FEDERAL COURT OF AUSTRALIA

MIGRATION – appeal and cross-appeal against decision of single judge – whether trial judge erred in setting aside the decision of the Refugee Review Tribunal in part only – whether the error identified by the trial judge was an error within the terms of s 476 of the *Migration Act* 1958 (Cth) – whether the Tribunal erred in failing to address the central question of whether the appellant spoke the language distinctive of a certain racial group in Angola relevant to his claim of persecution by reason of race. – whether such failure constitutes a failure to act in accordance with substantial justice and the merits of the case.

Migration Act 1958 (Cth) ss 420, 475, 476, 481

Eshetu v Minister for Immigration and Multicultural Affairs (1997) 71 FCR 300

Inderjit Singh v Minister for Immigration and Multicultural Affairs (unreported, Weinberg J, 28 October 1998)

Sun Zhan Qui v Minister for Immigration and Multicultural Affairs (1997) 151 ALR 505

R v War Pensions Entitlement Appeal Tribunal; ex parte Bott (1933) 50 CLR 228

MATEUS CALADO v MINISTER OF STATE FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

NG 523 OF 1998

MOORE, MANSFIELD AND EMMETT JJ

2 DECEMBER 1998

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NG 523 of 1998

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MATEUS CALADO AppELlant
AND:	MINISTER OF STATE FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent
JUDGES:	MOORE, MANSFIELD AND EMMETT JJ
DATE OF ORDER:	2 DECEMBER 1998
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal is dismissed.

2. The cross-appeal is dismissed.

3. Each party bear their own costs in the appeal and cross-appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NG 523 of 1998

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	MATEUS CALADO AppELlant
AND:	MINISTER OF STATE FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGES:	MOORE, MANSFIELD AND EMMETT JJ
DATE:	2 DECEMBER 1998
PLACE:	SYDNEY

REASONS FOR JUDGMENT

THE COURT

Introduction

This is an appeal and cross-appeal against a judgment of 19 December 1997 of a judge of this Court granting, in part, an application for judicial review of a decision of

the Refugee Review Tribunal ("the Tribunal") of 4 December 1997. The decision of the Tribunal was to affirm a decision of a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister") that Mr Mateus Calado ("the appellant") did not meet a prescribed criterion for a protection visa identified in clause 866.221 of Part 866 of Schedule 2 of the Migration Regulations made under the *Migration Act* 1958 (Cth) ("the Act"). The criterion was that an applicant was a person to whom Australia had protection obligations under the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol Relating to the Status of Refugees done at New York on 31 January 1967 ("the Convention"). The Tribunal treated the delegate's decision as a decision not to grant the appellant a protection visa. Art 1A(2) of the Convention contains, for present purposes, the definition of refugee. It provides:

…the term “refugee” shall apply to any person who;

…

(2) owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality in being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

The Tribunal’s decision

The Tribunal commenced its reasons for decision by briefly setting out the circumstances in which the appellant had applied for a protection visa and how the application had been dealt with by the delegate. It briefly outlined the legislative framework in which the application had to be considered. The Tribunal commenced to consider the claims of the appellant and the evidence before it bearing upon the appellant’s status as a refugee. The Tribunal first referred to what the appellant had said when he was interviewed on 4 April 1997 when he arrived in Australia. The appellant claimed to be from Angola and the Tribunal’s consideration of his visa application proceeded on the basis that he was a citizen of that country. The Tribunal then set out the appellant’s account of his circumstances in a statutory declaration dated 7 May 1997 apparently provided to the Minister’s delegate considering the visa application. In that statutory declaration the appellant said he was a Jehovah’s Witness and had been a member of a youth political group in Angola, the Juventude do Partido Movimento Popular de Libertacao de Angola, or “JMPLA”. That group was the youth wing of the Movement for the Popular Liberetion of Angola, or “MPLA”. The Tribunal then summarized the account the appellant had given of his circumstances in Angola in a departmental interview held on 15 May 1997 and the evidence given by the appellant at the hearing before the Tribunal. At that hearing the appellant gave evidence in support of his contention that he was a Jehovah’s Witness and had been a member of the JMPLA. The Tribunal also referred to a request it had made that the appellant provide further material after the hearing concerning his claim that he was a Jehovah’s Witness and noted that none had been forthcoming.

Following this summary of evidence the Tribunal set out what it viewed as the relevant law concerning what was a refugee and what was comprehended by the notion of persecution. The Tribunal next referred to material from a variety of sources which dealt with the circumstances in Angola generally, the extent to which religious freedom could be exercised in that country, and the racial groups in Angola and the relationship between them. It also referred to material relating to military service in Angola and the role of the MPLA and its relationship with the National

Union for the Total Independence of Angola ("UNITA"). The Tribunal also referred to material concerning the fate of Angolans who had fled their country and returned.

The Tribunal then dealt with the bases on which the appellant had said he was a refugee. It first summarized them:

The Applicant made claims on the ground of race, religion and political opinion. He said that as a Bakongo, he would be targeted by the government because the government and Luanda people "hate" Bakongos. He said that as a Jehovah's Witness, it was against his religion to fight and he might be conscripted. He said that as a person who had joined the government youth group, JMPLA, and refused to spy on UNITA, he was imprisoned and if he returns, he may be persecuted by the government for adverse political opinion imputed to him.

Later in its reasons the Tribunal made several findings which were of critical importance to the claims of the appellant. While they are couched in language of "not being satisfied", they are, in substance, findings of fact. It is convenient to set them out serially. First the Tribunal said:

After considering all the evidence, the Tribunal does not accept the Applicant's claims that he was a member of the JMPLA and was imprisoned for refusing to spy for the JMPLA against UNITA as credible.

Secondly it later found:

After considering all the evidence, the Tribunal does not accept the Applicant's claims that he is a Jehovah's Witness as credible.

Thirdly the Tribunal said:

The Applicant also made a claim on the ground of his race, that is, as a Bakongo, he would be at differential risk in Angola. He said that in 1993, he was injured when MPLA 'armed people' to massacre Bakongos. The Tribunal notes that Amnesty International, ('Angola-From war to …what? No reconciliation without accountability', Amnesty International, 1995), reported the January 1993 killings and other abuses of people belonging to the Bakongo ethnic group which took place in Luanda and other areas, as following reports that 'Zairian mercenaries had assisted UNITA in its attack on Soyo and that a Bakongo commando was in Luanda to assassinate President dos Santos'. The Tribunal also notes that there are about 1,300,000 Bakongo in Angola, about 25% of the total population. They are the third largest ethnic group in the country, and the distinguishing factor about Bakongos is the language they

speak. The Tribunal notes that the Applicant did not make this claim at the airport interview.

The Tribunal has noted above that his claim to be Bakongo would appear at odds with his alleged claim to have been a member of the JMPLA. **The Applicant speaks Portuguese which is not a particularly distinguishing feature of Bakongos;** opinion from Professor Cherry Gertzel, provided to the Tribunal on 26 August 1997. Having regard to those matters, and in the light of the general lack of credibility of the Applicant**, the Tribunal is not satisfied that the Applicant is a Bakongo**.

(Emphasis added)

The Tribunal concluded its reasons by indicating that it was not satisfied the appellant was a person to whom Australia has protection obligations under the Convention and that he was therefore not entitled to a protection visa. Having reached that conclusion the Tribunal indicated that it affirmed the decision not to grant a protection visa.

The proceedings at first instance

The application for judicial review in this Court was heard on 5 December 1997. The appellant was unrepresented and it is apparent from the reasons for judgment of the primary judge that the appellant's grasp of English was limited. In his reasons the primary judge set out some of the material that has already been referred to in this judgment. His Honour noted that the Tribunal had concluded that the appellant lacked credibility. His Honour indicated that there was ample material, in his view, for the Tribunal to have reached that conclusion. After setting out the grounds of the application for judicial review, the primary judge observed that in relation to the claims based on religion and political opinion, he was not persuaded that any reviewable error had been made out. He also indicated that he was satisfied that it had been open to the Tribunal to reach the conclusions it did on those matters.

The primary judge then commenced to consider the way the Tribunal had dealt with the appellant's contention that he held a well founded fear of persecution based on his race. His Honour noted that the Tribunal had not been satisfied that the appellant was a Bakongo but had accepted that Bakongos had been killed and abused in 1993 in Luanda and elsewhere. His Honour then set out an extract from the reasons of the Tribunal in which the Tribunal had discussed the notion of race in Angola and the position of Bakongos in that country. The quoted passage from the Tribunal's decision concluded with an extract from an opinion of a Professor Cherry Gertzel in which she said:

The Bakongo peoples …[all speak] the Kongo language … Language being a crucial source of identity and one of the most important means of distinguishing people …

A little later his Honour said:

The gravamen of [the appellant's] complaint, as I understand it, is that the RRT erred in not accepting that he belonged to the Bakongo ethno-linguistic group because he spoke Portuguese. This complaint calls for a conclusion, based on a fair and reasonable interpretation of the RRT decision, as to the way in which and grounds on which the RRT rejected the claim that he was a Bakongo.

The primary judge went on to note what the appellant had said about his language during the various stages of the consideration of his application for a protection visa. His Honour concluded:

These references indicate that the applicant has consistently stated, since his arrival, that Kikongo is one of his dialects, which I take to mean languages. The language referred to as Kikongo is the language of the ethno-linguistic group known as the Bakongo. This group appears to be alternatively known as Quicongo. The description "Quicongo" clearly is phonetically identical with the reference to "Kikongo" which I take to be the language of the Bakongo community.

His Honour then noted that the various characteristics of a refugee identified in the definition can overlap. His Honour discussed what is comprehended by the notion of "race" and referred to the judgment of Brennan J in *Commonwealth v Tasmania* (1983) 158 CLR 1 at 243-244. He observed that:

The native language of individuals, in my view, is clearly an important part of the cultural heritage and group identification of that person. In the present case it is evident that the appropriate language for consideration of the persecution question is the native language spoken by the Bakongo.

His Honour then summarized the process of reasoning of the Tribunal concerning whether the appellant was a Bakongo and concluded:

In my view, this approach discloses an error of law in relation to the interpretation of the term "race" as used in the Convention. At a critical point in the reasoning, the RRT, in my view, has referred to fluency in Portuguese as being an important indication that the applicant is **not** of the Bakongo community. It must of course be pointed out that what is asserted in that observation, namely that the applicant speaks Portuguese "which is not a particularly distinguishing feature of Bakongos", is literally correct. But reading the paragraph as a whole, in the light of the earlier

material concerning race, and the acceptance by the RRT that **the** distinguishing factor of a Bakongo is language, in my view, the passage reflects an approach which is wrong in law to the important question as to whether he is a Bakongo.

Because a person speaks Portuguese, it does not necessarily follow that the person is somehow excluded from being a Bakongo. Portuguese is, after all, the official language of Angola. The evidence indicates, but no finding is made, that the applicant speaks Kikongo. The fact that he also speaks Portuguese does not weaken his claim to belong to the Bakongo community. A central question, which is **not** addressed in the reasons, is whether the applicant speaks the Bakongo language. If it were decided that the applicant speaks Kikongo, on the criteria accepted by the RRT, this fact would lend support to his claim to be Bakongo. Such a finding would be in accordance with the view of Professor Gertzel as to the importance of language in distinguishing Bakongos.

(Emphasis is in the original text)

His Honour then referred to an analogy concerning German speaking Jews and further explains why, in his view, the approach of the Tribunal disclosed an error of law.

His Honour concluded his judgment with the following:

The approach taken by the RRT on the claim based on race therefore, in my view, disclosed an error of law involving an incorrect interpretation of the applicable law. The error is to be found in considering the applicant's fluency in Portuguese support the final determination that he was not a Bakongo. In addition, the question whether the applicant in fact spoke Bakongo [sic] was not addressed. The reasons only address the question whether the applicant spoke Portuguese. The former was the critical question which had to be resolved in view of the apparent acceptance of the opinion of Professor Gertzel as to language being the distinguishing factor of a Bakongo.

For these reasons I am satisfied that an error of legal interpretation has been made out under s 476(1)(e) of the Migration Act 1958 (Cth). Furthermore, I consider that the RRT did not act according to substantial justice and the merits of the case in relation to the race claim because of the approach it adopted to the applicant's ability to speak Portuguese. The consequence is also that there was a failure to comply with the requirements of s 420(2)(b) of the Act. Therefore, there was a failure to observe a procedure required by the Act. In reaching this further conclusion, I am aware that the Full Court decision in Eshetu v Minister for Immigration and Ethnic Affairs (1997) 71 FCR 300, on which I base the above view, is the subject of a special leave application to the High Court. However, notwithstanding the submissions on behalf of the Minister, I am not persuaded that the decision in that case is distinguishable or ought not to be followed in the present case.

Accordingly, I allow the application. I set aside the decision of the RRT insofar as it relates to the claims based on persecution because of race. I remit the matter to the RRT for redetermination in accordance with law on the question of persecution in relation to race. I order that the respondent pay the applicant's costs.

This conclusion was given effect to by three orders. The terms of the first two are of some importance in this appeal and should be set out in full. They were:

THE COURT ORDERS THAT:

1. The decision of the Refugee Review Tribunal on the question of persecution on the ground of race be set aside.

2. The matter be remitted to the Refugee Review Tribunal for determination in accordance with law on the question of persecution on the ground of race.

3. The respondent pay the applicant's costs.

The issues in the appeal and cross-appeal

The notice of appeal of the appellant was not lodged until 24 July 1998. Time had been extended by order of the Court made on 23 July 1998. The Minister then cross-appealed against the judgment of the primary judge. It should be mentioned that in consequence of the orders made by the primary judge the matter was again considered by the Tribunal who on 15 April 1998 decided that it was not satisfied the appellant was a refugee and affirmed the decision of the delegate of the Minister not to grant a protection visa.

In his appeal the appellant submitted that the primary judge had no power to make order 1. Further, it was submitted on behalf of the appellant that even if power existed, the exercise of the discretion to make the order miscarried. In his cross-appeal the Minister submitted that there was no error of law evident in the Tribunal's reasons of the type identified by the primary judge. In order to understand these issues it is necessary to refer to various provisions of the Act.

Section 36 declares that there is a class of visa known as a protection visa. Section 36(2) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Convention. Part 866 repeats, in substance, that criterion and identifies further criteria for a protection visa. A decision to refuse to grant a protection visa is identified in s 411 as a decision amenable to review by the Tribunal. A decision of the Tribunal is a class of decision amenable to review by this Court. Part 8 of the Act

deals with the judicial review by this Court of specified decisions made under the Act . Section 475(1) provides:

> (1) Subject to subsection (2), the following decisions are judicially-reviewable decisions:
>
> (a) decisions of the Immigration Review Tribunal;
>
> (b) decisions of the Refugee Review Tribunal;
>
> (c) other decisions made under this Act, or the regulations, relating to visas

The grounds on which such decisions may be reviewed are set out in s 476 which provides:

> (1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:
>
> (a) the procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;
>
> (b) that the person who purported to make the decision did not have jurisdiction to make the decision;
>
> (c) that the decision was not authorised by this Act or the regulations;
>
> (d) that the decision was an improper exercise of the power conferred by this Act or the regulations;
>
> (e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;
>
> (f) that the decision was induced or affected by fraud or by actual bias;
>
> (g) that there was no evidence or other material to justify the making of the decision.

(2) The following are not grounds upon which an application may be made under subsection (1):

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

(3) The reference in paragraph (1)(d) to an improper exercise of a power is to be construed as being a reference to:

(a) an exercise of a power for the purpose other than a purpose for which the power is conferred; and

(b) an exercise of a person discretionary power at the direction or behest of another person; and

(c) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

but not as including a reference to:

(d) taking an irrelevant consideration into account in the exercise of a power, or

(e) failing to take a relevant consideration into account in the exercise of a power; or

(f) an exercise of a discretionary power in bad faith; or

(g) any other exercise of the power in such a way that represents an abuse of the power that is not covered by paragraphs (a) to (c).

(4) The ground specified in paragraph (1)(g) is not to be taken to have been made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

Section 481 identifies the powers conferred on the Court in determining an application for judicial review and provides:

> (1) On an application for review of a judicially-reviewable decision, the Federal Court may, in its discretion, make all or any of the following orders:
>
> (a) an order affirming, quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or such earlier date as the Court specifies;
>
> (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit;
>
> (c) an order declaring the rights of the parties in respect of any matter to which the decision relates;
>
> (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Federal Court considers necessary to do justice between the parties.
>
> (2) …
>
> (3) …

Against the statutory background it is necessary to consider the issues raised in the appeal and cross-appeal.

Conclusions

(i) Did the primary judge err in setting aside part of the decision

It can be seen from order 1 made by the primary judge on 19 December 1997 that only part of the decision of the Tribunal was set aside. Counsel for the appellant submitted that there was no power, at least in a case such as the present, to set aside part of a decision refusing to grant a protection visa. However the language of s 481(1)(a) is clear. It confers on the Court a power to affirm, quash or set aside part of a decision. Neither the language of s 481 nor the statutory context in which it appears indicates that the expression "part of the decision" should not be taken to apply to any decision which is a judicially reviewable decision identified in s 475. Thus, in terms, s 481 empowers the Court to affirm, quash or set aside part of a decision of the Tribunal. It may be accepted that a decision to refuse to grant a protection visa may have involved a consideration of a number of matters including

various elements in the definition of refugee. It may also be accepted, and was accepted by the primary judge in this case, that the references in the definition of "refugee" to race, religion, nationality and social groups are not discrete, independent categories but rather categories that can overlap. Indeed, his Honour quoted a passage from Hathaway in the *Law of Refugee Status*, 1991 at p 144-145:

In addition to notions of formal nationality, it is generally suggested that nationality encompasses linguistic groups and other culturally defined collectives, thus overlapping to a significant extent with a concept of race. Because many such groups share a sense of political community distinct from that of the nation state, their claims to refugee protection may reasonably be determined on the basis of nationality as well as on race.

However this feature of the definition does not deny the existence of the power to set aside part of a decision of the Refugee Review Tribunal concerning an application for a protection visa in appropriate cases. The question becomes whether this was such a case.

Counsel for the appellant submitted that the bases upon which the appellant had advanced his claim for a protection visa involved several elements that were interdependent. They related to his race, his religion and his political opinion. Thus, it was submitted, any reconsideration of his application by the Tribunal should involve all aspects of his claim that he was a refugee. It may be accepted that the footing on which the application was advanced involved issues of race, religion and political opinion. However the Tribunal found, as a matter of fact, that the appellant was not a Jehovah's Witness, that he was not a member of the JMPLA and that he had not been in prison for refusing to spy for that organization against UNITA. These findings of fact by the Tribunal effectively dealt conclusively with the appellant's contention that he had a well founded fear of persecution based on his religion or his political opinion as he had identified them. In those circumstances the only basis upon which his application for a protection visa might be considered was his alleged fear of persecution based on race. It was the Tribunal's consideration of that issue that the primary judge concluded was attended by a reviewable error. By virtue of the findings the Tribunal had made concerning the appellant's religious beliefs and political opinion the scope of the inquiry the Tribunal would undertake on remittal from this Court was limited. The Tribunal could consider again, guided by the judgment of the Court, what remained of the bases upon which the appellant had originally said he was a refugee. Order 1 of the primary judge reflected the narrowed scope of the inquiry. It was open to his Honour to set aside part of the decision of the Tribunal and generally to make the orders he did. It follows that the appeal by the appellant should be dismissed.

(ii) Was the error identified by the primary judge a reviewable error?

The cross appeal by the Minister raised an issue as to whether the error identified by the primary judge was an error amenable to review having regard to the terms of s 476 of the Act. The primary judge characterized the error in two ways. His Honour characterized it as an incorrect interpretation of the applicable law and thus comprehended by the provisions of s 476(1)(e). His Honour also characterized it as a failure to comply with the requirements of s 420(2)(b) of the Act in that the Tribunal did not act according to substantial justice and the merits of the case. It was thus, having regard to the judgment of the Full Court in *Eshetu v Minister for Immigration and Ethnic Affairs* (1997) 71 FCR 300 an error of the type comprehended by s 476(1)(a).

Counsel for the Minister approached the cross-appeal in two ways. The first was to submit that the passage in the Tribunal's decision in which it stated that the appellant spoke Portuguese, which was not a particularly distinguishing feature of Bakongos, may have meant one of two things. It may have been, as the primary judge believed, a reference to the fact that the appellant was able to speak Portuguese. On this approach the criticism by the primary judge of the Tribunal's reasoning may have substance. However, it was submitted, the word "speaks" in this passage may be treated as a reference to the language usually used. Understood this way the Tribunal would have been saying that because the appellant usually spoke Portuguese he was not at risk of persecution because his membership of the Bakongo race would not have been apparent to groups who might otherwise persecute him because he was a Bakongo. However the difficulty with this second approach is that the relevant passage in the Tribunal's decision is preceded by the identification of another fact that indicated the appellant was not a Bakongo and was followed by the comparatively unambiguous intimation that the Tribunal was not satisfied that the appellant was a Bakongo. It is thus difficult to treat this passage from the Tribunal's reasons in any way other than the way the primary judge did. However even if approached this way the Tribunal's reasons, it was submitted by counsel for the Minister, did not manifest an error of law because, at most, it was a wrong finding of fact.

The conclusion of the Tribunal that it was not satisfied that the appellant was a Bakongo was, in substance, a finding of fact. It was a finding of fact ostensibly supported by other findings made by the Tribunal. The first of those findings was that no claim had been made by the appellant when he first arrived in Australia that he feared persecution in Angola by virtue being a Bakongo. The second was that the claim that he was a member of the JMPLA was inconsistent with him being a Bakongo. However it must be said of this second matter that the Tribunal had earlier effectively made a finding that the appellant was not a member of the JMPLA. Thus the ultimate finding that the appellant was not a Bakongo appears to have depended on the appellant having made no claim at the airport of persecution on the grounds of membership of that racial group, his general lack of credibility, and the fact that he spoke Portuguese. However it may be accepted that, for the reasons given by the primary judge, there is a logical difficulty in calling in aid the fact that the appellant spoke Portuguese in support of a conclusion that he was not a Bakongo.

The finding of the Tribunal that the appellant was not a Bakongo was plainly a critical one. It was made in a context where there was some material before the Tribunal that members of that racial group were at risk of harm in Angola. Had the Tribunal been satisfied that the appellant was a Bakongo it would probably have been necessary for it to have considered whether the appellant had a well founded fear of persecution in Angola for reasons of race. Its finding he was not a Bakongo rendered that unnecessary.

It is to be recalled that the primary judge concluded that the Tribunal had erred in law by incorrectly interpreting the applicable law: see s 476(1)(e) and that the Tribunal had not acted according to substantial justice and the merits of the case: ss 420(2)(b) and 476(1)(a). As to the latter matter his Honour referred to *Eshetu* (supra). Since the primary judge gave judgment in December 1997, there has been considerable debate about the approach of the majority in *Eshetu* and the scope of the principles that might have been established by the Full Court in that matter. The status of *Eshetu* and the nature of the ground of review raised by s 420(2)(b) and s 476(1)(a), and more recent authorities, have been comparatively comprehensively surveyed by Weinberg J in *Inderjit Singh v Minister for Immigration and Multicultural Affairs*, unreported, 29 October 1998.

His Honour's analysis of the status of *Eshetu* bears repeating in full:

The relevant legal principles

Having regard to the way in which the applicant has framed his case, it is necessary to say something as to the debate within this Court concerning the correctness or otherwise of the decision of the majority in Eshetu v Minister for Immigration and Multicultural Affairs (1997) 71 FCR 300. As is well-known, a majority of the Full Court of the Federal Court, Davies and Burchett JJ, determined in that case that a breach of the procedures with which the Tribunal is bound to comply pursuant to s 420 of the Act is a ground of review under s 476(1) of the Act. The procedural elements prescribed by s 420 may be challenged under s 476(1)(a) while the "applicable law" to which reference is made in s 476(1)(e) includes the substantive elements of the requirement under s 420(2)(b) that the Tribunal act in accordance with the substantial justice and merits of the case. As is also well-known, Whitlam J dissented from the views of the majority.

Counsel for the respondent submitted that the views of their Honours Davies and Burchett JJ were dicta, that they were erroneous, and that they ought therefore not be followed. That was the approach taken by Madgwick J in Drekevutu v Minister for Immigration and Ethnic Affairs (1997) 77 FCR 248. His Honour found himself unable to accept the reasoning of the majority in Eshetu, and expressed a strong preference for the reasoning of Whitlam J in that case.

The conclusion reached by Madgwick J that he was free to depart from the views of the majority in Eshetu, is, in my opinion, no longer properly open to a judge hearing a matter at first instance in this Court.

In Sun Zhan Qui v Minister for Immigration and Ethnic Affairs (1997) 151 ALR 505 a majority of the Full Court of the Federal Court effectively determined that the views of the majority in Eshetu should be followed by the judges of this Court, at least until the High Court has finally resolved the question whether those views are correct.

In dealing with the relationship between s 420 and s 476(1)(a) of the Act, Wilcox J observed at 546:

> "It is a vexed issue whether the stipulations of s 420 of the Act constitute "procedures … required by this Act" within the meaning of s 476(1)(a); diverse views have been expressed by members of this court. The significance of the issue is that, if they do, a breach of a stipulation is a ground upon which application may be made for review of a tribunal decision. If such an application is successful, the court may set aside or quash the decision and/or grant other relief: see s 481(1)(a) of the Act.
> I do not propose to add to the plethora of opinions about the relationship between ss 420 and 476(1)(a). The matter was recently considered by a Full Court in Eshetu v Minister for Immigration and Multicultural Affairs …. By majority (Davies and Burchett JJ, Whitlam J dissenting) the court decided s 420 did establish procedures to which s 476(1)(a) applied. Counsel for the respondent, … submitted Eshetu was wrongly decided and ought not be followed. Without expressing an opinion on the merits of the conflicting judgments in Eshetu, I decline to accede to that submission. I understand the case is presently the subject of an application for special leave to appeal to the High Court of Australia. If leave is granted and the appeal succeeds, the situation will change. In the meantime, as it cannot be said the result in Eshetu is "clearly wrong", the decision in that case should be followed by other Full Courts: …"

It goes without saying that his Honour's strong admonition concerning the proper course to be followed by other Full Courts has even greater force when applied to the task to be performed by judges at first instance.

His Honour Burchett J who, together with Davies J, comprised the majority in Eshetu, also delivered a judgment in Qui. His Honour stated at 554:

> "It is appropriate that I should say I remain of the view which I expressed in my reasons in [Eshetu]. Indeed, I am confirmed in that view by the endorsement it has since received from Lockhart J in Khan v Minister for Immigration and Multicultural Affairs (Fed C of A, Lockhart J, 4 August 1997, unreported) at 7 and Finkelstein J in Thambythurai v Minister for Immigration

> and Multicultural Affairs (Fed C of A, Finkelstein J, 16 September 1997, unreported)."

His Honour North J differed from the views of the majority in Qui. His Honour observed that prior to Eshetu he had expressed the view that the provisions of s 420 were not "procedures … required by this Act" within the meaning of s 476(1)(a). He continued at 564-5:

> "I remain of that view. The reasons of the trial judge on this aspect fortify me in that view. There have been many decisions on the issue in recent times. There is almost an equal number of decisions on each side of the argument. There is, therefore, an overriding need for an authoritative decision. It will be provided if the High Court grants special leave to appeal in Eshetu."

His Honour would have been prepared in Qui to reconsider the decision in Eshetu, and it would seem, to overrule it.

It was contended on behalf of the respondent that the observations of Wilcox and Burchett JJ in Qui were themselves dicta, and that I was not bound to approach Eshetu in the manner suggested by Wilcox J. That may be correct as a matter of strict logic. It is not, however, a course which commends itself to me. The High Court has, since Qui was decided, granted special leave to appeal against the decision of the Full Court in Eshetu. The appeal is scheduled to be heard in the very near future. That does not diminish the cogency of the views of Wilcox J in Qui that until the High Court finally resolves this matter, which still may not occur for some considerable time, the majority view in Eshetu should be followed by the judges of this Court.

In Velmurugu v Minister for Immigration and Ethnic Affairs (1997) 48 ALD 193 a Full Court comprising Davies, Burchett and Whitlam JJ (the same judges who comprised the Court in Eshetu) adhered to the views which they had each expressed in that case. Once again, it is arguable that, as in Eshetu, the positions taken by each member of the Court in Velmurugu were dicta. The actual basis of the Court's decision was that the applicants had not identified any procedure required by the Act or the regulations that had not been observed, and that the grounds which were relied upon were not grounds available under s 476 of the Act. Whether or not the approval given by Davies and Burchett JJ in Velmurugu to their own previous reasoning in Eshetu was in the nature of dicta, in my opinion a trial judge should, for the reasons given by Wilcox J in Qui, follow the views of the majority in Velmurugu as well.

I am fortified in my view that this is the correct course to follow by noting that in Amarjeet Singh v Minister for Immigration and Multicultural Affairs (unreported, Federal Court, 8 September 1998) Beaumont J arrived at the same conclusion. His Honour stated:

> "For present purposes, I accept that I am bound by the decisions of the Full Court in Eshetu v Minister for Immigration and Multicultural Affairs (1997) 71 FCR 300 and Sun Zhan Qui."

See also Kopalapillai v Minister for Immigration and Multicultural Affairs (unreported, Full Court, Federal Court, 8 September 1998) where a similar approach was adopted by the Full Court, their Honours O'Connor, Branson and Marshall JJ stating:

> "Although the High Court has granted special leave to the respondent to appeal the decision in Eshetu's case to the High Court, we consider that it is appropriate for us to follow that decision."

See also Kathiresan v Minister for Immigration and Multicultural Affairs (unreported, Federal Court, Gray J, 4 March 1998) and Son v Minister for Immigration and Multicultural Affairs (unreported, Federal Court, Hely J, 19 October 1998).

In electing to follow the majority in Eshetu I do not intend to muddy the waters, let alone enter the bog, by expressing any views as to the correctness or otherwise of the reasoning adopted by Davies and Burchett JJ. It is sufficient to say that the views of those judges of this Court who disagree strongly with that reasoning cannot be discounted. In the interim, however, until the High Court finally resolves this matter, I propose to follow the approach adopted by the majority in that case.

We approach this appeal on the same basis as identified by his Honour in the concluding paragraph.

Similarly his Honour's helpful analysis of the scope of judicial review in relation to findings of fact which may not manifest errors of the type identified in s 476(1)(g) and (4) bears repeating in full:

(b) Mistaken findings of fact as a source of review

Giving full weight to the admonition that the Court must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision, there are, nonetheless, cases where certain types of mistaken findings of fact can give rise to reviewable error. Such cases must, of course, fit properly within one or more of the legislatively mandated grounds for review set out in s 476(1) of the Act, as explained by the majority in Eshetu.

There are instances where the Tribunal has been found to have failed to act according to "substantial justice" by making findings which were of such a nature as to warrant the intervention of the Court.

In Kathiresan v Minister for Immigration and Multicultural Affairs (supra) Gray J set aside a decision of the Tribunal which had rejected the applicant's claim to refugee status largely upon the basis that the approach taken by the Tribunal to the credibility of the applicant was not open to it on the material before it, was not based on rational grounds, and was not arrived at after consideration of matters that were logically probative on the issue of credibility. His Honour observed:

> "The question which arises is whether it is open to this Court to overturn the finding of the tribunal on credit on the basis that the tribunal relied in part on two findings which were not open to it. It cannot be said with any certainty that, had the tribunal not relied on its finding as to the applicant's account of his education or on his suggested lack of knowledge of events during the time he was in Colombo, it would have come to the same conclusion as to his credit. There is much that resembles a house of cards in the tribunal's reasoning; disbelief of one fact is used as a reason to disbelieve another, and so on. The findings as to the applicant's educational history and unawareness of events whilst in Colombo were significant in the context of the tribunal's overall reasoning. It can therefore truly be said that the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist; see s 476(4)(b) of the Act. This is sufficient to make out the ground for review of a decision found in s 476(1)(g) of the Act, namely that there was no evidence or other material to justify the making of the decision.
>
> I am also of the view that to make adverse findings as to credit on the basis of non-existent facts amounts to a failure to act according to substantial justice, within the meaning of s 420(2)(b) of the Act and therefore a failure to observe procedures that were required by the Act to be observed, within the meaning of s 476(1)(a) of the Act."

In Epeabaka v Minister for Immigration and Multicultural Affairs (1997) 150 ALR 397 Finkelstein J set aside a decision of the Tribunal in circumstances where his Honour found that the Tribunal had failed to consider rationally certain probative evidence. His Honour distinguished between a failure of that type, and the making of a simple mistake of fact. Section 420(2)(b) of the Act imposed a procedural obligation upon the Tribunal requiring it to act rationally and reasonably. The Tribunal would not be acting rationally and reasonably if it made a finding of fact upon which its decision was based but which was not supported by probative evidence. The Tribunal would also have failed to act rationally and reasonably if it failed to consider rationally the probative evidence that was before it. In the particular circumstances, his Honour found that the Tribunal had failed to comply with that obligation. Its decision was therefore set aside on the grounds set out in s 476(1)(a).

Finkelstein J based his decision that there was an obligation upon a Tribunal to consider rationally the evidence before it upon the views of Brennan J in Re Pochi and Minister for Immigration and Ethnic Affairs (1979) 26 ALR 247, and of Deane J (with whom Evatt J agreed) on appeal in Minister for Immigration and Ethnic Affairs v Pochi (1980) 31 ALR 666. His Honour did not accept that Mason CJ in Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 357 had determined that these statements of principle did not represent the common law in this country – cf Roads Corporation v Dacakis [1995] 2 VR 508 at 520 per Batt J.

Whether a failure to consider rationally probative evidence is, as Finkelstein J held, clearly distinct from coming to a decision which is "irrational" (in the sense of so-called "Wednesbury unreasonableness": Associated Provincial Picture Houses Ltd v

Wednesbury Corporation [1948] 1 KB 223) may be open to doubt – the principles seem to me to overlap, at least in some cases. Nonetheless there is some justification for saying, as his Honour did, that a decision which is not reached as a result of the rational consideration of probative evidence may be described as the product of such reasoning by a Tribunal as can fairly be said to amount to a breach of its obligation to act according to "substantial justice and the merits of the case", and to fall outside the parameters of the exclusionary provisions of s 476(2)(b) of the Act.

In Kopalapillai v Minister for Immigration and Multicultural Affairs (supra) the Full Court referred to the judgment of Merkel J in Emiantor v Minister for Immigration and Multicultural Affairs (1997) 48 ALD 635 in which his Honour had rejected an application to review the decision of the Tribunal upon the basis that it had erred when dealing with issues of credibility by noting that the approach of the Tribunal to the credibility issues "was open to it on the material, was based on rational grounds and was arrived at after consideration of matters that were logically probative of the issue of credibility". The Full Court in Kopalapillai endorsed the approach adopted by Merkel J in Emiantor to the question whether the Tribunal, when assessing the credibility of the story told by the appellant, had erred in law within the meaning of s 476(1)(e) of the Act.

Though Epeabaka was not mentioned, in terms, in Kopalapillai, the principles which the Full Court adopted in dealing with the appeal in that case may be seen as being broadly consistent with those adopted by Finkelstein J.

It is thus necessary to ascertain whether, in the context of the requirements imposed on the Tribunal by s 420, the finding made by the Tribunal that the appellant was not a Bakongo leads to a conclusion that the decision of the Tribunal was not open on the material, was not based on rational grounds or was not the result of a rational consideration of probative evidence. As earlier noted the Tribunal indicated one reason it was not satisfied the appellant was a Bakongo was because he did not, when first interviewed, claim asylum on the basis that he would be persecuted in Angola because he was a Bakongo. In the immigration inspector's report of the airport interview the following is recorded:

HIS INTENTION TO A/A IS TO SEEK ASSYLUM [SIC]. HE IS A POLITICIAN IN ANGOLA.

HIS [SIC] IS A MEMBER OF THE "JMPLA", THE YOUTH POLITICAL GROUP. HE WAS KEPT IN PRISON SINCE NOVEMBER 1996 BECAUSE HE REFUSED TO CONTINUE TO SPY THE "UNITA HEADQUARTER". …

HE WANTED TO SEEK ASSYLUM [SIC] IN ENGLAND BUT WAS TOLD BY CORONEL [SIC] FACHO THAT IT IS NOT EASY TO SEEK ASYLUM IN ENGLAND AND WOULD BE BETTER TO SEEK ASSYLUM [SIC] IN AUSTRALIA. IT IS DANGEROUS FOR HIM TO STAY IN ENGLAND BECAUSE "MPLA" WILL FIND HIM.

…

HE LEFT ANGOLA BECAUSE HE DID NOT WANT TO JOIN THE ARMY. HE IS YOUNG AND DOES NOT WANT TO DIE.

The immigration inspector's report notes that the appellant spoke Portuguese, Kikongo and limited English. Plainly the appellant must have told the departmental officers who interviewed him at the airport that he spoke Kikongo. That statement is entirely consistent with him being a Bakongo. It may be accepted that fear of persecution on the ground of being a Bakongo was not raised by the appellant at this interview. However the totality of what he then said viewed objectively, is essentially neutral on the question of whether in fact he was a Bakongo. Or, it is at least not supportive of a conclusion that he was not. For reasons given by the primary judge in passages earlier set out, the fact that he could speak Portuguese was similarly neutral on this question.

This leaves, as a foundation for the finding of the Tribunal that the appellant was not a Bakongo, the Tribunal's view of the credibility of the appellant more generally. It is relatively clear that the basis upon which the appellant has asserted he is a refugee has changed since first arriving in Australia. His account of how he arrived in Australia and his background in Angola have not been entirely consistent. While views may differ about the weight to be given to the various factors identified by the Tribunal as reflecting adversely on the appellant's credibility, it cannot be said that the Tribunal was not reasonably able to doubt the credibility of the appellant. Thus it was open to the Tribunal to doubt the appellant's bare assertion that he was a Bakongo. However, as the primary judge noted, the appellant had also consistently stated since his arrival that Kikongo was one of his dialects. That was apparent not only from what he said at the interview at the airport but also at a request for a hearing date dated 8 July 1997 lodged, it seems, with the Tribunal.

The question that then arises is whether the Tribunal erred, having regard to ss 420(2)(b) and 476(1)(a), in failing to make any finding as to whether the applicant spoke the Bakongo language of Kikongo. The primary judge noted the Tribunal's express conclusion that *"the distinguishing feature about Bakongos is the language they speak"*. Its reasons for not being satisfied that the appellant was a Bakongo are set out above. Those reasons indicate, as the learned primary judge found, that it failed to address *"a central question"*, namely whether the appellant speaks the Bakongo language. His Honour added:

"If it were decided that the [appellant] speaks Kikongo, on the criteria accepted by the RRT, this fact would lend support to his claim to be a Bakongo. Such a finding would be in accordance with the view of Professor Gertzel as to the important of language in distinguishing Bakongos."

The failure to address that central question was found to constitute a failure on the part of the Tribunal to act according to substantial justice and to the merits of the case in relation to that aspect of the appellant's claim, and therefore to amount to a failure to observe a procedure required by the Act.

As the analysis in the reasons of Weinberg J in *Inderjit Singh* amply illustrates, the content of the obligations imposed upon the Tribunal under s 420 which may attract the ground of review under s 476(1)(a), if those obligations are not complied with, is not finally determined. Such matters were discussed, for example, in *Sun Zhan Qui v Minister for Immigration and Multicultural Affairs* (1997) 151 ALR 505 at 546-550 per Wilcox J. Burchett J agreed, and added his own comments at 554-562.

In the present case, the primary judge took the view that the failure of the Tribunal to make a finding on a question central to its determination that the appellant was not of a particular race did constitute such a matter. We are not persuaded that in the particular circumstances of this case, his Honour was in error.

In *Eshetu*, it was recognised by Davies J at 304 that the words *'act according to substantial justice and the merits of the case'* refer to more than matters of procedure. Davies J referred to the words *"substantial justice"* in relation to matters of procedure as illustrated, inter alia, by *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228. In that case the High Court discharged an order nisi for mandamus directed to a War Pensions Entitlement Appeal Tribunal acting under the *Australian Soldiers' Repatriation Act* 1920 (Cth). The complaint was that the Tribunal had failed properly to perform its functions. Section 45W(2) of that Act was in similar terms to s 420(2) of the Act, and in particular it obliged that Tribunal to "act according to substantial justice and the merits of the case." Rich, Dixon and McTiernan JJ at 242-243 said in that context:

If the person under the duty professes to perform it, but what he actually does amounts in law to no performance because he has misconceived his duty or, in the course of attempting to discharge it, has failed to comply with some requirement essential to its valid or effectual performance, he may be commanded by the writ to execute his function according to law de novo, at any rate if a sufficient demand or request to do so has been made upon him. In the case of a tribunal, whether of a judicial or an administrative nature, charged by law with the duty of ascertaining or determining facts upon which rights depend, if it has undertaken the inquiry and announced a conclusion, the prosecutor who seeks a writ of mandamus must show that the ostensible determination is not a real performance of the duty imposed by law upon the tribunal. It may be shown that the members of the tribunal have not applied themselves to the question which the law prescribes, or that in purporting to decide it they have in truth been actuated by extraneous considerations, or that in some other respect they have so proceeded that the determination is nugatory and void. But the prosecutor who undertakes to establish that a tribunal has so acted ought not to be permitted under colour of doing so to enter upon an examination of

the correctness of the tribunal's decision, or of the sufficiency of the evidence supporting it, or of the weight of the evidence against it, or of the regularity or irregularity of the manner in which the tribunal has proceeded. The correctness or incorrectness of the conclusion reached by the tribunal is entirely beside the question whether a writ of mandamus lies.

Evatt J who dissented on other grounds, at 256 described the provision as an "overriding statutory command" concerning the procedures before that Tribunal.

The reviewable obligation there recognised is consistent with the nature and extent of the obligation which the learned primary judge found to reside in the Tribunal, and which his Honour found the Tribunal had failed to fulfil. It is likely to be a rare case where the Tribunal has expressly identified for itself a central factual question, and then failed to address it. Such a failure, in our view, amounts to a failure to proceed in accordance with the (procedural) mandate of s 420(2)(b). The central question going to the merits of the case in this respect is one which the Tribunal did not answer. In the circumstances, it was open to the learned primary judge to conclude that the Tribunal failed to comply with a procedure prescribed, so as to attract review under s 476(1)(a) of the Act.

The second way the primary judge characterized the error of the Tribunal was that it involved an incorrect interpretation of the applicable law. The primary judge may have understood the Tribunal to have approached the appellant's contention that he was Bakongo on the footing that even if by reference to his lineage and cultural background he was a Bakongo, he nonetheless should not be treated as a member of the racial group because he spoke Portuguese. If that had been the approach of the Tribunal then it could well evidence an incorrect interpretation of the law. That is, the Tribunal may not have appreciated what was comprehended by the notion of race in the Convention. However the Tribunal did not, in our opinion, approach the matter that way. It was simply deciding whether or not the appellant was a Bakongo as a matter of fact. That is, whether the appellant was a member of that racial group having regard to his lineage and cultural background.

The orders that should be made are that the appeal is dismissed and the cross-appeal is dismissed. Each party should bear their own costs in the appeal and cross-appeal.

I certify that this and the preceding twenty-two (22) pages are a true copy of the Reasons for Judgment herein of the Court

Associate:

Dated: 2 December 1998

Counsel for the Applicant:	R Dubler
Solicitor for the Applicant:	Parish Patience
Counsel for the Respondent:	J Basten QC with R Beech-Jones
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	2 November 1998
Date of Judgment:	2 December 1998