FEDERAL COURT OF AUSTRALIA

Applicant A101/2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 556

MIGRATION – persecution for political opinion – laws of general application – whether discriminatory in operation

MIGRATION – procedural fairness – no opportunity to comment on information adverse to the authenticity of documents presented to the Tribunal

Judiciary Act 1903 (Cth)

Applicant A v Minister for Immigration & Ethnic Affairs (1997) 190 CLR 225 considered

Chen Shi Hai v Minister for Immigration & Multicultural Affairs (2000) 201 CLR 293 applied

Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389 cited

Kioa v West (1985) 159 CLR 550 cited

NARV v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 203 ALR 495 cited

Paramananthan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28 considered

Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476 cited

Stead v State Government Insurance Commission (1986) 161 CLR 141 cited

VHAP v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 82 cited

WACO v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 171 cited

WAEZ of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 341 cited

APPLICANT A101/2003 v MINISTER FOR IMMIGRATION& MULTICULTURAL & INDIGENOUS AFFAIRS, L NICHOLLS, MEMBER, REFUGEE REVIEW TRIBUNAL & PRINCIPAL MEMBER, REFUGEE REVIEW TRIBUNAL

No S 677 of 2003

FINN J

ADELAIDE

6 MAY 2004

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S 677 OF 2003

BETWEEN:	APPLICANT A101/2003 APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS FIRST RESPONDENT L NICHOLLS, MEMBER, REFUGEE REVIEW TRIBUNAL

	SECOND RESPONDENT
	PRINCIPAL MEMBER, REFUGEE REVIEW TRIBUNAL
	THIRD RESPONDENT
JUDGE:	FINN J
DATE OF ORDER:	6 MAY 2004
WHERE MADE:	ADELAIDE

THE COURT ORDERS THAT:

1. A writ of certiorari be issued, directed to the Refugee Review Tribunal removing its decision in this matter into this Court, for the purpose of quashing it.

2. The decision be quashed.

3. A writ of mandamus be issued, directed to the Refugee Review Tribunal, requiring it to hear and determine the matter the subject of the decision, according to law.

4. A writ of prohibition be issued, directed to the first respondent, prohibiting her from acting upon or giving effect to the decision of the Refugee Review Tribunal in this matter.

5. The first respondent pay the applicant's costs.

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

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S 677 OF 2003

BETWEEN:	APPLICANT A101/2003 APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS FIRST RESPONDENT L NICHOLLS, MEMBER, REFUGEE REVIEW TRIBUNAL SECOND RESPONDENT PRINCIPAL MEMBER, REFUGEE REVIEW TRIBUNAL THIRD RESPONDENT

JUDGE:	FINN J
DATE:	6 MAY 2004
PLACE:	ADELAIDE

REASONS FOR JUDGMENT

1 There are two issues of substance raised in this application under s 39B of the *Judiciary Act 1903* (Cth) to review a decision of the Refugee Review Tribunal which found that the applicant was not entitled to a protection visa. The first is whether the Tribunal denied the applicant procedural fairness in not putting adverse information to him before finding that supporting documents put in by him were not authentic. The second issue is whether the Tribunal should have considered that the applicant had a well founded fear of persecution in the circumstances, notwithstanding that he was subject to proceedings in Pakistan under laws of general application.

2 Given the structure of the Tribunal's reasons it is probably only strictly necessary to consider the second of these issues, though I will deal as well with the first.

THE PROCEDURAL FAIRNESS CLAIM

(a) Background Setting

3 The applicant is a citizen of Pakistan. His claims relate to his membership and support of the Pakistan Muslim League (N) Party ("PML (N)") and to his participation in public demonstrations that had been banned by the Musharraf military government. He was, as the Tribunal found, involved in political activities while both a college and a university student which resulted in political rivalries with the supporters of another political party (the People's Party of Pakistan). The applicant attended university to at least 1992.

4 After the military coup of October 1999 and the installation of General Musharraf as President, the applicant claimed to have had a problem with the military government. The Tribunal summarised his evidence on this at the hearing in the following manner:

"He told the Tribunal that he was involved in a demonstration which he organised as part of his role as student activist. He claims that the police and Army came in front of the demonstration and arrested many people as a result of that demonstration. He claims that although he escaped arrest a charge was brought against him for involvement in a demonstration against the military government. He claimed that the Local Court in Swabi issued a demand for the applicant's arrest along with other people involved in the demonstration. The applicant claimed that he had to leave Pakistan because he feared arrest and feared the Army government."

5 Towards the end of the Tribunal hearing the applicant indicated to the Tribunal that he was shocked to find that his previous agent, now deceased, had not submitted "other relevant documents" in support of his application to the Tribunal. The Tribunal then gave the applicant time to ascertain the whereabouts of, and then to lodge these documents. Four days after the hearing he lodged copies of the following with the Tribunal:

(i) A First Information Report ("FIR") dated 14 April 2000 – a translation of which is in the Court Book in this proceeding;

(ii) A Charge Sheet dated 15 May 2000 which charged the applicant with a variety of offences under Pakistan's Penal Code; and

(iii) A Proclamation for the Appearance of an Accused Person dated 2 May 2000.

The latter two of these (also in evidence before me) were in English.

6 By way of explanation an FIR as described by the Tribunal is the initial claim or complaint written up by police when police investigation is being demanded. It contains all the information and versions of events given to the

police by a complainant and is the trigger to any legal process the police might initiate.

7 The Tribunal dealt with these documents as follows:

"The alleged incident giving rise to the complaint against the applicant took place on the Mardan/Swabi road in Shewa Adda another small village in the North West Frontier Province. A search of the Dawn Pakistan website (1999-2002) found no reference to demonstrations or processions on the Mardan Swabi road or in the village of Shewa Adda in April 2000. The Dawn website carries very detailed local news of all areas in Pakistan. It records most significant local occurrences, for example, it reported extensively on protests against a toll plaza tax, local domestic disputes resulting in death or injuries and visits by political figures in the Swabi/Mardan area during the relevant time period. There were also a number of articles which discussed the campaigns of political parties in the Malakand/Swabi area including visits from political figures from the PML and PPP. In July 2002 a number of high profile political leaders visited the area and addressed public rallies despite the military government's ban on public rallies and processions. (Dawn Online.)

The FIR is written in such a way to convey to a reader of the document that the applicant was the local president of the Muslim Youth Wing, was exhorting the masses to restore democracy as well as criticising the military rulers. Further the FIR stated that a special report had been sent to all police stations on wireless and the high authorities of the Army and Police.

The charge sheet charges the applicant with 'criminal conspiracy, sedition, rioting, inducing students, for taking part in political activity and alarming slogans against present army government being activist for restoration of democratic government and joining the unlawful assembly and creating problems for the present government' and then lists a number of sections of the Pakistan penal code and MPO Maintenance of Public Order. The third document Proclamation for the Appearance of a Person Accused also refers to the charges against the applicant in much the same terms.

The Tribunal has doubts about the authenticity of these documents arising from the following:

- The late submission of the documents to the Tribunal. The applicant indicated at hearing that the failure to submit the documents was the fault of his previous agent who is now deceased.

- The absence of any information in the sources on the alleged incident in the village of Shewa Adda in April 2000 when information of lesser significance was extensively reported in the sources.

- The substance of the FIR reads as if to confirm the various claims of the applicant rather than a description of an incident giving rise to criminal charges. The substantive parts of the other documents are generalised

and appear to contain descriptions of offences which appear improbable when considering the wording of Pakistan's criminal legislation.

- The context of the alleged charges, that is, that the applicant who was 32 at the time of the alleged incident leading a procession as a 'student activist' in a small village in a remote Pashtun area of Pakistan where the major occupation of the population is either agriculture or production and sale of firearms. The village is not located near any universities or colleges and the population is well known for its reluctance to submit to government authority and its pursuance of local tribal laws and customs. The FIR also states that a report has been sent to the high authorities of the Army and police. This also appears improbable given that such reports are generally the responsibility of the local police station and the local court and a small demonstration in a provincial village is unlikely to have major national significance.

The Tribunal acknowledges that each of these factors on their own is not sufficient to lead the Tribunal to view that the documents are not authentic. However, considering all these factors together and considering the country information that false documentation is relatively easy to obtain the Tribunal is not satisfied that the documents submitted are genuine. Further the applicant left the country legally and the country information indicates that Pakistan maintains an Exit Control List which prevents those charged with serious criminal offences from leaving the country. Accordingly the Tribunal is not satisfied that the applicant led a demonstration in Shewa Adda in April 2000 or was charged with any offences in relation to that alleged incident." (Emphasis added)

8 Neither the Tribunal's concern about the authenticity of the documents nor the material on which its "doubts" were based were put to the applicant prior to the Tribunal's decision. It is this which grounds the denial of procedural fairness claim.

(b) Contentions and Conclusions

9 At the time of filing of the applicant's written submissions (28 November 2003), the applicant swore an affidavit in which he indicated that:

"2. I was not aware that the RRT was using the Dawn Pakistan website to check on the veracity of my claim concerning the demonstration in April 2000. To the best of my recollection, that was not put to me to comment on by the RRT.

3. Had I been aware of the RRT's research (and its conclusion because it could not find a report on the demonstration) I would have tried to contact people I know to try and get information to prove it did occur. I would also have tried to contact Dawn Pakistan to see if they could confirm that they are aware of every political demonstration that takes place in Pakistan and whether it reports on every demonstration.

4. The RRT did not bring the following to my attention, to the best of my recollection:

(a) IRDB Pak 14236 21 May 1993;

(b) Crime, Punishment in Islamic Republic of Pakistan, Pakistan Muslim academy, 1986;

(c) Pakistan Police Reports 24 Jan 2001;

(d) IRBD, Requirements of a valid arrest warrant, 13 Mar 2000;

(e) Information in IRBD Pakistan, Information obtained from German authorities on fraudulent documents – Sept 2000."

The materials referred to in par 4 above are country information reports mentioned by the Tribunal in its general discussion of FIRs and Warrants of Arrest.

10 Put shortly, the applicant's case is that if he had an opportunity to comment on the information upon which the second and fourth of the dot-point matters referred to in the Tribunal's reasons were based (i.e. the "Dawn website" information and the country information), the result could have been different. This denial of procedural fairness constituted a jurisdictional error: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; for which the relief sought should be granted.

11 The respondent Minister does not concede that there has been a denial of procedural fairness though it is accepted that the issue is a "difficult one" in this context. Further it is accepted that the manner in which the Tribunal made its finding on the authenticity of the applicant's documents posed a particular difficulty for the Minister. The reason for this is that the various doubts identified by the Tribunal which led to its finding were not separately sufficient to sustain that finding. They provided cumulative and interdependent reasons for the conclusion. Nonetheless, in this particular setting it is contended that there was no unfairness to the applicant as even if the "adverse material" has been disclosed, the applicant would have not conducted his case differently nor would the outcome have been different: cf *VHAP of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 82 at [15]-[16].

12 For my own part I accept the submissions made for the applicant. The Tribunal had made the authenticity of the applicant's documents an issue in the matter without apprising him that such was the case or giving him the opportunity to deal with adverse information that was 'credible, relevant and significant to the decision to be made': *Kioa v West* (1985) 159 CLR 550 at 629. Given the nature of that issue it was irrelevant that the adverse information was essentially country information and not information personal to the applicant: *NARV v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 203 ALR 494 at [15].

13 The applicant has given evidence as to what he would have done if the information relating to one of the causes of the Tribunal's doubt had been disclosed to him (i.e. "the Dawn website" information). Given that (i) an instance of practical injustice has thus been explicitly identified: *WACO v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 171 at [58]; and (ii) the Tribunal's various reasons for its findings were interdependent, I am satisfied that there has been a denial of procedural fairness and I am not satisfied that if proper disclosure had been made it "could make no difference to the result already reached": *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

14 For reasons to which I now turn, this conclusion of itself is not sufficient to entitle the applicant to the relief he seeks.

The laws of General Application Claim

(a) Background Setting

15 In his original application for a visa, and then later in a statutory declaration, the applicant claimed that the army (or the "law enforcing authorities") lodged a false and fabricated case against him. In the statutory declaration this "case" was related directly to his leadership of the demonstration to which I have already referred.

16 The material before the Tribunal on the nature and setting of the charges so laid was contained in the three documents he lodged with the Tribunal and in country information. For present purposes it is sufficient if I set out the body of two of those documents. Omitting formal parts, stamps and signatures, these are –

(i) "**PROCLAMATION FOR THE APPEARANCE OF A PERSON ACCUSED (UNDER SECTION 87 PAKISTAN CRIMINAL PROCEDURE CODE)**

Whereas, complaint has been made before me that [Applicant A101] resident of village Dagai District Swabi is suspected to have committed offence of 'Criminal Conspiracy', sedition, rioting, inducing students to take part in political activity, being the member of the un-lawful assembly, armed with deadly weapon against the present army government and assaulted/obstructed public servant when suppressing such anti Government activities and have disturbed the public peace and tranquillity, punishable under sections 120B, 124A, 144, 147, 148, 149, 152 & 153B PPC WITH 3 MPO and it has been returned to a Warrant of ARREST there upon issued that the said [Applicant A101] can not be found and WHEREAS, it has been/ shown to my satisfaction that the said [Applicant A101] has absconded himself to avoid the service of the said Warrant.

Proclamation is hereby made that the said [Applicant A101] Swabi district, is required to appear at Swabi before me to answer the said complaint on the 15th day of May, 2000."

(ii) "**Charge Sheet** File No NOO/35347

I, Ghafoor Khan Qurashi Judicial Magistrate/city Magistrate Swabi charge you Accused, [Applicant A101] S/O Dilbar Khan Resident of village Dagi Tehsil Swabi as follows:-

That you on 14-04-2000 found leading an illegal procession with the common object with your co-accused within the limits of police station, Kalu Khan at about 1100 hours and with my cognizance.

Whereas, I Ghaffor Khan Quraishi Judicial Magistrate/City Magistrate District, Swabi hereby charge you for the offence criminal conspiracy 'sedition, rioting, inducing student, for taking part in political activity and alarming slogans against present army government being activist for restoration of democratic government and joining the unlawful assembly and creating problems for present government and you thereby committed an offence punishable under sections 120B, 124A, 144, 147, 148, 149, 152, 153B Pakistan penal code and 3 (MPO) Maintenance of public order.

You are hereby directed to appear in person and to answer to the charge, failing which you will be trailed by me on the above charge in your absence which can result your conviction."

17 Having reached the conclusion it did on the authenticity of the FIR and the above two documents, the Tribunal indicated it was not satisfied that the applicant led a demonstration as claimed or that he was charged with offences arising from that demonstration. The Tribunal went on, though, to indicate that in any event, even if it was satisfied that there was a demonstration resulting in charges, it "would not be satisfied that the charges were Convention related".

18 This conclusion, which provides the primary reason for the rejection of the applicant's application for a protection visa, led the Tribunal to consider the alleged charges in their setting on the assumption that they were authentic. The following contains its reasoning on this matter:

"The documents submitted indicate, amongst other things, that the applicant was charged with being armed with a deadly weapon, assaulting public servants and breach of the peace all of which are laws of general application. If the applicant claims that these charges are false the country information indicates that the applicant is able to access a judicial system which provides for an open trial, legal representation, the presumption of innocence, cross-examination by an attorney and

appeal of sentences. Further there is some information to suggest that false accusations can be rectified by civil action against the accusers.

With respect to the allegation that the applicant participated in illegal street protests the country information indicates that between 2000 and 2002 the government had made arrests of PML supporters in various parts of the country (mainly in major cities in the Punjab province) following illegal demonstrations however demonstrators were generally released after a few hours or days. Prior to the lifting of the ban on public rallies and processions it appears that the military government was mainly concerned to maintain street control and to suppress public demonstrations rather than to target political opponents such as PML supporters for systematic and discriminatory treatment. The country information also indicates that the PML(N) was not banned following the coup, the PML(N) participated in elections in 2000 and 2002 and most normal party activities other than public demonstrations continued between 1999 and 2002. There is no evidence of targeting of PML members and supporters on the basis of their political opinion.

Thus even if the Tribunal had been satisfied that the applicant was involved in the incident at Shewa Adda and had been charged with offences arising out of that incident the Tribunal would not be satisfied that any charges laid against the applicant were Convention related and that he faced persecution for any Convention related reason.

With respect to the current position of PML(N) members and supporters the party participated in the 2002 elections and won a small number of seats in those elections. The party appeared to have lost much popular support with its leader exiled to Saudi Arabia and many former members standing as independents or for other factions of the party. The Tribunal is satisfied that it is unlikely that the current government will take any action against members and supporters of the PML(N) and there is no current evidence that members or supporters have been targeted for harm by authorities or that members and supporter face persecution involving systematic and discriminatory conduct. The Tribunal is not satisfied that there is a real chance that the applicant would face persecution for reasons of his political opinion should he return to Pakistan now or in the foreseeable future.

Taking all the foregoing into account the Tribunal is not satisfied that the applicant has a well founded fear of persecution for any Convention related reason."

(b) Contentions and Conclusions

19 The applicant contends that, in suggesting he had been accused under laws of general application, the Tribunal appears not to have appreciated that such laws "may impact differently on different people and, thus, operate discriminatorily": *Chen Shi Hai v Minister for Immigration & Multicultural Affairs* (2000) 201 CLR 293 at [21]. Moreover, selective enforcement of such a law may result in discrimination. Here, it is said the Tribunal focussed erroneously on the nature of the law and not on the motive for the arrest. Further the Tribunal did not consider the possible persecution the applicant could suffer if placed under arrest even if he was later released. There was a body of independent country information before the

Tribunal revealing widespread violation by police of the human rights of persons in detention.

20 The respondent Minister contends in contrast that the laws were ones of general application which did not operate discriminatorily on the applicant and which were not selectively enforced against him. The Tribunal recognised that the applicant claimed the charges against him were false but noted that redress against such charges was available through the Pakistani judicial system. The Tribunal also properly noted that there was no evidence of PML members being targeted on account of their political opinion.

21 It is, in my view, clear from the documents lodged by the applicant that an integral element in the course of official action taken against the applicant after the demonstration was that he had been engaging in political and anti-government activity. It is equally clear from the country information to which the Tribunal referred, that by the time of the demonstration in May 2000 the Musharraf military government had imposed a country wide ban on all political meetings at public places and that PML(N) party activists who defied the ban were arrested although they were generally released immediately or soon after the arrest. Further, as I earlier indicated, there was a deal of country information before the Tribunal that indicated the widespread prevalence of human rights violations by police of persons in their custody.

22 None of the provisions of the Penal Code etc that were referred to in the lodged documents are in the materials provided to me. The Tribunal's reasons do not betray whether or not they were before the Tribunal. I am, for present purposes, to accept the characterisation of all of the laws in question – as the applicant apparently does – as being laws of general application, though I would infer from the character of some of the offences mentioned that some at least have a distinct political character to the extent that they seek to preserve an existing political order. I refer, for example, to sedition.

23 It is well accepted that enforcement of a criminal law of general application does not ordinarily constitute persecution for the reason that enforcement of such a law does not ordinarily constitute discrimination: *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 258; *Chen Shi Hai* at 301. But as the qualifying word "ordinarily" suggests, that a law is one of a general character does not for that reason negative the possibility that its enforcement or the manner of its enforcement is discriminatory. As the joint judgment in *Chen Shi Hai* observed (at [21]):

"… general laws, which are apparently non-discriminatory, may impact differently on different people and, thus, operate discriminatorily. Nor is it to overlook the possibility that selective enforcement of a law of general application may result in discrimination."

24 When it is alleged that the enforcement or manner of enforcement of a generally applicable law is discriminatory by reference to political opinion, a complex inquiry may need to be engaged in. Where such a law is, or is said to

be, one having the purpose of protecting a State or its institutions (i.e. it has a "political" purpose), the nature and reach of the law itself and the actual manner of its application will require consideration for the reason that its reach or use in suppressing political opinion may go beyond, or be inconsistent with, what is appropriate to achieve a legitimate government object according to the standards of civil societies: cf *WAEZ of 2002 v Minister for Immigration& Multicultural & Indigenous Affairs* [2002] FCAFC 341 at [32]. It is not unheard of, for example, for a State to utilise sedition-like and public security offences to silence its opponents.

25 The less such a law has an overtly political character (as where for example, its concern is with ordinary criminal acts in a society), the more attention will turn on the integrity of the enforcement process itself and on the risks to which a person might be exposed, e.g. ill-treatment or torture, in the course of that process. Is that process used selectively against critics of the State or against the advocates of particular political views? Is it fraudulently invoked for punitive purposes? Does its improper use expose a person to adverse consequences, e.g. torture in detention, even if that person is not later charged or tried with an offence?

26 It is, in my respectful view, unsurprising that in *Applicant A* McHugh J made the following observations (at 259) on persecution for political opinion in the context of general laws:

"In cases concerned with political opinion and the membership of particular social groups, the issue of persecution may often be difficult to resolve when the sanctions arise from the proper application of enacted laws. Punishment for expressing ordinary political opinions or being a member of a political association or trade union is prima facie persecution for a Convention reason. Nevertheless, governments cannot be expected to tolerate political opinion or conduct that calls for their violent overthrow. Punishment for expressing such opinions is unlikely to amount to persecution. Nevertheless, even in these cases, punishment of the holders of the opinions may amount to persecution. It will certainly do so when the government in question is so repressive that, by the standards of the civilised world, it has so little legitimacy that its overthrow even by violent means is justified. One who fled from the regime of Hitler or Pol Pot could not be denied the status of refugee even if his or her only claim to that status relied on a fear of persecution for advocating the violent overthrow of that regime."

27 Turning to the present matter, I am not satisfied that the Tribunal addressed the issue it was required to address given the particular claim made. In consequence there was a constructive failure to exercise jurisdiction: *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389. To reiterate, the applicant's case at the hearing before the Tribunal was that:

"… he had a problem with the Musharraf government. He told the Tribunal that he was involved in a demonstration which he organised as part of his role as student activist. He claims that the police and Army came in front of the demonstration and arrested many people as a result of that demonstration. He claims that although he

escaped arrest a charge was brought against him for involvement in a demonstration against the military government. He claimed that the Local Court in Swabi issued a demand for the applicant's arrest along with other people involved in the demonstration. The applicant claimed that he had to leave Pakistan because he feared arrest and feared the Army government."

28 His fear of persecution was thus related, not to his membership of the PML(N) as such, but to his having engaged in a demonstration against the military government in contravention of the law and to the government's action against him in response. I emphasise this as I consider that the Tribunal has misapprehended the nature both of the claim being made by the applicant and of the inquiry it entailed.

29 The Tribunal characterised some at least of the offences with which the applicant was charged as involving laws of general application. It did not indicate what it considered was the significance or consequence of this. If it was intending to suggest that, having that character, the charges were not for that reason Convention related, it fell into error for the reasons given above. Rather than entering upon the inquiry whether some or all of the laws in question were either discriminatory per se or were being enforced discriminatorily in the circumstances, the Tribunal indicated that if the charges made were false the applicant had redress in the judicial system.

30 In taking this course the Tribunal appears to have assumed that all of the charges laid were claimed to be false – a rather large assumption given that the applicant's own evidence of participation in an unlawful demonstration. More importantly it did not consider the possible risks of harm to which the applicant could have been exposed in the law enforcement process, notwithstanding the country information before it relating to police brutality towards those in detention: cf *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28. Rather the Tribunal contented itself with the finding that if or when the applicant's case came before the courts the applicant could then raise the falsity of the charges laid against him and have the matter resolved there. The Tribunal did not address the anterior questions (i) whether the manner in which the machinery of the State was allegedly being brought to bear against him was discriminatory; and (ii) whether it would expose him to a real risk of harm at the hands of the police (whether or not the infliction of such harm was persecutory or was merely indiscriminate). In this it revealed "a basic misunderstanding of the case brought by the applicant": *Dranichnikov* at [88].

31 The Tribunal did acknowledge that the ban on public demonstrations could result in the arrest and detention of those who defied it, though the Tribunal accepted country information that demonstrators were generally released after a few hours or days. The Tribunal went on to indicate that it would appear that the military government was at the time "mainly concerned to maintain street control and to suppress public demonstrations rather than to target political opponents". Whether such suppression of public demonstrations could itself be found in the circumstances to be discriminatory for reasons of political opinion was not inquired into, though that matter was

central to the claim being advanced. The Tribunal's reasons suggest that it regarded its task as being to determine whether the applicant was being persecuted as a PML(N) member and supporter. Having negatived that contingency the Tribunal did not consider whether the enforcement of the banning law was itself discriminatory. That very issue was raised by the applicant's claim.

32 The Tribunal did go on to consider events in Pakistan subsequent to the applicant's departure in 2000. It concluded that it was unlikely that the current government would take any action against members and supporters of the PML(N). It found in consequence that there was not a real chance that the applicant would face persecution for reasons of political opinion should he return to Pakistan. However, because the Tribunal did not consider what if any stance would be likely to be taken by the government against a person in the applicant's position against whom charges have been laid, I do not consider that the above finding would as of course render futile the re-hearing of this matter.

33 Though I have concluded that the Tribunal has committed a jurisdictional error and that relief should not be denied for discretionary reasons, I should not be taken as making any comment on the merits of the applicant's case.

CONCLUSION

34 I will order that (i) a writ of certiorari be issued, directed to the Refugee Review Tribunal removing its decision in this matter into this Court, for the purpose of quashing it; (ii) the decision be quashed; (iii) a writ of mandamus be issued, directed to the Refugee Review Tribunal, requiring it to hear and determine the matter the subject of the decision, according to law; (iv) a writ of prohibition be issued, directed to the first respondent, prohibiting her from acting upon or giving effect to the decision of the Refugee Review Tribunal in this matter; and (v) the first respondent pay the applicant's costs.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finn.

Associate:

Dated: 6 May 2004

Counsel for the Applicant:	L Karp
Solicitor for the Applicant:	Parish Patience Immigration Lawyers
Counsel for the Respondent:	K Tredrea
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	27 April 2004
Date of Judgment:	6 May 2004