FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZFDK v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 1692

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a Protection (Class AZ) visa – application granted – Refugee Review Tribunal decision subject to jurisdictional error.

Judiciary Act 1903 (Cth), s.39B
Migration Act 1958 (Cth), ss.91X, 422B, 483A
Migration Legislation Amendment (Procedural Fairness) Act 2002 (Cth)

Abebe v Commonwealth of Australia (1999) 197 CLR 510
Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576
Kioa v West (1985) 159 CLR 550
Muin v Refugee Review Tribunal (2002) 190 ARL 601
Navarrete v Minister for Immigration [2004] FCA 1723
Re Minister for Immigration; Ex parte Applicant S154/2002 (2003) 201 ALR 437
SAAP v Minister for Immigration [2005] HCA 24
Somaghi v Minister for Immigration (1991) 31 FCR 100
SZEGT v Minister for Immigration [2005] FCA 1514
SZFWJ v Minister for Immigration [2006] FMCA 1231

Applicant:	SZFDK
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG3389 of 2005
Judgment of:	Lloyd-Jones FM
Hearing date:	25 September 2006
Delivered at:	Sydney
Delivered on:	22 December 2006

REPRESENTATION

Counsel for the Applicant: Mr L J Karp on a direct access basis

Counsel for the Respondents: Mr M Izzo

Solicitors for the Respondents: Ms M Jolley of Sparke Helmore

ORDERS

(1) The Refugee Review Tribunal is joined as the second respondent.

(2) The name of the first respondent be amended to read 'Minister for Immigration and Multicultural Affairs'.

(3) A writ of certiorari issue quashing the decision of the Refugee Review Tribunal made on 29 September 2005.

(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.

(5) The first respondent is to pay the applicant's costs and disbursements of and incidental to the application.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG3389 of 2005

SZFDK
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

The Proceedings

1. These proceedings were commenced by an application under s.39B of the *Judiciary Act 1903* (Cth) invoking s.483A of the *Migration Act 1958* (Cth) ("the Act") filed in the Sydney Registry of the Federal Magistrates Court of Australia on 21 November 2005 for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal"). The Tribunal decision was made on 29 September 2005 and handed down on 25 October 2005, affirming a decision of the delegate of the first respondent made on 9 November 1999, refusing to grant the applicant a Protection (class AZ) visa. The applicant's further amended application seeks relief in the form of constitutional writs against the decision of the Tribunal.

2. The applicant in these proceedings is not to be identified pursuant to s.91X of the Act and has been given the pseudonym "SZFDK".

3. The applicant has not sought to join the Tribunal as a party, however, given that it is an exercise of the Tribunal's jurisdiction that is under review, I will make the appropriate order that the Tribunal is joined as a party: *SAAP v Minister for Immigration* [2005] HCA 24 at [43], [91], [153] and [180].

Background

4. The Tribunal decision of Giles Short, reference N05/51121, provides the following background information. The applicant was notified of the delegate's decision by letter dated 9 November 1999. The application for review by the Tribunal was lodged on 1 December 1999. The Tribunal, differently constituted ("the first Tribunal"), affirmed the delegate's decision on 20 January 2003. The applicant sought judicial review of that decision in the Federal Court. On 10 February 2004, the Federal Magistrates Court declared that the decision of the first Tribunal made on 20 January 2003 was void and of no effect and ordered that the application be referred back to the Tribunal, differently constituted, to be heard and decided according to law. The Tribunal, differently constituted ("the second Tribunal"), affirmed the delegate's decision on 11 October 2004 and the applicant also sought review of this decision in the Federal Magistrates Court. On 7 April 2005, the Federal Magistrates Court ordered, by consent, that a writ of certiorari issue directing that the decision of the second Tribunal dated 11 October 2004 be quashed and that a writ of mandamus issue directing that the application be remitted to the Tribunal to be determined according to law.(Court Book ("CB") 181)

5. The applicant, a citizen of Bangladesh, arrived in Australia as a student in July 1999. He applied for a Protection (class AZ) visa on 31 August 1999. The applicant had completed his Secondary School Certificate (Year 10) in 1993. He was then admitted to Islamia Degree College in Chittagong where he completed his High School Certificate (Year 12) in March 1996. He then attended Omar Gani M.E.S. College and completed a Bachelor of Arts degree in March 1998.(CB 185)

Applicant's Claims

6. The applicant claims that his problems in Bangladesh arose from his involvement in the Awami League ("AL"). In a statement accompanying his visa application, the applicant said that he had been involved in the Chhatra League (a student wing of the AL) and was one of the leaders of the college committee at Islamia Degree College. He said that he was not able to sit for examinations in 1995 because members of the Chhatra Dal (the student wing of the Bangladesh Nationalist Party ("BNP")) tried to kill him on numerous occasions. The applicant said that he worked hard during the parliamentary election in 1996, which was won by the AL. He said that he had invited Kader Siddique, one of the AL leaders, to a public gathering but that local AL leaders opposed this. The applicant said that these leaders were members of the AL by day "but by night they were friends of the Jamaat-e-Islami and the BNP". The applicant had spoken at public gatherings about this kind of political malpractice. In order to stop his political activities, the leaders filed false cases against him. At his college campus, the applicant had stated that there were killers still in the AL and the local leaders conducted an oral hearing to oust him from the party. He said that if he returned to Bangladesh, he would be persecuted due to cases filed against him.(CB 185)

Tribunal's Findings and Reasons

7. A convenient summary of the Tribunal's reasons is in the first respondent's written submissions prepared by Mr Izzo and I adopt paragraphs 5 to 13 of those submissions:

> *5. The Tribunal set out the applicant's claims, and gave a detailed account of the evidence provided by the applicant to the first and second Tribunals, as well as the evidence provided to the present Tribunal. [CB 184.6-201.2]*
>
> *6. The Tribunal did not accept that the applicant bad been consistent in his evidence throughout the hearings before the various Tribunals. [CB 202.3]*
>
> *7. The Tribunal noted that the applicant's evidence in respect of two false cases he claimed had been filed against him was confused. He claimed before the second Tribunal to have*

been arrested in respect of the first case on 27 April 1997, whereas documents produced by the applicant indicated the first case was not the one in relation to which he had been arrested on 27 April 1997 but an earlier one initiated in March 1997 [CB 202.4, 202.6] He also claimed first that the case initiated in March 1997 had been finalised and that begun in April 1997 was still running, and then that the case filed in April had been finalised and that filed in March was still running. [CB 202.9-202.1] He claimed before the second Tribunal that the police had planted bullets in his pocket and this was the basis of the first case, but then said to the present Tribunal that the police had not planted the bullets on him. [CB 202.8,203.3]

8. *The Tribunal also pointed out that the applicant claimed to have been sentenced to seven months imprisonment in September 2000, but made no reference to this in his supplementary statement to the first Tribunal or at the first Tribunal hearing.[CB 203.4-203.6]*

9. *The Tribunal noted the applicant claimed to have been in hiding after being released on bail in August 1997 until he left Bangladesh in 1999, yet during this period he claimed to have completed his degree and to have been involved in political activities. He claimed the police bad not been hunting him at this time because he was on bail yet also claimed that he feared being arrested by the police. [CB 203.7-203.9]*

10. *The Tribunal referred to a letter from a clinical psychologist, suggesting the applicant was suffering from severe depression and post traumatic stress disorder and that she would therefore not expect him to have good recall. [CB 204.3] The letter dated 9 August 2005, was produced to the present Tribunal after the hearing had concluded, under cover of a further submission from the applicant's representatives. [CB 200.9] The Tribunal stated that there was no evidence before it to suggest that the applicant was affected by the conditions described in the letter when he gave evidence before the first and second Tribunals. Moreover, it pointed out, the applicant him did not claim any inability to recall events; rather, us the Tribunal laud indicated, he had given accounts which were contradictory. [CB 204.4]*

11. *The Tribunal referred to documents produced by the applicant in purported corroboration of his claims. It pointed to country information indicating that forged or fraudulently*

obtained documents are readily available in Bangladesh it also noted that three letters of reference the applicant had produced appeared, according the translations he produced, to be in identical terms in significant respects. [CB 204.5, 204.9]

12. *The Tribunal said that, having regard to the problems with the evidence which it had outlined, it did not accept the applicant as a witness of truth and taking into account the evidence as to forged or fraudulently obtained documents in Bangladesh it gave no weight to the documents he produced in purported corroboration of his claims. (CB 205.4] It accepted the applicant's teeth showed evidence of trauma, as indicated in a report from a dentist produced by the applicant but did not accept this trauma was caused when the applicant was arrested in April 1997 as had been submitted. It likewise accepted the applicant bad scars on his legs but not that they were caused by his political opponents in an incident it 1995 as be claimed. It accepted the professional opinion of the clinical psychologist regarding the conditions the applicant was suffering from, but noted that her account of the events leading to these conditions was based entirely on what she was told by the applicant. Since for the reasons it had given the Tribunal did not accept the applicant was a witness of truth, it did not accept that the conditions he was suffering from originated from persecution for political opinion which he suffered in Bangladesh, or would suffer if he returned there.[CB 205.5-205.7]*

13. *Having regard to the view the Tribunal had formed of the applicant's credibility, it did not accept his claimed involvement with the Awami League or the Chhatra League, or that his political opponents had attacked or threatened him or brought false cases against him. It did not accept that the applicant was arrested in Bangladesh, imprisoned there for four months as he claimed, or sentenced to seven years imprisonment. It concluded that it did not accept there was a real chance the applicant would be persecuted by reasons of his political opinion if he returned to Bangladesh, or that he would be involved in political activity if be returned there. [CB 205.8-206.1]*

Application for Review of the Tribunal's Decision

8. On 21 November 2005, the applicant filed an application for review under s.39B of the Judiciary Act setting out eight grounds of review which were unparticularised. On 26 April 2006, an amended application was filed prepared by Kah Lawyers who represented the applicant at that stage. The amended application contained four particularised grounds of review.

9. At the commencement of the hearing, Mr Karp, appearing for the applicant, sought leave to file a further amended application. Counsel for the respondents did not object and leave was granted. The further amended application contains one ground of review which is as follows:

   1. The Tribunal breached the rules of natural justice.

   Particulars

   (a) The Tribunal failed to disclose to the applicant conclusions that would not obviously have been open on the known evidence, those being

   (i) that there was no evidence before the current Tribunal that the applicant was suffering from post traumatic stress disorder affecting his memory at the time that he gave evidence before a previously constituted Tribunal.

   (ii) its opinion that it could not accept that the post traumatic stress disorder from which the applicant was suffering from resulted from the mistreatment to which he said he had been subjected because the account of events accepted by the clinical psychologist (whose diagnosis was accepted) was given to her by the applicant.

   Mr Karp confirmed that the previous amended application was abandoned. He also confirmed that the applicant now relied on the single ground appearing in the further amended application.

Submissions and Reasons

10. Mr Karp indicated that the further amended application raises a procedural fairness issue in an unusual context. He submits that the Tribunal failed to disclose to the applicant a conclusion which it came to, which would not have been obvious to the applicant. Therefore, the Tribunal failed to give the applicant an opportunity to respond. Mr Karp submits that this review application was made to the Tribunal before 4 July 2002 and the introduction by the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth); therefore s.422B of the Act does not apply. The amending Act introduces s.422B which applies in relation to any application for review made on or after the commencement of those provisions.

11. Mr Karp indicated that the pleaded ground applied to the Tribunal's conclusion about the letters from a clinical psychologist. Mr Karp also indicated that the form of words used in the further amended application derived from *Commissioner For the Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 ("*Alphaone*") at [30] per Northrop, Miles and French JJ:

> *…The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question. For a statutory exception to the latter proposition see the pre-decision conference process provided for in the Trade Practices Act 1974 (Cth).*

12. Mr Karp indicated that this was the way the issue had been articulated in several cases, the first being *Somaghi v Minister for Immigration* (1991) 31 FCR 100 ("*Somaghi*") at 108 to 109 where Jenkinson J, with whom Gummow J agreed, stated:

> *The reasons for judgment of Keely J, which I have had the advantage of reading, in my opinion demonstrate that the preponderance of authority favours a rule or principle that an administrative decision maker's evaluative conclusions on the material before him does not have to be communicated to an applicant so that considerations influencing the decision maker's mind adversely to the applicant's interest may be reviewed before the decision is made in the light of any submission or evidentiary*

material the applicant may desire to tender in response to the communication…There are other observations, which may be thought to constitute another gloss on the general rule, that an unfavourable animadversion, by the decision maker or expressed by a departmental officer to the decision maker, upon the conduct of an applicant, or even of another person whose interest in a decision favourable to the applicant is to be weighed by the decision maker, should be disclosed to the applicant so that he may respond, if the animadversion is not an obviously natural response to the circumstances which have evoked it: see Minister for Immigration, Local Government and Ethnic Affairs v Kumar (Full court of the Federal Court; unreported; judgment 31 May 1990); Kioa v West (1985) 159 CLR 550 at 573, 588, 634…

The delegate's conclusion that the appellant did not act in good faith in sending the letter is only critical in the sense that, if all the other issues have been found to be lawfully determined adversely to the applicant's interest in achieving recognition as a refugee, that conclusion destroys his last hope of that recognition. Even in that sense, criticality is not an undoubted quality of the conclusion, because the delegate was inclined to doubt whether transmission or publication of the letter would "result in any adverse attention from Iranian authorities". The other requirement, that unfavourable judgments by the decision maker on conduct of an applicant should, unless they are obviously natural responses in the circumstances, be communicated to the applicant so that he may have the opportunity by argument or evidence to try to change the judgment, is in my opinion applicable to the circumstances of this case. The purpose imputed by the delegate — of providing the applicant with a pretext for fear of persecution — was not so obviously the purpose which a reasonable observer would attribute to transmission of the letter that the applicant should be treated as having knowledge of what the delegate's judgment of that conduct would be.

13. Justice Gummow made the following statement to similar affect at 120:

In the present case, views already had been taken as to the "credibility problem" of the appellant. The course of events gave, as the primary Judge found, ample justification for that conclusion. Accordingly, it had been well open to decide in November 1989 that as then framed the application for refugee status should fail because the subjective element as to well-founded fear had not been made out.

It was against that background that there occurred the events which followed the letter of 6 December 1989 to the Embassy and

> *the solicitors' success in obtaining reconsider-ation of the application for refugee status. The solicitors had not asserted that their client now had a fresh claim, namely to be recognised as a refugee "sur place". But this point was taken by the DORS Committee and the Delegate. They embarked upon the question whether, even if the appellant previously had failed to make out a case for refugee status upon past events, now he was entitled to be treated, by virtue of subsequent events, as a refugee sur place. The uncommunicated assumption was that the appellant was to be taken as having now made such a claim.*
>
> *In that setting, it is to be borne in mind that the need to give the appellant the opportunity of meeting the proposed finding as to lack of bona fides would never be more necessary than when, given the existing view as to the appellant's "credibility problem", the decision maker was at risk otherwise of proceeding as if any response would be worthless. The observations of Deane J (in a slightly different setting) in* Kioa v West*, supra at 633, are in point.*

14. Mr Karp submits that the above passages are the genesis of his proposition in this case, although the principle has been applied sparingly. Mr Karp submits this principle was applied in *Navarrete v Minister for Immigration* [2004] FCA 1723 ("*Navarrete*") at [35] where Allsop J adopted and applied the words of the Full Federal Court in *Alphaone*:

> *A reasoned recommendation can be made, but it must deal with the material in a way that does not raise a consideration or issue or approach that is not obviously open or is such that a person in the position of the subject of the decision could not reasonably expect. New considerations, materially relevant mis-statements of the available material or materially relevant exaggeration or distortion of the available material, which is adverse to the person in question will raise such an issue or consideration. In these circumstances, fairness will generally demand that the person be given an opportunity to be heard because of the new consideration or because of the material mis-statement, exaggeration or distortion that has raised a new issue, in the sense that I have discussed.*

15. Federal Magistrate Raphael in *SZFWJ v Minister for Immigration* [2006] FMCA 1231 ("*SZFWJ*") referred to a Tribunal's consideration of what should have been in an interview of an applicant by a local

newspaper in the context of a local election. *SZFWJ* set out the newspaper interview in full (at [6]) and then the Tribunal's conclusion:

> *…The fact that the applicant availed himself of an opportunity to speak publicly about his political project in the local newspaper interview (in October 2001) without the Maoist insurgency even being raised suggests that the insurgency was not a significant issue in Simara or Bara at that time, or at least as far as he was concerned…*(*SZFWJ* at [7])

That Tribunal took as a credibility point against the applicant that he had stated he was an anti-Maoist campaigner, but did not say anything about that in the newspaper interview. Federal Magistrate Raphael's conclusion was that the finding by the Tribunal was not obviously open to it on the material before it, and therefore there had been a breach of natural justice.

16. Turning to the evidence in this case, Mr Karp referred the Court to the applicant's statutory declaration.(CB 108-117) The declaration sets out the applicant's claims, the salient points of which are:

    a) The applicant joined AL in Bangladesh with high ideals.

    b) He became disillusioned by the AL's compromise of those ideals.(CB 111, p.17-18)

    c) He and others invited Bangabir Kader Siddiqi MP to address a public meeting.(CB 111, p.20) This was objected to by certain members of the AL and resulted in him being attacked by police.(CB 112, p.25-26)

    d) He was charged with possession of arms, contrary to the Arms Act in Bangladesh.(CB 113, p.30)

    e) His incarceration in the cells for a period of four months was distressing.(CB 114)

    f) He explained certain things which were said to have occurred at various Tribunal hearings.(CB 115-116)

    Mr Karp contends that the attacks by the police before and during the applicant's incarceration were the only evidence of trauma that he had suffered. There is no evidence that he was traumatised in Australia;

however the applicant was diagnosed with post traumatic stress disorder after he saw a clinical psychologist in Australia.

17. A clinical psychologist from the Mindcare Centre, Ms Heidi Sumich, sent a report dated 2 August 2005 to Dr James Best of Castle Hill Medical Centre, stating that the applicant presented with symptoms consistent with a major depression and post traumatic stress disorder.(CB 145) Ms Sumich described the symptoms and proposed a brief management plan. I note that this report was sent to a medical practitioner and not to any person or organisation associated with the applicant's protection visa application.

18. A letter from Ms Sumich and also dated 9 August 2005, was addressed to Mr Simon Jeans of Simon Jeans Lawyers.(CB 144) The letter notes that one of the applicant's problems was his inability to consistently recall past events:

> *Given his state of severe depression and post-traumatic stress disorder, memory difficulties are the norm. I would not expect him to have good recall while he is in this state. If the apparent inconsistency of his reports of previous events had been interpreted in the context of severe mood disturbance, a different conclusion may have been reached. I hope that all parties will now take this into account before dismissing* [the applicant's] *application prematurely.*

19. Mr Karp then directed the Court's attention to the Tribunal's findings and reasons commencing at Court Book 201. The Tribunal went through the applicant's evidence and pointed to confusion and inconsistencies therein. The Tribunal stated:

> *In the present case I do not accept that, as submitted by the Applicant's current representatives, the Applicant has been consistent in his evidence throughout the hearings before the first and second Tribunals and before me. While it is true that the Applicant has consistently claimed that false cases have been brought against him by some of the local leaders of the Awami League, his evidence regarding these false cases has been confused.*(CB 202.2)

20. The Tribunal then came to its conclusion about the applicant's credibility and dismissed the documents the applicant used to support or corroborate his claims. The Tribunal then put to the applicant that

forged or fraudulent documents were readily available in Bangladesh and that the police were in collusion with lawyers in Dhaka. The Tribunal suggested that the person who verified the genuineness of his documents was falsely identified, therefore, its concerns about the authenticity of those documents were not allayed. The Tribunal also suggested that three corroborative letters supplied by the applicant were not genuine as they were written in very much the same terms.(CB 204-205)

21. The Tribunal then turned to the psychologist's letter to Mr Simon Jeans which suggested that because the applicant was suffering from severe depression and post traumatic stress disorder, he could not be expected to have a good memory.(CB 144) In response to this, the Tribunal stated:

> *There is, however, no evidence to suggest the Applicant was affected by these conditions when he gave evidence before the first and second Tribunals. Moreover the Applicant himself does not have any inability to recall events. Rather, as referred to above, he has given accounts which are contradictory.*(CB 204)

22. Mr Karp submits that the Tribunal accepted the professional opinion of the clinical psychologist regarding the applicant's condition, but noted that the psychologist's account of events which led to his condition was based entirely upon what was told to her by the applicant.(CB 205.6) As the Tribunal did not accept that the applicant was a witness of truth, it did not accept that the applicant's condition originated from persecution of political opinion. Mr Karp submits that the question in this case is whether the Tribunal's conclusion drawn from the psychologist's evidence was obvious, which depends on the reasons given in the psychologist's letter and report, the purpose for which they were written and their context. It does not depend on whether the conclusions the psychologist came to were open to her on the evidence. That is a different question and one which does not arise here.

23. Mr Karp argues that in this case, a professional clinical psychologist had expressed an opinion after at least one face-to-face consultation with the applicant. In this context, there is nothing before the Tribunal to suggest that the applicant experienced a traumatic event in Australia, as can be inferred from the Tribunal's statement that there was no

evidence that the applicant was affected by post traumatic stress disorder when he gave evidence before the previous Tribunals.(CB 204) It is argued that there is no evidence that the post traumatic stress disorder could have arisen anywhere other than in Bangladesh, as described by the applicant.

24. Mr Karp submits it is obvious that a person who is unable to recall events accurately may give an inconsistent account of those events as demonstrated by Ms Sumich's letter of 9 August 2005.(CB 144) Mr Karp argues that the Tribunal cannot reasonably or rationally accept a professional diagnosis but reject the history upon which that diagnosis is based. Such an approach suggests that the psychologist arrived at the right answer for the wrong reasons. The Tribunal member apparently concluded that the applicant, although traumatised, was able to, as it were, "put one over" a qualified clinical psychologist. Alternatively, the applicant fooled the psychologist but not the Tribunal member, who did not disclose any expertise in psychology.

25. Mr Karp submits that the test is whether in light of the matters put forth by the applicant, the conclusion drawn by the Tribunal was so obvious that a reasonable person would have expected it to be drawn: *Alphaone*; *Navarrete*; *SZFWJ*.

26. Mr Izzo, appearing for the respondents, highlighted in his written submissions some general principles which should be noted. First, that procedural fairness does not require a decision-maker to expose his or her mental processes or provisional views for comment. The only complications which a decision-maker must identify in advance are:

   a) Any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made; or

   b) Any adverse conclusion which would not obviously be open to it based on the known material: *Alphaone* at 590-592 (applied in *Re Minister for Immigration; Ex parte Applicant S154/2002* (2003) 201 ALR 437 at [54], [85] – [86])

27. Secondly, and relating to the first principle, procedural fairness does not require a decision-maker to tell an applicant that the material he or she has put forward is insufficient to support the claim, and invite the

applicant to improve upon that evidence: *Abebe v Commonwealth of Australia* (1999) 197 CLR 510 at 576 per Gummow and Hayne JJ; *Kioa v West* (1985) 159 CLR 550 at 587 per Mason J; *Muin v Refugee Review Tribunal* (2002) 190 ARL 601 at [265] – [266] per Hayne J. Mr Izzo submits that these principles apply to the two conclusions of the Tribunal which are in issue in this case.

28. Mr Izzo submits that the Tribunal did not invoke the principles which Mr Karp referred to. The Tribunal was only assessing the sufficiency of the evidence that was before it. Mr Izzo submits that the Tribunal found that the evidence which was before it did not establish what the applicant wished to establish. Such a situation is different to Mr Karp's proposal which relates to drawing implications from an applicant's conduct.

29. Mr Izzo identified two passages of importance in the Tribunal decision, the first is:

> *As referred to above, after the hearing the Applicant's representatives produced a letter from a clinical psychologist suggesting that the Applicant was suffering from severe depression and post traumatic stress disorder and that she would therefore not expect him to have good recall.*(CB 204.3)

30. Mr Izzo submits that it is evident from the content of the psychologist's letters**,** that the purpose of the applicant reference to them was to explain why he might have given inconsistent accounts. Mr Izzo submits that the Tribunal noted the letter from the psychologist and then said:

> *There is however, no evidence before me to suggest that the Applicant was affected by these conditions when he gave evidence before the first and second Tribunals. Moreover the Applicant himself does not claim any inability to recall events. Rather, as referred to above, he has given accounts which are contradictory.*(CB 204)

31. Mr Izzo submits that the earlier Tribunal hearings occurred between two and three years before this Tribunal hearing. This Tribunal said that the evidence of the psychologist was not specific to whether the applicant suffered from those symptoms when he gave evidence before the first and second Tribunals. Therefore, this Tribunal found that the

psychologist's assessment did not establish that the applicant was suffering from the symptoms during the first two Tribunal hearings.

32. Mr Izzo submits that there is nothing from the Tribunal's statement to infer that the applicant must have suffered some traumatic event in Australia. He submits that the Tribunal did not say this. It is not the only way of interpreting the psychologist's reports or the comments that were made. It is equally possible that the applicant suffers from these symptoms on account of an event which occurred in Bangladesh. The applicant's symptoms did not surface until the third Tribunal hearing. Consequently, the Tribunal did not say something happened in Australia; it only said that there is insufficient evidence to show that the symptoms were present at the time of the first and second Tribunal hearings. Mr Izzo acknowledged that the letters from the psychologist were subsequent to the third Tribunal hearing. However, there is no comment in them about when the applicant suffered from the symptoms. Therefore, it is simply a question of the evidence not going far enough, rather than the Tribunal drawing a conclusion from the evidence.

33. Mr Izzo referred the Court to the context in which the Tribunal referred to the psychologist's letter:

> *I accept that the Applicant's teeth show evidence of trauma as indicated in the report from a dentist which the Applicant's representatives produced but not that this trauma was caused when the Applicant was arrested in April 1997, as the Applicant's representatives submitted. I likewise accept that the Applicant has scars on his legs but not that these were caused by his political opponents in an incident in 1995 as he claims. I accept the professional opinion of the clinical psychologist regarding the conditions the Applicant is suffering from but I note that her account of the events leading to these conditions is based entirely on what she was told by the Applicant.*(CB 205.5)

34. The Tribunal went on to discuss the three different symptoms of the applicant: trauma to a tooth (verified by a dentist), scars on the legs (verified by observation) and post traumatic stress disorder (verified by the psychologist). For all three symptoms, the Tribunal accepted that they exist but did not accept that the reason they exist was persecution

of the applicant based on political opinion. Mr Izzo submits that this distinction is an acceptable one to draw.

35. Mr Izzo submits with reference to post traumatic stress disorder, that it could have resulted from a range of circumstances, not just political persecution in Bangladesh. The Tribunal pointed out that the evidence did not establish the origin or cause of the post traumatic stress disorder, despite the psychologist's diagnosis. The acceptance of a condition and its symptoms does not necessarily mean that one must accept the account of the cause of the condition.

36. Mr Izzo then turned to the argument raised by Mr Karp that one can imply from the Tribunal decision that the applicant managed to fool the psychologist but not the Tribunal member. Mr Izzo submits there is nothing in the Tribunal decision which shows this. Nowhere does the psychologist say that the account the applicant gave was true and there is nothing in the reasons of the Tribunal to indicate that such an implication was made. In respect of both matters, first, whether the psychologist's letters established that the applicant suffered from these symptoms at the time of the first two hearings, and secondly, whether they established that the applicant's condition proved that the applicant gave a true account of its history, Mr Izzo submits that the Tribunal simply said that the evidence was insufficient. Such insufficiency of evidence does not establish the above two matters.

37. Mr Izzo acknowledged that Mr Karp properly stated the principles in *Alphaone*, that is, if there is a conclusion not obviously open on the known material before the Tribunal, the Tribunal must put that to the applicant. Otherwise, there is no obligation on the Tribunal to make known its conclusion or thinking process. Mr Izzo contends, however, that a conclusion or an implication can be drawn from the conduct of an applicant: *Somaghi*. In *Somaghi*, the writing of a letter was deemed to be conduct from which it could be implied that the applicant was acting without bona fides.

38. Similarly, in *SZFWJ*, it was implied that because the applicant did not avail himself of an opportunity to comment about the Maoist insurgency in a newspaper interview, he was unconcerned about that issue and was not an opponent to the insurgency. That too was a conclusion drawn from the applicant's conduct. In *Navarrete*, the

applicant denied in a letter that he had committed particular crimes. The Minister inferred from his denial of that fact that he was of bad character because he had in fact committed those crimes. That inference was not put to the applicant. In *SZFWJ*, *Somaghi* and *Navarrete* the applicants in each case acted in particular ways from which the decision-makers drew adverse conclusions. However, the matter before this Court is not a case where anything has been said about the way the applicant acted.

39. The only conclusion the Tribunal in this case drew was that the evidence that the applicant put to the Tribunal was not sufficient to make good his claim. Mr Izzo referred to *SZEGT v Minister for Immigration* [2005] FCA 1514 ("*SZEGT*"). In that case, the applicant was picked up by the police and then by armed men. In both instances, he was detained, interrogated and subject to violence. There was a question about whether such treatment was for reason of the applicant's political activities. A letter from the applicant's lawyer purported to corroborate the two detentions:

> 6. *In support of these claims, the appellant's advisor submitted to the Tribunal a letter dated 15 January 2004 from the appellant's lawyer in Lagos, Mr Agbor, on the letterhead of the firm C R O Agbor and Co. This letter was addressed to the presiding officer of the Tribunal and was in the following terms:*
>
> > *We are Solicitors to* [SZEGT] *(hereinafter referred to simply as our client).*
> >
> > *We write to inform you that our client was arrested on 17th February 2003 by agents of the State Security Service and detained at Ughelli Police Station where he was subjected to intense interrogation. We were called to assist in securing his bail which we did promptly.*
> >
> > *On 15th March 2003, our client was picked up again by agents of the State Security Service and dumped at Ughelli police station for alleged involvement in Warri crisis. He later escaped from custody.*
> >
> > *Your assistance with respect to the above subject is solicited.*

40. The Tribunal then said that it was not satisfied on the basis of any of this material that the applicant's detention resulted from political activities:

- *As to the March detention, in the absence of any claim by the appellant or the lawyer that the lawyer was involved in any way in that second detention, the Tribunal did not accept that the lawyer had any direct knowledge of the appellant's second detention and therefore did not give the explanation of the appellant's second detention viz, 'alleged involvement in Warri crisis', any credence.* (*SZEGT* at [9])

41. Mr Izzo submits that that conclusion was not put to the applicant who complained of denial of procedural fairness. Justice Edmonds addressed whether it was an obvious and natural evaluation of the lawyer's letter, that the lawyer had any direct knowledge of the applicant's second detention: *SZGET* at [29]. His Honour found that it was not. His Honour referred to the authorities which made clear that a tribunal is not required to give an applicant a running commentary on the applicant's chances of success.

42. Mr Izzo submits that the approach of Edmonds J in *SZEGT* is the type of case that applies to this matter in that it applies more readily to the Tribunal's decision where the psychologist's report is referred to that she had no direct knowledge of the events surrounding the injury resulting in a natural and obvious evaluation of the psychologist's letter in a similar matter to the approach taken in *SZEGT*.

Conclusion

43. There is no dispute between the parties that s.422B of the Act does not apply to this case and I believe that is correct, due to the operation of the transitional provisions. I accept the submission of Mr Karp that Allsop J in *Navarrete* concluded that that decision-maker engaged in a misstatement, exaggeration or distortion and that the decision-maker should have put that issue to the applicant. His Honour stated at [36]:

> *…the subject of the decision is entitled to have a recommendation against him or her, or the provision of an available view against his or her interests, that is accompanied by detailed reasons for adoption, written in a way that fairly deals with the available*

> *material, in respect of which procedural fairness has been given, without material mis-statement, exaggeration or distortion…*

It was the exaggeration and distortion of facts which gave rise to a duty to disclose. Mr Karp submits that in this case it is not simply the contents of the psychologist's letters which does or does not give rise to a duty to disclose the implications drawn. Mr Izzo argues that the trauma could have occurred in Bangladesh, but had not manifested itself until years later, which in effect was between the second and third Tribunal hearings. Mr Karp's argument is that in those circumstances, it should have been put to the applicant that a person could have been traumatised in his own country and which manifests some years later. Mr Karp argues that the late manifestation of trauma as described by the Tribunal should have been put to the applicant for consideration and comment. However, the professional opinion of the clinical psychologist was the only independent corroboration by a person in Australia that the applicant may have suffered what he claimed to have suffered. I acknowledge that the Tribunal could be right in saying that the diagnosis was correct, but that the history that gave rise to the diagnosis was wrong. However, if that is so, it is not obvious and should have been disclosed to the applicant for comment. For this reason, I believe that the application should succeed and the matter remitted to the Tribunal for reconsideration.

44. The first respondent is to pay the applicant's costs and disbursements of and incidental to the application.

I certify that the preceding forty-four (44) paragraphs are a true copy of the reasons for judgment of Lloyd-Jones FM.

Associate:

Date: 21 December 2006