Sydney International Airport on 11 July 2008, that information being:

(i) That the step brother who attacked him in 2002 (or 2001) belonged to a cult or gang.
(ii) That the applicant's statement that he had no issues returning to Nigeria was qualified by the words to the effect "other than the events that [he had previously] described".
(iii) That there had been repetitions of the attack upon him in 2002 (or 2001) and that is why he stayed in other states of Nigeria.
(iv) That he was not returning the Nigeria voluntarily, but because of the situation at hand – that he did not have any say.

Particulars

(a) Contrary to the finding of the Court Below, s 418(3) of the *Migration Act* imposes a requirement upon the Secretary of the Department of Immigration and Citizenship (the Secretary) that documents in the Secretary's possession or control which viewed reasonably and objectively are relevant to the Tribunal's review be given to the Tribunal.

(b) Contrary to the finding of the Court Below, the audio recording of the appellant's interview with an officer of the Department of Immigration and Citizenship was constructively before the Tribunal.

(c) Contrary to the findings of the Court Below, consideration of this information could have made a difference to the outcome of the application.

33 To the extent that leave to amend the grounds of appeal is necessary then I would grant that leave. Self evidently from these reasons I have concluded that the grounds, broadly taken together, have merit.

Consideration

34 The audio recording of the Airport Interview was not contained in the materials before the delegate of the Minister who rejected the appellant's protection visa application, nor was it contained in the materials before the Tribunal. The partial transcript of the recording was not brought into existence until 4 days before the hearing of the proceedings in the Federal Magistrates Court.

35 The relevant part of this transcript, which was an annexure to the affidavit of Robert Liu affirmed 11 June 2010 and which the Federal Magistrate declined to admit into evidence is as follows:

Q	235.	And you're describing an event which occurred in 1992?
A		No, 19 – I mean 2002, sorry.
Q	236.	Okay.
A		Yeah, 2002.
Q	237.	You would have been 22 years of age?
A		Yeah.
Q	238.	In the year 2002?
A		2002, yeah. And he came in with a (indistinct) gun and – and bottle. While I was talking because I was bending because in Africa we don't have the washing machines, so I was washing with the pail, the bucket, and I was bending like this. While I was talking, was washing and so he was standing in front of me telling –asking me, "You and your daddy reported me to the police for them to come and catch me or to kill me". And I said, "Why didn't – why did you pick all those things, and you had to involve (indistinct) with daddy. Why should you do that?"
Q	239.	Who was this man that was making this comment to you?
A		My stepbrother.
Q	240.	Okay, not your father?
A		No. My stepbrother. He's younger than me, and he's into the gang, a secret code.
Q	241.	He's what?
A		He's into a gang, a secret code.
Q	242.	What do you mean by that?

A It – a kind of secret society. A gang.

Q 243. Egan?
Yeah, a gang. A group of people, you know.
Q 244. A gang?
A Yeah, a gang.

Q 245. Gang, okay.
A So I – and he – I was talking to him and I was bending like that, and all of a sudden he just picked up something, a bottle on his – on his pocket, because I never had – I never knew he had such intention on my head. And just slammed me on my head, bah, and I don't know the next what happened, but I know my – immediately I was – my eyes, everything darken me on my face. The next thing I had – I had, just like something was coming out of me, like this, and I never knew it was blood, so I thought maybe it's an ant that was coming, you know, and I did like this. At the moment I look at my thumb, I thought there's blood and that was when I recovered. That something happen to me, and that was when I start running and I was living in boxer short, and I had to report to the police and he broke a lot of things, and that's all, and I was of the intention to leave home because I know I – my brother – my stepbrothers, they don't like me and my mother. My mother is – because we're going to school and they are not in school.

Q 246. Okay. I will ask you a specific question. Are there any issues that would cause you any serious problems if you went back to Nigeria, other than the event that you described?
A No.

Q 247. Okay. After the 2002 event - - -
A Yeah.

Q 248. - - -have there been repetitive events?
A Yeah.

Q 249. How many?
A Yeah, that's why I – I wasn't in my state. I had – even when I went back home, I was another state so my mum was sometimes day transport to come and see me there. I (indistinct) now, I have to be in Lagos and if I stay in Lagos for some – for some days, and I'll get to Ghana and just stay with a friend in Ghana.

36 The document before the Tribunal was the Airport Interview Report of the appellant's Airport Interview. Reference in this Report to "Pax" are to the appellant. It contained relevantly the following:

> Summary of Client's response to NOICC: (sic)
>
> Pax declared that he has no reasons to provide as to why his visa should not be cancelled. Pax stated that he cannot go home if his visa is cancelled. He cannot face his mother and brothers. People in Nigeria believe he has come to Australia to

> participate in a program. He will be embarrassed if he is returned to Nigeria. He is having some family problems in Nigeria. He fears that his step brothers are going to attack him.
> . . .
> At approx 19.40 hrs, shift supervisor had a conversation with Pax in the interview room. Shift supervisor reiterated visa cancellation. Pax was asked if he had any problems returning to Nigeria. Pax said yes. He mentioned that his father broke into his home and stole personal effects.
> Pax then said his step brother attacked him and accused him of reporting their father to the police.
> The event occurred in 2002.
> . . .
> Mr Eton was asked if he had any issues returning to Nigeria.
> Pax answered no to the question.

37 The differences between what the appellant told the Inspector at the Airport Interview as stated in the Airport Interview Report and his later claims were central to the Tribunal's conclusion that the appellant was not a credible person. This is evident from the Tribunal's Statement of Decision and Reasons at [95]. I will refer to these findings in detail later.

38 That the Secretary to the Minister did not forward the audio recording of the Airport Interview to the Tribunal does not manifest jurisdictional error on the part of the Tribunal: *WAGP v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 151 FCR 413.

39 The first respondent submits that the Tribunal cannot be held to have failed to consider a claim, a fact or certain evidence if that claim fact or evidence was not before it: *Chen v Minister for Immigration & Multicultural Affairs* (2000) 106 FCR 157 at [114] citing *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425 per Brennan J.

40 The question here however, in light of what transpired, is whether the audio recording ought to have been obtained by the Tribunal and whether the appellant has been denied a fair hearing because it was not obtained.

41 The s 424 letter sent by the First Tribunal to the appellant dated 8 September 2008, referred to earlier, invited him to comment on or to respond to information which the First Tribunal then considered would, subject to those comments or responses, be the reason or part of the reason for affirming the decision under review. This letter was before the Tribunal.

42 The information gave rise to a number of "issues" articulated in the letter by the First Tribunal. They included:

> **Issue 2:**
>
> The Tribunal does not understand the claim to have been harmed, particularly in 2006, had been part of the Tribunal hearing. Please comment.
>
> **Issue 3:**
>
> The Tribunal does not understand why the applicant's brother allegedly would have attempted to attack him in Port Harcourt in 2007. Please comment.

43 The appellant, by letter from his migration agent, replied relevantly in relation to these two issues as follows:

> **Issue 2**
>
> In his Protection Visa Application in response to Q41 the Applicant stated:
>
> > "My stepbrother is ruthless, people are scared of him. He uses his power as a member of the Delta Militant Group to terrorise people. He also used it to terrorise me because I am a Christian and follow the light. (paragraph 5, page 3)."
> >
> > "The worst time was when he attacked me on September 2001. (first sentence, paragraph 6, page 3)."
>
> It is submitted that the intention of the Applicant in the last sentence of paragraph 5 and the first sentence in paragraph 6 was to convey that the attack in September 2001 was the worst time he was attacked, not the only time he was attacked.
>
> It is submitted that the attack in 2004 is an example of another time the Applicant claims to have been attacked by his brother rather than a new claim.
> Specific details of all the times the applicant have been attacked by his brother were not included with the Protection Visa Application nor stated at the Hearing. The only attacks mentioned by the Applicant were the attacks that the Applicant considered were the worst ones and the ones that highlight the risk the harm the Applicant suffered in the past and the risk of harm in the future if he is returned to Nigeria.
>
> **Issue 3**
>
> The Applicant states that he has been attacked in the past and is always at risk of being attacked by his step-brother and that he was at risk/would still be at risk even if he tries to relocate. The attempted attack in Port Harcourt in 2007 is an example of this. The reason for the attacks/attempted attacks are those stated by the Applicant in his Protection Visa Application and at the Tribunal Hearing.
>
> In terms of the statements made by the Applicant at the border interview the Applicant states that when he stated that "… he did not know how he was going to support his 2 year old daughter …" he also stated that this was because he was at risk of being harmed and if he was harmed or had to continually go into hiding or relocate

> he would not be able to work and support his daughter.
>
> *The Applicant does not have a copy of the border interview and would like an opportunity to have a copy of the border interview to fully comment on all the information recorded at the border interview should this information be information that impacts on the Applicant's credibility.* (Emphasis added)

This written response was also before the Tribunal.

44 It may be seen that in the last part of his response to Issue 3 the appellant said he wanted an opportunity to have a copy of the "border interview", that is, the Airport Interview, in order to "fully comment on all the information recorded" in order to respond to the s 424A letter and in particular in relation to information in that letter which might be information "that impacts on the Applicant's credibility".

45 The Tribunal also sent a letter to the appellant pursuant to s 424A of the Act. This one, in effect, summarised the Airport Interview Report. The letter stated in relation to what was in that Report:

> You have not provided any other information in your airport interview. In particular, you have not provided any information concerning the problems you had with your family as a result of your religion, which you later stated in your protection visa application.

46 It went on to state that this information was relevant because it may indicate that the appellant did not have a genuine fear of persecution when he last entered Australia and also relevant because it might cause the Tribunal to question his credibility and the authenticity of his claims.

47 The appellant responded by letter from his migration agent as follows:

> Response to information regarding comments made by the Applicant at the airport interview (page 1, 2 and 3 of the Tribunal's letter).
>
> The Applicant does not have a copy of the airport interview.
>
> The Applicant respectfully request the Tribunal that *a full copy of the airport interview* be provided to the Applicant so that the Applicant *has a copy of the full record of the airport interview – the actual questions asked and the actual recorded responses by the Applicant* to enable him to respond to the Tribunal's letter. (Emphasis added)

48 The Airport Interview Report notes at one point that the appellant had requested the DIAC Officer to "stop interview recording". It was not a request merely to stop the interview. It is apparent from the use of the word "recording" that the interview, by one means or another was being recorded. This ought reasonably to have been apparent to the Tribunal. The Federal Magistrate concluded otherwise.

49 The Tribunal was faced with a quite specific request for a "full" copy of the interview; a "full record of the Airport Interview – the actual questions asked and the actual recorded responses to enable him to respond to the Tribunal's letter". However, the Tribunal made no enquiries of the Department as to the existence of such a record. In my opinion, it ought to have done so. Had it done so it would, it seems probable, have come into possession of the audio recording of the Airport Interview. The reason it did not do so is perhaps explained by its failure to properly consider the precise request made by the appellant as well as the content of the Airport Interview Report which was in its possession.

50 The first respondent submits that, after receiving the Airport Interview Report, the appellant did not challenge its accuracy or ask the Tribunal to seek out any additional material at any stage of the review. However, in my opinion, the appellant was entitled to assume that his request had been answered, that the Airport Interview Report was, whilst plainly not a verbatim record, nonetheless the only record of the Airport Interview. In that respect, albeit unwittingly on the part of the Tribunal, I think that the appellant was misled as to the non-existence of the category of document he had expressly asked to be provided to him.

51 The Tribunal in its Statement of Decision and Reasons dated 27 May 2009 referred to its s 424A letter dated 2 April 2009 at [44] and to the appellant's reply at [45]-[46]. It described the appellant's request in this way:

> [45] … With respect to the airport interview, the applicant stated that he did not have a copy of the document. He requested the Tribunal to provide him with a copy of the airport interview …
>
> [46] On 20 April 2009 the Tribunal wrote to the applicant, providing him with a copy of the entire airport interview. The Tribunal noted that it was unsure what other information was requested and invited the applicant's representative to contact the Tribunal.

52 The "other information" referred to at [46], as is evident from the Tribunal's letter dated 20 April 2009, concerned Net Ministries and was not referrable to the request regarding the Airport Interview. Plainly however, the Tribunal, contrary to what it stated in its Statement of Decision and Reasons at [46], did not provide him with "a copy of the entire airport interview".

53 The first respondent submits that the Tribunal correctly understood the appellant's request to be seeking a copy of the material on which the Tribunal based its knowledge of the statements attributed to the appellant in the s 424A letter and that, on that understanding, the Tribunal complied with the request. I do not agree.

54 The description by the Tribunal as to what the appellant requested concerning the Airport Interview is in fact a misdescription. He did not ask for a copy of the airport interview. The appellant, as I earlier noted, asked for "a copy of the full record of the airport interview – the actual questions asked and the actual recorded responses by the appellant …".

55 The Airport Interview Report is self evidently a summary of the interview which, when referring to the appellant, is expressed in the third person. Indeed, that part of it which states that the interview recommenced at 18:48 hrs commences by stating "Summary of Client's Response to NOICC". It quite obviously does not present as a record, however taken, of questions actually asked by the Immigration Officer or answers actually given by the appellant. The Airport Interview Report as I observed, notes that shortly after the interview recommenced at 17.54 hours that the appellant "requested DIAC Officer to stop interview recording".

56 By s 424 of the Act the Tribunal in its conduct of a review may get any information that it considers relevant. The object of s 424A is to provide procedural fairness to the applicant by alerting the applicant to material that the Tribunal considers to be adverse to the applicant's case and affording the applicant the opportunity to comment upon it: *SAAP v Minister for Immigration & Multicultural Affairs* (2005) 215 ALR 162 per McHugh J at [50] and per Gummow J at [118].

57 As was observed in *Minister for Immigration & Citizenship v SZIAI* (2009) 259 ALR 429 the term "inquisitorial" has been applied to Tribunal proceedings to distinguish them

from adversarial proceedings. The term also gives character to the Tribunal's statutory functions. As the plurality judgment stated at [25]:

> [25] … The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. … [Footnote omitted.]

58 Section 427(1)(d) of the Act empowers the Tribunal, relevantly, to require the Secretary to the Department to "arrange for the making of any investigation … that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation …".

59 This provision confers a discretion upon the Tribunal to initiate an investigation and receive a report. It does not impose a duty on the Tribunal to do so. Rather it is an empowering provision that is intended to assist the Tribunal to better perform its duties as an inquisitorial body to inquire, to be informed, and to decide: *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at [43].

60 As French CJ and Kiefel J observed in *Minister for Immigration & Citizenship v SZGUR* (2011) 273 ALR 223 at [19]:

> The power conferred by s 427(1)(d) is to be exercised having regard to the requirement imposed on the tribunal, in the discharge of its core function of reviewing tribunal decisions, "to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick" and to act "according to substantial justice and the merits of the case". In so doing it is not to be bound by "technicalities, legal forms or rules of evidence". … [Footnotes omitted]

61 In *M164/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) FCAFC 16 at [76] the Full Court observed that if the material before the Tribunal and the circumstances are such that the need for further inquiry is obvious, and no impediment to the conduct of such an inquiry is apparent, the failure of the Tribunal to exercise the power under s 427(1)(d) and proceeding instead to make a decision adverse to an applicant may point to a conclusion that the Tribunal has denied the applicant the conduct of a fair proceeding.

62 *SZNKO v Minister for Immigration & Citizenship* (2010) 267 ALR 35 concerned in part the question whether there was procedural unfairness in the context of s 424A of the Act. Flick J considered, at [27] that:

> A meaningful opportunity to "comment … or respond" in the present proceeding required the disclosure of information that was withheld. An explanation may have been forthcoming if the applicant had been told more about the other letter that the tribunal member had come across. The reservations of the tribunal member, especially given his other concerns as to the credibility of the now appellant, may not have been misplaced. No further "comment … or respon[se]" may in fact have been forthcoming. But the opportunity to "comment … or respond" is the very procedural safeguard which enables an applicant to at least have an opportunity to address those reservations. An opportunity to "comment … or respond" to the other letter is only a meaningful opportunity if there has been disclosure of such particulars as enables an applicant to put that other letter into context.

63 In my view, the Tribunal ought to have exercised its power under s 427(1)(d) to require the Minister to arrange for an investigation to be made and then report back to the Tribunal. As I have said, it seems likely that this would have unearthed the audio recording of the Airport Interview which could have been provided to the Tribunal. This approach would have provided the appellant with a meaningful opportunity to comment or respond to the s 424A letter from the Tribunal. That after all, was what the appellant said he wanted the full record for: "to enable him to respond to the Tribunal's letter".

64 In *WAGP* the Court considered a document which had not been sent by the Secretary to the Tribunal and observed at [37]-[38] as follows:

> [37] However, in this matter, there is nothing to indicate that the Tribunal itself was aware of the missing document at the time of its decision or prior to its decision. The evidence is to the contrary.
>
> [38] It was the Second Tribunal's function, in deciding the appellant's claim, to have regard to the evidence before it and to accord him procedural fairness, relevantly so that he was given the opportunity to be heard on the matters before the Tribunal. It is not suggested that the appellant was not given that opportunity. Indeed, counsel for the appellant acknowledged in the course of submissions that the Tribunal could not have done more than it did in terms of according the appellant procedural fairness. The 'glitch' (to use the word used in submissions) in the flow of information from the Secretary so that the missing document, after it had been located, was not sent to the Second Tribunal when making its decision was not something within its control or of which it was aware.

65 It is apparent that if the Tribunal in *WAGP* had been aware of the missing document prior to making its decision then the result in the appeal may have been different. So much, it

seems, may also have been the case in *re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Applicant S134/2002* (2003) 211 CLR 441. There the High Court considered whether there was procedural unfairness where the Tribunal had in a departmental file certain information which may have been relevant to the disposition of the review before it. The majority concluded at [33] that "the Tribunal could not have disclosed that of which it was unaware" and there was accordingly no procedural unfairness. Here the Tribunal did not have the audio recording but, in my opinion, it should have made the appropriate enquiries. It was on notice as to the existence of a more fulsome record of the Airport Interview disclosing actual questions asked and actual answers given.

66 What occurred, in my opinion, deprived the appellant a meaningful opportunity to respond. The appellant was entitled to think that the Airport Interview Report was the only documentary evidence of what passed at the Airport Interview and that what he had asked for to enable him to comment or respond under s 424A(1)(c) did not exist.

67 If the Tribunal in this case had obtained the audio recording then in my opinion, its conclusions concerning the appellant's credibility could have been significantly different. That possibility is a sufficient basis to allow the appeal: *Re Refugee Review Tribunal; Ex parte Alaa* (2000) 204 CLR 82. There, Gleeson CJ said at [3]-[4]:

> [3] As to the first issue, the statement in question covered a matter which had a bearing upon the credibility of the prosecutor. It misled the prosecutor, as a consequence of which he was deprived of the opportunity to answer, by evidence and argument, adverse inferences which were based in part upon a misunderstanding of his previous conduct. Had he been given an opportunity to correct the misunderstanding, a different view might have been taken as to his credibility.
>
> [4] It cannot be concluded that the denial of that opportunity made no difference to the outcome of the proceeding. The tribunal's conclusion that certain information given by the prosecutor was a concoction was based, in part, upon an unwarranted assumption as to what the prosecutor had previously told various authorities; an assumption which, according to the evidence, the prosecutor could and would have corrected had he not been inadvertently misled by the tribunal. It is possible that, even if the prosecutor had been given an opportunity to deal with the point, the tribunal's ultimate conclusion would have been the same. But no one can be sure of that. Decisions as to credibility are often based upon matters of impression, and an unfavourable view taken upon an otherwise minor issue may be decisive. As a result of the conduct of the tribunal, the prosecutor was deprived of a fair opportunity of presenting his case, and of correcting an erroneous and unfavourable factual assumption relevant to his credibility. The circumstance that this resulted from an innocent misstatement does not alter the position. The question concerns the nature and extent of the statutory power exercised by the tribunal, and the condition that the power be exercised in a manner which was procedurally fair; not the good faith of the

tribunal.

68 This case, in principle, is similar to the position in *Ex parte Alaa* as to which see also Gaudron and Gummow JJ at [80]; McHugh J at [122]; Kirby J at [131]; and Callinan J at [211].

69 I do not accept the first respondent's submission that even if the evidence were admitted, the Tribunal did not overlook or misunderstand any of the appellant's statements given at the Airport Interview and that there are no discrepancies between the Airport Interview Report and the audio recording of the Airport Interview (as partially transcribed).

70 The findings of the Tribunal at [95] of its Reasons are relevant. They are as follows:

> 95. The Tribunal found the applicant not to be a witness of credibility. The Tribunal notes that many of his claims, or descriptions of events, had changed significantly in various interviews and submissions put forward by the applicant. For example:
>
> - at the airport interview the applicant stated that he had family problems and that he was afraid that his step-brothers would attack him. His claimed fear at the time is directed only to his family and he expressly stated that he had no issues returning to Nigeria. In his protection visa application, the applicant claims that he feared persecution from other groups, including his father's and brother's cults and the Niger Delta Group to which his brother belonged.
>
> - The reasons for the harm he feared also changed significantly from the airport interview to the applicant's evidence to the Tribunal. The applicant claimed at the airport interview that he had "family problems" with his step-brothers. The applicant made no mention of the cults, his special powers or the Niger Delta Group or the fear he has as a result of his refusal to join the cult.
>
> - In the airport interview the applicant claimed that his father broke into his home and stole some property. In his protection visa application the applicant claimed that his father was against him because he refused to join the cult and also because he had exposed his father in the church and his brother to the police. The applicant informed the Tribunal in his oral evidence that his fear of his father and brothers arises only from his refusal to join the cult
>
> - At the airport interview, the applicant referred to one specific instance of past harm, when his father broke into his home and stole his personal effects and his step-brother attacked him in 2002 for reporting his father to the police. In his protection visa application the applicant referred to his brother's attack in 2001 and also to having to leave his house for fear of being attacked by the cult members and the Niger Delta Group members. In his protection visa interview the applicant referred to an

> attack in 2004 and he stated in the protection interview that after he moved away from the family home, his father did not try to look for him because he did not want to have anything to do with the applicant. In his oral evidence to the Tribunals he referred to several incidents which he had not mentioned in his earlier evidence, such as the cult members threatening him in church and at the university, the attack in 2000 when a gun was pointed at him and as a result of which he had to leave home, the written threats he used to receive between 1999 or 2000 and 2007 and a shooting in 2004. The applicant refers to threats received by his family and attacks on the homes of those he lived with. None of these claims were raised in the applicant's earlier evidence.

71 The appellant's submissions identified a number of discrepancies. The first respondent submits that each of them was correctly rejected by the Federal Magistrate at [80]-[102], [108]-[110].

72 The appellant submits that had the audio recording of the Airport Interview (or the relevant part of the transcript) been before the Tribunal it may have concluded that:

(i) The step brother who attacked him in 2002 (or 2001) belonged to a cult or gang.

(ii) The applicant’s statement that he had no issues returning to Nigeria was qualified by words to the effect “other than the events that [he had previously] described”.

(iii) There had been repetitions of the attack upon him in 2002 (or 2001) and that is why he stayed in other states of Nigeria.

(iv) He was not returning the (sic) Nigeria voluntarily, but because of the situation at hand – that he did not have any say.

73 I agree, having considered the transcript of the audio recording, which I have set out at [35] above.

74 It seems to me that the possibility of a successful outcome for the appellant had the audio recording been before the Tribunal cannot be discounted. Contrary to the submissions of the first respondent the transcript of the audio recording is in significant respects different to the relevant content of the Airport Interview Report.

75 The first respondent submits that the Airport Interview Report was not deficient and that, even if the appellant's evidence were received, there would be no factual basis to support the appellant's claims that the Tribunal fell into jurisdictional error in the manner asserted in grounds 3 or 4 of the amended notice of appeal.

76 I reject this submission. I find that the Federal Magistrate erred in refusing the appellant's application to amend his application to introduce a new ground 4 on the basis that it lacked merit. That proposed ground raised the procedural fairness ground which has been successful in this Court.

77 It is necessary, because the appellant could not have established the denial of procedural fairness otherwise, to admit into evidence the affidavit of Robert Liu of 11 June 2010 with the partial transcript of the Airport Interview as well as the audio recording: *Percerep v Minister for Immigration & Multicultural Affairs* (1998) 86 FCR 483 at 495; *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28 at [13] per Gray ACJ and North J. I find that the Federal Magistrate was in error in excluding this affidavit in the application before him.

78 I would allow this appeal with costs. The orders of the Federal Magistrate made on 13 December 2010 should be set aside and in lieu thereof be orders that:

(a) The matter be remitted to the Refugee Review Tribunal, differently constituted, to be heard and determined according to law;

(b) The first respondent pay the applicant's costs to be taxed if not agreed.

I certify that the preceding seventy-eight (78) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour.

Associate:

Dated: 17 May 2011