

# FEDERAL COURT OF AUSTRALIA

NAZO v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA  
1173

**NAZO AND ORS v MINISTER FOR IMMIGRATION AND MULTICULTURAL  
AND INDIGENOUS AFFAIRS**

**N 33 of 2004**

**ALLSOP J**

**8 SEPTEMBER 2004**

**SYDNEY**

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

N 33 of 2004

BETWEEN:           NAZO  
  
                          FIRST APPLICANT  
  
                          NAZP  
  
                          SECOND APPLICANT  
  
                          NAZQ  
  
                          THIRD APPLICANT  
  
                          NAZR

FOURTH APPLICANT

NAZS

FIFTH APPLICANT

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL  
AND INDIGENOUS AFFAIRS

RESPONDENT

JUDGE: ALLSOP J

DATE OF ORDER: 8 SEPTEMBER 2004

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The first and second applicants being the husband and wife pay the respondent's costs.
3. The time for filing and serving a notice of appeal is extended up to and including the whole of Wednesday, 6 October 2004.

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

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BETWEEN: NAZO  
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AND INDIGENOUS AFFAIRS  
RESPONDENT

JUDGE: ALLSOP J

DATE: 8 SEPTEMBER 2004

PLACE: SYDNEY

## REASONS FOR JUDGMENT

1 This is an application under the *Judiciary Act 1903* (Cth) made by four persons: a husband and wife and two children. The application is for judicial review pursuant to s 39B of the *Judiciary Act* of the decision of the Refugee Review Tribunal made on 5 November 2003.

2 The applicant who appeared today is the husband and father in the family. He said from the bar table, with the assistance of an interpreter, that his wife and children asked him to appear for them today. Mr Bromwich, on behalf of the Minister, did not require that statement to be put to me on oath in the witness box. I am prepared to accept the statement of the first applicant that he appears not only for himself but for his wife and children. His children attend school and are in years 12 and 8. I granted leave for the applicant to represent not only himself but his wife and children and I also made an order that the applicant act in effect as *guardian ad litem* for the purposes of the litigation.

3 The application in its terms claims that the Refugee Review Tribunal did not take into account all relevant information when making its decision. The grounds of the application then rely upon a passage from Professor Hathaway's text as to the need not to impugn a claimant's story simply because of vagueness or inconsistencies. It is stated in the application that, in effect, an overly stringent approach was taken to credibility in this case by the Tribunal. Another ground of error by the Tribunal was an asserted error of fact when the Tribunal made a finding as to the applicant moving back to Pune where he was born in 2001. In making this finding of fact it is asserted without substantiation that there was an error of law.

4 The third ground of the application was that the Tribunal failed to consider the fact that the applicant was having problems with communication and therefore was not able to provide actual evidence to support his claims. The ground then identifies that the applicant had many problems flowing from stress and trauma prior to his arrival in Australia and that he was still experiencing this due to the fact that he had to leave his wife behind which was not also taken into account. The inappropriateness of this ground to the applicant is clear from the surrounding circumstances of the application; that the application was made by the applicant for the benefit not only of himself, but also of his wife and children within this country. I do not say any more about how the application came to be in that form.

5 The fourth ground of the application is that the applicant is aggrieved by the decision of the Tribunal because he honestly believes that he will be a

prime target for persecution if he returns to India, and that the authorities will not be willing to help him. He also believes that relocating within India will not lessen the persecution he will suffer if he goes back.

6 The fifth ground of the application relies on five reports of Amnesty International from 1999 to 2003 which are said to support findings favourable to the applicant. The ground does not specifically identify any error of law in the Tribunal, but presumably it is stated that the Tribunal in some fashion committed a jurisdictional error in failing to come to a result conformable with the Amnesty International reports there identified.

7 I have begun by identifying these grounds of the application before describing the circumstances of the applicant and his family to reveal the limited nature of the attack made on the decision. The only grounds identified in the application which could support a conclusion that there had been jurisdictional error were, first, the assertion that all relevant considerations had not been taken into account and, secondly, a claim that the Tribunal had so misunderstood its task as to inappropriately approach the assessment of factual material before it.

8 If it be the case that the Tribunal has displayed an approach to fact finding which discloses such a stringent approach to the questions of credibility it might conceivably be said that the findings of fact generally made were such that the satisfaction or lack of satisfaction reached by the Tribunal was either irrational or capricious. It is therefore necessary to understand the approach of the Tribunal.

9 The applicants, as I have said, are a married couple and their two children. They arrived in Australia from India in January 2003. The claims for protection are and were based substantially upon the fear which the male first applicant said he had in relation to returning to India. The substance of the husband's claim was to fear persecution by reason of being a Muslim and in particular by reason of being an active member of the Muslim Student Union in years past. He claimed to have suffered a great deal of persecution and acts of harassment at the hands of Hindus and to have undergone systematic harassment at the hands of the authorities. He said that he was in real danger as was his family at the hands of Hindu extremists backed by the authorities and was unable to seek protection. He said that if he and his family were to be returned to India he would be killed by Hindu fundamentalists on religious grounds. This is a summary of the claims and evidence set out on pages 4 to 8 of the Tribunal's reasons.

10 In its findings and reasons on pages 8, 9, 10 and 11 of its reasons the Tribunal took the following approach. It accepted the applicant's claim that he had been targeted by extortionists in Mumbai. The Tribunal, however, was not satisfied that various other claims were credible including claims that the extortionists were fundamentalists, that he had been targeted by Hindu extremists who had beaten him and broken into his house because he assisted poor Muslims, that he had been harassed by authorities and by Hindus in India due to his religion and his involvement with the Mumbai

Muslim Student Federation. The Tribunal was also not satisfied that he could not relocate within India to avoid the harm he anticipated in Mumbai and Pune because of his restriction in language to Hindi and Urdu.

11 The Tribunal expressly acknowledged the need to take a liberal approach when assessing refugee status and the need to give an applicant the benefit of the doubt. Nevertheless, the Tribunal found that the applicant did not present a truthful account of his circumstances in India either in his written submissions to the Department or his oral evidence to the Tribunal. The approach of the Tribunal is set out on pages 9 and 10 of its reasons which were in the following terms:

The Tribunal does not consider it appropriate to take an overly stringent approach to questions of credibility. The Tribunal must be sensitive to special considerations which may arise out of the difficulties of proof which applicants face, problems of communication and mistrust, and problems flowing from the experience of trauma and stress prior to arrival in Australia. Professor Hathaway cautioned decision-makers that “a claimant’s credibility should not be impugned simply because of vagueness or inconsistencies in recounting peripheral details” (James Hathaway, 1991, *The Law of Refugee Status*, Butterworths Canada Ltd, pp 85-86).

Nevertheless, although it is important to adopt a liberal attitude when assessing refugee status it should not lead to an uncritical acceptance of all claims: see for example, *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 per Beaumont J at 451, *Sivalingam v Minister for Immigration and Multicultural Affairs (MIMA)* (unreported, Federal Court of Australia, O’Connor, Branson & Marshall JJ, 17 September 1998), *Aruliah v MIMA* (unreported, Federal Court of Australia, Marshall J, 1 October 1997) at 6, *Sellamuthu v MIMA* (1999) 90 FCR 287 per Hill J at para 40.

The Handbook on Procedures and Criteria for determining Refugee Status, suggests that it is “frequently necessary to give the applicant the benefit of the doubt... [but only after]...all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant’s general credibility. The applicant’s statements must be coherent and plausible, and must not run counter to generally known facts: (Handbook on Procedures and Criteria for Determining Refugee Status, 1992, United Nations High Commissioner for Refugees, Geneva, para 203 and 204).

The Tribunal finds that the applicant did not present a truthful account of his circumstances in India either in his written submission to the Department or in his oral evidence to the Tribunal. The applicant made broad vague claims that in India he was targeted by Shiv Sena, Hindu extremists, the authorities and the government, due to his religion and religious/political activities. At the hearing he also stated that he was targeted by Hindu extremists because he assisted poor Muslims and because he was a Muslim. The applicant was unable to provide any meaningful information to support the claims. The Tribunal cannot be satisfied by the applicant’s broad generalisations that he was targeted by any individual or group due to his religion or his activities with the Muslim community. It is the Tribunal’s view that if the applicant was indeed targeted by Hindus extremists, the government or the authorities, in India he would be able to provide meaningful details to enhance the application. The

Tribunal does not accept as credible the applicant's claim that he was targeted by Shiv Sena, Hindu extremists, the authorities or the government, in India due to his religion or religious/political activities.

The Tribunal has accepted the applicant's claim that he was targeted by extortionists in Mumbai, but it finds that this matter is beyond the scope of Refugees Convention. The applicant stated that he was targeted because he was Muslim and due to his activities in the Muslim community. However, as already indicated above, the applicant has no evidence on which to draw such conclusions and indeed he appears to know nothing regarding the persons who extorted money from him. The applicant's knowledge regarding perpetrators is so limited that the Tribunal cannot be satisfied that the applicant was targeted by extortionists in India for a Convention reason.

The Tribunal considered the applicant's claim that he fled the country to avoid further extortion demands. The Tribunal has already decided that this matter is beyond the scope of the Refugees Convention. However, even if the Tribunal accepts that the applicant is at risk of harm by criminals in Mumbai, albeit not for a Convention reason, it finds that the applicant's difficulties in India were and continue to be restricted to Mumbai and the nearby places by relocating elsewhere in India (Ranhawa v Minister for Immigration, Local Government and Ethnic Affairs (1194) 52 FCR 437). The Tribunal considered the applicant's claim that he cannot relocate in India because he only speaks Hindi and Urdu. The Tribunal is not satisfied that the claim is credible. The applicant is fluent in two relatively common languages in India which enabled him to conduct business in New Delhi, Bangalore and Madras, before he came to Australia. The Tribunal is satisfied that the language will not prevent the applicant from relocating successfully within India. The Tribunal is satisfied that the applicant has the skills, knowledge and ability to relocate in India.

Accordingly the Tribunal finds that [NAXO] does not have a well-founded fear of persecution in India for reasons of religion or any other Convention reason.

12 The approach of the Tribunal is one that significantly rests upon assertion of disbelief. Some recognition is given to the need to express in a *priori* terms why this view was reached. To a degree, I am troubled by the broad sweep of the approach of the Tribunal. However, the Tribunal appears to have directed itself to the task at hand, has reminded itself of the need to take care in relation to credibility findings and in all the circumstances the material before the Tribunal, which I have examined, and the reasons of the Tribunal are not such as to allow me to come to the view that the Tribunal has not faithfully followed the task set out for itself on page 9 of the reasons as to which see above.

13 Further, the finding of fact in relation to relocation was not in any way coherently attacked by the applicant.

14 The applicant was ordered on 8 March to provide written submissions five working days prior to the hearing of the application. No such submissions were filed. The applicant had six months to prepare his case and the case of his wife and children. Before me today the applicant, in effect, asked for an

adjournment to allow him to prepare argument. He said that he has been sick and has had an operation. In all the circumstances of the matter having been set down for six months those matters are not sufficient, in my view, to warrant the adjourning of this case.

15 In oral submissions before me the applicant reiterated his view which he had placed before the Tribunal: that he needs protection in this country. He also said that his children were studying here and their return to India would disrupt and disturb their education. Those latter matters, whilst I appreciate their importance to a father, are not matters which I can take into account in assessing whether or not the Tribunal fell into jurisdictional area.

16 The other basis of possible jurisdictional error identified in the application is the failure to take into account relevant considerations. Understood as it should be, in terms of the failure by the Tribunal to take into account matters made mandatory by the *Migration Act* and otherwise under the law of this country, I see no basis to conclude that there was a failure to address the issues before the Tribunal.

17 The complaint of the applicant and his family with the decision of the Tribunal is entirely a factual one. That does not mean that there is no possibility of jurisdictional error. A tribunal can betray a misunderstanding of its task, or betray other error of a jurisdictional character, by the way it finds facts in a case. Here, whilst, as I have said, the strength of the credibility findings in the context in which they were made is to a degree troubling, I am not persuaded that the Tribunal has not faithfully undertaken the task that it said it was undertaking.

18 For that reason and by reason of the relocation findings I see no basis to conclude that there has been jurisdictional error on the part of the Tribunal. For those reasons I will dismiss the application with costs.

19 I extend the time for filing and serving a notice of appeal up to and including 6 October 2004.

20 Therefore, the orders I make are:

1. The application be dismissed.
2. The first and second applicants being the husband and wife pay the respondents costs.
3. The time for filing and serving a notice of appeal is extended up to and including the whole of Wednesday, 6 October 2004.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for



Judgment herein of the  
Honourable Justice Allsop.

Associate:

Dated: 15 September 2004

Applicant appeared in person with the assistance of an Urdu interpreter.

Counsel for the  
Respondent: Mr R Bromwich

Solicitor for the  
Respondent: Australian Government Solicitor

Date of Hearing: 8 September 2004

Date of Judgment: 8 September 2004