FEDERAL COURT OF AUSTRALIA

Applicants S1266 of 2003 v Minister for Immigration & Multicultural Affairs [2006] FCA 1771

MIGRATION – logical difficulty with Tribunal's conclusion that harm suffered by appellant not racially motivated in circumstances where Tribunal satisfied that ethnic Chinese in Indonesia suffered harm amounting to persecution – Tribunal's conclusion nevertheless open – no jurisdictional error in Tribunal's reasoning process – allegation that Tribunal denied appellant common law procedural fairness – application for protection visa filed prior to the commencement of s 422B – Tribunal not obliged to provide the appellant with specific documents where substance of information provided – mere fact that information has been published does not render it obvious – Tribunal suggested to appellant that it accepted that ethnic Chinese suffered persecution – Tribunal suggested to appellant that it accepted that he, as an ethnic Chinese, suffered persecution – Tribunal found that appellant had not suffered persecution – issue as to whether some ethnic Chinese were not targeted because of their race should have been put to the appellant – denial of natural justice – appeal allowed

Migration Act 1958 (Cth) ss 417, 422B

Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 222 ALR 411 considered
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576 cited
Kioa v West (1985) 159 CLR 550 applied
Minister for Immigration and Multicultural Affairs v Al-Miahi (2001) 65 ALD 141 cited
Minister for Immigration and Multicultural and Indigenous Affairs v NAMW (2004) 140 FCR 572 cited
Muin v Refugee Review Tribunal (S36 of 1999) (2002) 190 ALR 601 cited
NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 214 ALR 264 cited
Pilbara Aboriginal Land Council Aboriginal Corporation Inc v Minister for Aboriginal and Torres Strait Islander Affairs (2000) 103 FCR 539 cited
Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2002) 198 ALR 59 cited
Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S 154/2002 (2003) 201 ALR 437 cited
Re Minister for Immigration and Multicultural Affairs Ex Parte Miah (2001) 206 CLR 57 cited
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63 cited
SZBPM v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 215 cited
VAAD v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 117 cited
VHAP v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 80 ALD 559 applied

APPLICANTS S1266 OF 2003 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS AND REFUGEE REVIEW TRIBUNAL

NSD 582 OF 2006

BENNETT J
21 DECEMBER 2006
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 582 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **APPLICANTS S1266 OF 2003**
Appellants

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **BENNETT J**
DATE OF ORDER: **21 DECEMBER 2006**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by Scarlett FM, in the Federal Magistrates Court of Australia on 28 February 2006, be set aside and in lieu thereof, it be ordered that:

   a. an order in the nature of certiorari be made to bring in and quash the decision of the Refugee Review Tribunal in matter N98/25606 made on 12 January 2000.

   b. an order in the nature of prohibition be made prohibiting the first respondent from giving effect to the said decision.

   c. an order in the nature of mandamus be made requiring the second respondent to rehear, and determine according to law, the appellants' application for review of the decision of a delegate of the first respondent that was made on 22 October 1998.

3. Costs be reserved.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

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NEW SOUTH WALES DISTRICT REGISTRY **NSD 582 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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Appellants

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **BENNETT J**
DATE: **21 DECEMBER 2006**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1 The first appellant is an Indonesian citizen of Chinese ethnicity. During riots in 1998 his business salon in Jakarta was looted and destroyed. While neither he nor his family were harmed physically, the Refugee Review Tribunal accepted that he had a fear of persecution. It was not satisfied, however, on the basis of independent evidence and the evidence given by him, that his fear of persecution was well-founded.

2 No specific Convention claims were made by the other appellants, his wife and two children. The fate of their applications, as members of the family unit, rested on that finding. Their appeal to this Court is dependent on the grounds raised by the first appellant and it is convenient for me to refer to him in these reasons as 'the appellant'.

3 The Tribunal decision was made on 9 December 1999 and dated 12 January 2000. The Tribunal gave three bases for its conclusion. In summary, they were:

- Only a very small percentage of Indonesia's ethnic Chinese were actually harmed during riots in May 1998. The appellants were unharmed and there was no evidence

of difficulties since experienced by the appellant's siblings, who continue to reside in Indonesia.

- The '*evidence from many credible sources*' was that there have been '*significant changes*' in Indonesia since the appellant left in August 1998.
- The new political leadership, as at the Tribunal hearing, was determined to promote racial tolerance '*and in this appears to have the support of a substantial proportion of the population*'.

4 The appellant sought judicial review of the Tribunal's decision in the Federal Magistrate's Court pursuant to s 39B of the *Judiciary Act 1903* (Cth). Federal Magistrate Scarlett characterised the Tribunal's conclusion as a finding that, if there were a further riot, it would be no more than speculation that ethnic Chinese might be the target and, even if they were, the chance was remote that the appellants may face serious harm (*Applicants S1266/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FMCA 335 at [22]).

5 In the appeal to this Court the appellant alleges a denial of natural justice by the Tribunal and a failure on the part of the Federal Magistrate to recognise that fact. Before Scarlett FM, the alleged denial of procedural fairness was a failure to put to the appellant country information comprised in 15 reports referred to by the Tribunal in its decision. In the amended notice of appeal in this Court, the appellant raises a failure to afford procedural fairness with respect to 13 of those reports.

6 The Federal Magistrate considered that the Tribunal complied with its obligations to provide natural justice. His Honour observed that there was no requirement to provide all material to the appellant as long as an opportunity was given to deal with adverse information '*that is credible, relevant and significant to the decision to be made*' (at [23] citing *Kioa v West* (1985) 159 CLR 550 at 629). His Honour also stated that '[a] *decision maker is not required to disclose information that is already obvious*'.

7 The appellant also submitted to his Honour that the Tribunal failed to consider the question of state protection. This ground was not included in the amended notice of appeal. Federal Magistrate Scarlett concluded that the Tribunal did not need to consider whether

protection may be withheld for reason of ethnicity (at [22]). That finding followed from the conclusion that the Chinese in Indonesia were not targeted because of their ethnicity and that it was speculation that ethnic Chinese might be targeted.

8 A further issue arose during the hearing of this appeal that was not within the amended notice of appeal. That is whether there was an absence of evidence or of an available inference, so that the Tribunal's conclusion was not open to it or that the Tribunal decision was otherwise illogical. There was no objection to these grounds of appeal. The parties addressed the issue in more detail in written submissions filed after the hearing.

CONSIDERATION

9 The Tribunal's reasoning seems to be as follows:

1. The May 1998 riots did target ethnic Chinese.
2. Only a very small percentage of the country's ethnic Chinese were harmed during those riots.
3. The appellants were unharmed.
4. There is no evidence that the appellant's siblings, who continue to reside in Indonesia, have been harmed since May 1998 because of their race.
5. There have been changes in Indonesia since August 1998, when the appellant left the country.
6. There were demonstrations in Jakarta in September 1999.
7. Those demonstrations were directed at the authorities; there was some looting of businesses in Chinatown but the evidence does not indicate that ethnic Chinese were among those targeted because of their race.
8. There was an outbreak of violence in Bandung in 1999 in which a predominantly Chinese area was targeted but there were no reported deaths or injuries.
9. Even if there were a further riot, it is no more than speculation that ethnic Chinese might be targeted because of their race.
10. Even if Chinese were targeted, the chance of such riots resulting in serious harm to the appellant was remote.

11. Indonesia's new leadership, with the apparent support of a substantial proportion of the population, is determined to promote racial and religious tolerance.

Alleged illogicality

10 The reasoning pressed by the Minister is that the Tribunal's conclusion was based on the fact that the appellant was unharmed and therefore not singled out for harm. In the context of the evidence of a breakdown in law and order and in the absence of evidence that the appellant, as distinct from ethnic Chinese generally, was singled out for harm or threats because of race, the Minister submits that the Tribunal was entitled to conclude, and it was not perverse to conclude, that the destruction and looting of the appellant's business in Jakarta was not due to race. The Tribunal did not reach a positive state of satisfaction that harm experienced by the appellant was directed at him based on his race. The Minister submits that, despite evidence to the contrary, the Tribunal was entitled to reach that conclusion.

11 The Minister emphasises that the fact that alternative inferences in the appellant's favour were open on the evidence is not sufficient, where reasons have been given, to find that the decision was perverse, or that the decision could not have been arrived at or is beyond jurisdiction. Indeed, she submits, it is not illogical.

12 Mr Karp, who appears for the appellant, acknowledges that mere illogical reasoning on the part of the Tribunal is not sufficient to attract jurisdictional error (*Minister for Immigration and Multicultural Affairs v Al-Miahi* (2001) 65 ALD 141 at [34]). He points out, however, that a decision that was irrational, illogical and not based upon findings or inferences of fact supported by logical grounds may be so infected (*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2002) 198 ALR 59 at [34]–[37]).

13 In *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 214 ALR 264 at [136]–[137], Allsop J (with whom Moore and Tamberlin JJ agreed) provided some elucidation of the analysis to be undertaken in dealing with an allegation of illogicality. As his Honour pointed out, perfect logicality is a standard not necessarily achieved in the reasoning process of many decision makers; indeed, illogicality

may highlight the understanding of how an error occurred within jurisdiction. There must, of course, be a process of reasoning.

14 Mr Karp does not submit that the Tribunal decision was of the kind described by Allsop J in *NADH*, a decision that lacked reasoning. It cannot be said that the Tribunal could not or did not reach its conclusion by a process of reasoning.

15 It was not inevitable, logically, that because the May 1998 riots were directed towards the ethnic Chinese and the appellant was ethnically Chinese, that the destruction of his family's business in Jakarta was racially motivated. It cannot be said that the conclusion was so unreasonable that no reasonable person could have come to it. It was open to the Tribunal to conclude that, in the context of general lawlessness, the destruction of his salon was not based on his race.

16 The appellant has not established jurisdictional error on this ground.

Denial of natural justice

17 The appellant's application for a protection visa was filed prior to the commencement of s 422B of the Act. Accordingly, the appellants were entitled to be accorded natural justice at common law (*Minister for Immigration and Multicultural and Indigenous Affairs v NAMW* (2004) 140 FCR 572 at [139]).

Changes in Indonesia

18 Two of the three reasons advanced by the Tribunal for its lack of satisfaction of a well-founded fear of persecution were based on independent evidence of "significant changes" in Indonesia since the appellant's departure. The Tribunal concluded that the appellant's fear, though genuine, was not well-founded. In its view, the chance of persecution was remote.

19 The amended notice of appeal asserts an obligation on the part of the Tribunal to put matters to the appellant to provide the opportunity for him to respond, including:

- information that '*is already obvious*';

- information known to the appellant;
- information that is credible, relevant and significant to the decision to be made, whether obvious or not;
- any adverse conclusion which has been arrived at which would not obviously be open on the known material; and
- country information in the reports relied on in the decision.

20 Mr Karp contends that, while the Tribunal put to the appellant the general propositions gleaned from the country information, it was obliged to and did not put to him the specific information upon which it relied. That specific information should have been disclosed, he submits, to enable the appellant to answer realistically and meaningfully '*the case that the Tribunal had amassed against him*'. The general proposition that there had been changes in Indonesia since May 1988 could only lead to a general response, for example that there had not been sufficient change to enable a return. Accepting that the Tribunal is not obliged to put its thought processes to the appellant, Mr Karp submits that specific information was cited in the decision, not as a reflection of thought processes but as evidence on which the Tribunal relied. Disclosure of that specific information could, he contends, have elicited a more detailed rebuttal.

21 Mr Karp contends that what is obvious and relevant to the decision maker may be less so to the appellant, especially if the information is used adversely against him (*Re Minister for Immigration and Multicultural Affairs Ex Parte Miah* (2001) 206 CLR 57 at [141]–[142]). Further, he contends, there is a requirement to disclose information known to the appellant if any adverse conclusion arrived at would not obviously be open on the known material (*Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-2). The appellant must be given the opportunity to deal with adverse information that is credible, relevant and significant to seek to establish that it is not credible, not relevant or not sufficiently significant (*Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 ALR 411 at [17]).

22 Mr Mitchell appears for the Minister and contends that the Tribunal's findings, upon which the decision was based, were, in essence, put to the appellant. He submits that it was not necessary to put the specific evidence to him, nor the process of drawing conclusions

from that evidence. Nor was it necessary to put the generalisations drawn from the specific evidence, although in his submission the Tribunal did give the appellant the opportunity to respond to those generalisations.

What information was put to the appellant?

23 The Tribunal's decision records that it put to the appellant:

- that there had been '*apparently significant improvements in the political and social situation'* on the island of Java since his departure;
- that '*a reportedly tolerant and moderate leadership which had the support of many ethnic Chinese in Indonesia'* had recently been elected; and
- that there had been an '*absence of reports* [of] *rioting on Java during 1999 which could be characterised as "anti-Chinese"*'.

24 As to the last matter, the Tribunal referred to "sources" cited later in its reasons. Those sources, in turn, asserted a number of matters, including:

- In riots in many locations in Indonesia in December 1998, it was not always Chinese or Chinese property that was targeted.
- Indonesians of Chinese descent were active in the growing democratization process.
- Numerous rumours of planned attacks on ethnic Chinese had '*rarely materialised*'.
- Since November 1998, Java had been '*relatively quiet*'.
- Official and informal discrimination against ethnic Chinese has existed.
- There were signs of a commitment by the post-Suharto government to begin to eradicate institutionalised discrimination against Chinese Indonesians.
- The Indonesian Constitution provided for religious freedom for members of five out of six officially recognised religions.

25 The appellant submits that he could not sensibly address the alleged changes in Indonesia since 1998 unless he knew which changes were being relied on by the Tribunal. He submits that the Tribunal breached the requirement to provide to him the information used

by it in sufficient detail to enable him to comment on it sensibly.

26 One example given by Mr Karp is that the appellant may have been aware of the fact that his religion, Catholicism, was constitutionally recognised as noted by the Tribunal but this does not mean that it is tolerated by diverse sections of the Indonesian population. He was not given the opportunity to put that constitutional recognition in context.

27 The Minister contends that the substance, or "essential features" of each factor on which the decision turned were brought to the appellant's attention (*Pilbara Aboriginal Land Council Aboriginal Corporation Inc v Minister for Aboriginal and Torres Strait Islander Affairs* (2000) 103 FCR 539 at [70]). Mr Mitchell submits that it is apparent from the Tribunal's reasons that the appellant was given the opportunity to deal with the substance of the information which was credible, relevant and significant to the decision, with the possible exception of information that was obvious or favourable to or corroborative of the appellant's claims (*Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at [133]-[134] per McHugh J). Examples of obviousness of the constitutional protection of Catholicism and the population of Chinese Indonesians of the order of 5 million are given. The change in government is conceded not to be in this category but it is submitted that it was raised by the Tribunal with the appellant.

28 The Minister also submits that, because the information was in the public domain and sourced from newspapers, it was "obvious" and therefore there was no requirement to put it to the appellant. The Minister relied on *Kioa* at 633 and *Miah* at [141] in support of its submission. Those authorities do not stand for that proposition and the submission is rejected. The mere fact that information has been published does not make it obvious, nor does mere publication make apparent the use to which the information will be put by the Tribunal.

29 The transcript of the Tribunal hearing was not available to the Federal Magistrate. After the hearing of the appeal, the Minister filed a copy of the transcript and supplementary submissions which referred to the transcript without objection. The appellant was given an opportunity to, and did, put further submissions in reply. The parties thereby consented to my perusal of the transcript.

30 The Tribunal told the appellant that the recent changes in Indonesia were '*quite significant*' as far as the appellant was concerned and that there had been some '*significant changes*' since the May 1998 riots. The Tribunal stated to him that there had been no press reports of anti-Chinese riots in Java in 1999.

31 The Tribunal put to the appellant that Bandung '*didn't explode*' after May 1998, with which he agreed and that there were no reports of riots involving harm to Chinese in Bandung in 1999. The Tribunal member also told the appellant that her impression was that the problems in Ambon between Christians and Muslims were local and did not necessarily apply to Java and around Bandung.

32 The Tribunal referred the appellant to the fact that the new leadership in Indonesia was regarded by many as an advocate for the rights of the Chinese minority and that President Wahid had taken steps to ensure protection. When the Tribunal put to the appellant the interest of the new government in protecting the ethnic Chinese community and its actions in that regard, it also put to him, for reasons which it gave, its view that it was unlikely that he would be harmed for that reason.

33 After the Tribunal put these matters to the appellant, it invited him to ask for them to be repeated or to respond, which the appellant did. He referred in particular to President Wahid and an event near Bandung where Chinese-owned shops were looted and burned.

34 Subject to one additional matter, the Tribunal did put to the appellant the key factors and critical issues on which that aspect of the decision was ultimately based and explained why they were important. The Tribunal was not obliged to put to the appellant the conclusions drawn from those facts or its reasoning (*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S 154/2002* (2003) 201 ALR 437 at [54] per Gummow and Heydon JJ and at [85]–[86] per Kirby J). It was not obliged to provide the appellant with the specific documents recording the information where the substance of the information was provided (*VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 559 at [28] per Allsop J with whom Gyles and Conti JJ agreed; *SZBPM v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 215 at [19] to [20]).

Racial basis of the destruction of the appellant's family business in May 1998

35 The appellant's claim was clearly directed to a fear of persecution because of race. He claimed that Chinese people had been killed in the riots of May 1998 and that all ethnic Chinese were in danger. He claimed that ethnic Chinese and even poor Chinese were targeted by looters and that wealthy Indonesian military officers and public servants were not.

36 The appellant's evidence, which the Tribunal accepted, was that the appellant and his family were not harmed during the 1998 May riots. The Tribunal accepted that, during those riots, the appellant's family business in Jakarta was looted and destroyed. The Tribunal did not accept, however, that this occurred because the business was owned by a Chinese family and that the appellant and his family were singled out for harm or threats because of their race. The Tribunal concluded that the destruction of the family's business '*occurred in the context of a breakdown of law and order and widespread rioting affecting many shop-front businesses in Jakarta*'.

37 Mr Mitchell submits that this conclusion was open to the Tribunal on the facts before it. He submits that there was evidence on which the conclusion could be based, that the Tribunal has not acted perversely or unreasonably and that the findings are not illogical or irrational. That does not, however, answer the assertion of a denial of natural justice.

38 The Tribunal accepted that the family business in Jakarta was looted and destroyed in the May 1998 riots. The Tribunal member said to the appellant during the hearing:

> '*I absolutely accept that it was a terrifying experience for the ethnic Chinese population in Indonesia in May* [1998] *and that many people like yourself are genuinely terrified about what might happen.*'

39 The Tribunal member did not suggest to the appellant that it doubted that the destruction of his family's business was due to it being owned by a Chinese family (cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 201 ALR 437 at [43]). She did not suggest to him that ethnic Chinese were not targeted in the 1998 May riots because of their race. To the contrary, she suggested that this part of his claim was accepted.

40 The Tribunal accepted in its decision that '*some ethnic Chinese suffered harm*

amounting to persecution during the 1998 riots' and that '*if there were a real chance that an individual might face* [such harm] *during riots or at any other time, because of his or her race, that person would come within the definition of a refugee*'. However, it drew a distinction between those persons and the appellant. It found that the looting and destruction of his business occurred not because the business was owned by a Chinese family, but in the context of a breakdown of law and order and widespread rioting affecting many shop-front businesses. The Tribunal said that it was not satisfied that the appellant was targeted because of his race.

41 The Minister submits that the Tribunal accepted the appellant's subjective fear arising during and subsequent to the May 1998 riots; that was not contradicted in the Tribunal's findings. The Minister contends that the Tribunal was not satisfied, however, that the looting of the appellant's shop was for reasons of his or his family's ethnicity. That is, the Tribunal accepted the appellant's subjective fears but did not accept that they were objectively well-founded at the time of the Tribunal decision.

42 The Minister submits further that, with respect to the Tribunal's expressed satisfaction that the attack on the family's business did not occur because it was owned by a Chinese family, there was no denial of procedural fairness. The Minister emphasises that the Tribunal is not bound by technicalities or rules of evidence, is not under a general duty to inquire or seek elaboration of the claims and that it is for the appellant to satisfy the Tribunal. She submits that the obligation to afford procedural fairness is less onerous with respect to a finding of non-satisfaction than a finding based on adverse material. Further, as is the case, the Tribunal is not obliged to provide a running commentary upon the appellant's case and the prospects of success.

43 In that context, the Minister submits that there was no obligation to put to the appellant the Tribunal's appraisal of the material with respect to the looting and destruction of the business as it was based on insufficiency or inadequacy of evidence to satisfy the Tribunal that the incident was based on ethnicity.

44 The Tribunal is not obliged to assist the appellant in the presentation of his case or as to the evidence presented. However, it could well be said that, had the appellant known that the Tribunal did not accept the ethnic link with the attack on the family business, he would

have presented further material or argument to the Tribunal.

Conclusion on denial of natural justice

45 The Tribunal member discussed with the appellant events after President Suharto resigned. The Tribunal put to the appellant that there had been significant changes since the May 1998 riots, in particular changes in the attitude to ethnic Chinese.

46 The conclusion as to the absence of a racial basis for the looting and destruction of the appellant's family business in May 1998 impacts upon the Tribunal's characterisation of the events of September 1999 and its conclusion that '*even if there were a further riot, it is no more than speculation that ethnic Chinese might be its target because of their race and, even if they were, the chance is remote that* [the appellant] *may face serious harm during it*'. It also impacts on the failure by the Tribunal to consider whether there had been a relevant change between May 1998 and September 1999 even in the context of a change in political leadership and policies. To the extent that the Tribunal relied upon evidence that some ethnic Chinese were not targeted because of their race but instead suffered harm in the context of a breakdown of law and order, that evidence was adverse information that was "credible, relevant and significant" in the sense discussed in *VEAL* at [16] to [17]. The Tribunal was obliged to give the appellant the opportunity to deal with it. Its failure to do so resulted in a denial of natural justice and jurisdictional error.

47 The observations of the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63 are apposite. In *SZBEL* the Tribunal did not challenge what the appellant said, express reaction or invite him to amplify those matters that the Tribunal later found to be "implausible' (at [3]). Where an issue arose at the Tribunal hearing that was not an issue before the Delegate, the High Court held that it was incumbent on the Tribunal to identify that issue and to tell the applicant of it (at [35]). The applicant was entitled to be on notice that his account on a particular aspect was an issue arising in relation to the decision under review (at [42]). Where the Delegate had not based his decision on an aspect, the Delegate's reasons did not indicate that that aspect of the account was in issue and the Tribunal did not identify the aspect as important and did not challenge what the appellant said, there is a denial of procedural fairness (at [42]-[44]; [47]).

48 Had the appellant been given an opportunity to respond to the issue of the cause of destruction of the salon in 1998, the Tribunal may have concluded that the looting of businesses in the Chinatown district of Jakarata did have a racial nexus, and that if this were to reoccur, as it apparently had in Bandung, the applicants could suffer harm serious enough to amount to persecution.

49 The Tribunal stated that its failure to be satisfied that the appellant had a well-founded fear of persecution was for three reasons. The second of these was that there had been significant changes since the appellant left and, even if there were a further riot, the chance was remote that the appellant would face serious harm. This, on its face, is a separate basis for its conclusion that there was no well-founded fear of persecution. I am satisfied that the Tribunal did put to the appellant the changes that had generally taken place in Indonesia after May 1998. However, this second reason was inextricably linked to the Tribunal's conclusion that, while demonstrations in September 1999 involved looting of businesses in Chinatown, ethnic Chinese were not then targeted because of their race and as such, it was speculation that ethnic Chinese might be targeted in the future.

50 The Tribunal denied the appellant natural justice by suggesting to the appellant that it accepted that the family's business had been destroyed because of Chinese ethnicity, when it concluded that the business was destroyed as part of a general breakdown of law and order and the evidence which supported that conclusion was not put to the appellant.

51 The Tribunal's finding, that there was no link between the harm and the appellant's race could have affected the Tribunal's conclusion that the chance was remote that the appellant would face harm in the future from any riots as an ethnic Chinese.

52 That finding, in turn, could have affected the conclusion as at the date of the Tribunal decision, that changes in Indonesia meant that, it there were a riot, the chance of harm was remote. If there has been a denial of natural justice, there is jurisdictional error where, as here, the ultimate conclusion could have been affected (*VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 117 at [80]–[81] citing *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at [51]–[52] and [104]).

53 Accordingly the appeal should be allowed.

The recommendation of the Federal Magistrate

54 The Federal Magistrate made a recommendation to the Minister in clear terms (at [34]–[35]). His Honour understood that it was merely a recommendation but included reference to it in his reasons and in his orders. I was informed at the hearing that, apart from drafting a letter that was not forwarded to the Minister, no action was taken to give effect to that recommendation.

55 I do not approve that course of action. I would have thought that the solicitors had an obligation, at the least, to bring that recommendation to the attention of their client. This obligation is, in my view, analogous to the obligation to pass on to a client any matter requiring further instructions. This would apply to a recommendation by a judicial offer where the party is a holder of public office.

56 I am informed that guidance issued by the Minister provides that it is inappropriate for the Minister to consider exercising her discretion under s 417 of the Act where there is migration-related litigation that has not been resolved. The appeal lodged from the decision of Scarlett FM resulted in the suspension of further consideration of the referral of this matter to the Minister by the Department. I am also informed that the Department has expedited its assessment of the appellant's case. That does not affect the obligation on the part of the solicitors to pass to the client the Federal Magistrate's recommendation.

Costs

57 The grounds relied upon by the appellants at the hearing were unsuccessful. The Court then sought further submissions from the parties as to the specific question of a denial of natural justice in light of the matters discussed at [35]–[52] above. In the circumstances, I will hear from the parties as to costs.

I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bennett.

Associate:

Dated: 21 December 2006

Counsel for the Appellants:	L Karp
Solicitor for the Appellants:	Parish Patience Immigration
Counsel for the Respondent:	J Mitchell
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	21 August 2006
Date of Final Submissions:	14 December 2006
Date of Judgment:	21 December 2006