FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v MZYRI [2012] FCA 1107

Citation:	Minister for Immigration and Citizenship v MZYRI [2012] FCA 1107
Appeal from:	MZYRI v Minister for Immigration & Anor [2012] FMCA 396
Parties:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP v MZYRI and W J BLICK, IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER**
File number:	NSD 607 of 2012
Judge:	**JAGOT J**
Date of judgment:	16 October 2012

Catchwords:	**MIGRATION** – whether independent merits reviewer misunderstood, misconstrued or failed to consider first respondent's claims – "essential and significant" Convention reasons pursuant to s 91R *Migration Act 1958* (Cth)
Legislation:	*Migration Act 1958* (Cth) *1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees*
Cases cited:	*Dranichnikov v Minister for Immigration & Multicultural Affairs* (2003) 197 ALR 389; [2003] HCA 26 *Minister for Immigration and Multicultural Affairs v Sarrazola* (1999) 95 FCR 517; [1999] FCA 1134 *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533; [2002] HCA 7 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 *Rajaratnam v Minister for Immigration & Multicultural Affairs (2000)* 62 ALD 73; [2000] FCA 1111 *SHKB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 545 *SZATE v Minister for Immigration* [2004] FMCA 532 *SZCBT v Minister for Immigration & Multicultural Affairs* [2007] FCA 9

SZJRI v Minister for Immigration & Citizenship (2008) 103 ALD 176; [2008] FCA 1090

SZQJH v Minister for Immigration and Citizenship [2012] FCA 297

Date of hearing:	7 August 2012
Date of last submissions:	24 September 2012
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords

Number of paragraphs:	40
Counsel for the Appellant:	Mr G T Johnson SC and Mr B Kaplan
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Solicitor for the First Respondent:	Allens Arthur Robinson

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	

GENERAL DIVISION	NSD 607 of 2012

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	MINISTER FOR IMMIGRATION AND CITIZENSHIP Appellant
AND:	MZYRI First Respondent W J BLICK, IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER Second Respondent
JUDGE:	JAGOT J
DATE OF ORDER:	16 OCTOBER 2012
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the first respondent's costs of the appeal as agreed or taxed.

Note: Settlement and entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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AND:	MZYRI First Respondent W J BLICK, IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER Second Respondent

JUDGE:	JAGOT J

DATE:	16 OCTOBER 2012
PLACE:	SYDNEY

REASONS FOR JUDGMENT

THE APPEAL

1 This is an appeal by the Minister for Immigration and Citizenship (**the Minister**) against orders of the Federal Magistrates Court of Australia declaring that the second respondent, an independent merits reviewer of the first respondent's application for a protection visa, erred in law in recommending to the Minister that the first respondent not be recognised as a person to whom Australia has protection obligations under the *1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees* (the **Refugees Convention**) (*MZYRI v Minister for Immigration & Anor* [2012] FMCA 396).

2 There are five grounds of appeal each relating to the same factual substratum and the way in which it was dealt with by the independent merits reviewer, as well as the conclusions the primary judge reached in that regard. The appeal grounds may be summarised as challenges to the conclusions of the primary judge that the independent merits reviewer misunderstood, misconstrued or failed to consider one or more of the first respondent's claims and thereby failed to make findings which had to be made in order to deal with the first respondent's claims. As a result of discussion during the course of the hearing I also granted the first respondent leave to file and serve a further notice of contention and for both parties to make additional submissions in that regard. By the notice of contention the first respondent contends that the decision of the primary judge should be upheld on the ground that, in the circumstances of the first respondent's claims and the independent merits reviewer's findings, the independent merits reviewer was bound to consider whether the first respondent had a well-founded fear of persecution by reason of his being perceived to be a non-believer but failed to consider that matter.

3 To understand these grounds of appeal and contention it is necessary to explain the first respondent's claims, how they were resolved by the independent merits reviewer, and the conclusions reached by the primary judge.

background

Overview

4 The first respondent was born in Afghanistan and is a Hazara and Shi'a Muslim. He arrived in Australia by boat on 15 April 2010 and was given an entry interview on 20 April 2010. On 8 July 2010 the first respondent requested a refugee status

assessment. He was interviewed by a delegate of the Minister on 10 July 2010. The first respondent was notified on 27 September 2010 that he had been assessed as not being owed protection.

5 On 7 October 2010 the first respondent sought review of the refugee status assessment by an independent merits reviewer. A hearing took place on 13 May 2011. On 5 September 2011 the Department of Immigration and Citizenship notified the first respondent that his application for review had been unsuccessful. On 20 September 2011 the first respondent applied to the Federal Magistrates Court for judicial review of the independent merits reviewer's decision. The first respondent filed an amended application for review on 20 January 2012. The primary judge delivered his reasons for judgment on 30 April 2012 upholding the first respondent's claims of legal error by the independent merits reviewer.

The refugee status assessment

6 The first respondent stated in his claims to the delegate that around 12 years ago the United Nations (**UN**) came to his local area bringing oil, lentils and other food. The first respondent's family ate the food and were called infidels by the local people because the food they were consuming was "haram" (religiously prohibited). The local people were also Hazara and Shi'a Muslims. The first respondent stated that the local people attacked his father one day and beat him to death. A few days later the same people came to his family's house and took the documents for their land. The first respondent stated that he believed his family's imputed support for the UN and Western aid was an excuse to take his family's land. His family went to the local authorities but they were corrupt and did not help them.

7 The first respondent claimed that if he were to return to Afghanistan he would be persecuted by those who killed his father on the basis of his Hazara ethnicity and Shi'a religion, his membership of the particular social groups of returnees and/or Western returnees, and his imputed pro-Western political opinion. He submitted that the authorities would be unable or unwilling to protect him from such harm by reason of his Hazara ethnicity and Shi'a religion.

8 The delegate found that the first respondent did not have a well-founded fear of persecution and as such was not a person to whom Australia owes protection obligations.

The independent merits review

9 The independent merits reviewer noted that:

(1) The first respondent said that when the Taliban took over his area the UN also came. The UN needed a guide so they asked his father. The local people accused his family of becoming infidels because of this and killed the first respondent's father, threatening also to kill the rest of the family (at [14]).

(2) When the first respondent was about 15 years old UN food aid came to the area. The locals did not want to consume this food because it was not halal and was

banned for religious reasons. His family consumed the food and were called infidels as a result. One day people from the village (also Shi'as and Hazaras) came and attacked his father, killed him and a few days later returned and took the documents relating to their land. They told the family they could not live there any more. The first respondent believes this was an excuse to expropriate them. Although they complained to the local authorities, no-one helped them and the first respondent believes there may have been corrupt connections between the authorities and the people who carried out the attack (at [15]).

(3) In his refugee status assessment (referred to as **RSA**) interview the first respondent said that the land dispute had been going on for some time (at [17]).

(4) The first respondent's mother sent him to Iran to his older brother who was already there as she feared for his safety as the oldest male member of the family remaining at home (at [18]).

(5) In about 2000, the first respondent's brother returned from Iran to their home village, where he had a wife and children. At the entry interview the first respondent said that this was to try to get the rest of the family and move them to Iran. In his statutory declaration he said his brother went back to try to find out who was responsible for killing their father (at [20]).

(6) Several months later the older brother was hit by a car and killed. The family does not know who was responsible but believes it was the same people who were responsible for the father's death, who knew the brother was making inquiries with the authorities about it (at [21]).

(7) The first respondent fears that if he returns to his home district he will be killed like his father and brother (at [28]).

10 The first respondent made further statements in an interview with the independent reviewer, which the reviewer summarised in his reasons as follows:

40. The [first respondent] explained that the person who took his family land when he was about 15 was a resident of the village, one [T] who the first respondent described as a commander and who, he said was under the control of the [governor] mentioned in his statutory declaration.

41. The [first respondent] said that Commander [T], a Hazara, was still in the village and occupying the family's land. [T] was still an associate of [the governor].

42. Asked why he feared harm from these people so long after his father and brother were killed, the first respondent said that if he returned to Afghanistan they would think that he intended to reassert ownership of the expropriated land and would set out to kill him.

43. He said, however, that if he went back it would not be to reclaim the land or to find out about his father. He would just want to live there. This would be impossible because [T] would use the local people to find and kill him.

…

45. I put it to the [first respondent] that action that might be taken in order to prevent him reclaiming his land would not necessarily be for a Convention reason of race, religion or political opinion. He repeated that he feared being killed if he returned.

11 In a further submission to the independent merits reviewer it was claimed that the first respondent had a well-founded fear of persecution if he were required to return to Afghanistan on two grounds, leaving aside his Hazara ethnicity and his being a Shi'a Muslim (which were also claimed to found his well-founded fear of persecution). First, by reason of the first respondent's imputed political opinion as he and his family are open opponents of two powerful and influential local commanders, Commanders D and T (the **commanders**). Second, by reason of the perception that the first respondent is a non-believer arising from: – (i) his father's work for the UN and associated perceptions about his father and family being non-believers, being the perceptions held by and reflected in accusations made by people in the first respondent's village to that effect, and (ii) his status as a Hazara Shi'a returnee to Afghanistan from Iran and the West after a protracted 13 year absence (constituting the first respondent as a member of a particular social class). The independent merits reviewer referred to these claims at [49] of his reasons as follows:

The first respondent fears that if he were forced to return to Afghanistan there is a real chance he would be seriously harmed for the following reasons:

- The first respondent's imputed political opinion as he and his family are openly opposed to Commander [D] and Commander [T], both of whom are powerful and influential Commanders in the … province.

- The perception that the first respondent is a non-believer on account of:

o The accusations made by people in his village that the family were non-believers and must be killed on account of his father's work with the UN and the perception that his father was a non-believer (religion); and

o His status as a Hazara Shi'a returnee from Iran and/or Western returnee who will be returning to Afghanistan after a protracted 13 year absence from the country (membership of a particular social group).

…

12 The independent merits reviewer continued (at [51]) as follows:

The submission argued that [T] and his men perceive the first respondent and his family to be non-believers and that the first respondent's brother's inquiries about his father's murder and the seizure of the land were seen as a threat to the power and influence of Commander [D] and Commander [T].

13 The independent merits reviewer stated at [55] that the submission on behalf of the first respondent also said that the first respondent had instructed the agent that if returned to Afghanistan he would "attempt to seek justice for the murder of his father and brother and reclaim his family's stolen land".

14 In a section of the reasons entitled "Findings and Reasons" the independent merits reviewer said (at [65]) that he accepted that the first respondent is who he says and is from where he claims. The reviewer also accepted, amongst other things, that the first respondent's father was killed and his family evicted from their land following the father taking action that could have been perceived by local people as contrary to their religious beliefs and supportive of the UN. The independent merits reviewer noted inconsistencies in the first respondent's evidence on what he would do on returning to Afghanistan (either just return and not inquire about his family's land or why his father was killed or return and seek justice for his father and brother and seek to reclaim the family's land). The independent merits reviewer accepted that the most likely explanation for these inconsistencies is the fact that the first respondent is "fearful of returning to Afghanistan, reluctant to face up to the possibility that he will have to, and confused about what he would do in that event", with the consequence that the inconsistencies did not affect the first respondent's overall credibility.

15 In dealing with the question – is there a real chance that the first respondent will be harmed for a Convention reason if he is returned – the independent merits reviewer dealt with the issue "imputed political opinion, non-believer" including as follows:

(1) The independent merits reviewer (at [100]) said that:

The proposition advanced on the [first respondent's] behalf by his agent can be summarised as follows:

- Local people formed the view that the [first respondent's] father and his family were opposed to their religious and political beliefs;

- The murder of his father and seizure of the family land were the direct results of this perception;

- [T], a Hazara who occupied the land at the time and still does, is a powerful local commander who is under the control of [D], a Hazara described by various sources as a strongman in [the] province who is responsible for many human rights abuses;

- The [first respondent] would be at risk of Convention-related harm from [T] and/or [D] if he were to return to reclaim the land. [T] would see him as holding similar religious and political opinions and demonstrating opposition to those of [T]/ [D];

- [T]'s association with [D] would mean that nowhere in Afghanistan would be safe for the [first respondent].

(2) The independent merits reviewer continued:

101. I accept the [first respondent's] account of the killing of his father.

102. The Migration Act (s 91R(1)(a)) provides that Article 1A(2) of the Convention does not apply in relation to persecution for one or more of the reasons mentioned in the Article unless that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution.

103. The threshold question, then, is whether the people responsible at the time were just using the father's behaviour as an excuse for a land grab, or whether the religious and political aspects were the essential and significant reasons for their actions. If the former, then even if the [first respondent] on return were at risk of harm from, or instigated by, [T] it could not logically be attributed to any other factors than [T]'s desire to retain the family land and/or avoid retribution for the murder of the [first respondent's] father.

104. In considering this, I attach weight to the [first respondent's] comment in his statutory declaration that: *I believe this was an excuse to take our land from us.* The [first respondent] repeated this in the IMR interview. He also mentioned in the RSA interview that the land dispute had been going on for some time.

105. At the IMR interview the [first respondent] said that [T] and the "[governor]" mentioned in his statutory declaration were working together. He did not, however, assert any motivation beyond the wish to seize and occupy the family land. This was a claim made by the agent during closing submissions and later in the second written submission.

106. I have also taken note of the sources in relation to [D], referred to in the second agent submission. It would appear from these that [D]'s activities, sometimes in association with local commanders, included dispossession and seizure of Hazara lands on a fairly wide scale – although there are no recent reports of such activities.

107. For example one source, the 2003 UNHCR report *Land Issues Within the Repatriation Process of Afghan Refugees* relates that:

in sub-district 8 and 10 of Kabul City, a number of Hazara families from [location], have claimed that persons affiliated to two major commanders [TA] and [D] had occupied their houses and land.

108. Certainly, [D] comes across as a political player - in the 1990s he is reported as negotiating a surrender to the Taliban in [location]. There is also a recent biographical summary of one of [D]'s wives [M], an Afghan politician, which says

[M] is married to [D], a strong man and warlord in [the] Province. [M] is said to be "controlled" by her husband.

109. But the sources adduced by the agent do not support the view that in dispossessing Hazaras [D] or his collaborators had an agenda beyond simple self interest.

110. I do not accept, therefore, that political or religious motivations were the essential and significant reasons for the actions of [T] in instigating the murder of the [first respondent's] father and the consequent illegal occupation of the family land, as claimed in the agent's second submission.

(3) The independent merits reviewer then considered the relevance of the death of the first respondent's brother when he returned to Afghanistan and the harassment of his mother leading to her departure for Iran. The reviewer concluded:

114. There is a clear nexus, therefore, between the harassment and the land dispute.

115. I do accept that the [first respondent] would be at risk of harm from [T] if he returned to Afghanistan, and particularly if he returned to [the village] to investigate his father's murder and try to reclaim the land. Were he to return, [T], [D] or their collaborators may seek to persecute him. However, I find that the essential and significant reasons for harming the [first respondent] would not be religion or politics, but the reasons of self-interest and criminality that operated earlier.

116. Accordingly, having regard to the available information, I find that the [first respondent] does not have a well-founded fear of persecution on return to Afghanistan in the reasonably foreseeable future on any of the following grounds:

- as a non-believer;
- for an imputed political opinion arising from his father's assistance to the United Nations;
- for an imputed political opinion in opposition to [T]/ [D];
- on account of his profile or his family's profile.

The primary judge's reasoning

16 By an amended application (the **amended application**) filed in the Federal Magistrates Court of Australia on 20 January 2012 the first respondent sought review of the independent merits reviewer's recommendation to the Minister. Only grounds 1 and 3 of that application are relevant for present purposes:

1. The second respondent committed jurisdictional error by failing to address, or inadequately addressing, one of the claimed bases for the applicant's fear of persecution.

(a) The applicant claimed that if he was forced to return to Afghanistan there was a real chance he would be seriously harmed for a Convention reason, being the perception that the applicant is a non-believer.

(b) The second respondent failed to consider whether a well-founded fear of persecution based on a person's perceived status as a "non-believer" or infidel falls within the definition of a refugee under Article 1A(2) of the Refugees Convention (Convention).

(c) The second respondent further failed to consider whether the applicant was perceived to be a non-believer or infidel by persons within Afghanistan.

(d) The second respondent further failed to consider the applicant's claim that there was a real chance that the applicant would be seriously harmed or persecuted because of the perception that he was a non-believer or infidel.

3. In the alternative to ground 2 above, the second respondent committed jurisdictional error by asking the wrong question or incorrectly applying the law.

17 In relation to ground 1, the primary judge noted at [31] of his reasons for decision that:

…the applicant's evidence clearly presented a Convention nexus to the death of his father, both in his original claims and also clearly at his interview by Mr Blick in the passages which I have emphasised above. He clearly referred to the people who killed his father as being motivated by "thinking that he is trying to bring Christian religion too", and "probably he will bring the different religion too". It is clear that he understood the religious opinions of the murderers of his father to have provided their sole reasons for killing his father, when he said: "it's not a good reason for me, but it was a good reason for those people".

18 His Honour went on to find at [33]-[37]:

33. I am unable to find in Mr Blick's "Findings and Reasons", any discussion by Mr Blick indicating he did not accept that part of the applicant's evidence. However, he implicitly decided that it was not necessary for him to address this evidence in his findings and reasons, when characterising the fears of the applicant for returning to the location of his father's murder, and the location of the continuing harassment of his mother at the hands of the local villagers. Rather, it is clear that Mr Blick's finding at paragraph 110, which I have extracted above, was focused entirely upon the motives of the local commander when taking advantage of the religious prejudices of the local villagers, and not upon the motives of the murderers of the applicant's father, which had presented to the local leader a means of obtaining the family's property.

34. Counsel for the Minister sought to explain the absence of discussion and findings as to the motives for the harms inflicted and feared from the local villagers, and to persuade me that Mr Blick had not failed to address essential integers or elements in the applicant's refugee claims. He submitted that the applicant's

evidence raised only a claim that the villagers were motivated solely by reason of subservience to the local leader, that is, that they were non-thinking tools of his personal greed, so that their religious opinions were immaterial to the events which unfolded. However, in my opinion, to understand the applicant's evidence in that way would be to misconstrue his evidence in a manner which would amount to error of law. I do not consider that such an interpretation of the applicant's refugee claims would have been open to Mr Blick, if he indeed had interpreted the applicant's evidence that way.

35. Moreover, I cannot read his report as treating the applicant's evidence about the opinions and actions of the local villagers in that way. Rather, in my opinion, Mr Blick probably reasoned that the underlying motives of the murderers and the agents of direct persecution of the applicant's family had become superseded, or subsumed, or rendered irrelevant, by the actions of personal greed of the village leader, who had taken advantage of the villagers' religious beliefs and their murder of the applicant's father, to seize the family property. As I shall explain below, this reasoning itself reflects an error of law raised by Ground 3.

36. However, it is enough to uphold Ground 1, for me to conclude from the omission of critically important discussion and findings from Mr Blick's report in relation to an essential element in the applicant's refugee claims, that Mr Blick has misunderstood or misconstrued the applicant's refugee claims, in so far as they clearly presented a claimed religious nexus between the actions of his father in support of the UN agencies and the ensuing perception of the local villagers that the father and his family were infidels and enemies of the local population, which in turn directly resulted in the persecution of the family. He clearly addressed only the applicant's fears in relation to the actions of the local commander, without examining the claimed Convention reasons for the actions of the true persecutors.

37. In my opinion, therefore, Ground 1 is established in its essential argument.

19 After setting out the relevant authorities, the primary judge made the following findings in relation to ground 3 at [53]-[56]:

53. Using the language of the above authorities, it appears to me on a fair reading of Mr Blick's reasoning between paragraphs 102 and 110, that Mr Blick has made an error of law of a similar type, by assuming that there is simple dichotomy between the motives of the beneficiary of the initial persecution of the family and the underlying religious reasons motivating the villagers to persecute the family and to enable the oppressive conduct of the local commander. Or using Selway J's language, Mr Blick assumed that there was "an antithesis" between the commander's taking the applicant's family's land and exploiting the villagers' continuing hostility to his family, and the underlying religious and political circumstances which allowed his conduct to happen. These errors then led him to treat as irrelevant, a consideration of the causative implications of the perceptions of the local villagers that the applicant's father and his family were supporters of infidels and a menace to their society.

54. Although paragraph 103 of Mr Blick's report might appear ambiguous in relation to such an error, his subsequent reasoning can only fairly be understood on the basis that he has made the error of law contended under Ground 3. The identification of

this error then explains Mr Blick’s failure to address in his report the important elements in the applicant’s refugee claims which support Ground 1. In short, in my opinion Mr Blick erroneously thought that the Convention definition, as embellished by s.91R(1)(a), did not require him to make further findings as to the motivations of the murderers and the relevance of the attitudes of the local village to the religious opinions of the applicant’s family, once he found that C was not personally motivated by a Convention reason when occupying the family land.

55. The error also, in my opinion, is reflected in Mr Blick’s reasoning which failed to appreciate the significance of the applicant’s statement that the villagers’ perceptions of his father provided “an excuse to take our land from us”. In my opinion, in the context of his other evidence, the applicant could only have been understood as saying that the villagers’ religious attitudes had provided the means by which the local commander had been able to aggrandise himself for his own personal benefit. This statement should have been considered by Mr Blick as providing, rather than denying, evidence of a relevant Convention nexus to the harms which had followed from their perceptions and their murderous consequences.

56. I am, therefore, for all the above reasons persuaded that an error of law coming within Ground 3 of the application has been made out.

DISCUSSION

20 The notice of appeal sets out five grounds of appeal as follows:

1. Contrary to his Honour’s findings, the Second Respondent did not misunderstand, misconstrue or fail to consider any claim that he was jurisdictionally obliged to consider.

2. Contrary to his Honour’s findings, any claim of a well-founded fear of persecution for a Convention reason by local villagers was, at least implicitly, rejected by the Second Respondent, including at [115]-[116] of his reasons. The Second Respondent considered that no Convention reason supplied the essential and significant reason for any harm that may be faced by the First Respondent from local villagers.

3. Contrary to his Honour’s findings at [53]-[54], the Second Respondent did not:

(a) assume any “simple dichotomy” or “antithesis” between the motives of the local villagers and the motives of the Commander; or

(b) fail to make findings as to whether the motives of the local villagers gave rise to a well founded fear of persecution for a Convention reason by those villagers.

4. Contrary to the approach of the Federal Magistrate at [55], it was a matter for the Second Respondent how to weigh the evidence referred to in that paragraph, including its significance, and there was no error of law revealed by the Second Respondent’s treatment of that evidence.

5. The Second Respondent did not fail to ask the correct question, or misapply the law, as alleged in ground 3 in the court below, including particular (d) to that ground.

21 Although articulated as separate grounds the real issue in this appeal is whether the primary judge's analysis at [53]-[56] of his reasons for judgment was correct.

22 The Minister submitted that:

(1) The first respondent made no reference to Commander T or Commander D at the entry interview stage or before the delegate. It was not until the independent merits review that submissions were made suggesting that those who perceived members of the first respondent's family to be infidels or non-believers were Commander T and the men working for him.

(2) The reviewer was therefore entitled to conclude on the basis of these statements that it was only through the leadership of Commander T that the local people became instruments of serious harm. The reviewer was entitled to approach the first respondent's claim on the basis that Commander T was the "controlling mind".

(3) The reviewer was mindful of the role played by the local people and referred to the first respondent's claim regarding the local people as originally put to the Minister's delegate at [15] of his reasons. The reviewer also referred to the first respondent's claims regarding the local people at [98] and [100] of his reasons. The reviewer's references to "the people responsible" and the "collaborators" at [103] and [109] should be read in context as including the local people.

(4) The reviewer found at [110] that T acted in instigating the murder of the father and the illegal occupation of the family land; T was therefore, at least implicitly, the controlling mind that governed any serious harm inflicted by the local people. The reviewer was entitled to take this approach having regard to the way in which the first respondent's claim was developed during the merits review process.

(5) The reviewer found at [115] that, while the first respondent may be persecuted by "[T], [D] or their collaborators" were he to return to Afghanistan, there were no essential and significant Convention reasons for this persecution. The essential and significant reasons for harming the first respondent would not be religion or politics but the reasons of self-interest and criminality that operated earlier. In referring to "their collaborators" the reviewer was referring to the local people under the control of T. Accordingly, this finding includes a finding to the effect that any fear on the part of the first respondent of serious harm from the local people had as its essential and significant reason a non-Convention reason of self-interest and criminality.

(6) Consequently, the reviewer concluded at [116] that the first respondent did not have a well-founded fear of persecution on any of the four grounds set out. All of those grounds but the third included the attitudes of the local people.

(7) The reviewer may have considered the motives of the local people to be subsumed by, or essentially identical to, the motives of T. However, the reviewer was entitled to do that given the way in which the first respondent's case developed. The

reviewer ultimately made findings as to the essential and significant reasons for the persecution in relation to T as well as T and his collaborators, including the local people. The reviewer therefore expressly addressed the first respondent's claim in relation to the local people.

23 Based on a fair reading of the reasons of the independent merits reviewer as a whole I do not accept the Minister's argument. I consider the analysis of the primary judge to be correct.

24 In *Dranichnikov v Minister for Immigration & Multicultural Affairs* (2003) 197 ALR 389; [2003] HCA 26 Gummow and Callinan JJ stated at [24] that "[t]o fail to respond to a substantial, clearly articulated argument relying upon established facts" is to fail to accord natural justice. Two substantial and clearly articulated arguments were put to the reviewer in the written submissions of the first respondent's agent: first, the claim that the first respondent fears harm on the basis of an imputed political opinion as he and his family are openly opposed to Commander D and Commander T, and second, the claim made in relation to the perception that the first respondent is a non-believer. The independent merits reviewer identified these claims (at [49]). At [65] and [101] of his reasons the independent merits reviewer accepted the first respondent's account of the circumstances in which the killing of his father occurred. The first respondent's two distinct arguments were therefore underpinned by an established set of facts. The independent merits reviewer, however, failed to deal with the second claim as a claim in and of itself and impermissibly treated that claim as subsumed into the first claim. It was impermissible to do so because the claims as clearly articulated included that the local people were themselves willing to do what they did (kill the first respondent's father, steal his family's land, act against the first respondent at the behest of the Commanders and, by implication, to harm the first respondent should he return) because they perceived the first respondent to be a non-believer and supporter of the UN.

25 The impermissible chain of reasoning commences at [51] where the independent merits reviewer wrongly characterises the claims as claims that "[T] and his men" perceive the first respondent and his family to be non-believers whilst omitting reference to the local people themselves as holding such perceptions. The chain of reasoning continues at [100] where the first two bullet points in that paragraph refer to the views of local people that the first respondent and his family were opposed to the local religious and political beliefs, such beliefs being the direct cause of the murder of the first respondent's father, but the fear of harm is expressed in the last two bullet points as coming solely from "[T] and/or [D]", with no reference to the local people. When [103]ff of the reasons of the independent merits reviewer are read in this context it becomes apparent that:

(1) The independent merits reviewer did establish a conceptual dichotomy between the local people just being interested in a land grab and the local people acting for political and/or religious reasons. The independent merits reviewer characterised these two options as opposites so that if the former were true the latter could not exist. The inclusion of the word "just" in [103] (which I accept means "only" in this context) does not avoid the problem. It exposes the impermissible dichotomy. The local people may well have wanted both the land and been motivated to get it by their perceptions of the religious and political beliefs of the first respondent's family.

(2) Giving weight to the first respondent's comment that he believed that it (presumably, the accusations of the local people) was just an excuse to take the land, as the independent merits reviewer did at [104], also reinforces the impermissible dichotomy. Willingness to use and act on the perceptions founding the accusations may be said to be an "excuse" but it does not mean that the perceptions were not causative of the actions.

(3) At [105] the independent merits reviewer said that the first respondent did not assert any motivation beyond the wish to seize and occupy the family's land. This is true if the Commanders alone are considered – but is not true about the local people. The first respondent specifically claimed that his father was killed because he was perceived to be opposed to the local people's religious and political beliefs. The independent merits reviewer, moreover, accepted this account of the reasons why the first respondent's father was killed.

(4) The same proposition of Commander D and his collaborators acting purely in their own self-interest is made at [109] which, again, makes no sense if the evidence of the motivations of the local people as a source of potential harm in and of themselves is considered.

(5) At [110] the motivations of Commander T alone are considered as being unrelated to any political or religious considerations.

(6) And again at [115] there is reference to the risk of harm the first respondent would face if he returned to his village, being a risk said to come only from the Commanders or their collaborators.

26 Section 91R of the *Migration Act 1958* (Cth) does not assist the Minister. Section 91R(1) provides that:

For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct.

27 The Minister submitted that the independent merits reviewer did not assume that there was a simple dichotomy or antithesis between self-interest and criminality on the one hand and Convention reasons on the other but correctly appreciated that he had to identify whether any Convention reason was the essential and significant reason for any serious harm of which the first respondent faced a real chance. The Minister submitted that the reviewer's reasoning clearly demonstrates that he was not satisfied that the essential and significant reason for the harm feared by the first

respondent from local people and the Commanders was a Convention reason. The independent merits reviewer made findings as to the motives of the local people and the primary judge erred in holding to the contrary at [53]-[54] of his reasons.

28 This submission is confounded by the reasons of the independent merits reviewer.

29 At [51] of the primary judge's reasons, his Honour said "[t]he need to examine the underlying circumstances which have allowed a person to participate in and benefit from acts of persecution has been pointed to in a series of cases in the Federal Court concerning fears of extortion. As it has been pointed out, the activities of extortionists may or may not have underlying Convention nexus, and it is an error of law to overlook the need to examine the underlying reasons for the refugee claimant being targeted for extortion by its principal beneficiary". The primary judge referred to the decision of *Rajaratnam v Minister for Immigration & Multicultural Affairs* (2000) 62 ALD 73; [2000] FCA 1111 (***Rajaratnam***), also relied on by the first respondent in this Court, where Finn and Dowsett JJ said at [46] and [48]:

[46] As this Court has indicated on several occasions, care needs to be taken when considering whether extortion has been practised upon a person for a Convention reason: see eg *Minister for Immigration and Multicultural Affairs v Sarrazola* (1999) 166 ALR 641 at 645-646. The need for this is apparent enough. In the usual case of extortion the extorting party will be acting for a self-interested reason (ie to gain an advantage for himself or herself, or for another). In this sense, his or her interest in the person extorted can always be said to be personal. What needs to be recognised, though, is that the reason why the extorting party has that interest may or may not have foundation in a Convention reason. The extorted party may have been chosen specifically as the target of extortion for a Convention reason, or may have become the subject of extortion because of the known susceptibility of a vulnerable social group to which he or she belongs, that social group being identified by a Convention criterion. Or, conversely, the person may have been selected simply because of his or her perceived personal capacity to provide the particular advantage sought and for no other reason or purpose.

…

[48] In a particular setting, then, extortion can be a multi-faceted phenomenon exhibiting elements both of personal interest and of Convention-related persecutory conduct. For this reason the correct character to be attributed to extorsive conduct practised upon an applicant for refugee status is not to be determined as of course by the application of the simple dichotomy: "Was the perpetrator's interest in the extorted personal or was it Convention related?" In a given instance the formation of the extorsive relationship and actions taken within it can quite properly be said to be motivated by personal interest on the perpetrator's part. But they may also be Convention-related. Accordingly any inquiry concerning causation arising in an extortion case must allow for the possibility that the extorsive activity has this dual character.

30 The primary judge also referred to the decisions of *SZJRI v Minister for Immigration & Citizenship* (2008) 103 ALD 176; [2008] FCA 1090 and *SHKB v*

Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 545. In *SHKB* at [12] Selway J referred to *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533; [2002] HCA 7 (***Singh***) in which the claimant had been involved in the killing of a police officer as a member of a political organisation. The Administrative Appeals Tribunal found that the claimant was not owed protection obligations under the *Refugees Convention* because pursuant to Article 1F(b) there were serious reasons for considering that the respondent had committed a serious non-political crime outside Australia. Gleeson CJ stated at [19]-[20]:

[19] …On the respondent's account, which the Tribunal evidently accepted, the police officer became a "target" because he had tortured a KLF [Khalistan Liberation Force] member. That can be described as a form of vengeance or retribution, but, if it were accepted that one of the political objectives of the KLF was to resist oppression of Sikhs, it is not vengeance or retribution of a kind that is necessarily inconsistent with political action in the circumstances which the respondent claimed existed in India. For the Tribunal to say, even by reference to the facts of the case, that such retribution cannot be political, was wrong.

[20] The very fact that the Tribunal found it unnecessary to form a view as to the political nature of the KLF, or as to whether it was a terrorist organisation, demonstrates that it was proceeding upon a view that there is a necessary antithesis between violent retribution and political action. That was an error of law.

31 In *SHKB* Selway J noted at [12]:

In my view the attempt by the Tribunal to draw a distinction between Convention based reasons and retribution involves a jurisdictional error. In [*Singh*] the High Court held, although in a slightly different context, that where an act of revenge or retribution is derived from or arises out of a political act or campaign then the act or revenge or retribution may be a political act…

The Tribunal in this case would seem to have fallen into the same error. In this case the Tribunal would seem to have proceeded on the view that there was an antithesis between retribution on the one hand and political or racial persecution on the other. At the very least there was a further step that was necessary in the Tribunal's reasoning - the Tribunal was required to determine whether or not it was satisfied that those seeking retribution against the applicant were doing so as an aspect of a broader political or racial campaign to seize farm lands near Durban, or were doing so for reasons unrelated to that campaign. If the Tribunal was satisfied that the retribution formed an aspect of such a broader campaign then it would follow that fear of such an act of retribution was a fear based upon a Convention reason. In my view the Tribunal has fallen into the same error as that identified in *Singh*.

32 The Minister noted that *Rajaratnam* and *Minister for Immigration and Multicultural Affairs v Sarrazola* (1999) 95 FCR 517; [1999] FCA 1134 were decided prior to the introduction of s 91R and must be read in light of that provision. The Minister also submitted that *SHKB* can be distinguished on the basis that the impugned finding of the Refugee Review Tribunal in that decision revealed no consideration of the "essential and significant" test in s 91R. Similarly, *SZJRI* does not mention s 91R and turned on its own facts. The Minister also relied on *SZATE v Minister for Immigration*

[2004] FMCA 532, where Federal Magistrate Barnes noted at [20] that “[t]he words `essential and significant' recognise that there may be more than one reason but that any Convention reason must reach this threshold”.

33 I accept that s 91R requires that the Convention reason reach the threshold of being the essential and significant reason for the persecution. It is also apparent that s 91R(1) recognises that there may be more than one “essential and significant” Convention reason for the persecution. What s 91R does not legitimise, however, is the process of reasoning of the independent merits reviewer in the present case. This is because nothing in s 91R permits a failure to consider a clearly articulated claim about a source of harm capable of being an “essential and significant reason” for Convention related persecution on the basis of an unstated assumption or belief that such a source of harm is subsumed into some other source of harm or that, by reason thereof, there is a simple dichotomy between persecution by reason of self-interest and for a Convention reason or reasons.

34 It is apparent from [103] of the reasons that the independent merits reviewer concluded that if the local people were merely using the father’s connection to the UN as an excuse to kill him and take the land then there was no logical possibility of demonstrating that there was also a Convention reason behind the killing of the father and the taking of the land. This is also seen at [115] of the reasons, where the independent merits reviewer stated that “the essential and significant reasons for harming the [first respondent] would not be religion or politics, *but* the reasons of self-interest and criminality that operated earlier” (my emphasis). The dichotomy is false. The conclusion about the self-interest of the local people, moreover, reflects an assumption that their reasons for acting (otherwise accepted by the independent merits reviewer to be their beliefs about the religious and political beliefs of the first respondent’s family – see at [100] and [101]) have no existence separate from the self-interest of the Commanders. Having accepted, in terms, the first respondent’s claim that his father was killed because local people formed the view that the first respondent’s father and his family were opposed to the local people’s religious and political beliefs, the independent merits reviewer could not thereafter fail to consider the first respondent’s claims of a well-founded fear of persecution at the hands of the local people for religious and political, that is Convention, reasons.

35 I do not accept that reaching this conclusion involves reading the independent merits reviewer’s reasons “minutely and finely with an eye keenly attuned to the perception of error” (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at [30]). As the primary judge said at [54] of his reasons, [103] is ambiguous. However, I also agree with the reasoning of the primary judge that despite the ambiguity the reasoning of the independent merits reviewer as a whole can be understood only on the basis of an assumed “dichotomy between the motives of the beneficiary of the initial persecution of the family and the underlying religious reasons motivating the villagers to persecute the family and to enable the oppressive conduct of the local commander” (at [53]). I also agree with the first respondent that the error is exposed further by the way in which the independent merits reviewer treated the first respondent’s statement that the local people’s perception of his father was “an excuse to take our land from us”. As the primary judge said at [55], if the independent merits reviewer had not operated on the basis of the impermissible

dichotomy, this statement could not have been considered as indicating that the local people were solely motivated by reasons of self-interest.

36 In the context of the reasons as a whole I also do not accept that the “collaborators” of the Commanders should be understood to be a reference to the local people as a whole who perceive the first respondent to be a non-believer and supporter of the UN. More relevantly, I do not accept that it was reasonably open to the independent merits reviewer to assume that the motivations of the Commanders (self-interest) are the same as and exhaustive of the motivations of the local people. I also do not accept that the independent merits reviewer was entitled to approach the first respondent’s claim on the basis that the Commanders were or are the controlling mind responsible for any harm inflicted by the local people. No finding to that effect was made or should be implied.

37 As Stone J stated in *SZCBT v Minister for Immigration & Multicultural Affairs* [2007] FCA 9 at [26] (approved by Rares J in *SZQJH v Minister for Immigration and Citizenship* [2012] FCA 297 at [36]):

“The phrase ‘beneficial construction’, as used in *Wu Shan Liang* [*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259] has a specific meaning, and was certainly not intended to mean that any ambiguity in the Tribunal’s reasons be resolved in the Tribunal’s favour. Rather, the construction of the Tribunal’s reasons should be beneficial in the sense that the Tribunal’s reasons would not be over-zealously scrutinised, with an eye attuned to error. In this sense a ‘beneficial’ approach to the Tribunal’s reasons does not require this Court to assume that a vital issue was addressed when there is no evidence of this and, indeed, the general thrust of the Tribunal’s comments suggest that the issue was overlooked.

38 The reasons here disclose that the vital issue of the first respondent’s fear of harm from the local people was overlooked. Accordingly, I agree with the analysis of the primary judge as set out at [53]-[56] of his Honour’s reasons.

39 Although it is not necessary to consider the notice of contention it is appropriate to record my view that the notice is a more complicated version of the conclusions the primary judge in fact reached. The essence of the notice of contention is that the independent merits reviewer failed to consider the first respondent’s claim of a well-founded fear of persecution by reason of his being perceived to be a non-believer. The primary judge at [54] found that the independent merits reviewer failed to consider the first respondent’s claim of a well-founded fear of harm for local people by reason of the religious opinions of the first respondent’s family, which is another way of saying the perceptions of the first respondent as a non-believer. Accordingly, the notice of contention does not add anything.

40 For these reasons the appeal should be dismissed.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot.

Associate:

Dated: 16 October 2012