FEDERAL COURT OF AUSTRALIA

BVC15 v Minister for Immigration and Border Protection and Another

[2017] FCAFC 223

Tracey, Mortimer and Moshinsky JJ

18 August, 21 December 2017

Immigration — Procedural fairness — Protection visa — Application for — Appellant prepared two written statements while in immigration detention — Written statements mistakenly placed on a separate file — Written statements not provided to the Tribunal — Appellant mistakenly assumed Tribunal had received written statements — Whether mistaken belief amounts to denial of procedural fairness — Migration Act 1958 (Cth), ss 418(3), 425.

Section 418(3) of the *Migration Act 1958* (Cth) (the Act) provided that, if an application for review were made to the Refugee Review Tribunal (the Tribunal), the Secretary of the Department of Immigration and Border Protection (Department) was required to give to the Registrar of the Tribunal each document in the Secretary's possession or control the Secretary considered to be relevant to the review of the decision.

Section 425(1) of the Act provided that the Tribunal had to invite the appellant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.

The appellant was a citizen of Vietnam. In April 2013 the appellant arrived in Australia by boat as an unauthorised maritime arrival. In October 2013, while in immigration detention, the appellant prepared and gave to officers of the Department two statements (October 2013 statements). In the first statement, the appellant claimed, amongst other things, that his family had moved from one village to another about 12 years earlier and, since that time, they had not been granted any land for farming. In the second statement, the appellant referred to instances of intimidation and violence, during which the local authorities did not assist, said to cause him to fear that he would be killed.

In June 2014, the appellant applied for a protection visa. By reason of an administrative error, the Department opened a separate file in respect of the appellant's protection visa application and the October 2013 statements were not placed on that file.

On 11 October 2014, the appellant was interviewed by a delegate of the Minister. The delegate did not have the October 2013 statements. On 16 December 2014, the delegate refused the appellant's application for a protection visa.

The appellant applied to the Tribunal for a review of the delegate's decision. On 20 January 2015, the Tribunal wrote to the appellant to invite him to appear before it. In its letter, the Tribunal stated that it had "considered the material before it".

On 17 April 2015, a hearing before the Tribunal took place. At the outset of the hearing, the Tribunal member stated that "I have got a copy of the Department's file before me … [t]he file contains your statement of claim and an application for a protection visa and various supporting documents." The Tribunal did not have the October 2013 statements before it. During the course of the hearing, there was an exchange between the appellant and the Tribunal member, in which the appellant mentioned that his family had not been given any land to work on, to which the Tribunal member responded, inter alia, "[y]ou've never mentioned this before". In the course of the exchange, the appellant adverted to his first statement but accepted that the matter did not form part of his application. The appellant did not refer to the matters covered by his second statement.

On 18 June 2015, the Tribunal affirmed the decision of the delegate.

The appellant applied to the Federal Circuit Court for judicial review of the Tribunal's decision on grounds including that the Tribunal failed to take account of the matters in his October 2013 statements. The appellant argued that the Court should infer by reason of s 418(3) of the Act that the Tribunal had been provided with the October 2013 statements. Alternatively, if there was a failure to comply with s 418(3) of the Act, the appellant argued that he had been denied procedural fairness.

The primary judge dismissed the appellant's application for judicial review. His Honour did not consider that the appellant had been misled into assuming that the Tribunal had the October 2013 statements before it. His Honour held that the technical breach of s 418(3) in the circumstances of the case did not amount to jurisdictional error.

Held: Allowing the appeal: (1) Section 425 of the Act requires the Tribunal to conduct a hearing that is meaningful and fair. [39], [49]

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152, applied.

NALQ v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 121, followed.

(2) Operating under the mistaken belief that the Tribunal had his statements before it, when in fact it did not, the appellant was deprived of a fair opportunity to present his case, contrary to s 425 of the Act, and denied procedural fairness. [45]-[49]

Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966, applied.

BBS15 v Minister for Immigration and Border Protection (2017) 248 FCR 159, followed.

Appeal from decision of Judge Riethmuller, [2017] FCCA 306, allowed.

Cases Cited

BBS15 v Minister for Immigration and Border Protection (2017) 248 FCR 159.

Muin v Refugee Review Tribunal (2002) 76 ALJR 966.

NALQ v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 121.

Refugee Review Tribunal, Re; Ex parte Aala (2000) 204 CLR 82.

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152.

SZEIV v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 1798.

SZFDE v Minister for Immigration and Citizenship (2007) 232 CLR 189.

SZOIN v Minister for Immigration and Citizenship (2011) 191 FCR 123.

WAGP v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 151 FCR 413.

Appeal

L De Ferrari with *M Guo*, for the appellant.

PRD Gray QC with *C Tran*, for the first respondent.

21 December 2017

The Court

Introduction

1 Section 418(3) of the *Migration Act 1958* (Cth) provided at the relevant time that, if an application for review was made to the Refugee Review Tribunal (the **Tribunal**) (now the Administrative Appeals Tribunal), the Secretary of the Department of Immigration and Border Protection (the **Department**) was required, as soon as practicable after being notified of the application, to give to the Registrar of the Tribunal each document that was in the Secretary's possession or control and was considered by the Secretary to be relevant to the review of the decision.

2 In or about October 2013, the appellant, a citizen of Vietnam, gave two statements, handwritten in Vietnamese, to officers of the Department (the **October 2013 Statements**). The second of these statements was translated into English by the Department. The appellant subsequently applied for a protection visa. This application was refused by a delegate of the first respondent (the **Minister**), apparently without reference to the October 2013 Statements. The appellant applied to the Tribunal for review of the delegate's decision. It is common ground on the appeal that the Secretary failed to provide the October 2013 Statements to the Tribunal, in breach of the obligation in s 418(3).

3 The primary judge found (and there is no challenge to these findings on appeal) that: due to an administrative error, two separate departmental files were generated for the appellant; and the October 2013 Statements were placed on a departmental file that was not utilised for the purpose of considering the appellant's protection visa claims or for the purpose of providing documents to the Tribunal. In the event, the Tribunal proceeded to hear and determine the appellant's application for review unaware of the existence of the October 2013 Statements. The second of these statements contained a "complementary protection" claim that was not otherwise before the Tribunal.

4 The principal issue that arises on the appeal is whether the primary judge erred in concluding that there was no denial of procedural fairness to the appellant. For the reasons that follow, we consider that the primary judge erred in so concluding. At the outset of the hearing before the Tribunal, the Tribunal member said that he had a copy of the departmental file before him. Based on this, other things said during the course of the hearing, and correspondence before the hearing, the Tribunal gave the impression that it had received and would consider the October 2013 Statements. The appellant was entitled to assume and, we would infer, did assume that the Tribunal had received and

would consider the statements. Had the appellant not made this assumption, he would have taken further steps to bring the existence of the statements to the Tribunal member's attention. In the circumstances, there was a denial of procedural fairness to the appellant.

Background facts

5 The following statement of the background facts is based on the reasons of the primary judge (the **Reasons**) and the documents in the Appeal Book to which we were taken during the appeal hearing.

6 The appellant is a citizen of Vietnam. The appellant left Vietnam in March 2013. In April 2013, the appellant arrived in Australia by boat as an unauthorised maritime arrival (having previously flown from Vietnam to Indonesia).

7 In May 2013, an entry interview with the appellant was conducted.

8 In or about October 2013, the appellant prepared and gave to officers of the Department the October 2013 Statements. The appellant was located at the Yongah Hill Immigration Detention Centre at this time. He gave the statements to his case manager. As noted above, both statements were handwritten in Vietnamese. The first statement (AB 661), which is undated, was not translated by the Department (the **First Statement**). However, an English translation of this statement was prepared by the appellant's lawyers for the purposes of the hearing before the Federal Circuit Court of Australia (AB 660). In this statement, the appellant claimed, among other things, that his family had moved from one village to another about 12 years earlier and, since that time, they had not been granted any land for farming.

9 The second statement (AB 656-658), which is dated 1 October 2013, was translated by the Department (AB 648) (the **Second Statement**). This statement (as translated by the Department) included the following:

> I didn't intend to seek refuge a week before the day I came here. I have a cousin who studies at high school and for some reasons school friends didn't understand him. On that day, when I was working I heard noises in front of my house, I went out and saw that my cousin was beaten. I asked them to spare my cousin but the people beat me as well. I thought that problem was finished but the next day those people came again, they picked a quarrel and wanted to beat me. As I was so scared I locked the gate and sat in my house, a group of people armed with [knives] and big weapons also sat in front of my house and they only left later in the afternoon. After that day, at 5:30pm I finished my work and played volleyball at the People's Committee's playground, then a group of people with coloured hair including 2 people holding knives rushed in and beat me, so I ran away. The chief of communal police stood there but he didn't dare do anything. The next day, I called and asked my friend in town, he said that there were a group of bullies, underworld people who were often rented by debt collectors, and he advised me to hide away otherwise those people would kill me whenever they saw me.

10 The October 2013 Statements (including the translation of the Second Statement) were placed on departmental file CLF2013/83103.

11 On or about 15 June 2014, the appellant applied for a protection visa. At this time, departmental file CLF2014/89849 was created. The October 2013 Statements were not placed on this file.

12 On 11 October 2014, the appellant was interviewed by a delegate of the

Minister (the **Delegate**) in connection with his protection visa application. The Delegate did not have the October 2013 Statements when considering the appellant's application for a protection visa.

13 On 16 December 2014, the Delegate refused the appellant's application for a protection visa.

14 The appellant then applied to the Tribunal for review of the Delegate's decision.

15 On 20 January 2015, the Tribunal wrote to the appellant to invite him to appear before the Tribunal to give evidence. In its letter, the Tribunal stated that it "has considered the material before it but it is unable to make a favourable decision on this information alone".

16 On 11 March 2015, Dr Tanya McIntyre, who subsequently became the appellant's migration agent, lodged a request under the *Freedom of Information Act 1982* (Cth) for access to documents held on the Tribunal's file and Department's file for the appellant. On 16 March 2015, the Tribunal sent a response to Dr McIntyre to the effect that: her freedom of information (**FOI**) request for access to documents held by the Tribunal would be processed by the Tribunal; and her FOI request for access to documents held on the Department's file CLF2014/89849 had been transferred to the Department, and the Department would contact her in that regard. Dr McIntyre's request had not specified any departmental file number; rather, it had sought access to "[t]he whole of the DIBP file" for the appellant. The October 2013 Statements were not provided in response to this request.

17 On 15 April 2015, Dr McIntyre became registered as a migration agent and became the appellant's representative.

18 On 17 April 2015, a hearing before the Tribunal took place. The hearing took place by videoconference, in circumstances where the appellant was located in an immigration detention centre at Christmas Island and the Tribunal member and the interpreter were in Adelaide, South Australia. Dr McIntyre participated by telephone from Darwin, Northern Territory. The appellant had not met with, or discussed his protection claims with, Dr McIntyre before the hearing (AB 664).

19 The transcript of the Tribunal hearing was before the primary judge. At the outset of the hearing, the Tribunal member stated (transcript, p 3):

> I have got a copy of the Department's file before me and I understand you also requested a copy. The file contains your statement of claim and an application for a protection visa and various supporting documents.

After a series of questions designed to elicit background information, the member said that he now wanted to ask the appellant "some questions about why you decided to leave Vietnam and why you fear returning there" (transcript, p 9). The member asked the appellant a number of open questions in this regard. The member also asked some more directed questions based on the statements that he had before him (which did not include the October 2013 Statements) and the Delegate's decision (prepared without reference to the October 2013 Statements).

20 At p 21 of the transcript, the appellant raised the fact that his family had lived in their village for more than ten years but had not been given any land to work on. (We interpolate that the appellant had raised this matter in the First Statement, but the Tribunal was unaware of the existence of this statement.) In

response to the appellant's statements about this matter, the member said: "You've never mentioned this before". The appellant responded (incorporating an agreed correction to the transcript set out at AB 676):

> Yes, that's what I pointed out to my lawyer because the first time that I did send them to my lawyer I did give that but, you know, when I read that again I didn't [see that] in my application and that's why I did point it to my lawyer.

The member then said:

> Well, I've got a statement that was prepared for the assistance of the lawyer when he first arrived in Australia. You were interviewed by the department as well. In any event, I don't understand what the relevance of this is, you have to explain it to me.

After some further questions and answers, the following exchange occurred (incorporating an agreed correction):

MEMBER:	Well, at the moment, this has come very late. Its relevance is not quite clear to me and I'll give you time to explain it. Your evidence about it is quite vague and all those things cause me a little bit of concern about whether this is something that you've just made up now and whether it is actually truthful evidence.
[APPELLANT:]	Yes, you know, this one I already talk to my lawyer.
MEMBER:	Look that's not the answer. I'm asking you to explain to me why you didn't mention it in your interview when you actually had the opportunity to discuss it with the department or what's it relevance. I don't understand. [I'll repeat what you told me,] that people in Vietnam are entitled to get land after five years from the Government. You said your parents had been there for 10 years and they've got no land. You only recently went to Australia in 2013. If your parents were owned land they would have got it a long time ago. It doesn't make sense to me.
[APPELLANT:]	I agree the first time when I have interview with the department officer but then after that they asked us to go back to the room and write out the additional information. I don't know the reason why they didn't put into my application.

(Errors in the original.)

The appellant did not refer during the hearing to the matters covered by the Second Statement, as set out at [9] above. At the conclusion of the hearing, the appellant was given leave to file a further written submission.

21 On 30 April 2015, Dr McIntyre, on behalf of the appellant, filed a written submission with the Tribunal (the **Post-hearing Submission**). The Post-hearing Submission included a statement by the appellant, prepared with the assistance of an interpreter. As indicated in paragraph 6 of the statement, it did not purport to be an exhaustive record of the appellant's claims. The statement did not refer to the claims contained in the Second Statement.

22 On 18 June 2015, the Tribunal affirmed the decision of the Delegate.

23 The appellant applied to the Federal Circuit Court for judicial review of the Tribunal's decision.

24 In November 2016, in response to an FOI request by the appellant's solicitor, the Department provided the October 2013 Statements (including the translation of the Second Statement). These were annexed to an affidavit of Jinane Ghazale,

the appellant's solicitor, affirmed on 10 November 2016, that formed part of the evidence before the primary judge. (Although the heading to the affidavit has the date as 10 November 2015, this is evidently a typographical error and the correct date, as indicated at the end of the affidavit, is 10 November 2016.)

The hearing before the primary judge

25 The hearing before the primary judge took place on 14 December 2016. At this hearing, the appellant relied on a further amended application that set out four grounds, numbered 1, 2, 4 and 5. Grounds 1, 2 and 5 are not relevant for the purposes of the appeal. Ground 4 was as follows:

> The Tribunal failed to take into account relevant considerations, being:
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> a. the Applicant's claims made to his Department case manager that Vietnamese authorities had excluded the Applicant's parents from the policy that gave residents access to land, by reason of the Applicant having fled to Vietnam;
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> Particulars
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> a. At paragraph 62, the Tribunal rejected the Applicant's claim that Vietnamese authorities had excluded the Applicant's parents from the policy that gave residents access to land by reason of the Applicant having fled to Vietnam, because the Tribunal concluded that the Applicant had not mentioned this claim previously.
> b. The Applicant did in fact mention this claim previously, in written statements he furnished to his Department case manager prior to the Tribunal hearing.
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> b. the Applicant's claims of fear of significant harm at the hands of people "hired for debt collection", and the lack of state protection in relation to the risk of that harm.

However, as the primary judge noted at [7] of the Reasons, the arguments before him had "unfolded in a way that did not neatly follow the grounds, instead relating to which documents the department had provided to the Tribunal". The primary point developed on behalf of the appellant (who was represented by counsel) in relation to ground 4 was that the Tribunal had failed to deal with an aspect of the appellant's claim that was disclosed in the October 2013 Statements (see the Reasons, [26]). The appellant relied in part on an argument that, because s 418 of the *Migration Act* required all relevant documents (including the October 2013 Statements) to be provided to the Tribunal, an inference should be drawn that they were so provided unless there was proof to the contrary (see the Reasons, [35]). However, the appellant's counsel also developed an alternative argument that the failure to comply with s 418 of the *Migration Act*, if this was what in fact had occurred, had resulted in a denial of procedural fairness (see the Reasons, [39]).

26 The evidence before the primary judge included two affidavits of the appellant, two affidavits of the appellant's solicitor, and an affidavit of Dr McIntyre. None of these deponents was cross-examined.

27 The Minister called evidence from a solicitor, the Delegate, and a staff member from the Tribunal. The latter two of these witnesses were cross-examined by counsel for the appellant. The Minister did not call the person in the Department who was responsible for the handling of the relevant files.

The decision of the primary judge

28 The primary judge delivered the Reasons and made orders on 24 February

2017. In relation to ground 4, the primary judge focused on the Second Statement. This reflected the way in which the argument for the appellant was presented. At [26]-[27], the primary judge described the claims made in the Second Statement and set out an extract from that statement (being part of the paragraph quoted in [9] above). The primary judge noted that the claim set out in that statement was not dealt with by the Delegate or the Tribunal.

29 The primary judge then considered whether the Second Statement had been provided by the Secretary to the Tribunal. The evidence of the witnesses called by the Minister was to the effect that it had not been provided. The primary judge accepted this evidence. The primary judge stated (at [30]):

> It appears clear that, for reasons that are unable to be fully explained, two separate departmental files were generated for the applicant, and that these documents were on a departmental file that was not later utilised for the purpose of the consideration of his claims, nor the provision of documents to the Tribunal. The delegate was unsure as to why there would be two file numbers generated by the department. It appears to me that this probably occurred simply as a result of an administrative error at some point.

This finding is not challenged on appeal.

30 The primary judge found, at [33], that the Delegate did not have the Second Statement before him when considering the appellant's visa application and, at [34], that the October 2013 Statements were not provided to the Tribunal. These findings are not challenged on appeal. At [35] of the Reasons, the primary judge reiterated the finding that the documents were not provided due to an administrative error:

> All of the evidence that has been obtained indicates that the relevant documents were not provided to the Tribunal, and admits of a rational explanation for that having occurred. Namely that through an administrative error some years ago a second file had been created which was not accessed or pursued through the delegate's decision-making process, nor in the Tribunal. There is no evidence that even gives rise to an alternative hypothesis.

31 The primary judge then considered s 418 of the *Migration Act*, including the argument that the failure to comply with the section resulted in a denial of procedural fairness. The primary judge rejected this argument for the reasons set out at [39]-[60]. This part of the Reasons included the following:

> 39. The applicant's counsel developed the argument on the basis of a claim that the failure to comply with s.418 of the Act ultimately resulted in a lack of procedural fairness. Importantly, in the present case, the applicant was provided with an opportunity to attend and give evidence and make submissions as required under s.425 of the Act. He attended not only with an interpreter but with the assistance of his migration agent, Dr McIntyre. This argument was thus developed as one analogous with the argument that a failure to accord procedural fairness may occur where the delegate has accepted a proposition and an applicant is not challenged on that proposition before the Tribunal.
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> 40. In this case, however, the transcript of the hearing before the Tribunal contains nothing to indicate that the applicant had assumed that the Tribunal had received this earlier statement he had made. Nor is there anything in the delegate's decision to indicate an acceptance of the facts and circumstances within this statement. Indeed, the whole of his case as

discussed with the delegate, and his evidence before the Tribunal, proceeded on the basis that his version of events did not contain these particular allegations.

32 After considering the transcript of the Tribunal hearing in some detail, the primary judge said:

> 51. On a fair reading of the transcript, it is clear that the applicant did not raise the matters set out in the document obtained by FOI before the delegate (other than the land claims) even though, if they were true and to be relied upon, they formed a natural part of the narrative that he provided.

33 The primary judge referred to a further part of the transcript, relating to the provision of further submissions on behalf of the appellant, and said:

> 55. In these circumstances, I am not persuaded that this is a case where the effect of an administrative error within the Department (failing to provide the applicant's statement to the Tribunal) resulted in any procedural unfairness.
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> 56. There is nothing to indicate that the applicant ever relied upon the statement having been provided to the Tribunal, nor any assumption that the contents of it had been accepted by the Tribunal member. The applicant's representative appears to have been aware that documents had not been provided, and was given an opportunity to make inquiries and make further submissions, together with the option being pointed out to her of seeking an extension of time to make submissions if there was a proper reason for it. There was nothing in the document that was not known to the applicant who could have given direct evidence of all the facts alleged in the document, if he had wanted to, at the Tribunal hearing. Indeed he gave evidence that he had made the claims relating to land in the past in a statement to the department.
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> 57. Despite the extensive and detailed submissions critiquing the decision of the delegate, no mention is made of the further claims that are set out in the document obtained by FOI.
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> 58. Whilst at first blush this appears remarkable, it is adequately explained if the applicant (with the advice of his agent) made a forensic decision not [to] rely upon the document. Given the fact that the applicant had not raised claims set out in the document, when giving his account orally at the hearing, it was likely to significantly undermine his credibility. The agent was not on affidavit, nor was there evidence of her declining to provide an affidavit. The applicant did not address this issue in his affidavit evidence. It is clear that:
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> a) The existence of the document was known to the applicant;
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> b) The applicant knew that the Tribunal did not have the document;
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> c) Parts of the document contained claims he had not made to the Tribunal;
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> d) The applicant was on notice he could provide the document after the hearing (and if necessary seek an extension of time to do so);
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> e) The applicant did not seek to provide the document, nor an extension of time to do so, in his detailed post hearing submissions.
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> 59. The position of the applicant, post hearing, was one of having to decide whether to provide the document, knowing it rebutted the allegation of recent invention with respect to the land claims, but would potentially undermine his credibility by setting out claims he had not mentioned at

> either oral hearing. If the applicant made a forensic decision not to pursue the issue in post-hearing submissions it can hardly result in procedural unfairness or jurisdictional error.
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> 60. In the circumstances, I am not persuaded that the applicant has made out a ground in this respect. Rather, I find that:
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> a) the technical breach of s.418 of the Act in the circumstances of this case does not amount to a jurisdictional error, relying upon the reasoning set out in *SZOIN* and *WAGP* (noting that the applicant argued that *WAGP* and *SZOIN* were not correctly decided so as to keep this issue open for potential appeal);
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> b) having regard to the way in which the delegate's decision was framed and the hearing was conducted before the Tribunal member, the facts and circumstances did not result in a lack of procedural fairness to the applicant as a result of him presuming that the Tribunal member was aware of the contents of the document, implicitly relying upon the contents of the document, or assuming that the claims in that document had been accepted expressly or tacitly; and
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> c) the failure of the Department to provide every document to the Tribunal as a result of administrative error, at least in the circumstances of this case, does not amount to a fraud on the Tribunal (in the technical administrative law sense) as discussed in *SZFDE*.

34 The primary judge then dealt with a further issue, namely whether the appellant had abandoned any claim made in the Second Statement. The primary judge concluded, at [69], that, even if the appellant had raised a claim as contained in the Second Statement, "it appears clear it had been abandoned by the time of the Tribunal hearing".

35 The orders made by the primary judge were to the effect that: the time for filing the application for judicial review be extended to 8 September 2016; the application for judicial review be dismissed; and the appellant pay the first respondent's costs.

The appeal

36 The appellant appeals to this Court from the judgment of the Federal Circuit Court. There are two grounds set out in the notice of appeal:

> 1. His Honour erred in finding that the Appellant's claim for protection based on his assault had been abandoned.
> 2. His Honour erred in failing to find that the breach of section 418 of the *Migration Act 1958* (Cth) resulted in the Second Respondent's decision being affected by jurisdictional error.

37 Consistently with the way the appellant's submissions were presented, it is convenient to deal first with ground 2, and then with ground 1.

The procedural fairness ground

38 The appellant submits that a breach of s 418(3) may result in a denial of procedural fairness, referring to *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966; 190 ALR 601 (*Muin*) and *BBS15 v Minister for Immigration and Border Protection* (2017) 248 FCR 159 (*BBS15*). The appellant submits that: in each of these cases, the Court found that the applicant had been misled by the Tribunal into believing that certain relevant materials had been considered by the Tribunal when this was not the case; and the misleading of the applicant was

enough for the Court to find that there had been a denial of procedural fairness. The appellant submits that the same is true in the present case. The appellant challenges some of the factual findings made by the primary judge at [56], [58] and [59] of the Reasons. In particular, the appellant challenges: the statement that that Dr McIntyre "appears to have been aware that documents had not been provided" to the Tribunal; the raising of the possibility that it was a "forensic decision" not to rely on the "document"; and the finding that the appellant knew that the Tribunal did not have the "document".

39 The Minister submits, in summary, that *Muin* and *BBS15* are distinguishable on two bases: first, there is no evidence that the appellant relied upon any representation by the Tribunal in a manner that was detrimental to his case, or at all; and secondly, there is an insufficient basis in the record to conclude that the Tribunal (inadvertently or otherwise) represented to the appellant that it had the October 2013 Statements. The Minister submits that: the ultimate question is whether the breach by the Secretary of s 418 resulted in the Tribunal failing to comply with s 425 of the *Migration Act*, which requires the Tribunal to conduct a hearing that is meaningful and fair: *NALQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 121 at [30]; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; the Tribunal did so comply; as the primary judge recorded in the Reasons, the Tribunal member took care to try to elicit the appellant's claims from him in an open-ended fashion; the Tribunal member permitted the appellant's representative to put on post-hearing submissions, saying "if you have information that is relevant, then by all means provide it to me"; the appellant's representative took up this invitation; and none of the further material submitted by the appellant raised the claim made in the Second Statement.

40 In our view, the primary judge erred in making some of the factual findings in [56], [58] and [59] of the Reasons. In [56], the primary judge stated that the appellant's representative, that is, Dr McIntyre, "appears to have been aware that documents had not been provided" to the Tribunal. The reference to "documents" was to the October 2013 Statements. However, there does not appear to be a proper basis to conclude that Dr McIntyre was aware of the *existence* of the October 2013 Statements at the relevant time, let alone that they had not been provided to the Tribunal. We note the following matters. Before the Tribunal hearing, Dr McIntyre had made an FOI request for the Tribunal's file and the Department's file in relation to the appellant. However, the October 2013 Statements were not provided to her in response to that request. Both the appellant and Dr McIntyre, in their affidavits before the primary judge, stated that they did not discuss the appellant's protection claims before the Tribunal hearing. They were not cross-examined. In these circumstances, it is difficult to see how Dr McIntyre could have been aware of the existence of the October 2013 Statements, at least at the time of the Tribunal hearing. Further, there was no evidence that the appellant told Dr McIntyre about the existence of the statements after the Tribunal hearing and before the Post-hearing Submission was filed. We do not consider that the transcript of the Tribunal hearing, including the parts extracted at [20] above, provides a sound basis to infer that Dr McIntyre was aware, or became aware during the course of the hearing, of the existence of the October 2013 Statements. Accordingly, we consider the finding to the effect that Dr McIntyre was aware that the

October 2013 Statements had not been provided to the Tribunal, to have been erroneous. We note that, in her affidavit before the primary judge, Dr McIntyre did not state that she was not aware of the existence of the October 2013 Statements or that they had not been provided. However, we do not consider that any inference can be drawn from the absence of a statement to this effect.

41 We note for completeness that, at [52] of the Reasons, the primary judge set out an extract from the transcript of the Tribunal hearing that included a statement by Dr McIntyre that "[o]ur understanding is that the Department has more information about the first two events than what they have revealed". But it is clear that this was a reference to two particular events, namely the "privacy breach" and "A18" claims referred to in the immediately preceding paragraph of the transcript. The sentence of the transcript highlighted in bold by the primary judge ("I'll have some more details in (indistinct) submission if you will allow me to provide that") evidently related to the same matters. These statements by Dr McIntyre did not relate to the October 2013 Statements.

42 The primary judge noted, at [57], that the Post-hearing Submission made no mention of the further claims that are set out in "the document obtained by FOI". This would appear to be a reference to the Second Statement. The primary judge then said at [58]: "Whilst at first blush this appears remarkable, it is adequately explained if the applicant (with the advice of his agent) made a forensic decision not [to] rely upon the document." While this statement does not constitute a finding (the word "if" is used), we doubt that there was a proper basis to consider this as a possible explanation. The possibility is necessarily premised on Dr McIntyre having been aware of the existence of the October 2013 Statements. But, for the reasons given above, there was no proper basis to infer that she was so aware.

43 In [58](b) of the Reasons, the primary judge found that the appellant "knew that the Tribunal did not have the document". This would appear to be a reference to the Second Statement. There was no direct evidence to this effect. We do not consider that the transcript, including the passages set out at [20] above, provides a proper basis to infer that the appellant knew that the Tribunal did not have the Second Statement. First, it is necessary to have regard to the circumstances in which the hearing took place (by videoconference, with the interpreter located in a different place to the appellant). This is likely to have affected the appellant's understanding and the likelihood of his drawing inferences from exchanges with the Tribunal member. Secondly, after the appellant said that he had written out additional information, the Tribunal member did not follow this up with further questions or state that he had not received any such information. Thirdly, as discussed below, the Tribunal member made other statements to the effect that he had received the Department's file and statements made by the appellant. In the circumstances, there was no proper basis to infer that the appellant knew that the Tribunal member did not have the Second Statement.

44 It follows that the further finding, at [58](d), that the appellant was "on notice he could provide the document after the hearing" also lacked a proper basis. Further, it follows that there was no proper basis for the statement, in [59], that "[t]he position of the applicant, post hearing, was one of having to decide whether to provide the document". We note that, at this point, there is some confusion as to which document is being referred to. The sentence in the Reasons continued: "knowing it rebutted the allegation of recent invention with

respect to the land claims, but would potentially undermine his credibility by setting out claims he had not mentioned at either oral hearing". This seems to involve reference to both of the October 2013 Statements.

45 The primary judge's conclusion that there was no denial of procedural fairness was dependent on these findings. It follows from the above that the primary judge's conclusion must be set aside and the matter reconsidered. It is appropriate for that reconsideration to be undertaken by this Court.

46 In our view, in the circumstances of this case, including the breach of s 418(3), there was a denial of procedural fairness to the appellant. We accept the proposition that not every breach of s 418(3) will result in a denial of procedural fairness. Rather, it is necessary to consider the way in which the proceeding before the Tribunal was conducted and the circumstances of the particular case. In the present case, the Tribunal gave the impression that it had received and would consider the October 2013 Statements. On 20 January 2015, the Tribunal wrote to the appellant stating that "[t]he Tribunal has considered the material before it". At the outset of the hearing on 17 April 2015, the Tribunal member stated that "I have got a copy of the Department's file before me" and that it contained the appellant's statement of claim, an application for a protection visa and "various supporting documents". At p 12 of the transcript, the member referred to what the appellant had said in his "statement" (albeit, referring to a different statement). At p 15 of the transcript, the Tribunal member said "[l]et me just look at your evidence". At p 17 of the transcript, the member referred to one of the concerns "you've raised in your statement", albeit, again, referring to a different statement. At p 18, the member referred to "[t]he information that I have from the department". These references are likely to have created the impression that the Tribunal had received all relevant material held by the Department, including the October 2013 Statements. We do not consider that the exchange set out in [20] above altered this impression. If anything, the fact that, after the appellant said that he had written out "additional information", the member did not ask further questions about this or say that he had not received any such information, tended to reinforce the impression that the October 2013 Statements had been received.

47 In these circumstances, the appellant was entitled to assume and, we would infer, did assume that the Tribunal had received and would consider the October 2013 Statements. This was a natural assumption to make in light of the impression given by the Tribunal. It is true that the appellant's affidavits before the primary judge do not contain a statement to the effect that he assumed or believed that the Tribunal had the October 2013 Statements. But we do not consider it necessary for the appellant to make such a statement if (as we consider to be the case) an inference to this effect arises.

48 We would also infer that, had the appellant not made this assumption, he would have taken further steps to bring the existence of the statements to the Tribunal's attention. In the passage extracted at [20] above, the appellant indicated to the Tribunal that he had written out "additional information". Had the appellant not assumed that the Tribunal had received this additional information, it is likely that he would have raised the matter again. Although the appellant did not mention the matters covered by the Second Statement in the course of the Tribunal hearing or in the Post-hearing Submission, it is distinctly possible that this was because he assumed that the statement was before the Tribunal and would be considered.

49 In short, for the reasons given above, the appellant was misled by the Tribunal into assuming that it had the October 2013 Statements before it, albeit that the Tribunal itself was unaware of the existence of the documents. The Second Statement contained a distinct claim and it cannot be concluded that the applicant being misled in this way made no difference to the outcome of the proceeding before the Tribunal. The appellant was thereby deprived of a fair opportunity of presenting his case, contrary to s 425 of the *Migration Act*, and denied procedural fairness. It is established by *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, *Muin* and *BBS15* that in such circumstances the Tribunal fell into jurisdictional error.

50 Although it is not necessary for our decision, we would add that the whole conduct of the Tribunal hearing is likely to have been different had the Secretary provided the October 2013 Statements to the Tribunal as required by s 418(3). It is likely that the Tribunal member would have asked the appellant about the matters contained in those statements. Further, it is unlikely that the Tribunal member would have had the same concerns about whether the appellant's evidence was truthful, as set out in [20] above.

51 We note for completeness that, although in the appellant's written submissions he submitted that *WAGP v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 151 FCR 413 was wrongly decided, during oral submissions counsel for the appellant indicated that this argument was not pressed.

52 For the above reasons, we would uphold ground 2.

The abandonment ground

53 The appellant submits that there was no proper basis upon which to conclude that the appellant had abandoned any claim made in the Second Statement.

54 The Minister submits that: first, the primary judge's finding that the appellant can be taken to have abandoned the claim contained in the Second Statement was an *obiter* finding that was not necessary to the orders that the primary judge made; and secondly, it was open to the primary judge to conclude that the claim had been abandoned, it not having been raised by anyone. The Minister contends that, where a claim is made to a delegate but "not advanced at all before the Tribunal and does not arise from the material before the Tribunal, the Tribunal is entitled to assume that the claim is no longer made": *SZEIV v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 1798 at [34].

55 The primary judge's reasoning in relation to abandonment would appear to depend, at least in part, on his finding at [62] that "[t]here was nothing to indicate or give the impression that the document [ie, the Second Statement] was before the Tribunal". But, for the reasons given in [46] above, we consider that an impression was given that the Second Statement was before the Tribunal. In these circumstances, the fact that the appellant did not refer to this claim in his evidence before the Tribunal does not provide a basis to infer an abandonment of the claim.

56 For these reasons, we would uphold ground 1.

Conclusion

57 It follows from these conclusions that the appeal is to be allowed. We will also make orders that paragraphs 2 and 3 of the orders made by the primary judge be set aside and, in lieu thereof, it be ordered that: the application for

judicial review be allowed; the decision of the Tribunal be quashed; and the matter be remitted to the Administrative Appeals Tribunal for determination according to law. There is no apparent reason why costs should not follow the event. Accordingly, we will also order that the Minister pay the appellant's costs of the appeal and of the proceeding in the Federal Circuit Court.

Appeal allowed

Solicitors for the appellant: *Asylum Seeker Resource Centre*.

Solicitors for the first respondent: *Australian Government Solicitor*.

ALBERT OUNAPUU