FEDERAL MAGISTRATES COURT OF AUSTRALIA

S1322 of 2003 v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 1583*

MIGRATION – Review of decision of Refugee Review Tribunal – whether the Tribunal relied on information that was not the subject of exceptions pursuant to s.424A(3) and which should have been put to the applicants in writing pursuant to s.424A(1) – Tribunal decision made on the basis of two items of information in relation to which the applicant was not invited to comment – failure on the part of the Tribunal to comply with s.424A(1) constituted jurisdictional error – application allowed.

Migration Act 1958, ss.424A, 425

SZEPZ v Minister for Immigration and Multicultural Affairs [2006] FCAFC 107
SZDOG v Minister for Immigration and Multicultural Affairs (2005) 213 ALR 439
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597
SZEQF v Minister for Immigration and Multicultural Affairs [2005] FMCA 1819
VAAD v Minister for Immigration and Multicultural Affairs [2005] FCAFC 117
X v Minister for Immigration and Multicultural Affairs (2002) 116 FCR 319
Abebe v Commonwealth of Australia (1999) 197 CLR 510
Minister for Immigration and Multicultural Affairs v NAMW [2004] FCAFC 264
QAAC of 2004 v Refugee Review Tribunal [2005] FCAFC 92
Kioa v West (1985) 62 ALR 321
VAAC v Minister for Immigration and Multicultural Affairs [2003] FCAFC 74
Minister for Immigration and Multicultural Affairs v Applicants S194 of 2002 [2003] FCAFC 273
Muin v Refugee Review Tribunal and Ors; Lie v Refugee Review Tribunal & Ors [2002] HCA 30
Re Refugee Review Tribunal; Ex Parte Aala (2000) 204 CLR 82

Applicant:	APPLICANT S1322 of 2003
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2869 of 2006
Judgment of:	Nicholls FM
Hearing date:	7 May 2007
Date of Last Submission:	7 May 2007
Delivered at:	Sydney
Delivered on:	21 September 2007

REPRESENTATION

Counsel for the Applicant:	Mr B Zipser
Solicitors for the Applicant:	Nil
Counsel for the Respondents:	Ms A Mitchelmore
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) The reference to the first respondent be amended to read "Minister for Immigration and Citizenship".

(2) A writ of certiorari be issued quashing the decision of the second respondent made on 31 August 2006.

(3) A writ of mandamus be issued requiring the second respondent to redetermine the matter according to law.

(4) The first respondent to pay the applicant's costs set in the amount of $3,000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2869 of 2006

APPLICANT S1322 of 2003
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application filed in this Court on 6 October 2006 seeking review of the decision of the Refugee Review Tribunal ("the Tribunal"), signed on 31 August 2006, which affirmed the decision of a delegate of the respondent Minister to refuse a protection visa to the applicant.

Background

2. The applicant is a citizen of Bangladesh who arrived in Australia on 16 September 1999 and applied for a protection visa on 28 October 1999. On 6 December 1999, the delegate refused to grant a protection visa to the applicant and the applicant sought review of the delegate's decision by the Tribunal on 21 December 1999. On 14 September 2000, the ("earlier constituted") Tribunal affirmed the decision of the delegate. On 27 October 2000 the applicant sought review of the Tribunal's decision in the Federal Court, but withdrew his request prior to a directions hearing. On 17 March 2004, the applicant sought review in

the Federal Magistrates Court, and on 5 June 2006, the Court quashed the decision and remitted the matter to the Tribunal to be redetermined according to law (see CB 91.4).

3. In the current proceedings the Minister has filed a bundle of relevant documents – the Court Book ("CB"). On 13 July 2006, the applicant was notified by the Tribunal (CB 91 to CB 92) that it had received his case for reconsideration. On 2 August 2006 (received by the Tribunal on 3 August 2006) (CB 94 to CB 97), the applicant's advisers provided further documents in support of the applicant's claims. On 4 August 2006, the applicant was invited to comment on certain information that the Tribunal said would be the reason or part of the reason that he would not be entitled to a protection visa (CB 99 to CB 100). The applicant's response through his then migration adviser is reproduced at CB 104 to CB 106.

The Applicant's Claims to Protection

4. The applicant's claims to protection are set out in his application for a protection visa (CB 1 to CB 36), in his application for review to the Tribunal (CB 47), and in various submissions made by the applicant's representative and accompanying documents (CB 57 to CB 69, and CB 96 to CB97, and CB 103 to CB 106). The applicant's claims to protection were that he suffered political persecution because of his and his father's, "personal involvement" with the Bangladesh National Party ("BNP"), that false charges had been made against him, and that he had been questioned, tortured and beaten by the police in Bangladesh.

The Tribunal

5. The Tribunal's decision record is reproduced at CB 112 to CB 123. The Tribunal found:

    1) The applicant had responded substantively to most, but not all, of the matters raised in its letter of 4 August 2006.

    2) While doubts remained about the applicant's oral and written claims made in 1999 and 2000, these doubts were not critical to

the Tribunal's view of the applicant's case. It therefore proceeded on the basis that the history claimed by the applicant at this time in politics in Bangladesh was "essentially true".

3) The Tribunal noted that the last two matters raised by it in its letter of 4 August 2006 were not the subject of any response by the applicant and were "important". These issues were:

   i) The matter of the fifteen months the applicant spent in Dhaka before coming to Australia, which the applicant explained was "like being under house arrest". The Tribunal was not satisfied that the applicant, in all the circumstances, would suffer harm amounting to persecution if he were to return to Dakar.

   ii) Since the applicant left Bangladesh, a change in government meant that the applicant's party was in power. Further, that letters in support received from persons purporting to be members of his party were cast in very general terms and went further than claims made by the applicant.

4) Ultimately found that the "inescapable fact" was that the applicant's party was, at the time of decision, leading the government and, as such, controlled the police and the courts, that the applicant was "still in contact with senior people in his party and held in high regard", and if he were under any threat on return to Bangladesh, in contrast to the situation that he claimed existed before he left Bangladesh, he could rely on ready access to, and assistance from, the police.

5) In all, therefore, it was not satisfied that there was a real chance that the applicant would suffer harm amounting to persecution anywhere in Bangladesh for reason of his political opinion, or for any other Convention reason, and affirmed the decision under review.

Before the Court

6. At the hearing before the Court, Mr B Zipser of Counsel appeared for the applicant. Ms A Mitchelmore of Counsel appeared for the first respondent.

7. Mr Zipser sought leave to file in Court an amended application, which was granted. The grounds are:

> *"1. The Tribunal's failure to invite the applicant to a hearing involves jurisdictional error. Alternatively, the Tribunal's failure to give the applicant an opportunity to comment on the two matters on which it dismissed his claim involved a denial of procedural fairness.*
>
> *2. The Tribunal was 'not satisfied that there is a real chance of the applicant suffering harm amounting to persecution anywhere in Bangladesh for reason of his political opinion or for any other Convention reason'. One reason the Tribunal made this finding was because 'the applicant's party is now in power'. It is common knowledge that in 2007 there is a national election in Bangladesh. The Tribunal failed to consider: (a) whether the applicant's party might lose power at the 2007 national election; and (b) whether the applicant will suffer persecution in Bangladesh in the reasonably foreseeable future."*

8. Mr Zipser also tendered two documents in support. Both documents were what Mr Zipser submitted were country reports on human rights practices in Bangladesh. One dated 8 March 2006, and a later one dated 2007. The document dated 2007 clearly post-dated the Tribunal's decision (made in August 2006), and I was not persuaded by Mr Zipser that this document was relevant to the applicant's grounds. However, I did mark as an exhibit ("AE1") the document dated 8 March 2006 on the basis of allowing Mr Zipser to make his argument and to be able to show the relevance of this document to the grounds that he was putting forward.

9. In submissions, Mr Zipser described the first ground as the "opportunity to comment issue". He clarified that the emphasis in this ground was not so much on the Tribunal's failure to invite the applicant to a hearing, (the applicant had been invited to a hearing before the (earlier constituted) Tribunal in any event), but that the Tribunal failed

to give the applicant an opportunity to comment on the two very matters on which it dismissed his claim.

10. I should just note for the sake of completeness that the applicant was invited to a hearing before the Tribunal, and he appeared and gave evidence before the earlier constituted Tribunal on 4 September 2000. Applying the reasoning set out by the Full Court of the Federal Court in *SZEPZ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 107 (although the issue before the Court in that matter was s.424A of the *Migration Act 1958* ("the Act"), the reasoning applies with equal force to the Tribunal's obligations under s.425(1)), in that procedures before the earlier constituted Tribunal are not made invalid by the setting aside of the decision made by that Tribunal. That is, the invitation issued by the earlier constituted Tribunal does constitute compliance with s.425 of the Act for the purposes of the review of the delegate's decision. The Tribunal was not required to hold a "second" hearing.

11. The factual basis for the applicant's complaint in this regard, arises from the letter of 4 August 2006, which the Tribunal sent to the applicant inviting his comment on certain information which it said would the reason, or part of the reason, for deciding that he was not entitled to a protection visa (reproduced at CB 99 to CB 100). The terms used by the Tribunal and the setting out of the letter are crucial to understanding the applicant's complaint in this regard.

12. The heading to the letter is:

> *"**INVITATION TO COMMENT ON INFORMATION**"*

The Tribunal begins with:

> *"The Tribunal has information that would, subject to any comments you make, be the reason, or part of the reason, for deciding that you are not entitled to a protection visa.*
>
> *The information is as follows:"*

What follows are nine items of information.

13. Just below the ninth item, the Tribunal then states:

> *"This information is relevant because the inconsistencies and implausible claims in your written and oral evidence may be the reason or part of the reason for the Tribunal to come to the conclusion that your claims are fabricated and not to be believed.*
>
> *You are invited to comment on this information. Your comments are to be in writing and in English. They are to be received at the Tribunal by **18 August 2006**.*
>
> *IF YOU DO NOT GIVE COMMENTS BY 18 AUGUST 2006 THE TRIBUNAL MAY MAKE A DECISION ON THE REVIEW OF YOUR CASE WITHOUT FURTHER NOTICE."*

14. Below this, and without further explanation from the Tribunal, appears the following:

> *"**IN ADDITION**, the Tribunal notes that you informed the Tribunal previously constituted that, during the period in which the Government of Bangladesh was led by the Bangladesh Nationalist Party, from 1991 to 1996, you encountered no problems. A BNP-led Government was returned to power in Bangladesh in the elections of 2001, which may lead the presently constituted Tribunal to conclude that there is now no chance of you suffering harm amounting to persecution for a Convention reason in Bangladesh.*
>
> *The Tribunal also notes that you relocated to Dhaka for a period of over a year before leaving for Australia, during which time you suffered no harm. This may lead the Tribunal to conclude that you would be able to return to Dhaka without there being a real chance that you would there suffer harm amounting to persecution for a Convention reason."*

15. In its "Findings and Reasons" the Tribunal recorded that the applicant had responded substantively to most, but not all of the matters raised in its letter. Then at CB 123.1:

> *"However, the last two matters raised by the Tribunal with the applicant in the Tribunal's letter of 4 August 2006 have not received any response on the part of the applicant and are important."*

16. Plainly, the "last two matters" relate to what followed after the words "IN ADDITION". They related to the time which the applicant spent in Dhaka before coming to Australia and (as the Tribunal described "more

important") that there had been a change of government in Bangladesh and that the applicant's party, at the time of its decision, was in power.

17. Mr Zipser confirmed that he was not asserting that there was a contravention of s.424A of the Act, but that there was a denial of procedural fairness at general law on the basis that the applicant was not provided with an opportunity to comment on two matters which were determinative of the Tribunal's decision to affirm the delegate's decision. I note in this regard that the application for review as made on 21 December 1999. This predates the introduction of s.422B of the Act (which became operational on 4 July 2002) which made the provisions of Division 4 of Part 7 the exhaustive statement of the natural justice hearing rule (absent bias).

18. The first of Mr Zipser's arguments in support of his complaint is, that in relation to these "two important matters", the Tribunal had a discretion whereby it could invite an applicant to a further hearing (s.427(1)(b)), or request further information in writing (s.424(2)), and that the Tribunal must exercise the discretion contained in these sections reasonably and without falling into jurisdictional error (*SZDOG v Minister for Immigration and Multicultural Affairs* (2005) 213 ALR 439, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [40] and *SZEQF v Minister for Immigration and Multicultural Affairs* [2005] FMCA 1819 at [30]).

19. The argument is that, on a fair reading of the Tribunal's decision record (CB 123.1), the Tribunal believed it had invited the applicant to respond to: "the last two matters raised by it in its letter of 4 August 2006", and relied on this in deciding to proceed to "make a decision on the review … without further notice" (see CB 100.5). Mr Zipser's contention was that the Tribunal did not invite the applicant to respond to the last two matters raised by it in its letter of 4 August 2006 and in the circumstances, fell into jurisdictional error: *VAAD v Minister for Immigration and Multicultural Affairs* [2005] FCAFC 117 ("*VAAD*") at [72] and [77].

20. Second, that six years had passed between the decision made by the earlier constituted Tribunal and the Tribunal's decision in August 2006. In this time, the circumstances for the applicant may have changed as the situation in Bangladesh had changed in that time, and by not

inviting the applicant to provide updated information, the Tribunal, on the two matters (relying on the contention that the noting of the two dot points in the letter of 4 August 2006 was not such an opportunity), denied the applicant procedural fairness, giving rise to jurisdictional error.

21. Third, that with reference to *X v Minister for Immigration and Multicultural Affairs* (2002) 116 FCR 319 at [15], the Tribunal was required to base its decision on information current at the date when the decision was made. In his submission, this included up to date country information (it was in this context that he sought to rely on "AE1").

22. Ms Mitchelmore submitted, with reference to *Abebe v Commonwealth of Australia* (1999) 197 CLR 510, that the proceedings before the Tribunal are inquisitorial, and it is for an applicant to advance whatever arguments and evidence they wish to advance in support of their application, and in support of their claim to have a well founded fear of persecution for a Convention reason. In this regard she submitted that when this matter was remitted to the Tribunal, the applicant was invited by letter of 13 July 2006 (CB 91 to CB 92) to "provide any documents or written arguments you wish the Tribunal to consider which you have not already provided to the Tribunal" (CB 91.4).

23. Ms Mitchelmore further submitted, that the two paragraphs in the letter of 4 August 2006, at CB 100.6, following the words in bold "IN ADDITION", that the Tribunal thereby put the applicant on notice of two matters that were of concern to it. Further, in respect of each of those matters, told the applicant why each of those matters might lead it to conclude adversely to the applicant. The submission was that by so setting out these matters, the Tribunal complied with its obligation to accord procedural fairness to the applicant by putting him on notice of two issues that were of particular concern, notifying the applicant that those matters were in issue, and importantly, that this was done in the context of a letter inviting the applicant to comment on information.

24. Ms Mitchelmore sought to explain the positioning of these two matters in the letter as being appropriate given that the Tribunal was operating in a statutory framework. That is, in relation to s.424A of the Act. I understood this argument to be that these two matters fell within the

exceptions contained within ss.424A(3)(a) and (b) of the Act. This information therefore did not engage the obligation pursuant to s.424A(1) of the Act which did relate to the other items (that is, from one to nine), which the Tribunal put to the applicant pursuant to its statutory obligation to do so.

25. I note that the information that there had been a change in government in Bangladesh is information that falls within the exception contained in s.424A(3)(a) (*Minister for Immigration and Multicultural Affairs v NAMW* [2004] FCAFC 264 and *QAAC of 2004 v Refugee Review Tribunal* [2005] FCAFC 92), and the information that the applicant relocated to Dhaka for a period of over a year before leaving for Australia was information the applicant had given to the earlier constituted Tribunal at the hearing such that it fell within the exception contained in s.424A(3)(b) (see the earlier constituted Tribunal's account of what occurred at the hearing before it at CB 79.9 to CB 80.2).

26. It is well established at common law that an opportunity should be given to an applicant to deal with information adverse to an applicant's claims that is credible, relevant and significant to the decision to be made (*Kioa v West* (1985) 62 ALR 321 and, for example, *VAAC v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 74). That the applicant had stayed in Dhaka for some fifteen months before coming to Australia, and that there had been a change in government in Bangladesh since his departure, were clearly significant to the Tribunal's decision. They were the two matters on which the Tribunal's decision turned.

27. Plainly, the Tribunal was not satisfied that the applicant would suffer harm amounting to persecution for reason of his political opinion if he were to return to Dhaka based on his having stayed in Dhaka for fifteen months before coming to Australia without harm. Further, and "more important", that there had been a change in government in Bangladesh since his departure. As the Tribunal said, "the boot of law and order is now on the other foot". It therefore concluded that it was not satisfied that there was a real chance of the applicant suffering harm amounting to persecution anywhere in Bangladesh for any Convention reason for these two reasons.

28. However, the issue before the Court now is not that the Tribunal failed to notify the applicant of these two items, or that it failed to notify him of the possibility that these issues may be relevant to its decision. Nor is there any doubt that they were an important plank in the Tribunal's reasons (see for example, *Minister for Immigration and Multicultural Affairs v Applicants S194 of 2002* [2003] FCAFC 273 at [17]). The applicant's failure to have responded to the Tribunal on these issues was an important part of its reasoning (see CB 123.2). Further, the two issues were the very basis for affirming the decision under review. The issue is whether the provision of the substance of this information in the Tribunal's letter of 4 August 2006, provided the applicant with an opportunity to comment on it.

29. In my view, the applicant was not given the opportunity to comment on this information, given the terms, and the presentation of the Tribunal's letter of 4 August 2006.

30. In *Muin v Refugee Review Tribunal and Ors; Lie v Refugee Review Tribunal & Ors* [2002] HCA 30 ("*Muin and Lie*"), a majority of the High Court found that the Tribunal in that instance had not accorded the plaintiffs procedural fairness because it misled the plaintiffs in leading them to believe that the Tribunal had considered certain documents for the purposes of the review, when it in fact had not.

31. While there are no agreed facts in the case before me as there were in *Muin and Lie*, and while the subject matter relating to the misleading action is different, nonetheless what can be drawn as relevant to the circumstances before the Court now is that the Tribunal, in misleading the applicant, did not accord the applicant procedural fairness. As was set out in *Muin and Lie*, per Gaudron J, at [61] to [63], the Tribunal was required to give the applicant a reasonable opportunity to present a case as it relates to the question of whether the applicant was a refugee or not. At [62]:

> *"As already indicated, all that was relevantly required was that Mr Muin be given a reasonable opportunity to present his case. It can only be said that he was denied procedural fairness if a reasonable person in his position would also have been misled and, in consequence, would have acted as Mr Muin did."*

32. In my view, the Tribunal's letter of 4 August 2006 is misleading and the Tribunal thereby failed to give the applicant the opportunity of making submissions in relation to issues which were critical to its decision. (See, for example, *Re Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 82 per McHugh J at [103].)

33. The Tribunal's letter specifically sought comments from the applicant in relation to nine items of information which it set out "as follows" (CB 99.4). The Tribunal's letter following the setting out of these nine items of information, specifically stated:

> *"You are invited to comment on this information. Your comments are to be in writing and in English. They are to be received at the Tribunal by **18 August 2006**."* (Emphasis original)

34. The Tribunal further warned the applicant that if the comments were not given by a particular date (18 August 2006), it may proceed to a decision on review of his case without further notice. It was following this invitation to comment, and the warning as to the consequences of not commenting, that the Tribunal noted the two items which were subsequently the determinative issues in its decision. In my view, given the language used by the Tribunal, the lay out and placement of the items in relation to which it invited comment, and in relation to which the caution applied, and the separate provision of "noting" of the other two items, ("the Tribunal notes" (CB 100.6) and "the Tribunal also notes" (CB 100.7)), any reasonable reading of the letter was that the Tribunal was providing the opportunity to comment in relation to items one to nine, but was, at best, silent in this regard in relation to the two items presented as having noted.

35. While on one view it may be said that it was always open to the applicant, indeed, an applicant who had the benefit of a migration adviser, to have nonetheless provided some comment in relation to the two issues noted by the Tribunal, what is at issue here is that the Tribunal must act fairly. It is to the Tribunal's procedure that this obligation is directed. A letter which by its terms and presentation is misleading cannot, in my view, be said to be fair when the applicant is misled in relation to the capacity to comment on what were the determinative issues in the case.

36. Ms Mitchelmore submitted that the Tribunal's setting out of its letter in the fashion that it did is "understandable" in the context of the Tribunal seeking to discharge its obligations pursuant to s.424A of the Act. That is, that items one to nine were matters of "information" that the Tribunal was required to put to the applicant for comment in discharge of its obligations pursuant to s.424A(1) of the Act, but that the two other matters which it noted below were not so required.

37. At a first quick glance, there may be an attraction in this argument, given that the information in relation to the two determinative matters, can be seen to fall within the exceptions in s.424A(3) of the Act. However, this explanation would have greater force but for the fact that some of the items in relation to which the Tribunal sought comments by the applicant, purportedly in discharge of its obligation pursuant to s.424A(1) of the Act, similarly appeared to fall within the exceptions contained in s.424A(3). Items two, three, seven and eight, appeared to be information provided by the applicant at the hearing such as to fall within the exceptions set out in s.424A(3)(b), and the document referred to at item five, was provided by the applicant to the Tribunal just prior to the hearing (see CB 76.4), and therefore also falls within the exception contained in s.424A(3)(b).

38. But even if this were to be accepted as an explanation, it does not absolve the Tribunal from its obligation to act fairly at general law. What still remains is that in relation to those two matters which the Tribunal itself described subsequently as "important" and "more important", the Tribunal was silent as to the invitation to comment, and even on a fair and reasonable reading of the letter, were excluded from the invitation to comment. In my view, the Tribunal misled the applicant, and by so misleading him, denied him the opportunity to comment on matters critical to the determination of his application.

39. Even further, I also agree with Mr Zipser (with reference to the Full Federal Court in *VAAD* at [77]) that "…the initial error tainted the later consideration of this evidence [information] and compounded the Tribunal's error". In its analysis in its decision record, the Tribunal specifically stated that no response had been received to the last two matters raised by it in its letter of 4 August 2006. That is not surprising.

Given the terms of its letter no such invitation to comment was given to the applicant.

40. The Tribunal noted, that the applicant had responded "substantively to most but not all of the matters raised in the Tribunal's letter of 4 August 2006" (CB 122.9). That response is reproduced at CB 104 to CB 106. It reveals that the applicant, through his adviser, specifically addressed (with varying degrees of substance) each of the nine items listed by the Tribunal in its letter of 4 August 2006, and in respect of which the invitation to comment had been issued. This is not a situation where the Tribunal's letters were completely ignored or overlooked. I should also just note that in relation to the two items where the applicant's response was stated to be: "noted", that is, listed items one and six, in spite of the Tribunal's explanation that each of these items was relevant to its decision because of "inconsistencies", both listed items, on their face, do not appear to contain inconsistencies, but appear to be directed at various claims, or integers of claims, made by the applicant, such that no inconsistency is apparent. In these circumstances, it is not surprising that the applicant, through his adviser, responded merely by saying: "noted".

41. Ms Mitchelmore also submitted that in relation to the two "important" items, it was still open to the applicant to have provided comments to the Tribunal. Further, that in these circumstances therefore, it was reasonable for the Tribunal to proceed in the way that it did. That is, to find that no response had been given in relation to these two matters. I do not accept this argument for two reasons.

42. One, the Tribunal specifically sought comment in relation to other items in the letter and did not seek comments in relation to those two items. As set out above, the layout and presentation of the letter is such that a reasonable reading of the letter is that the Tribunal was not seeking comments in relation to those two matters but was merely "noting" them with the applicant for a purpose which is not made clear by the terms of the letter. A reasonable reading of the letter is that the applicant was invited to comment only on the nine items above and failure to do so would result in the Tribunal proceeding to a decision without "further notice".

43. Further, that having complied with the Tribunal's direction to give comments by a particular date, that in relation to the two matters noted by the Tribunal, that some other process may have been expected, possibly a further letter or even an invitation to another hearing. As it turned out, the Tribunal accepted the applicant's claims in relation to items one to nine in light of the adviser's responses, including those responses which were expressed merely as: "noted". In fact, it proceeded on the basis that the applicant's claims to which items one to nine in its letter related were "essentially true".

44. I agree with Mr Zipser that the Tribunal's initial error in misleading the applicant was compounded by its finding that it had not received any response from the applicant on these important matters. This was in circumstances where no response had been asked for in the letter. The Tribunal failed to consider that it had not in fact asked the applicant to so comment on these important matters. The very two matters on which it made its decision adverse to the applicant. The Tribunal described these matters as important, found that a response had not been received from the applicant, but in circumstances where no invitation meriting a response had been given, proceeded to find adversely to the applicant in these circumstances. I agree with Mr Zipser that the Tribunal failed to accord the applicant procedural fairness and thereby fell into jurisdictional error in these circumstances.

45. In all, therefore, having found jurisdictional error in what the Tribunal has done in this regard, it is not necessary to consider ground two in the application. I cannot see any reason to deny the applicant the relief that he seeks and will make orders accordingly remitting the matter to the Tribunal for consideration according to law.

I certify that the preceding forty-five (45) paragraphs are a true copy of the reasons for judgment of Nicholls FM

Associate: Dawnie Lam

Date: 21 September 2007