

# FEDERAL COURT OF AUSTRALIA

Kuthyar v Minister for Immigration & Multicultural Affairs [2000] FCA 110

**MIGRATION** – Hindu from Kashmir – application for a protection visa – fear of persecution because of applicant's past association with Muslim militants, because he is a Hindu from Kashmir, because his parents were killed by Muslim separatists, because he was forcibly converted to Islam and circumcised, and because of his HIV infection – whether the Refugee Review Tribunal failed to set out findings on material questions of fact and to refer to the evidence or any other material upon which its findings of fact were based

*Migration Act 1958* (Cth) ss 476(1)(a), 430(1)(c), 430(1)(d)

*Applicant A v Minister for Immigration and Ethnic Affairs* [1997] 190 CLR 225; 142 ALR 331, approved

*Minister for Immigration & Multicultural Affairs v Eshetu* [1999] 162 ALR 577, approved

*Minister for Immigration and Multicultural Affairs v Sarrazola* [1999] 166 ALR 641, applied

*Chokov v Minister for Immigration and Multicultural Affairs* [1999] FCA 823, applied

*AAA v Minister for Immigration and Multicultural Affairs* [1999] FCA 1699, referred to

*Minister for Immigration and Multicultural Affairs v Zamora* [1998] 51 ALD 1, approved

**DEEPAK KUTHYAR v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS**

**N 1029 OF 1999**

**EINFELD J**

**11 FEBRUARY 2000**

**SYDNEY**

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

N 1029 OF 1999

BETWEEN: DEEPAK KUTHYAR

Applicant

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL  
AFFAIRS

Respondent

JUDGE: EINFELD J

DATE OF ORDER: 11 FEBRUARY 2000

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. the application for judicial review be allowed
2. the decision of the Tribunal be set aside and the matter be remitted to a differently constituted Tribunal for a fresh hearing
3. the respondent pay the applicant's costs

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

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PLACE: SYDNEY

## REASONS FOR JUDGMENT

### Introduction

1 The applicant is a 34 year old Hindu from Kashmir in Northern India who has been diagnosed with HIV infection. He arrived in Australia on 14 May 1995 and on 8 August lodged an application for a protection visa with the respondent's department (although in a letter from the department to the applicant dated 16 October 1997, it was incorrectly stated that this application was lodged on 8 August 1997). On 16 October 1997 a delegate of the Minister refused to grant a protection visa and on 18 June 1998 the applicant appealed to the Refugee Review Tribunal. The Tribunal affirmed the delegate's decision on 18 August 1999 and by application on 13 September 1999, the applicant applied to this Court for judicial review of the Tribunal's decision. The success of his application depends on whether there was relevant legal error in the Tribunal's rejection of his contention that he cannot

return to India for fear of persecution claimed to arise from his past association with Muslim militants, because he is a Hindu from Kashmir, because his parents were killed by Muslim separatists, because he was forcibly converted to Islam and circumcised, and because he is HIV positive.

2 The application for review of the delegate's decision was received by the Tribunal some 8 months after the decision was made as against a statutory limit of 28 days from notification. Upon the examination of the department's file, it was revealed that the applicant had arguably not been validly notified of the decision. In his statutory declaration of 16 December 1998 (the first statement), the applicant stated that in January 1998 when he had visited a Medicare office in order to renew his Medicare card, he was asked to provide a letter from the Immigration Department summarising his status in Australia. He immediately went to the Onshore Protection section of the department in Pitt Street, Sydney where a male employee checked the computer system and informed him that his application had been refused in 1996 (in fact it was refused in 1997). When the applicant responded that he had not received any notification, he was told that a letter had been sent to his residential address and not to the post office address that he provided for correspondence. When the applicant asked "what should I do?", he was told to "make arrangements to leave the country". As he was aware neither of the decision nor of the fact that his bridging visa had expired, the applicant got into a panic. He spoke to a friend, Chris Abel, the assistant manager at his place of employment, who referred him to his father, a former Liberal Party MP, John Abel. John Abel apparently told the applicant that he could ask the Minister to consider a further application for a protection visa and sent copies of the applicant's documents to the Minister's office. Mr Abel told the applicant that he could remain in Australia and continue to work while the matter was being considered. The applicant was told that if asked about his immigration status he should explain that his request was under consideration by the Minister.

3 The applicant relied on this information and continued working but on 10 June 1998, while he was at work, he was found by immigration officers and taken into custody at the Villawood Immigration Detention Centre for 20 days. It was during his detention that the applicant first saw a copy of the delegate's decision brought to him by John Abel. Mr Abel contacted the Legal Aid Commission of New South Wales on the applicant's behalf following which and his release from detention the applicant first received what he called "proper advice" about his case from a solicitor of the Commission.

4 There is no date, therefore, from which the 28 day limitation period can be calculated, by reason of the fact that the applicant was not properly notified. Accordingly the Tribunal member was satisfied that the appeal period had not been triggered, that the application was eligible for consideration, and that the Tribunal had jurisdiction to review the decision. There is no application before the Court to review that decision.

5 It was from Villawood that the applicant made his application for review by the Tribunal. He was thereafter released from detention with a bridging visa E, the conditions of which did not allow him to work and did not

allow for the allocation of a Medicare card. He sought assistance from his solicitor who, between September and November 1998, approached the department on several occasions seeking to alter the conditions imposed on the visa. On 27 November 1998, he was issued with a new visa which enabled him to work and gave him access to Medicare benefits. The Commonwealth Ombudsman's office had apparently inquired about the delay in issuing the visa. At the date of his application to this Court, the applicant held a bridging visa E which gave him permission to work and which was to expire two days later, on 15 September. Presumably it has been subsequently extended.

6 The applicant's claims were set out in written submissions to the department, and in oral evidence presented to the Tribunal at its hearing on 21 December 1998. The evidence was presented in three statutory declarations: the first statement (of 16 December 1998), one of 21 June 1999 (the second statement – created after his receipt of a letter from the Tribunal dated 24 May 1999 following its further research into several matters raised in the application, which put to him concerns about the inaccuracy of his account of an abduction and the ensuing events), and one of 13 September 1999 (the third statement – requesting an early hearing in this Court for reason of his medical condition). Written submissions were also made on the applicant's behalf by his solicitor on 21 December 1998 (the first submission) and 29 January 1999 (the second submission).

## Undisputed facts

7 Some facts appear to have been accepted by the Tribunal. The applicant was born on 12 January 1965 in Belman in the state of Karnataka which is located in the central area of southern India. From 1969 he and his parents lived in Baba Mohalla near the Charar-e-Sharief Mosque, which is 45 kilometres south west of Srinagar in Kashmir state. His father had told him that he left Karnataka because he became involved in a property dispute with his brother, the applicant's uncle, after their father's death, and that his uncle had attempted to poison his father. He was also told that his father's family had never accepted his mother because she was Catholic, not Hindu. The applicant has therefore never had contact with his relatives in Karnataka state. When he left school, he worked in Baba Mohalla in the family's business, a canteen which served drinks and snacks to tourists and other visitors. His application showed that he is able to speak, read and write Hindi, Kannada and English, although in the first statement, he wrote that he was able to speak only a few words of Kannada – the state language of Karnataka. At the hearing before the Tribunal, the applicant revealed that he also speaks a little Urdu. The passport with which the applicant travelled to Australia was issued in Bombay on 11 January 1995. It showed the applicant's permanent address as Belman in Karnataka state, and that his visa was issued in New Delhi on 21 April 1995.

8 In the first statement the applicant stated that he arrived in Australia with a 3 month visa. He did not know anything about the Australian system in

relation to refugees and he did not obtain any legal advice. A Bangladeshi, with whom he shared a flat, told him what he knew about the system and helped him to complete his application. He therefore had no legal advice with regard to what to include.

## Other evidence presented

9 On 9 December 1996 the department wrote to the applicant to inform him that the photocopies of documents in relation to the past and present situation in Kashmir which were indicated on his application as attached were in fact not provided. The applicant was asked to provide those documents, which he did on 31 December 1996. The decision of the Tribunal stated that the content of those documents was taken into account in the section of the reasons for decision which sets out information about India relevant to the applicant's claims. Some further documents were provided by the applicant in April 1997, which were then included with the first statement. Some of the correspondence, which was before the Tribunal and before this Court, is included here so as to introduce various characters who play a role in the matter. Other correspondence in relation to the applicant appears elsewhere in the course of these reasons for judgment.

10 The departmental file included a report dated 24 December 1996 from a social worker, Hayley Symon, at St Vincents Hospital, Sydney. Ms Symon stated that the report was prepared in order to support the applicant's application for permanent residency, and that in July 1996 he had presented at the hospital and was referred for counselling. Ms Symon stated:

Mr Kuthyer [sic] has been known to me since July 1 1996, when he presented to this hospital with a medical complication. During his medical assessment the doctor noted that Mr Kuthyer [sic] seemed depressed and anxious. The doctor referred him to the social work department for counselling.

During the counselling sessions it became obvious to me that Mr Kuthyer [sic] was suffering from associated features of past [presumably "post"] traumatic stress. Some of the symptoms he experienced were recurrent distressing dreams, anxiety, depression and difficulty sleeping. At times during our therapeutic relationship Mr Kuthyer [sic] felt suicidal and felt that his life had no meaning and value.

During our sessions Mr Kuthyer [sic] shared his history and the events that had taken place in his life.

He stated that he had to flee from Kashmir on the 17 November 1994, as his life was in danger. His village was fire-bombed and twenty four people died, including both his parents. The reason for this bombing was that Mr Kuthyer [sic] had fled from a Kashmir separatist terrorist training camp, where he was forced to under go [sic] a circumcision and convert to the muslim [sic] faith, and forced to engage in terrorist activities. Mr Kuthyer [sic] went to the police to ask for protection, however the police informed the terrorist group. The group took revenge by burning his home and killing

his family. This terrorist group are [sic] unaware that Mr Kuthyer [sic] has escaped with his life.

Mr Kuthyer [sic] fled to Bombay where Junior Chamber international assisted him with his passage to Australia.

These events have had a major psychological impact on Mr Kuthyer [sic]. He constantly feels unsafe, anxious and depressed. He constantly mourns his family who he was unable to bury and farewell in a traditional way.

At this point Mr Kuthyer [sic] has begun to rebuild his life. He is employed at MacDonald [sic] and is constantly receiving promotions. He has also developed a small friendship network, and is beginning to integrate into Australian society.

Ms Symon added that she would strongly support Mr Kuthyar's application for residency and would be willing to assist in any way possible.

11 A letter from Angelo Di Gana, the owner of the McDonalds outlet at Waterloo, dated 2 January 1997 was also provided to the Tribunal. This letter stated:

Deepak Kuthyar has been employed by myself for 15 months.

He is employed in a Full Time position and [word cut off, presumably "is"] a highly valued member of my team.

Deepak is aiming to become a Manager Trainee.

I envisage this for late 1997 early 1998.

He is an honest, hard working young man, who [word cut off, presumably "has"] the respect of the entire staff.

12 Other material from the company, including "Crew Performance Reviews" and a performance certificate, describing the applicant's good work performance, were also provided. A letter from a Jehovah's Witness "Minister of Religion", Mr W. Pennings, dated 24 June 1998, was included with the first statement. Mr Pennings stated that he had had regular bible studies with the applicant over several years and had observed that the applicant feared having to return to India. His faith in the applicant was supported by the fact that the applicant's account corresponded with many comments he had heard from other students from India that inhumane treatment by hostile factions seems to go unrestrained and is even tolerated there.

13 A letter dated 21 February 1997 from Rajesh Kinnerkar, who is described on the letterhead as "Advocate High Court", "Member: Amnesty International" and "Vice President: Malabar Hill Junior Chamber", was addressed to the "Offshore Refugee Operations" section of the respondent's department. This letter described the relevant events that had taken place in the applicant's life. At the outset of the letter, Mr Kinnerkar introduced himself

as a practising advocate in the jurisdiction of Mumbai, formerly known as Bombay (it will be referred to as Bombay in these reasons for judgment). He went on to say:

Mr. Deepak Kuthyar first met me in Bombay some time during the last week of November, 1994. He was referred to me by RTN Ganesh Shambag a member of Shivaji Park Rotary Club in District 3140.

In course of his meeting with me Deepak has narrated the genocide occurring [sic] in his town in Kashmir alongwith [sic] the personal abuse suffered by him during this period.

I am also a consultant to a recruitment firm named MANPOWER CONSULTANCY having its office at Taredo and an objective of providing quality personnel to its clients in and around Bombay. It was with this background that Rotarian Ganesh sent him to me with a request to find him a job placement.

I called Deepak to my office as part of the interview process but during the course of my discussions with him I learnt that he was under grave depression arising out of the horrors of inhuman treatment and involuntary physical abuse.

Further during conversations I noticed many spontaneous emotional outbursts epitomising memories of the backlash of his suffering and agony.

I gave him a job in a guest house called Goa Lodge at Lamington Road so that he had the additional advantage of residing therein. However I noticed he came back often with psychological and emotional breakdowns. His mortal fear being that some one [sic] would recognise him in Bombay and he would be taken back to the very atrocities he faced previously with no help coming from any government authorities in India.

I did carry out correspondence on his behalf to various authorities in Kashmir, and other Non-Government organisations on human rights but nothing constructive was achieved which could restore the cause or confidence of Deepak Kuthyer. I believe he has settled well in Australia and is constantly improving in the area of work, health and self confidence which is just the poetic turnabout in his life.

14        Written at the request of Mr Kinnerkar, a letter of Deepak G. Talwar, handwritten on "Amnesty International India Group" letterhead, and dated 23 February 1998, sought to inform the applicant of the situation in Kashmir. The letter, which revealed that the applicant had previously corresponded with the India Group of Amnesty International, advised the applicant:

The situation...has not improved even after elections taking place there. In fact during the last we[ek] of January a locality of Kashmiri Hindus were massac[red] by militants and now the Hindus there are in a st[ate of] shock and are migrating to various refugee camps situated in other states.

...



In one of your letters you had written to me if I could help you to locate your parents but according to my colleague Rajiv who visited the site stated - there was a mass cremation or burial of the dead...many death certificates does not purport any names. [It] is positive that your parents have not survived attack and hence it is better to come to term[s] with yourself about the inevitable. Hence the situation in Kashmir is very dangerous to life and property and no government, police or army can ever guarantee this to you.

From the letters and work appraisal [sic] certificates sent by you to us I presume your personality has undergone a drastic change for the better in regards to your self esteem determination confidence and morale.

I think in the interest of justice it would be good if the government of Australia gives you protection and I shall represent your case to them if the need arises on your behalf. [words or letters omitted on the photocopy provided]

## The applicant's claims

### *Detention*

15 (First statement) On 3 July 1992 four armed men from Hezbollah Mujahadeen – a pro-Pakistan organisation with militants trained in Afghanistan and with connections to the Pakistan intelligence agency, the Jammu Kashmir Liberation Front and the All Party Hurriyat which is an umbrella organisation with 36 member groups – came to his family's home and demanded food. They blindfolded the applicant and forced him into a van, where there was another person who was also being forcibly taken away. They drove for about eight hours and at the border of Pakistan-occupied Kashmir changed vehicles. There was no incident at the border, as the applicant later realised, because of corrupt arrangements between the militants and the Border Security Force (BSF). They drove a further two and a half hours, after which they arrived at what the applicant believed to be a rest and recreation camp for Muslim militants. At the camp he was photographed and introduced to a commander named Shakil (written "Zakir" in the hearing transcript) Khan. He worked "as a slave" cleaning tents, washing dishes and helping with the preparation of food for the militants, who believed that Hindus should be slaves to Muslims. There were about 30 tents at the camp and about 150 people were staying there at any one time. He was told that he was required to convert to Islam, that Muslim priests visited the camp on Fridays, and that once he converted, he would be sent to another camp to undertake military training. (Hearing) There were about five slaves at the camp on the day of his arrival, but the numbers gradually reduced until there remained only one other whose role was to cook and clean for the militants. As a slave he could not ask questions about what was happening at the camp. Militants also kidnapped young Hindu men to use as suicide bombers. Many people, apart

from Commander Khan, came and went, and people at the camp carried guns. He concluded that this place was a rest and recreation camp because despite being told that he would be trained by the militants, no training took place. Meetings took place at the camp and occasionally women, most likely prostitutes, visited. The women did not stay at the camp.

16 (First statement) On 11 September 1992 he was forcibly circumcised as part of the conversion process. Prior to performing the procedure a Muslim priest, who normally came to the camp on Fridays, asked him to say a prayer in Urdu affirming his acceptance of Islam. He was made to smell a cloth soaked in what he thought was chloroform, which caused him to black out until after the completion of the procedure. Following the procedure Commander Khan directed that the applicant only be taken to a doctor if he continued to obey orders. Those orders were that the applicant go with three militants on a mission to Bombay. He was told that his parents would be killed if he tried to escape. The four men went to New Delhi by jeep and from there caught the train to Bombay. During the journey the applicant complained about the pain of his operation (which by then had become infected) and he was given sleeping tablets (which in the second statement he said he could only presume were painkillers or tranquillisers as they gave him some relief). The applicant's task was to go to the premises of a business named "Shalimer Cold Storage" in order to pick up money which had apparently come from Dubai. He carried the money so that if caught, the men accompanying him would not be found responsible.

17 He told the militants that he needed to obtain medical attention and one of them accompanied him to see a doctor. The applicant saw the doctor alone, but the militant was waiting for him outside in the waiting room. He told the doctor that he was from Kashmir and had been forcibly circumcised, and that the man with him, wearing a turban, was his father. He had been told to say this, although he did not think that the doctor believed that part of his story. He was put into hospital in Bombay for two and a half days, after which he returned to the camp in Pakistan-occupied Kashmir. Following his return he continued to work hard for the militants and to adopt Muslim customs, such as fasting during Ramadan. His aim in doing so was to have the militants believe that he had really converted to Islam. He hoped that through his actions in this respect he would gain their trust and then would one day have an opportunity to escape. (Hearing) He did not know to what stream of Islam he was converted, but understood that in Kashmir the majority of Muslims were Sunni, for whom circumcision was compulsory. He did not know if anyone else was circumcised on the same day as him. (Hearing) Had these events in 1992 not taken place, the applicant would have been happy to remain in Kashmir, marry, and continue the family business.

## The killing of the applicant's parents

18 (First statement) In November 1994, more than two years after the applicant's return from Bombay, Commander Khan called him to his tent and ordered him to go with the militants to be dropped two kilometres away from his parents' home. There he was to meet Constable Imitiat (or Imitiaz) Khan

at the BSF outpost near the Charar-e-Sharief mosque – which he stated at the hearing was a five minute walk from his parents' home – to hand over to him one envelope, and receive another in return containing a roster of BSF officers working at the outpost. He was then to meet the militants at the site where he was left on the evening of 15 November. The applicant spent the entire night with his parents who had, up to then, not known what had become of him. He recounted to them what happened to him and decided to tell his story to the chief of the BSF outpost and then, on the morning of 17 November, escape with his parents to Delhi. (Hearing) The applicant believed that the envelope handed to the BSF officer contained money. The roster he was to receive was important for the militants' co-ordination of movements across the border.

19 (First statement) On the morning of 16 November, the applicant went to the BSF outpost near the mosque and informed the officer in charge of his plan. The officer assured him that he would take care of everything, and the applicant observed that the officer had shown no surprise at receiving the information about terrorist activity. He began to suspect the officer when he was asked where he was going and how he could be contacted. He then realised that he was wrong to have placed trust in the officer. He returned to his parents' home and told them to prepare to leave for Delhi. The applicant's father told him that he and the applicant's mother would meet with him at 4 am the following morning about a kilometre away, at the home of a Hindu man known to the applicant's father.

20 According to the applicant, the terrorist network was so good that it quickly learned of what he had done. Early on the morning of 17 November, he heard gunfire and explosions coming from the direction of his parents' neighbourhood. The Hindu man, at whose house they were to have met, went to see what had happened and upon his return informed the applicant that his parents' house had been burnt down, along with some neighbouring houses, that his parents were presumably killed, and that the applicant could not stay with him. The applicant was certain that the attack was directed at him, and believed that his parents had been killed because he had not seen or heard of them since that time. He believed that the terrorists may have thought that he was at his parents' home and was therefore also dead.

21 He caught a lift in a truck to Bombay, a journey which took eight days. When he arrived, he saw a sign for the Shivaji Park Rotary Club and thought that it may be possible to obtain some help from that organisation. He was referred by a Mr Ghanesh Shanbhag (a member of the Club) to the office of Rajesh Kinnerkar, for help in finding accommodation and employment there. The applicant asked Mr Kinnerkar to send him away from India explaining that he felt mentally and physically sick, and unsafe, knowing from his earlier experiences in 1992 of how the militants' national network operated.

## Experience in Bombay

22 The applicant found employment in Goa Lodge, a guest house in Bombay. One evening in February 1995 – which at the hearing the applicant

stated was about two and a half months after the day he had commenced his employment there – the Lodge was visited by one of the militants who had been at the camp, accompanied by a prostitute. The applicant considered this event a feasible coincidence. The militant was shocked to see the applicant and threatened him, stating that his days were numbered and that he would soon discover what befalls traitors. Following this event the applicant went to Mr Kinnerkar who told him not to return to work. While arrangements were being made for him to leave the country, he resided with a friend of Mr Kinnerkar. (Hearing) The coincidence was not improbable because he was known to the militants. They had his photograph and, with the assistance of Muslim supporters all over India, would be able to find him. They would want to find him because of the information he had about them and because they would have considered him a traitor.

23 (First statement) Following this encounter with the militant at the Lodge, Mr Kinnerkar and Mr Talwar feared that they themselves would be at risk if Bombay police discovered that they were sheltering someone from a militants' camp. They helped the applicant organise a passport and a visa, for which he was required to sign some forms and provide some photographs. The passport address in Belman, Karnataka (his birthplace) was incorrect but was given by his helpers as his permanent address because if an address in Kashmir had been provided, a police clearance may have become necessary and this was "not practical". (Hearing) The police in Kashmir could have assumed that the applicant supported separatists, and there are laws in India, such as the *Terrorist and Disruptive Activities Act (TADA)*, under which people can be detained without trial. (First statement) The applicant lived in Kashmir for nearly all of his life. The applicant does not know for certain where exactly in Karnataka he was born. His mother spoke some Kannada language to him. His passport also included an address in Bombay as a present address although the applicant had never stayed there.

## Consequent fears of persecution

24 (Second submission) People from Kashmir are regarded with suspicion. The applicant was one of a few domestic slaves at the camp who became a popular figure because of his efforts and apparent conversion to Islam. As a camp for rest and recreation, perhaps several thousand militants had passed through any one of whom may be able to identify the applicant. The cumulative effect of future discrimination, mistreatment or disadvantage as a result of what took place in the past, and of his medical condition, must be considered. (First statement) The applicant fears that the militants would kill him if they ever found out where he was living. If it were to be ascertained that he was from Kashmir, which would be obvious because of his accent, the police in India would check his background with the Kashmiri authorities. If his connection to the militants came to light, it could lead to his arrest, beating, detention, and possible prosecution as a terrorist. (Second statement) The applicant fears that he would face serious problems if Indian authorities were to know that he had been staying in Australia for a long time on a bridging visa, and that he had made a claim for asylum.

## *HIV status*

25 The applicant is unable to return to India because he is HIV positive, which was diagnosed in Australia in June 1996. The general Indian population is largely uninformed about HIV/AIDS and carriers face discrimination. People do not want to associate with them, or employ them, and doctors do not want to treat HIV patients. HIV sufferers are branded with the well-known, though in Australia diminishing, stereotypes that they are either sexually promiscuous and gay, or drug users. The applicant has never engaged in any homosexual relationship and has only ever had one girlfriend in India with whom he had sexual relations. In light of her "good family background", he did not believe that she was the source of the infection. He believes that he contracted the virus when he was circumcised by the militants because they did not exercise proper care and had circumcised other captured young Hindu men with the same implements within a short period of time beforehand.

26 A certificate from Dr Shetty in Bombay, dated 17 February 1997, was provided by the applicant. The certificate stated that the applicant had attended with his father in September 1992 and was treated for "cellulitis" following his undergoing of a raw circumcision. It stated that he had shown signs of stress and emotional trauma and that he had been released from care on 28 September 1992. This certificate was obtained after the applicant's arrival in Australia with the assistance of Mr Kinnerkar.

27 On 14 January 1999 the applicant's solicitor arranged for him to be seen by Dr Anthony Dinnen, a consultant psychiatrist practising in Bondi Junction, a Sydney suburb. In a report dated 18 January 1999 attached to the second submission, Dr Dinnen concluded that the "applicant's history and presentation are in accord with what I would expect for someone who has undergone the experiences described in his account...The appropriate diagnosis is indeed that of post traumatic stress disorder".

28 Megan Fifield succeeded Hayley Symon as Senior HIV/AIDS social worker at Sydney's St Vincents Hospital in about July 1997. In an undated letter apparently written in about December 1998 (as it refers to the applicant's progression at his place of employment over three years, that employment commencing around December 1995), Ms Fifield wrote:

Deepak is currently being treated for HIV infection at St Vincents Hospital. He is taking a range of medications including triple combination therapy, and prophylaxis against opportunistic infections. His viral load is currently stable on this treatment, however his CD4 count is low and he has been hospitalised a number of times...This treatment is allowing Deepak to remain relatively well, to be able to work and to be self caring. Without this treatment, we would anticipate that someone at Deepak's stage of HIV disease would deteriorate quite rapidly.

I have contacted the Treatments Officer at the AIDS Council of NSW...who confirms my view that HIV treatment in Kashmir or India would be rudimentary and highly expensive. Monotherapy (one drug treatment) with the AZT would be the most likely treatment available, and this is now considered to be substandard treatment even in

a patient who was new to treatment. For Deepak, who has already been exposed to AZT in combination with other drugs, AZT alone would be unlikely to have any significant therapeutic effect.

Patient confidentiality would be unlikely to be afforded the same protection in Kashmir or India as in Australia, and Deepak would be at significant risk of discrimination and persecution as an HIV infected person in Kashmir or India.

Deepak believes that both his parents were killed in the retaliation against him by the terrorist group as outlined in the documentation with his original application, and that Amnesty International support him in this belief. In consultation with Ms Simon [sic], we are both of the professional opinion that Deepak believes himself to have no links, supports or relatives in Kashmir or India, and that he would be returning to social isolation, depression and significant risk of suicide.

During his original presentation at St Vincents hospital [sic] Deepak was found to be "depressed and anxious" by the doctor who referred him to social work [sic]. Ms Simon [sic] found features of post traumatic stress including "recurrent distressing dreams, anxiety, depression and difficulty sleeping". These have since largely resolved with the improvement in his social situation.

Deepak has been very successful in fulltime employment with progression in 3 years to Assistant Manager at McDonalds at Waterloo. He is well respected there and his Manager Mr Angelo D'Geneo [sic] remains supportive of Deepak and keen to consider him for reemployment should the opportunity arise.

Deepak has been able to develop a good support network here in Australia in addition to the support he receives from myself, Ms Simon [sic] and his physician Dr Debbie Marriot. Deepak shares a house with Irene Menezes and Jacinta Shetty. They are both aware of his health status and are very supportive. They, and the minister of his church Mr Wim Pennings, have been instrumental in Deepak's improved state of mind and sense of hope about making a life for himself here in Australia. All of these people have pledged ongoing emotional and material support for Deepak, as have his good friends Chris and John Abel.

During my involvement with Deepak in the last year, I have noticed a significant improvement in his state of mind, and in his ability to deal with the challenges that he continues to face. He has used his time in Australia to good effect, establishing excellent community supports, gaining stable employment and resolving many of the issues surrounding his departure from Kashmir and his diagnosis with HIV.

Return to Kashmir or India for Deepak would have a serious detrimental effect on his ability to enjoy a period of good health and happiness. I believe he would be returning to feelings of personal unsafety, social isolation, lack of employment and housing opportunities, and seriously limited access to HIV treatment options. This would inevitably lead to rapidly deteriorating physical and emotional health and a significantly shortened life expectancy for Deepak.

Ms Fifield added that she would strongly support a favourable view of the applicant's application, and would be happy to provide further information if required.

29 An undated letter of the applicant's treating doctor, Dr Debbie Marriot of St Vincent's Hospital, annexed to the third statement (and therefore presumably dated around that time), recounted to the Tribunal the applicant's recent medical history and condition:

Mr Kuthyar was treated in November 1995 for suspected Tuberculosis after presenting with high fevers, weight loss and vomiting. His symptoms resolved rapidly, however in June 1996 he was diagnosed HIV positive.

Mr Kuthyar commenced combination anti-retroviral therapy (AZT and 3TC) and progressed through a number of combinations (ddl, d4T) in an attempt to minimise the side effects he was experiencing including peripheral neuropathy, nausea, anorexia and acute monoarthritis (L knee).

...

Mr Kuthyar has been exposed to a number of anti-retroviral medications. Preservation of his immune function, and maximisation of his good health will depend on careful management of those treatment options as yet unaffected by the development of drug resistance.

To date Mr Kuthyar's general health has been reasonable with symptoms including eye and skin irritations, shingles and upper respiratory tract infections. Maintaining him on an effective combination of anti-retroviral treatments combined with appropriate prophylaxis against opportunistic infections, represents Mr Kuthyar's best chance for continued good health.

If Mr Kuthyar were to be required to live in Kashmir or India at this stage of his HIV infection, he would not be offered [sic] the treatment options he is currently able to access. He would at best be able to access monotherapy with AZT, which would be unlikely to represent any therapeutic benefit to someone with Mr Kuthyar's treatment history.

With appropriate treatment Mr Kuthyar is likely to have a number of years of productive good health and quality of life. Without this treatment his prognosis is likely to be poor, with rapid deterioration to ill health and death.

30 The applicant was seen for a medico-legal consultation by Dr Gordon O'Neill, a consultant urological surgeon at St Vincent's Hospital. In his report dated 15 February 1999, Dr O'Neill recounted details of the circumstances surrounding the circumcision as described to him by the applicant:

The elder placed a moist handkerchief over his face and the next thing he knew was waking up in terrible pain. He looked down and saw that his penis was wrapped in a bandage and was covered in blood. There were no hospital facilities in the camp, although there were men who had some experience in treating injuries etc. as a result of their political activity.

...

...the circumcision was carried out in an area of the camp which was typically dirty.

The bleeding eventually settled and the pain became tolerable after 24 hours. He was not administered any analgesics. On the third day, however, his penis became swollen, red and the pain increased dramatically. Over the next two days his penis increased to approximately four times its normal size and was obviously infected. His continuous pleas for medical help were finally granted...

...

Whilst in Australia, after a number of unexplained illnesses, including tuberculosis, Mr Kuthyar was diagnosed with HIV infection...

...

...The only incident in his life from which he could have contracted the virus, would appear to be this act of circumcision in an unsterile environment with contaminated surgical instruments.

...

It is my opinion he was circumcised by a person with little or no medical training, consistent with his story. It is difficult to say definitely that the circumcision was carried out when he was an adult as opposed to a child, but given the fact that he was raised a Hindu and Hindus are not circumcised, the story speaks for itself.

The condition "cellulitis" to which Dr Shetty's report refers is in my opinion the correct term for an infected penis after an unsterile circumcision.

Dr O'Neill concluded:

It is also my opinion that he contracted HIV during this circumcision.

### *Relocation*

31 (First statement) The applicant has had no contact with his relatives in Karnataka throughout his life, and the circumstances of his parents' departure from that state means that he could not rely on those relatives. The applicant would face practical difficulties in relocating in India. Reasons for this include language, age and caste requirements for federal or union jobs, and residence and language requirements for state and local authority jobs. There are also state residence, language, qualification recognition policies and industrial practices which limit who can secure employment in the private sector. Only people domiciled in a state can access certain higher education courses. The applicant speaks English, Hindi, some words of Kannada and a little Urdu. Language is a real barrier to mobility and Hindi, while the official national language of India, is not widely spoken in many parts of India.



# Application for review

32 When the matter first came before me on 23 September, I ordered the applicant to file and serve an amended application particularising the grounds upon which he sought review. An amended application was filed on 20 October 1999 grounded in section 476(1)(a) of the *Migration Act 1958* (the Act), viz. that procedures required by the Act to be observed in connection with the making of the decision were not observed. The particulars were that the Tribunal failed to set out findings on material questions of fact and to refer to the evidence or any other material upon which those findings of fact were based, pursuant to paragraphs (c) and (d) of sections 430(1). In fact the applicant asserted that the Tribunal failed to deal with evidence provided by him on important aspects of his claims. The respondent accepted the view, for the purpose of these proceedings, that the failure to comply with procedures required by section 430 would constitute a reviewable error under section 476(1)(a) of the Act.

33 I recently discussed the operation of section 430 in *AAA v Minister for Immigration and Multicultural Affairs* [1999] FCA 1699 at some length and there is no point in reiterating those observations here. I drew attention there, as I do again here, to the views expressed by Justice Gummow in *Minister for Immigration & Multicultural Affairs v Eshetu* [1999] 162 ALR 577. At 609 his Honour put the proposition that:

...where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question. It may be otherwise if the evidence which establishes or denies, or, with other matters, goes to establish or to deny, that the necessary criterion has been met was all one way.

34 His Honour's view was to the effect that an error of law will occur, not simply in the making of a wrong finding of fact, but in the making of findings and the drawing of inferences in the absence of evidence.

35 The amended application set out that the Tribunal failed to comply with sections 430(1)(c) and (d) in relation to:

- (a) the applicant's fear of harm as a result of his past association with Muslim militants in a training camp;
- (b) the applicant's claim that he had a well-founded fear of persecution in India because he is a Hindu from the Kashmir; and
- (c) the applicant's claim that he faced persecution in India because of his HIV status.

36 The first submission summarised the applicant's claims as consisting of:

- fear of persecution by militant Kashmiri separatists because of imputed political opinion and religion
- fear of persecution by Indian authorities because of imputed political opinion
- fear of vilification and severe discrimination by ordinary people, service providers and agencies, and of inability to access adequate medical treatment, because he is a member of the particular social group of HIV sufferers
- unreasonableness of the option to relocate in India, outside Kashmir, because of compelling logistic, economic, linguistic, cultural and social barriers

## The Tribunal's conclusions

37 The Tribunal found as "not true" that the applicant:

- was kidnapped or enslaved as claimed
- undertook a mission for the militants in November 1994 to his home area as claimed
- lost his parents in the circumstances claimed
- encountered, while in Bombay in early 1995, a militant he knew from the camp

38 The Tribunal did not accept the proffered circumstances of the circumcision. It did not consider that the authorities in India would regard the applicant as having had the association with the militants he claims to fear they would. Nor did the Tribunal accept that the Indian authorities would have any interest in whether the applicant had been in Australia, on what type of visa, or that he had lodged an application for asylum, as claimed in the second statement.

39 To determine that accounts of this detail and particularity are untrue is to assert, not that the applicant had erred or been inconsistent, but that he lied about them. In fact the delegate made no adverse findings as to the applicant's truthfulness about the matters, but found that the circumstances surrounding his claims were "unusual". The Court has often expressed the need to scrutinise with care such rejections by an inquisitorial tribunal to determine their correctness in law. With all the benefits for the ascertainment of truth available in adversarial proceedings, and this society's experience with them, rejection of cases as fabricated and fraudulent is not common. It should

not be resorted to by tribunals which are both interrogator and judge without ample grounds.

40 At the hearing before the Tribunal on 21 December 1998, the applicant explained that some things which were included in his early submissions may have been misunderstood or misinterpreted by the friend who had been helping him. He explained that he had only recently arrived in Australia and that his competence in the English language was somewhat limited at that time. The second submission stated that the applicant's facility with English had, not surprisingly, improved with time since his arrival, largely as a result of his employment with McDonalds. The submission made was:

It is not in doubt that the applicant's English ability is now quite good, and was good enough to communicate with the Tribunal at the hearing. However, even now it is not "perfect". The applicant speaks with an accent, and his language does not flow with the rhythm of a person for whom English is a first language. I note that [sic] Tribunal was not without concern about the applicant's ability to effectively communicate during the hearing, and at two points point [sic] an adjournment was briefly considered, before it was decided that it would not be necessary.

It is submitted that it would be dangerous in the extreme to draw adverse inferences as to he [sic] applicant's credibility based upon inconsistent statements on the face of the visa application forms, which the evidence indicates was prepared by an applicant who (a) at that time had limited English ability (b) suffers from Post Traumatic Stress Disorder (b) [presumably (c)] was without professional advice or assistance (c) [presumably (d)] was completing the form without the aid of an interpreter, using a non Hindu speaking flatmate for assistance.

The Tribunal introduced its conclusions with the following paragraph:

It is appropriate here to state that inconsistencies, omissions or additions to the evidence provided by an applicant in the course of the refugee determination process can occur for many reasons. In this case, it has been submitted that the applicant's command of English in the months after his arrival was not good and a declaration from his supervisor which attests this has been provided. As well, it is claimed that the applicant was helped in completing the application form by a person from Bangladesh who did not speak the applicant's main language (Hindi), that the applicant was traumatised and that he did not have professional assistance. I accept that all of these factors can contribute to statements of claims varying as the refugee determination process proceeds. It is also possible that variations can reflect that the evidence is not entirely truthful. The Tribunal is required to make findings of fact on applications for refugee status and this frequently involves an assessment of the credibility of what the applicant has said.

The Tribunal went on to say in relation to this issue:

As indicated in the description of the applicant's evidence, there were some significant differences in the claims made in the initial application and submissions

and those made later but variations in the applicant's claims as first made some three months after his arrival and those made in later declarations and submissions are not the primary reasons why I do not accept that the applicant has given a truthful account of what happened to him although have contributed to my doubt about some particular matters.

Although these differences are not particularly material to the case, and were not a primary reason for the Tribunal's rejection of the applicant's claims, they have no doubt, as conceded by the respondent at the hearing in this Court, coloured its approach to the applicant's case.

41 In relation to the material submitted by the applicant in support of his claim which indicated the existence of a great deal of support for the applicant from a number of professional people, the Tribunal stated:

The specialist medical reports provided to the Tribunal from a psychiatrist and a urologist each set out the elements of the applicant's story as did two reports by social workers but I do not accept that the inclusion of the applicant's story in the reports lends any weight to the credibility of what the applicant has claimed: the specialists' and social workers' roles are to provide medical treatment or counselling and professional assessment for the person referred to them. Both specialists were provided with full background by the applicant's adviser. Health professionals are not required to form conclusions about whether a person's story is true but deal with the patient as they find them. That the applicant has post-traumatic stress disorder and that he was a victim of a poorly performed circumcision are matters on which health professionals provide authoritative evidence and are accepted by me as matters of fact in relation to this case. It is important here to draw a distinction between the medical reports about what happened in India and the medical and social worker reports concerning the applicant's HIV status: these latter reports provide professional opinion about the applicant's condition and about the implication of changes in treatment which could follow if he were to return to India...I note in particular the concern communicated in the social worker's [Hayley Symon's] statutory declaration of 24 June 1999 that I 'would rely upon the two paragraph summary in her letter as purporting to represent a comprehensive examination of the applicant's past compared to a statement he has prepared with the assistance of a lawyer'. The document dated 24 December 1996 was provided by the social worker in support of his application for a protection visa and I am obliged to consider it.

42 It is true that health professionals are not required to form definitive conclusions as to whether a patient's story is true, but they are trained, and required, to consider the likelihood of their truth, first, to decide on the likely aetiology of the condition and its appropriate treatment, second, to determine other relevant specialties to be consulted, and third, to be able to express opinions on prognosis and future treatment options. What is more, health professionals are trained to look at the whole person, which involves looking at the patient's current situation, and possible factors which have led to the person's present circumstances. In fact, experienced doctors and health workers develop significant skills and insights in assessing the truth of what they are told. The supporting material of this kind was therefore required, in

the consideration of this case, to be taken as providing some weight in favour of the applicant.

43 The Tribunal concluded that the applicant's evidence "contains too many implausibilities and improbabilities and that significant aspects of it are not true". It went on to say:

I...have concluded that the applicant's evidence about what happened to him in India and why he would be at risk of harm at the hands of militants Kashmiri separatists and the authorities because of his association with the militants contains too many implausibilities and improbabilities and that significant aspects of it are not true. Some parts are not supported by independent information. As stated already, that he suffers from post-traumatic stress disorder and was the victim of a poorly performed circumcision are accepted but the evidence has not enabled me to accept that these conditions were or are a result of the episode with the militants as has been claimed...I recognise that very unusual things can happen, as can coincidences, but there are simply too many of these in the applicant's story for me to be satisfied that his account is truthful. While applying the benefit of the doubt might be appropriate in relation to some aspects of the applicant's story about his kidnapping and enslavement, there are too many matters which are not plausible, or about which there is doubt, for me to do so in relation to the whole of this part of his evidence.

Fear of harm from Muslim separatists and authorities because of the applicant's past association with militants

44 The Tribunal considered that at the heart of the applicant's story was his evidence in relation to the camp, his circumcision and his encounter with the militant in Bombay.

*Kidnapping, detention and enslavement*

45 The Tribunal stated:

I find that the applicant's evidence about his fear of harm at the hands of those Muslim separatists who he claims kidnapped and enslaved him and his fear of the authorities because of his past association with the militants is not a true account and that his fear is not well-founded.

The Tribunal "doubted" the applicant's evidence that the camp was for rest and recreation although it did not reject it. It did not provide any reasoning for its doubt. It merely said:

I consider that there is doubt that camps accommodating up to 150 militants at a time would not involve training ...

46 A strong factor going to the rejection of this evidence was the applicant's account of the virtual non-existence of prayer at the camp. In his second statement the applicant explained:

In reality there are many militants, like others in the Muslim community in general, who may call themselves "Muslim" but do not practice [sic] prayer five times a day; or may only observe religion on Friday; or think that by fasting during Ramadan, all their sins for the year will be forgiven.

The Tribunal stated:

[I]am unable to accept that there was as little prayer apparent as the applicant claims occurred when the priest came to conduct prayers on Fridays. As put to the applicant, some militants fighting in Kashmir may have left their religious zeal aside and I accept his submission that many of the Kashmiri separatists are fighting for many reasons of which religion is just one. But independent information is that Hezb-ul-Mujahideen had in 1995 around 2000-2500 activists and the applicant claims that some thousands of people would have passed through the camp during the considerable time when the applicant claims to have been there. It is a fundamentalist and pro-Pakistan militant group and has been described as hardline. While some may not have prayed in accordance with muslim rituals, I consider that very many would have done so.

47 In addressing the Tribunal's acceptance that many Kashmiri separatists are fighting for "many reasons of which religion is just one", and its finding that "very many" militants would have prayed according to Muslim rituals, yet rejecting the applicant's claims, the applicant submitted to this Court that the Tribunal was being inconsistent, including with a statement made at the hearing by the member herself that she had read an interesting article which reported that many of those recruited into the terrorist movement were displaced and estranged young people with nothing else to do. The applicant said that the Tribunal therefore failed to consider independent evidence as well as the applicant's evidence of what he had witnessed at the camp.

48 The issue of the religiousness of the militants was critical to the Tribunal's rejection of the account that the applicant had been held at the camp. I must say that this conclusion strikes me as providing a remarkably flimsy basis upon which to base a complete rejection of the applicant's entire and quite graphic account of his travails. Fundamentalism worldwide is an umbrella under which are gathered a large range of people of all religions – some orthodox, others not, some practising, others non-practising. As I understand the evidence, accepted by the Tribunal here and in other cases, it cuts across religious beliefs and practices and does not, in this case in relation to Islam, distinguish between those who do or do not pray. It is unrealistic to believe, and there was no evidence before the Tribunal, that because Muslim fundamentalists purport to act in the name of, in adherence with, or for the sake of their religion, that they practise the daily rituals and live in accordance with doctrines of that religion.

49 Yet on this basis the Tribunal rejected the applicant's whole claim that he was detained at all, which in effect negates the possibility of the ensuing circumstances ever taking place. It was incumbent on the Tribunal to provide some sort of evidence to support this major finding, something more than a belief that a different state of affairs would have been more credible, such as that the presence, particularly of hardline fundamentalists at the camp, would have undeniably meant that widespread prayer would have taken place. This matter would be an odd thing for the applicant to lie about, and the respondent did not suggest any way in which the applicant could have gained from this deception, only that his lie was flawed in that it exposed the falsity of his whole account. In my view the Tribunal's failure to support this finding, crucial to its conclusions, with reasons exposes the conclusion as erroneous in law.

### *Circumcision*

50 The Tribunal stated that it accepted the evidence that the applicant had been a victim of a poorly performed circumcision, that he is HIV positive and that the procedure could have led him to acquire the infection, but it was not satisfied that the evidence given about the circumstances surrounding the procedure was accurate. The Tribunal considered that the applicant's story was inconsistent because, on the one hand, he said that the militants did not practise religion, but on the other claimed that they wanted him to convert. On this point the Tribunal continued:

While I can accept that, in the context of the troubled Hindu-Muslim relations as can exist, such an act of cruelty might be inflicted upon a young Hindu man, I found the applicant's evidence that his captors wanted him to convert and first raised his conversion and the matter of circumcision during the first week at the camp and that he reluctantly agreed to the procedure in an attempt to demonstrate his conversion to his captors and so win their trust and so be able to make his escape to be improbable particularly given his evidence that they were not devout followers of Islam.

51 I cannot see the relevance of attendance at prayers to the requirement of the applicant's circumcision. Persons conducting a forced circumcision on an adult in circumstances of peculiar cruelty and conspicuous lack of hygienic care and skill would hardly be doing so for the purpose of upholding moral law. If so, the procedure would presumably have been carried out in a proper medical manner – under anaesthetic with appropriate post-operative treatment.

52 At the hearing the applicant paraphrased what he alleged the militants had said to him at the time of the procedure:

You will remember this all your life. Whenever you go to the toilet you will remember, you will see that you are Muslim, you are not any more a Hindu.

53 In his second statement the applicant asserted that the circumcision:

...was an act of power over a Hindu person. It was a small victory for them to have me circumcised. I did not resist the circumcision because I had no choice, and hoped that no resisting would improve my position at the camp.

...

The circumcision was forcibly done to me...

54 Part of the Tribunal's reasons for finding that the applicant's claims on this matter were "not true" was, as more benignly stated by the delegate, the unusualness of the idea that Muslim militants would take any interest in him. Religious conflicts are in effect conflicts of power, not of religion. Mr Kofi Annan, the United Nations Secretary-General, summarised the state of affairs effectively, when speaking in May 1998 at the Inter-religious Dialogue between the Four Religious Leaders of Bosnia and Herzegovina. He stated:

...the problem is never the Bible or the Torah or the Koran. Indeed, the problem is never the faith - it is the faithful and how we behave towards each other.

55 It is a well known historical method of cruelty, humiliation and power, to force persons of various religions into the performance of acts which are abhorrent or sacrilegious to their own religion, such as the cutting off of *payot* (religious side curls) and beards of Orthodox Jewish men by the Nazis during World War II, a relatively mild example of the horrors that took place. Another method used is to force a person to convert, or to go through the motions of conversion, such as the forced baptism of Muslims and Jews, among others, during the Spanish Inquisition. Although many would try to struggle against such subjection, a majority would give in to it and appear to willingly accept their fate in the hope that their cooperation would lessen the severity of the other torture practised on them. Even if it was unusual, it is certainly not improbable that the militants would have had an interest in the applicant. On the other hand, no reason was even slightly intimated by the Tribunal as to why any young Hindu, let alone this applicant, would as an adult volunteer to have a circumcision at all, let alone in crude and painful circumstances.

## Bombay journey

56 The Tribunal went on to say:

In the context of all of the evidence about his kidnapping and enslavement, I also found very improbable to the applicant's claim to have undertaken a journey such as that he claims occurred soon after the circumcision (from Pakistan to Delhi by jeep and on to Bombay by train where he collected a suitcase for the militants and then back to the camp in Pakistan).

57 The applicant stated that he was given sleeping tablets, but was not sure of the exact medication given to him, and that the only way he was going to receive medical attention was by cooperating with the militants. He stated "I had no choice". Militant killers and tyrants are not known for their compassion and humanitarian concerns. Had the applicant claimed to have made such a



journey voluntarily, and not in a situation of duress, the Tribunal's concerns with the evidence would have been more reasonable. However, here the Tribunal rejected evidence which clearly illustrated the existence of foreseeable intimidation and inhumanity that Hindus were taken on as slaves, the very definition of which according to *The Australian Concise Oxford Dictionary*, is, inter alia, persons who are "the legal property of another or others and ... bound to absolute obedience", "human chattels", "helpless victims of some dominating influence". In his submissions and at the hearing before this Court, the respondent asserted that it would be unlikely that while in hospital for three days the applicant would not take the opportunity to ask for help. Apart from the fear of doing so, in his second statement the applicant explained that in India people would not go out of their way to help a person even "if he is murdered in front of him in the street". He was therefore alluding to the fact that any attempt by him to obtain help would have fallen on deaf ears. In any case it is not acceptable, and almost bizarre, for the Tribunal, being so far removed from the actual situation, to assert without evidence or reason that it would have been possible for the applicant to have done so.

58 The applicant contended that no reasons were given for the Tribunal's finding that his undertaking of the journey was "very improbable". In his submission the respondent stated that the applicant was wrong in his contention, as the finding that the claims were improbable in all the circumstances was a matter of judgment for the Tribunal. The submissions went on to say that "[t]he Applicant may not be happy with the Tribunal's assessment but it is wrong to say that it has not provided reasons". The Tribunal's error did not lie in this respect so much in the non-provision of reasons, as in a lack of evidence or other material to support those reasons, in the sense spoken of by Justice Gummow in *Eshetu*.

## Disappearance of applicant's parents

59 The applicant's evidence concerning the attack on the area around his parents' home in November 1994 was based on what he heard and had been told at the time, the non-arrival of his parents at the agreed rendezvous as planned and the fact that he had not heard from them since. In his original application for protection he had stated that his parents were "abducted" but in the letter of Ms Symon dated 24 December 1996, the account given was that his parents had died in the attack.

60 The Tribunal rejected the account of the attack on the grounds that the incident was not mentioned anywhere in independent information on Kashmir, particularly as other terrorist incidents there had been reported:

Although independent information indicates that reporting about Kashmir in 1994 was largely unconstrained, I recognise that not every attack in a conflict such as that in Kashmir would be necessarily reported but many which led to fewer deaths than the number of twenty-four mentioned in the December 1996 social worker's report (which the applicant claims was the number told to him by the Hindu man at whose house he planned to meet his parents) were reported. Significantly, detailed reports of what occurred at Charar-e-Sharief some six months after November 1994 (in May 1995

when the shrine was destroyed and when between twenty and thirty people died) make no mention of an attack by militants six or so months earlier in which houses were burned and people died even though the particular area where the applicant claims his parents' house and stall were located (Baba Mohalla) was set alight during the siege. He said at the hearing that his home was about a five minute walk from the mosque. Had what the applicant claims occurred when and where he claims, I consider that it would have been mentioned in these reports, especially when the number of casualties at the later event was similar to the number who the applicant believed died in November 1994.

61 The Tribunal concluded:

Against the background of all of the evidence before me, I am not satisfied that the applicant lost his parents in the circumstances he has described or that there was an attack at the place where his family lived in November 1994.

62 The Tribunal's doubt in relation to the incident was only supported by the fact that it did not find an independent account of the incident. The Tribunal conceded that not every attack would be reported, but in light of the number of deaths claimed to have taken place, a report or reports would have existed. It compared the significance of this incident with a later one which took place close to the area of the applicant's parents' home where between twenty and thirty people died and a shrine was destroyed and which was reported. But the Tribunal did not entertain the possibility that that report may have been significantly galvanised by the destruction of the shrine, as well as the loss of many lives. The newsworthiness of an incident in India may in any event not be determined by the number of casualties, but by other factors. In Kashmir, there has been so much death and agony that it is the more likely that some "incidents" are not specifically reported.

63 The applicant contended in his submissions that the Tribunal "completely failed to address" what he provided as corroborating evidence in support of this account – the letter from Mr Talwar of Amnesty International dated 23 February 1998. The respondent stated in his submissions that the letter, written by a friend of the applicant's, was given no emphasis by the applicant when given a chance to do so. However, at the hearing the applicant agreed with the Tribunal member when asked "[w]as that, I suppose, the concrete evidence that you had that they had died?", referring to this letter. The Tribunal found the letter to be irrelevant, particularly as it did not refer specifically to the incident of November 1994, stating only that the applicant's parents had "not survived attack". Yet it does provide evidence from a person close to the area in question at the time, and whose colleague had the opportunity to visit the actual site involved. The non-specificity of the letter to the November 1994 attack may be explained by the fact that the letter was a response to queries of the applicant, rather than a simple account. This possibility was simply not considered by the Tribunal.

*Encounter with the militant in Bombay*

64 The applicant claimed that at the guest house in Bombay he encountered a militant who noticed, recognised and threatened him. Again the Tribunal did not accept that claim and in relation to it stated:

I consider it most unlikely that a militant who had been in the camp in Pakistan would come to the very guest house in Bombay where he was working and recognise him. That this encounter was not mentioned in any submissions until the application for review of the Department's decision by the Tribunal in June 1998 has contributed to my doubt. Leaving aside the social worker's report of December 1996, the letter dated 21 February 1997 from Rajesh Kinnerkar, one of the applicant's friends in Bombay, mentioned only a fear that the applicant would be recognised even though it was to him that applicant claims to have gone after encountering the militant at the guest house, who hastened arrangements for the applicant to leave the country and who had said he could no longer help the applicant because the militant's identification of the applicant would make it dangerous for Rajesh to do so.

No explanation was given by the applicant for the fact that Mr Kinnerkar only referred to the applicant's fear that he would be recognised by a militant, and not to the actual encounter that the applicant claims to have had. However, this matter was not of material importance to the applicant's case as a whole. The incident was referred to in the applicant's application for review. It was not mentioned in his original application for a protection visa. Neither, however, was his job at the Lodge, only that he had left Kashmir for Bombay and that he wanted to leave the country because militants have connections all over India and therefore could find him. The applicant explained the various omissions by stating that he only received proper advice about what information was required from him prior to his appeal to the Tribunal. The Tribunal acknowledged this contention and stated:

The applicant claimed in his statutory declaration of 16 December 1998 that it was not until he received professional advice that he realised the type of detailed information required to support an application for recognition as a refugee but that the encounter with the militant was not mentioned in anything until June 1998, given its conspicuous relevance to the applicant's claim to fear persecution at the hands of militants if he were to return to India, has led me to find that it did not occur as he has claimed.

65 It is also possible that the omission of the incident with the militant from Mr Kinnerkar's letter was an accidental omission on his part. In any case, it was in my view not open to the Tribunal on the evidence to reject the applicant's account of the encounter on these grounds alone. Even if rejected, it was not alone sufficiently important to the overall claim to form a basis for its complete rejection.

## Relocation

66 In the light of my conclusions thus far, it is not strictly necessary to deal with this subject. I shall do so briefly for completeness. Because of the way the Tribunal dealt with relocation, it is necessary to have resort to the decision of the Minister's delegate on this subject.

67 The delegate did not raise with the applicant the possibility of him returning to Karnataka state and his relatives, but nonetheless concluded that he could move there. In this regard the delegate stated:

In considering the option of relocation I have taken the applicant's background into account. The applicant is educated, and was successfully self employed prior to his departure from Kashmir. The applicant speaks, reads and writes English, Hindi and Kannada. The applicant was born in Karnataka and given the fact that he speaks, reads and writes Kannada, it can be assumed that he may have family in Karnataka, which might assist him [sic] relocate to that state should he wish to do so. However, the presence or absence of family members does not appear to have influenced his decision to relocate to Australia. I consider that it would be reasonable for the applicant to relocate within India should he wish to do so.

68 The delegate found that the applicant could reasonably relocate within India. As to Kashmir, it said:

Country information confirms that civilians in Kashmir have been attacked by militants. The applicant has submitted documents from various sources attesting to the fact that he has been traumatised. I sympathise with the applicant, and I accept that he fears to return to Kashmir due to the ongoing armed conflict between various secessionist groups, counter-insurgency groups and the Indian government security forces.

The delegate thus accepted that the applicant feared returning to Kashmir because of upheavals there and because of actions by Muslim separatists in the area but was satisfied that the applicant could avoid those difficulties by living elsewhere in the country, and that it would be reasonable for him to do so. The delegate went on:

However, the applicant has the option of relocation within India. If it is accepted that the applicant will be pursued by militant groups, there is not a real chance that the [sic, presumably 'he'] will be located by secessionist Kashmiri Muslim groups if he relocates to another region of India. In addition, the applicant has been absent from India for more than two years and it is not plausible that any militant Muslim group would have continuing interest in the applicant. It is not clear, however, why the applicant would be wanted by Muslim secessionists. I consider it unusual that militant Muslims, wishing to establish an independent state with, as the applicant states, "only Muslims", would attempt to recruit a Hindu to their organisation. In any event I do not find that there is a real chance that militant Muslim groups would have the resources to pursue the applicant in a continent with a population as vast as that of India, for whatever purpose.

69 The Tribunal acknowledged that the conflict in Kashmir has continued for some years and in that time thousands of people have been killed. Many continue to be killed to this day. Both the militant separatist groups and the Indian authorities have committed serious human rights abuses. The Tribunal did not accept that the applicant had an association with the militants and therefore that they would seek him out for retribution, or that the authorities would have an interest in him as a result of the association. Nevertheless, the Tribunal recognised that the situation in Kashmir is far from settled and people

live there with the threat of violence and will continue to do so in the reasonably foreseeable future, notwithstanding, at the time of the decision, a fairly recent retreat of some Pakistan-based forces who had entered Indian territory. Many Hindus have left Kashmir as they have been subjected to attacks in the recent past. No doubt this situation will continue.

70 The Tribunal did not accept that:

- all people from Kashmir can be suspected by people and police elsewhere in India as being associated with terrorist activities and mistreated as a result
- the applicant would be a target for the attention of heavy handed authorities because he is a Hindu man
- the authorities have any interest in the applicant in relation to militants
- Hindi is not widely spoken in India as independent information suggests it is the first language for around 20% of the population, widely spoken in the north and English is also in common use

There can be no successful legal challenge to these conclusions in principle. But the alternative places proposed or reasonably available required evidence before a conclusion that the applicant could reasonably relocate within India could be made.

## Bombay

71 The applicant claimed that he could not live safely in Bombay because it was there that a militant saw him and that the militants' network would locate and harm him because of his betrayal and escape. The Tribunal neither accepted that the encounter took place, nor that he had the association with the militants, nor that they would seek him out. However, the applicant gave an example at the hearing of the difficulties he has and would find if he were to be sent there:

When I was in Bombay I wanted to get driving licence, I thought maybe I can get driving licence, I can maybe drive maybe truck or maybe I can get some job somehow and when I went to apply for the driving licence the officer in charge he told me that he needed proof who I am and I couldn't provide anything for him because I don't have anything to prove that I am Deepak Kuthyar, see.

This approach required findings based on identified evidence.

## *Karnataka*

72 The applicant claimed that he could not receive assistance from relatives in Karnataka because of a history of family problems. The Tribunal pointed to the fact that as the applicant is an engaging person and has readily made friends, both in Bombay and Australia, he would meet people and develop friendships if he were to return to Karnataka state. I have been able to discern no explanation for the link between this determination and the conclusion about relocation such as might reasonably comply with the requirements of section 430.

### *Other places*

73 The Tribunal contended that the applicant has other places in India to which he could return and live safe from the fear of violence, such as Delhi, where health services would generally be better than in smaller centres, and where Hindi and English are widely spoken. The applicant told the Tribunal that a passport was not considered to be relevant in proving that a person was living in a certain state. The member stated in response:

Millions of people move around India all of the time and there will be, as it is, if you move from Victoria to New South Wales - I mean there are hurdles that one needs to overcome but people do it all the time and I don't believe that those barriers are of a sort that could amount to persecution. I think that they're inconvenient but I'm sure they're surmountable.

The Australian example was as irrelevant as it was evidentiary of error. No evidence was available to support the Tribunal's certainty or its superficial and unsubstantiated analogy between the Indian and Australian situations. The question of relocation, particularly in light of the applicant's health, as well as his claimed association with militants, is a question of life and death. It cannot be determined on conclusions, unsupported by evidence, as to what the Tribunal thinks would be the situation, and by rejecting the applicant's credibility on insubstantial grounds.

## Fears in relation to HIV status

74 How the applicant became infected was taken by the Tribunal to be irrelevant to the consideration of his claim to have a well-founded fear of persecution if he were to return to India. The Tribunal accepted that the applicant may not be able to access care, monitoring and medication in India of the same or similar standard to those who are HIV positive in Australia. In relation to the requisite fear arising out of the applicant's HIV status, the Tribunal stated:

Given independent information about treatment of people who are HIV-positive in India, I can understand the applicant's fear about what might become of him because of his medical condition if he were to return to India and consider that it could be reasonably found that people who are HIV-positive might constitute a particular social group. However, the central question to address in relation to the applicant's medical

condition is whether what he might experience if he were to return to India is persecution within the meaning of the Convention.

...

The applicant's claims in relation to his medical condition have two parts: his fear that adequate medical treatment would not be available and affordable and his fear of being ostracised and discriminated against by people who learn of his condition.

It is clear from the independent information ... that the care available in India to people who are HIV-positive is far below the standard of care available in Australia. Dealing with the disease is a major problem confronting Indian governments but [it] ... is addressing the issue and working to provide care to people diagnosed with the condition...I have also noted that there have been some reports of a reluctance on the part of some practitioners and hospitals to treat people who have HIV but I have considered these reports against the experience in Australia where, when AIDS first appeared, there was a similar response on the part of some health service providers.

If I may say so, such a comparison was quite unexplained and unsupported by evidence. Without evidence the Australian experience in relation to the HIV virus, both past and present, cannot be used to predict a possible improvement in the level of services in India, as claimed by the respondent in his submissions. At the time to which the Tribunal was referring, people in Australia did not know what the disease was or how it was contracted. It was therefore an issue of health and not one of discrimination. There was a general concern that health service providers might contract the then mysterious illness. The state of knowledge is now significantly greater throughout much of the world but what the situation is in India is a matter for evidence, not speculation. Because India has such a large population and the developmental level of the people varies so much from one region or place to the next, generalised speculation is even more inappropriate.

75 The Tribunal went on:

... while there is much evidence about the relatively limited treatment and services available and while the failure to provide adequate medical care might in some circumstances amount to persecution, there is no evidence of which I am aware which could support a conclusion that the difficult resource allocation decisions which must confront governments and public health officials in India in relation to HIV involve considerations which could come within the reasons in the Refugees Convention or are affected by any motivation to harm people who have the disease...I do not consider that the different level of health care availability in that country amounts to persecution within the meaning of the Refugees Convention...

76 It is not the motive of harm which is definitive under the Convention but the capacity and willingness of the authorities to protect individuals from harm. The applicant's fears of discrimination in employment, social interaction and reputation were understood by the Tribunal but it was not satisfied that, even if considered cumulatively, they could properly be seen to be a harm amounting to persecution. It concluded:

I note here that the applicant's medical condition may give rise to compelling circumstances to justify his remaining in Australia but the Tribunal's role does not extend to beyond deciding whether applicants satisfy the criteria for a protection visa. Consideration of applicants' circumstances on other grounds is a matter solely within the Minister's discretion.

77 At the hearing in this Court counsel for the applicant argued that persecution because of the applicant's HIV status was the independent ground for refugee status of membership of a "particular social group". This contention was not part of the original application and was only briefly argued and I should therefore discuss it only as an adjunct to the other more central issues of the case. In *Chokov v Minister for Immigration and Multicultural Affairs* [1999] FCA 823 I discussed the various definitions of "particular social group", as Moore and Branson JJ and I did in *Minister for Immigration and Multicultural Affairs v Sarrazola* [1999] 166 ALR 641 where the Court stated at 646-647:

Where an applicant for a protection visa bases his or her claim on a fear of persecution for reason of membership of the relevant social group the first decision to be determined by an Australian decision-maker is that of the identification of the relevant social group.

In *Zamora* [*Minister for Immigration and Multicultural Affairs v Zamora* [1998] 51 ALD 1] at 6-7 the Full Court [Black CJ, Branson and Finkelstein JJ] expressed the view that Applicant A [*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; 142 ALR 331] is authority for the following proposition:

To determine that a particular social group exists, the putative group must be shown to have the following features. First, there must be some characteristic other than persecution or the fear of persecution that unites the collection of individuals; persecution or the fear of it cannot be a defining feature of the group. Secondly, that characteristic must set the group apart, as a social group, from the rest of the community. Thirdly, there must be recognition within the society that the collection of individuals is a group that is set apart from the rest of the community.

It is only after the relevant particular social group, if any, has been identified that a decision-maker can sensibly give consideration to the question whether the applicant has a well-founded fear of persecution for reason of his or her membership of that particular social group. As was pointed out by Dawson J in *Applicant A* at CLR 240; ALR 340:

The words "for reasons of" require a causal nexus between actual or perceived membership of the particular social group and the well-founded fear of persecution. It is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution.

Dawson J went on in *Applicant A* at CLR 241-242; ALR 341:



...not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society.

...

...the characteristic or element which unites the group cannot be a common fear of persecution. There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular social group is their common fear of persecution.

78 In its decision the Tribunal conceded that the applicant may in fact be a member of the particular social group of people with HIV or AIDS, but it was not satisfied that the treatment of the members of that group constituted persecution within the meaning of the Convention on Refugees.

79 The applicant asserted that the Tribunal ignored reports he had provided which recounted various discriminatory circumstances imposed on HIV sufferers in India. However, the Tribunal in its reasons did consider a range of independent information on HIV in India and accepted the substance of the reports. It conceded that there were few resources available but that the material did not reveal a motivation on the part of Indian authorities to harm sufferers of the disease, a situation which would have been persecution for a Convention reason. The Tribunal therefore considered that the different level of health care available in India could not be said to constitute persecution for a Convention reason. This finding was not legally erroneous but the true question here was, and is, whether the Indian authorities are in a position or are trying to protect HIV sufferers from the persecutory discrimination which it appears to be admitted does occur. It seems that the Tribunal simply failed to consider whether the applicant was reasonably unwilling to return because he could not avail himself of any such protection. In my view this omission manifests an error of law, under section 430 and section 476(1) as explained by Justice Gummow in *Eshetu* and discussed in *AAA*.

## Conclusion

80 With such potential for error and resulting dire consequences, it is not sufficient for a fact-finding body to merely describe as unusual, or state its doubts about, the claims made. Many cases or issues in cases raise doubts in the mind of the determining body. But the criminal onus of proof does not decide refugee cases. If in adversarial contexts there is positive evidence in favour of some allegation or claim, it can be accepted without necessarily requiring an explanation as to why other evidence is rejected. But without the benefit of adversarial confrontation, it is quite different to assert that something is implausible or incredible or not acceptable, there being no evidence to support that view, and no reason given as to why the evidence in favour is rejected. Tribunals of fact have traditionally chosen between differing factual evidence. Where the evidence is all one way, rejecting it on intuitive or other

grounds without an explanation as to why the evidence in favour has been rejected will often produce a breach of section 430. Evidence is required to support major findings. In my view the Tribunal failed to identify any evidence to support its adverse conclusion as to the applicant's claims that he was abducted and detained by Muslim militants, that he was forcibly circumcised in the way alleged, and that his parents died at the hands of Muslim Kashmiri separatists. As I apprehend the evidentiary material, there was no such evidence.

81 The Tribunal reached its conclusion that the applicant's account was "not true" based on a finding of doubts, implausibilities and improbabilities, without entertaining other major possibilities thrown up by the evidence provided. The conclusion was reached, not on the basis of evidence, but on the Tribunal member's feelings about what was plausible. For the reasons explained here and further detailed in my judgment in *AAA* based on the analysis provided by Justice Gummow in *Eshetu* to which reference has been made, it is my view that these findings were therefore legally erroneous.

82 The application for judicial review is allowed. The decision of the Tribunal is set aside and the matter is remitted to a differently constituted Tribunal for a fresh hearing. The respondent will pay the applicant's costs.

I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marcus Einfeld.

Associate:

Dated: 11 February 2000

Counsel for the Applicant: Mr N. Poynder

Counsel for the Respondent: Mr S. B. Lloyd

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 26 October 1998

Date of Judgment: 11 February 2000