

# FEDERAL COURT OF AUSTRALIA

## SZKUS v Minister for Immigration and Citizenship [2009] FCA 1285

**MIGRATION** – where Tribunal obtains information pursuant to s 424(1) *Migration Act 1958* (Cth) – obligation to consider information obtained – whether Tribunal considered information obtained

**Held:** appeal allowed

*Migration Act 1958* (Cth), s 424(1)

*Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 75 ALD 630; [2003] FCAFC 184

*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259

*SZKUS v Minister for Immigration* [2009] FMCA 727

**SZKUS v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE  
REVIEW TRIBUNAL  
NSD 892 of 2009**

**JAGOT J  
12 NOVEMBER 2009  
SYDNEY**

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**

**NSD 892 of 2009**

**ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA**

**BETWEEN:               SZKUS  
                                  Appellant**

**AND:                     MINISTER FOR IMMIGRATION AND CITIZENSHIP  
                                  First Respondent**

**REFUGEE REVIEW TRIBUNAL  
Second Respondent**

**JUDGE:                 JAGOT J**

**DATE OF ORDER:     12 NOVEMBER 2009**

**WHERE MADE:        SYDNEY**

**THE COURT ORDERS THAT:**

1.     The appeal be allowed.
2.     The orders of the Federal Magistrates Court dated 31 July 2009 be set aside.
3.     The decision of the Refugee Review Tribunal signed on 6 May 2008 and published on 27 May 2008 affirming the decision not to grant the appellant a Protection (Class XA) visa be set aside.
4.     The matter be remitted to the Refugee Review Tribunal for determination in accordance with law.
5.     The first respondent pay the appellant's costs of this appeal and of the hearing before the Federal Magistrates Court, as agreed or taxed.

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.

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Appellant**

**AND: MINISTER FOR IMMIGRATION AND CITIZENSHIP  
First Respondent**

**REFUGEE REVIEW TRIBUNAL  
Second Respondent**

**JUDGE: JAGOT J**

**DATE: 12 NOVEMBER 2009**

**PLACE: SYDNEY**

**REASONS FOR JUDGMENT**

1 This appeal raises a question about the obligation of the Refugee Review Tribunal (**the Tribunal**) to have regard to information that it has obtained under s 424(1) of the *Migration Act 1958* (Cth) in conducting a review of a decision of a delegate of the first respondent (**the Minister**) to refuse the appellant's application for a protection visa.

2 The appellant was represented at the hearing before the Federal Magistrates Court but not in this appeal. Before the Federal Magistrates Court the appellant's representative submitted that the Tribunal failed to consider the evidence of a Mr Sharma that the Tribunal had obtained as part of a response to a request by the Tribunal for information from the Department of Foreign Affairs and Trade (**DFAT**). The Federal Magistrate concluded that the Tribunal had considered Mr Sharma's evidence as required and, in consequence, dismissed the appeal (*SZKUS v Minister for Immigration & Anor* [2009] FMCA 727 at [9]).

3 The appellant's notice of appeal challenges the Federal Magistrate's reasoning process in [9] of his Honour's reasons for judgment. While the details of the challenge are not easy to follow it is clear enough that the appellant claims that the Federal Magistrate was

in error in finding that the Tribunal “did not ignore the comments made by Mr Sharma”. On my review of the available material, this is a real issue requiring detailed examination.

## **BACKGROUND**

4           The appellant is a citizen of India. He arrived in Australia on 12 November 2006 and applied for a Protection (Class XA) visa on 20 December 2006. The appellant claimed that he was a member of the Indian National Lok Dal (**INLD**) political party. In 2000, the INLD came to power in the district of Haryana. The appellant said that by September 2000 he was the block officer within the party and was involved in organising various activities for politicians within the party and collecting donations on its behalf. When the INLD lost power to the Congress Party in late February to early March 2005 the appellant claimed that he was attacked and beaten by a group of persons, two of whom he recognised as members of the Jai Singh Rana group. The attackers demanded the money he had collected as part of his work collecting donations for the INLD. The appellant said that he informed the police of the incident; however, the police were suspicious of his use of the money and they searched his house and took him into custody where he was beaten by the police. The appellant was later released without charge and went into hiding. These facts, claimed the appellant, gave rise to the appellant having a well-founded fear of persecution if he were to return to India.

5           The Minister’s delegate refused to grant the appellant a protection visa on 19 March 2007. The Tribunal affirmed the decision on 12 June 2007. The appellant appealed to the Federal Magistrates Court. On 19 September 2007 the Court made consent orders setting aside the Tribunal’s decision and remitting the matter to the Tribunal for determination in accordance with law. By letter dated 2 October 2007 the Tribunal invited the appellant to provide any further information he wished in support of his application for review. It also invited the appellant to appear at the hearing by letter dated 5 October 2007. The hearing took place on 2 November 2007.

6           On 3 December 2007 the appellant submitted a newspaper cutting to the Tribunal. The cutting referred to the appellant as a block member for the INLD who was beaten by members of the ruling Congress Party who demanded that the appellant hand over the donations he collected for the INLD. Further, that the appellant was taken to a police station by the members of the Congress Party where the police also tortured the appellant.

7 On 8 January 2008 the Tribunal contacted DFAT and asked it if it could confirm that:  
- (i) the newspaper article had been published, and (ii) the reported incident took place. On 5 February 2008 DFAT responded to the first question as follows:

DFAT contacted Mr K D Sharma, Editor of the newspaper “Dainik Sandhya – Vyom Kesh Times”, Karnal, Haryana. This newspaper is a local Hindi language publication of the state of Haryana.

Mr Sharma advised that their office normally only keeps hard copies of newspapers for a year. Mr Sharma checked the electronic records of the newspaper for 1 March 2005 that were kept in his office and verified that such an article was published on that day. Mr Sharma read the article over telephone and the details matched the Hindi language record attached to the RRT request.

Mr Sharma agreed to send a copy of the newspaper dated 1 March 2005. DFAT will advise once it has been received.

Mr Sharma believed that the incident took place on either 28 February 2005 or 1 March 2005 after the Assembly election results were announced. The former Minister, Mr Om Prakash Chautala of the Indian National Lok Dal party had lost the election during this period and the Congress party had taken over. Mr Sharma stated that [applicant] had been a party worker (Administration Officer) for the Indian National Lok Dal and it was his responsibility to collect contributions for the party. [Applicant] had apparently collected between INR 1,00,000 to INR 2,00,000 from the residents of Nilokheri, Haryana and deposited it into the party account. Mr Sharma stated that after the election results were announced the Congress party had attempted to acquire the money collected by [applicant]. Mr Sharma further stated that apparently [applicant] was not willing to hand over the party funds and was forcibly taken to a local police station where he was beaten in the presence of a local Member of Legislative Assembly (MLA). Mr Sharma stated that he had been advised that [applicant] was not able to hand over any funds at the time, and as a consequence the police had demanded that [applicant] provide INR 2,00,000 within few days to the Local MLA. Since that day, [applicant] whereabouts have been unknown to people in the town.

Mr Sharma believed the local police did not register any complaints about the incident due to the fact that the police and Congress party workers were involved. If a case was registered, then the police would be obliged to take action.

Mr Sharma further advised that on 31 January 2008, Mr Om Prakash Chautala of Indian National Lok Dal visited Karnal, Haryana. The parents of [applicant] were also present and they requested Mr Chautala to investigate the matter and verify the whereabouts of their son [applicant].

8 DFAT responded to the second question in these terms:

DFAT established contact with the Security Division of the Karnal Police. Mr Gajraj Singh, Assistant Sub Inspector and Mr Ram Mehr, Inspector were requested to verify if such an incident took place in 2005. The police officers stated that no such incident was recorded with the police station and declined to provide or verify any further information.

9 The appellant submitted another newspaper cutting on 16 January 2008. This article referred to the same incident as the first article with a comment by Kanwal Jai Singh Rana, described as the “newly elected consular of Nilokheri area”, that the ruling party would “never spare” the appellant.

10 The Tribunal was concerned that DFAT’s inquiries might have revealed the appellant’s identity to the police. It asked DFAT for details of the inquiries made. The Tribunal also asked DFAT to revisit the question whether the incident took place. In response to the latter question, DFAT responded as follows:

Post was unable to obtain further confirmation of whether the incident took place. To further validate the information in relation to the subject, post checked with the website of “The Tribune” newspaper, a widely published publication in the states of Haryana and Punjab. Post checked the archived news articles on Tribune’s website for February and March 2005. No information of such an incident was found, however the articles published during that period did provide detailed information about the political party change over in Haryana.

Post then established contact with Mr Sanjay Malik (via telephone on ###), a reporter of “The Tribune” located at the district headquarters in Haryana. Mr Malik stated that he had been employed with the Hindi language publication of “The Tribune” in Karnal, state of Haryana for the last 20 years. Mr Malik was questioned about whether he had any knowledge of any disputes between the two political parties, INLD and Congress, in 2005 during party change over and where an INLD party worker was forcefully taken to the police station. Mr Malik was not able to recollect any such incidents. Mr Malik further stated that he personally did not report on such incidents nor did he hear about it from his colleagues working for other printed media.

Mr Malik was then asked about the existence of a newspaper called “Dainik Sandhya Vyom Kesh Times” and he stated that this was a local evening newspaper published in Karnal. Mr Malik commented that “Dainik Sandhya Vyom Kesh Times” is “not a valued newspaper and is not in demand by the residents at all”. As per Mr Malik, “The Dainik Sandhya Vyom Kesh Times” is published once in two or three days with the circulation of maximum 300 copies.

Post then contacted Mr Narender Sangwan (via telephone on ###), the District President of the Indian National Lok Dal (INLD) party. Mr Sangwan claimed to have been involved with INLD party since 1991. Mr Sangwan was question about the timing of when the Congress party took over in Haryana. Mr Sangwan responded that the Congress party took over in March 2005 although he could not recollect the exact date. Mr Sangwan was then question if he was aware of an incident in 2005 in Karnal, Haryana and nearby districts where one of the INLD party workers was beaten by the Congress party workers and was forcibly taken to the local police station. Mr Sangwan confidently stated that no such incident took place. Mr Sangwan also spoke to other INLD party workers to recollect if such incident took place and finally verified that there was no such incident.

Post then contacted Dr Ved Prakash (via telephone on ###) employed as the District

Public Relations Officer based in Karnal, Haryana for the last five years. The District Public Relations Office is a local state body responsible for control of the mass media in the region. Dr Prakash was questioned whether he had any knowledge of an incident in Karnal, Haryana and nearby districts in Haryana where one of the party members of INLD was beaten by the Congress workers and was forcibly taken to the local police station in 2005. Dr Prakash responded that he was not aware of such an incident. Dr Prakash also verified with some of his staff members about the incident and stated that none of his staff were aware of it.

11 On 7 February 2008 the Tribunal wrote to the appellant inviting the appellant to comment on the fact that the DFAT report said the police had no record of the incident referred to in the newspaper cutting. The appellant responded by letter dated 28 February 2008. In his letter the appellant said that the police would not have made a report of the incident because they acted in favour of the ruling party and he was the victim of the police. The Tribunal wrote to the appellant again on 7 April 2008 about DFAT's further response and invited the appellant's comment. In a letter of 28 April 2008, the appellant requested an extension of time to obtain information from overseas. The Tribunal declined this request on 29 April 2008. On 27 May 2008 the Tribunal affirmed the delegate's decision to refuse the appellant a protection visa.

### **THE TRIBUNAL'S DECISION**

12 The Tribunal recorded the events that occurred after the hearing on 2 November 2007. In so doing the Tribunal identified the first newspaper article and said the article had been referred to DFAT to confirm whether it was published and the incident alleged in the article occurred. The Tribunal referred to DFAT's response to the two questions (that the article had been published but the Karnal police station had no record of the incident). The Tribunal also identified the second newspaper cutting submitted by the appellant, as well as its communications requesting the appellant to comment on DFAT's first response. In dealing with DFAT's response to the Tribunal's further query about whether the incident occurred, the Tribunal stated that:

No information to support the applicant's claims was found. Among other things a reporter for a widely published newspaper in the states of Haryana and Punjab advised that he did not report on such incidents or hear about it from his colleagues. He also said that the newspaper that published the applicant's article is a local evening newspaper in Karnal which is "not a valued newspaper and is not in demand by the residents at all".

13 In the section of its decision record headed “Findings and Reasons” the Tribunal referred to the appellant’s claim that members of the Congress Party and police had attacked and threatened him in connection with the donations he collected for the INLD. Based on the appellant’s oral evidence at the hearing, the Tribunal did not accept that the appellant worked for the INLD. The Tribunal did not accept that the Congress Party would have any interest in the appellant. The Tribunal found unconvincing the appellant’s evidence about going into hiding following the attack by the police. The Tribunal was also sceptical of the appellant’s evidence about his lost passport and migration agent. Under the heading “Cumulative findings on credibility” the Tribunal said these matters individually would not have led it to make an adverse finding about the appellant’s credibility. However, cumulatively, these matters led the Tribunal to conclude that the appellant was not a credible witness and that he was not involved in politics and did not work for the INLD as claimed. The Tribunal’s reasons then refer to the heading “Corroborative evidence”. In that part of its reasons the Tribunal states as follows:

The Tribunal has considered and sought further information about newspaper articles submitted by the applicant. While the Tribunal accepts that the newspaper articles appeared in the local Karnal newspaper, the Tribunal does not accept that the articles report on incidents that actually occurred. This is because despite repeated enquiries DFAT was unable to obtain information to verify that the reported incidents occurred. The Tribunal prefers the evidence provided by DFAT than the evidence provided by the applicant and gives greater weight to the view it has formed about the applicant’s credibility than the documents that the applicant has provided.

14 The Tribunal then found that the appellant was not attacked by members of the Congress Party or the police. The Tribunal found also that the police did not deny the appellant protection or detain or mistreat the appellant. The Tribunal concluded that the appellant did not have a well-founded fear of persecution if he returned to India by reason of his political opinions or activities.

### **THE FEDERAL MAGISTRATE’S DECISION**

15 The critical part of the Federal Magistrate’s reasons is contained in [7]-[10] as follows:

[7] ...The argument at the hearing concentrated on Ground 1. Mr Karp put the matter in his usually admirably succinct way at paragraphs 14 to 16 of his submissions:

[14] The difficulty with the paragraph of the Tribunal extracted at



paragraph 11(g) above is that it completely ignores the information given to DFAT by Mr K.D. Sharma and which is reproduced at SCB 6. It is simply not true that, "... DFAT was unable to obtain information to verify that the reported incidents occurred." As stated above (paragraph 7), Mr Sharma gave information to DFAT which was corroborative of the applicant's claims, the more so because it went well beyond that in the newspaper article submitted by the applicant.

[15] As at the date of the applicant's application to the Tribunal, s.424(1) of the Migration Act stated,

(1) In conducting the review, the Tribunal may get any information that it considers relevant. However, **if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.**

[16] The Tribunal's failure to have regard to Mr Sharma's evidence, obtained via DFAT amounts to jurisdictional error."

Mr Karp argued that in order for the Tribunal to have given genuine consideration to the statements made by Mr Sharma it was required to engage in "an active intellectual process" in relation to it; *Tickner v Chapman* (1995) 57 FCR 451 at 462 referred to in *NAJT v Minister for Immigration* (2005) 147 FCR 51 at [212]. Certainly the Tribunal makes no mention of the remarks made by Mr Sharma which appeared to corroborate the story given by the applicant, but a careful consideration of those remarks reveals that Mr Sharma is not speaking as a direct witness of the events....

[8] On the other hand the DFAT officer spoke to an assistant sub inspector and an inspector of police to see whether the incident had actually taken place and they told him that no incidents of that nature were reported. ...

[9] I am of the view that the Tribunal did not ignore the comments made by Mr Sharma at all. It actually sought to verify them. It was unable to verify them and decided to prefer the evidence provided by DFAT to that provided by the applicant, which would have included Mr Sharma's comments because the Tribunal noted and accepted his direct evidence that the article had been published by his newspaper. It seems to me that the Tribunal merely preferred direct evidence, albeit of a negative, than the hearsay evidence and supposition provided by Mr Sharma. I am satisfied that the Tribunal did give the DFAT report, on the conversations with Mr Sharma, genuine consideration of the type described by Black CJ. The Tribunal is not obliged to make reference to every piece of evidence; *Minister for Immigration v Yusuf* (2001) 206 CLR 323. I think that if one considers the second articulation of Question A found at [CB 18] it will be reasonably clear that the Tribunal had read what Mr Sharma had said and it was those statements that it wanted to be checked by the methods of consultation therein suggested.

[10] I am not satisfied that the Tribunal ignored this evidence and thus fell into the jurisdictional error pressed for by Mr Karp. The application is dismissed.

## DISCUSSION

16 The Minister accepted that as the material from Mr Sharma was provided by DFAT in response to the Tribunal's request for information the Tribunal was bound to have regard to that information in making its decision as specified in s 424(1) of the Migration Act. The Minister submitted that it should be inferred that the Tribunal had regard to the information from Mr Sharma. The Tribunal referred to its request to DFAT for information. Mr Sharma's material was provided as part of DFAT's response to the Tribunal's first question, namely, whether the article was published in the newspaper and not whether the incident occurred. The Tribunal said that it accepted that the article had been published but DFAT had been unable to verify that the incident occurred. This was correct. The Minister submitted that, in referring to its preference for the evidence provided by DFAT to that provided by the appellant, the Tribunal should be understood as considering Mr Sharma's material. Mr Sharma's material was part of the information DFAT provided to the Tribunal and thus, by implication, must have been considered given the Tribunal's reliance on the DFAT information. The fact that the Tribunal did not refer expressly to Mr Sharma's material relevant to the occurrence of the incident is not fatal. It had no obligation to do so. As was said in *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630; [2003] FCAFC 184 at [46]-[47]:

[46] It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [87]-[97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised 'with an eye keenly attuned to error'. Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.

[47] The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced

on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.

17 I have considered the material provided by Mr Sharma (which was described as not being “direct” evidence in the Federal Magistrate’s reasons at [7]) and the context in which it was provided, as well as the structure and content of the Tribunal’s decision. I have done so mindful of the fact that the appellant bears the onus of proof and of the principle that the “reasons of an administrative decision-maker are meant to inform and [are] not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed” (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272).

18 Mr Sharma’s material does read as if it is based on information and belief rather than first-hand knowledge of the events in question. I do not consider that fact, however, relieved the Tribunal of its obligation to consider Mr Sharma’s material as part of the information it had obtained. The quality of the material, in terms of it being based on first or second-hand knowledge, would be relevant to the weight to be given to it by the Tribunal but not to the Tribunal’s obligation to have regard to the material as required by s 424(1).

19 Once the potential second-hand nature of the material is put to one side, it is apparent that the information from Mr Sharma was important to the appellant’s claims. In his visa application the appellant claimed that he was a block leader for the INDL and, after the change of government in Haryana, had been attacked by members of the new ruling party in connection with the donations he had collected for the INLD. He said that when he went to the police station the police attacked and threatened him instead of dealing with his complaint because they too were in favour of the ruling party and wanted the donations the appellant had collected. The newspaper article referred to the appellant as having been the victim of the incident he described in his claim because of his membership of the INDL “from the Nilokheri block”. The only difference between the appellant’s description of the incident and that in the article is that the appellant said he went to the police himself after recovering in hospital. The article said that the appellant was forcibly taken to the police by the members of the ruling party who had attacked him. In his claim the appellant said he met Jai Singh Rana at the police station when he was beaten and threatened by the police. Consistent with

the appellant's claim, the article said that the police had tortured the appellant in front of the "local MLA Jai Singh Rana".

20 DFAT ascertained that the article had been published by a local newspaper on 1 March 2005. DFAT spoke to Mr Sharma, the editor of the paper, who then provided the additional material quoted in [7] above. Mr Sharma's additional material also corroborated the appellant's claims. Because this material was corroborative of the appellant's central claim of being a member of the INDL who had been subject to harassment by political opponents and unable to obtain police protection it was relevant to the Tribunal's assessment of the appellant's credibility and the existence of the appellant's claimed fear of persecution.

21 The Tribunal's decision does not expressly refer to any aspect of the information from Mr Sharma relevant to the occurrence of the incident. In its summary of DFAT's first response (which included the information from Mr Sharma) the Tribunal said that the newspaper editor (Mr Sharma) confirmed publication of the article but the police had no record of the incident. The Tribunal, however, made no reference to the fact that, in the information it had requested from DFAT, Mr Sharma did more than confirm publication of the article. Mr Sharma gave detailed information about the events in question which was consistent with the claims made by the appellant in his visa application. The lack of a police record, to which the Tribunal did refer, was also consistent with the appellant's claims and the information provided by Mr Sharma because both referred to the fact that, when the appellant went (or was taken according to Mr Sharma) to the police, the police did not deal with the appellant's complaint but attacked and threatened him in front of the local member for the ruling party.

22 In dealing with the second response from DFAT in answer to its further request for information, the Tribunal said that no information to support the appellant's claims was found. In fact, in its second response, DFAT repeated the information obtained from Mr Sharma and obtained information confirming that Mr Sharma's newspaper was a local evening paper albeit with a small circulation and apparently not well-regarded. In reaching its conclusions the Tribunal accepted publication of the articles on which the appellant relied but did not accept that the incident therein described occurred. It did so on the basis that DFAT had been unable to verify that the incident had occurred and, according to the

Tribunal, it preferred DFAT's evidence to that of the appellant. The difficulty is that this reasoning process strongly suggests that, in the Tribunal's mind, DFAT's evidence about whether the incident occurred did not include the information from Mr Sharma. If the Tribunal had treated DFAT's evidence as including that from Mr Sharma then its statement that it preferred DFAT's evidence to that of the appellant makes no sense as Mr Sharma's material supported the appellant's claims.

23           There are other indications consistent with the inference that the Tribunal did not have regard to the information from Mr Sharma relevant to the occurrence of the incident. DFAT provided Mr Sharma's information in that part of its response dealing with the first question of publication of the article and not in the part dealing with the second question whether the incident occurred. The Tribunal mentioned that the editor of the newspaper (Mr Sharma) had confirmed the fact of publication (the first question) but did not refer to any of the other things he said relevant to the occurrence of the incident (the second question). When dealing with that second question, the Tribunal mentioned only the information that DFAT provided in response to that particular question (that is, the lack of any police record). In other words, because DFAT provided all information from Mr Sharma under its response to the Tribunal's first question (whether the article was published) and not under its answer to the second question (whether the incident occurred) the Tribunal appears not to have considered Mr Sharma's information as relevant to the second question. This example of the common human tendency to compartmentalise information is readily understandable given the way in which the Tribunal structured its questions and DFAT provided its answers. The context of the questions and answers thus also supports the inference I have drawn that the Tribunal did not consider Mr Sharma's information insofar it concerned the occurrence of the incident.

24           These considerations also support my divergence from the conclusion that the Federal Magistrate reached. The Federal Magistrate inferred that the Tribunal had considered the information provided by Mr Sharma as to whether the incident occurred because it "sought to verify" that information (at [9]) by its further inquiry to DFAT. In my view, however, the Tribunal did not seek to verify Mr Sharma's information about whether the incident occurred. It sought to verify the information from the police to the effect that there was no police record of the incident. This was the information DFAT provided in response to the Tribunal's second question about whether the incident occurred.

25 Taking all of these matters together I am satisfied that an inference can and should be drawn that the Tribunal failed to have regard to the information from Mr Sharma about the occurrence of the incident described in the newspaper article. Accordingly, I disagree with the conclusion of the Federal Magistrate that the Tribunal should be understood as having sought to verify (and thus must have considered) Mr Sharma's comments. The Tribunal contravened its obligation under s 424(1) of the Migration Act. This is a jurisdictional error. The appeal to be allowed and the decision of the Tribunal to be set aside and I so order.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:

Dated: 12 November 2009

Counsel for the Appellant: The Appellant appeared in person

Counsel for the First Respondent: Mr P D Reynolds

Solicitor for the First Respondent: Clayton Utz

Date of Hearing: 3 November 2009

Date of Judgment: 12 November 2009