FEDERAL COURT OF AUSTRALIA

SZMZL v Minister for Immigration and Citizenship [2009] FCA 971

MIGRATION – jurisdictional error – failure to sufficiently address two out of three reasons for a claimed well-founded fear of persecution – impact of failure on consideration of reasonableness of relocation within country of nationality

Held: appeal allowed

Migration Act 1958 (Cth) ss 36(2), 65, 91R, 411(1)(c), 412, 415(1) and 420

Re RUDDOCK (in his capacity as Minister for Immigration and Multicultural Affairs); Ex parte APPLICANT S154/2002 (2003) 201 ALR 437 cited

Minister for Immigration and Multicultural Affairs v Rajalingam (1999) 93 FCR 220 referred to

Kalala v Minister for Immigration and Multicultural Affairs (2001) 114 FCR 212 referred to

Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004 (2006) 231 CLR 1 referred to

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152 cited

NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs and Another (2005) 222 CLR 161 referred to

VBAO v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 233 CLR 1 cited

Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 cited

SZATV v Minister for Immigration and Citizenship [2007] 233 CLR 18 referred to

Chan v The Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 referred to

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225 referred to

Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 222 CLR 1 referred to

Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 referred to

SZMZL and SZMZM v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL

NSD 434 of 2009

GRAHAM J

17 AUGUST 2009

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	
GENERAL DIVISION	NSD 434 of 2009

BETWEEN:	SZMZL First Appellant SZMZM Second Appellant
AND:	MINISTER FOR IMMIGRATION AND CITIZENSHIP

	First Respondent REFUGEE REVIEW TRIBUNAL Second Respondent

JUDGE:	GRAHAM J
DATE OF ORDER:	17 AUGUST 2009
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders of the Federal Magistrate of 29 April 2009 be set aside.

3. The decision of the Refugee Review Tribunal made on 15 October 2008 and handed down on 4 November 2008 be quashed.

4. A writ in the nature of mandamus issue, directed to the second respondent requiring the second respondent to determine according to law the application for review made to it on 30 July 2008.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA	
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GENERAL DIVISION	NSD 434 of 2009

BETWEEN:	SZMZL First Appellant SZMZM Second Appellant
AND:	MINISTER FOR IMMIGRATION AND CITIZENSHIP First Respondent REFUGEE REVIEW TRIBUNAL Second Respondent

JUDGE:	GRAHAM J
DATE:	17 AUGUST 2009
PLACE:	SYDNEY

REASONS FOR JUDGMENT

The relevant principles

1 Decisions upon the grant or refusal of protection visas are made in the first instance by the Minister, his or her powers normally being exercised by one or other of the Minister's delegates for the purposes of s 65 of the *Migration Act 1958* (Cth) ('the Act'). Section 65 of the Act relevantly provides:

'65(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

…

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; …

…

is to grant a visa; or

(b) if not so satisfied, is to refuse to grant the visa.'

2 A decision to refuse to grant a visa is a RRT-reviewable decision within the meaning of the Act (see s 411(1)(c)). Section 412 makes provision for applications for review of RRT-reviewable decisions. Under s 415(1) of the Act, the Refugee Review Tribunal ('the Tribunal') may, for the purposes of the review of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by the Act on the person who made the decision. Section 420 of the Act provided for the process whereby the Tribunal would exercise its powers as follows:

'420(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case.'

3 The purpose of a provision such as s 420(2) was explained by Gummow and Heydon JJ, with whose reasons Gleeson CJ agreed, in *Re RUDDOCK (in his capacity as Minister for Immigration and Multicultural*

Affairs); Ex parte APPLICANT S154/2002 (2003) 201 ALR 437 at [56] ('Applicant S154/2002') as follows:

'[56] … The purpose of a provision such as s 420(2) is to free bodies such as the tribunal from certain constraints otherwise applicable in courts of law which the legislature regards as inappropriate. Further, … administrative decision-making is of a different nature from decisions to be made on civil litigation conducted under common law procedures. There, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have considered it in their respective interests to adduce at trial.'

4 The relevant criterion for the grant of a protection visa to which s 65(1)(a)(ii) refers is to be found in s 36(2) of the Act, which, relevantly, for present purposes, provides as follows:

'36(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(b) a non-citizen in Australia who is the spouse … of a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa.'

The Refugees Convention means the Convention Relating to the Status of Refugees, done at Geneva on 28 July 1951, and the Refugees Protocol means the Protocol Relating to the Status of Refugees, done at New York on 31 January 1967. Hereafter I will refer to the Refugees Convention as amended by the Refugees Protocol as 'the Convention.'

5 Plainly, satisfaction under s 65(1) is not to be addressed by deciding where the truth lies on the balance of probabilities. Whilst cases such as *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR

220 ('Rajalingam') refer to the 'civil standard of proof' being not irrelevant to the process of fact-finding by the Tribunal and cases such as *Kalala v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 212 ('Kalala') refer to the Tribunal being obliged to consider matters on 'a standard less than the balance of probabilities' (see at [25]). I doubt the utility of addressing matters on which the Tribunal has to be 'satisfied' by a standard which is related to the standard of proof required in adversarial civil litigation.

6 As has been said many times, proceedings in the Tribunal are not adversarial, but, rather, inquisitorial. The Tribunal is not in the position of a contradictor of the case being advanced by an applicant. The Tribunal member conducting the relevant inquiry is not an adversarial cross-examiner, but an inquisitor obliged to be fair (see per Gummow and Heydon JJ in *Applicant S154/2002* at [57]; see also *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at [40]).

7 The Tribunal conducting an inquisitorial hearing is not obliged to prompt and stimulate an elaboration which an applicant chooses not to embark on. It is for an applicant to advance whatever evidence or argument he or she may wish to advance before the Tribunal, and for the Tribunal to decide whether the relevant claim has been made out (see per Gummow and Heydon JJ in *Applicant S154/2002* at [57] – [58]).

8 Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of pre-judgment (per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [48]).

9 In *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs and Another* (2005) 222 CLR 161 ('NAGV'), the High Court considered s 36(2) of the Act in the form in which it existed prior to the passage of the *Border Protection Legislation Amendment Act 1999* (Cth). Relevantly, for present purposes, Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ said at [31]-[33]:

'31 … a perusal of the Convention shows that, Art 33 apart, there is a range of requirements imposed upon Contracting States with respect to refugees some of which can fairly be characterised as "protection obligations". Free access to courts of law (Art 16(1)), temporary admission to refugee seamen (Art 11), and the measure of religious freedom provided by Art 4 are examples.

32 … Section 36(2) does not use the term "refugee". But the "protection obligations under [the Convention]" of which it does speak are best understood as a general expression of the precept to which the Convention gives effect. The Convention provides for Contracting States to offer "surrogate protection" in the place

of that of the country of nationality of which, in terms of Art 1A(2), the applicant is unwilling to avail himself. That directs attention to Art 1 and to the definition of the term "refugee".

33 Such a construction of s 36(2) is consistent with the legislative history of the Act. This indicates that the terms in which s 36 is expressed were adopted to do no more than present a criterion that the applicant for the protection visa had the status of a refugee because that person answered the definition of "refugee" spelled out in Art 1 of the Convention.'

(Footnotes omitted)

10 Article 33(1) of the Convention, to which reference was made in *NAGV*, provides:

'1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

11 The question of who answers the description of a 'refugee' is relevantly determined by Art 1 of the Convention, which relevantly provides:

'A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

…

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

12 The Convention does not apply in relation to persecution for one or more of the reasons mentioned unless, by virtue of s 91R of the Act:

'(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.'

13 Instances of 'serious harm' were provided in s 91R(2) of the Act. They include:

'(a) a threat to the person's life or liberty;

(b) significant physical harassment of the person;

(c) significant physical ill-treatment of the person;

(d) significant economic hardship that threatens the person's capacity to subsist.'

14 The requirements of s 91R(1) of the Act provide a manifestation of a statutory intent to define persecution, and therefore serious harm, in strict and perhaps narrower terms than an unqualified reading of any unadapted Art 1A(2) of the Convention might otherwise require.

The section is not concerned exclusively with or applicable to events in the past, rather than current or future circumstances. The Convention is framed to ensure that persons will not be exposed to persecution, as defined by Australian law, if they were to return to the country which they have left. If any threat or relevant risk is not current or prospective, then there can be no well-founded fear of persecution (per Callinan and Heydon JJ in *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 233 CLR 1 ('VBAO') at [49]-[50]).

15 The word 'threat' as used in s 91R(2)(a) of the Act connotes 'risk' in the sense of danger or hazard (per Gummow J in *VBAO* at [18]). It is

indicative of a likelihood of harm (per Gleeson CJ and Kirby J in *VBAO* at [1] and [3]).

16 The definition of 'refugee' in the Convention is couched in the present tense, and the text indicates that the position of the putative refugee is to be considered on the footing that that person is outside the country of nationality. The reference then made in the text to 'protection' is to 'external protection' by the country of nationality, for example, by the provision of diplomatic or consular protection, and not to the provision of 'internal protection' provided inside the country of nationality from which the refugee has departed (per McHugh and Gummow JJ in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 ('Khawar') at [62], cited with approval by Gummow, Hayne and Crennan JJ in *SZATV v Minister for Immigration and Citizenship* [2007] 233 CLR 18 ('SZATV') at [16]).

17 The definition of 'refugee' presents two cumulative conditions, the satisfaction of both of which is necessary for classification as a refugee. The first condition is that a person be *outside* the country of nationality 'owing to' fear of persecution for a relevant Convention reason, which is well-founded both in an objective and a subjective sense. The second condition is met if the person who satisfies the first condition is *unable* to avail himself or herself 'of the protection of' the country of nationality. This includes persons who find themselves outside the country of their nationality and in a country where the country of nationality has no representation to which the refugee may have recourse to obtain protection. The second condition also is satisfied by a person who meets the requirements of the first condition and who, for a particular reason, is *unwilling* to avail himself or herself of the protection of the country of nationality; that particular reason is that well-founded fear of persecution in the country of nationality which is identified in the first condition (per McHugh and Gummow JJ in *Khawar* at [61], cited with approval by Gummow, Hayne and Crennan JJ in *SZATV* at [16]; see also *Chan v The Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 ('Chan'), *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 ('Applicant A') at 283 and *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 ('S152') at [19]).

18 It is well settled since *Chan* and *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 ('Guo') at 571-572 and 596 that the requirement that the 'fear' be 'well-founded' adds an objective requirement to the examination of the facts and that this examination is not confined to those facts which form the basis of the fear experienced by the particular applicant (per Gummow, Hayne and Crennan JJ in *SZATV* at [18]). A fear is 'well-founded' where there is a real substantial basis for it (see *Guo* at 572).

19 The so-called 'relocation principle' was considered by Gummow, Hayne and Crennan JJ in *SZATV* at [9] - [22]. At [11] their Honours observed that any notion of 'relocation' and of the 'reasonableness' thereof is to be derived, if at all, as a matter of inference from the more generally stated provisions of the definition of 'refugee' contained in the Convention. At [24], their Honours said:

'24 … What is "reasonable", in the sense of "practicable", must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality.'

20 In *SZATV* the Tribunal had considered that the appellant could reasonably have relocated within Ukraine. The effect of the Tribunal's stance was that the appellant in that case was expected to move elsewhere in Ukraine and live 'discreetly' so as not to attract the adverse interest of the authorities in his new location lest he be further persecuted by reason of his political opinion. The High Court ordered that the decision of the Tribunal be quashed and that the appeal from the decision of the Federal Court on an appeal from the Federal Magistrates Court of Australia be allowed.

Application of relevant principles to the present case

21 The first applicant is a non-citizen in Australia who is a citizen of India. The second appellant is a non-citizen in Australia who is the spouse of the first appellant. She does not contend that she is a person to whom Australia has protection obligations under the Convention.

22 The appellants arrived in Australia on 4 March 2008 having left India on the previous day. They each travelled on passports issued by the Indian government and entered Australia relying upon three month visitor visas. On 17 April 2008 the appellants applied for Protection (Class XA) visas. On 3 July 2008 a delegate of the Minister decided that the application of the appellants for protection visas should be refused as their claims did not meet the requisite criterion for a protection visa set out in s 36(2) of the Act.

23 On 30 July 2008 the appellants applied for review of the Minister's delegate's decision to the Tribunal. On 18 August 2008 the Tribunal wrote to the appellants' representative advising that it had considered the material before it but it was unable to make a favourable decision on that information alone. In the circumstances, the appellants were invited to appear before the Tribunal to give oral evidence and present arguments on 17 September 2008. That hearing was rescheduled for 3 October 2008 and on that day the first appellant alone appeared. The first appellant is fluent in English and can read and write English. He has been accompanied to Court today by an interpreter who is able to interpret from the English language into Malayalam and from Malayalam into English but it has been unnecessary for the interpreter to become involved in assisting the first appellant except in a minor respect. The hearing before the Tribunal occupied a little over one hour.

24 No record of what transpired in the Tribunal hearing was placed before the Federal Magistrates Court of Australia, to which further reference will be made shortly. The Tribunal's decision of 15 October 2008, affirming the decisions of the Minister's delegate not to grant the appellants Protection (Class XA) visas, was handed down on 4 November 2008.

25 On 28 November 2008 the appellants filed an application in the Federal Magistrates Court of Australia seeking constitutional writ relief in respect of the decision of the Tribunal. The original application contained two grounds as follows:

'1. The RRT misunderstood my Convention claims advanced- NABE v MIMA (No2) [2004] FCAFC 263

2. The RRT did not comply with its obligation under section 424A of the Migration Act 1958.'

26 On 2 April 2009 a further document was filed in the Federal Magistrates Court of Australia entitled 'Additional Grounds of Application'. The additional grounds were expressed in the following terms:

'In addition to the Grounds set out in the Application filed 28 November 2008 the Applicants rely upon the following grounds:

1. The Tribunal failed to determine the application made to it.

<u>Particulars</u>

a) At par. 58 the Tribunal correctly determined the basis of the application before it as fear of persecution on the basis of religion, political opinion and membership of a particular social group.

b) At par. 60 the Tribunal purported to determine the issue of political belief.

c) The Tribunal however failed to determine the issues of religion and membership of a particular social group in relation to the harm feared by the Applicants.

d) In addition to the extent that membership of a particular social group is related to religious belief the Tribunal in determining the Applicants could relocate to another part of India failed to consider the impact of that relocation on their membership of a particular social group (see below).

2. The Tribunal in determining the Applicants could relocate to another part of India failed to consider at all or fully the reasonableness and effect of that relocation.

<u>Particulars</u>

a) The Tribunal found that Kerala had the largest Christian population in India.

b) The Tribunal failed to consider and assess the effect on the Applicants of relocation within India to parts that have a smaller or minimal Christian population, and in addition the impact on the Applicants of being separated from people having similar Christian beliefs and practices and/or different social groupings.'

27 It would appear that at a directions hearing before the Federal Magistrates Court of Australia on 9 February 2009 the court referred the applicants to the court's legal advice scheme for free legal advice. It would appear that thereafter Additional Grounds of Application to which reference has been made were drawn by one of the panel advisers, Mr John Atkin of counsel. The application for constitutional writ relief came before a Federal Magistrate on 3 April 2009, the relevant decision thereon being delivered on 29 April 2009. The orders of the learned Federal Magistrate were :

'1. The proceeding before the Court, commenced by way of application filed 28 November 2008, is dismissed.

2. The Applicants pay the costs of the First Respondent fixed in the amount of $5,000.'

28 From that decision an appeal has been brought to this Court by Notice of Appeal filed 18 May 2009. The grounds of appeal before this Court were expressed succinctly as follows:

'1. The RRT did not consider all the practicalities for my wife and me in relocating in India.

2. The RRT decision is affected by jurisdictional error.

3. The RRT failed to deal with the all elements (sic) *of my Convention claims which I advanced to the RRT (my religion and my membership of a particular social group).*

I am unrepresented. I will file and serve an amended notice of appeal and written submissions when required by this Court.'

29 Somewhat unusually in matters such as this, the Court was assisted by the provision of an **APPELLANTS' WRITTEN SUBMISSION** filed 7 August 2009. Those submissions were signed by both the first appellant and the second appellant, although the first appellant alone has appeared on the hearing of the appeal.

The Court has also been assisted by the filing on 12 August 2009 of a detailed written submission on behalf of the first respondent. It would appear that the Appellants' Written Submission was not served upon the legal representatives for the first respondent, although a copy of it was made available during the course of the present hearing.

30 The appellants' application for Protection (Class XA) visas revealed that they were members of an ethnic group described as 'Other Backward Community' and that their religion was 'Latin Catholic.' Each of the appellants comes from the State of Kerala, although it would appear that the home town of the appellants was at Kazhakoottam, which may not be typical of the whole of the State of Kerala.

31 The first appellant's claim to having a well-founded fear of persecution for a Convention reason referred to his membership of the Kerala Student Union, being a student wing of the Indian National Congress. He referred to the opposition to the student wing to which he belonged, being the Student Federation of India, which was a wing of the Communist Party of India (CPI(M)).

32 The first appellant referred to his student political activity in the period 1985 – 1987. He asserted that he had been assaulted by members of the Student Federation of India in his student days.

33 The first appellant also referred to the fact that he had spent a considerable period of time working in Abu Dhabi. It would appear that he worked there for some eight years, from 1997 to 2005, with irregular contact with his family back in India. He apparently married the second appellant in 2000 and they appear to have two children, born in 2003 and 2005. When the first appellant returned from the Gulf area in 2005, he established, so he says, a small bakery business in the names of himself and his wife, although he said that his father was the legal owner of the business even though it had been financed and managed by him.

34 At this stage, the CPI(M) was in power in Kerala. It would appear that union workers who were members of CPI(M) made claims upon the first appellant for preferential employment for union members who were members of the CPI(M). The first appellant claimed that he ran into difficulties with the CPI(M) and that 'thugs demanded my workers to stop working for me and I was badly beaten by them.' The first appellant asserts that he was warned that he should not report the matter to the police.

35 The first appellant also referred to a public well located in front of a church at which he worshipped in Kazhakoottam. It would appear that Hindus were engaged in constructing a memorial in that location and according to the first appellant were filling the well with concrete or mud, however one describes the relevant material. The first appellant asserted that he was:

'… severally (sic) *assaulted by the Hindu supporters in this conflict. As a backward Christian community I faced lose* (sic) *of income, inability to run the business and threats from CPI (M) union …".'*

He decided to leave India, 'as escalating violence by the CPI(M) against me (sic).' He further said, 'My opportunity to run a business and to survive was denied due to my political profile.'

36 He proceeded to indicate that the Kerala police and the CPI(M) were in power and were slow to protect him from his problems. He said that he was vulnerable to persecution in the state of Kerala as long as CPI(M) was in power.

37 The '**CLAIMS AND EVIDENCE**' section of the Tribunal member's Statementof Decision and Reasons recorded demands made upon the first appellant by the CPI(M) and local council members in about March 2007 who demanded that he provide them with funding for their party, which he refused. He claimed before the Tribunal member that the CPI(M) members and a local council member, Rajan, threatened his workers, and he was 'badly beaten'. He says that he was warned not to go to the police (see [34] above).

38 The Tribunal also recorded the first appellant's claim 'that there were clashes between Christian and Hindu extremists along with the SNDP members and supporters and he was severely assaulted by the Hindu supporters in this conflict' (see [35] above).

The first appellant claimed that the Kerala police could not protect him from these problems. He asserted that as long as the CPI(M) was in power in the state of Kerala, he was vulnerable to persecution.

The 'Country Information' to which the Tribunal member referred included a note that India was a secular state with no official religion. It also referred to the fact that Kerala was the State which had the highest concentration of Christians in all of India. It was said that, according to government figures, Christians comprised 19 per cent of the population of Kerala whilst the national average was 2.3 per cent.

39 At [30] of the Tribunal member's Reasons for Decision, she said:

'30. Recent reports of attacks on Christians in Kerala include the murder of a Christian man by suspected extremists, and the vandalising of a new Gospel Centre. Both of these incidents took place in February 2007 …'

40 In relation to relocation in India, the Tribunal said at [38]:

'38. Generally, citizens are free to relocate from one state of India to another. The available information suggests that, although Christians are generally able to live a normal life in India, this has been affected by an increase in Hindu fundamentalism in recent years. …'

Later, at [39], the Tribunal member referred to further country information which included:

'39. … the available information suggests that religious minority groups, (including Christians) are being increasingly targeted by Hindu extremist groups and that the central government sometimes does not act effectively to counter such attacks, thereby contributing to the view that these violent acts may be committed with impunity. …'

41 In the '**FINDINGS AND REASONS**' section of her Statement of Decision and Reasons, the Tribunal member said:

'58. The applicant's claims, as they emerged from the hearing, are that he fears persecution on the basis of his religion, political opinion and membership of a particular social group. He claims he has been subject to persecution in the past because of this and fears persecution should he return to India in the future.'

42 I would observe that in his original protection visa application the first appellant did not expound a detailed case of persecution founded upon his membership of a particular social group, being that of wealthy returnees from the Gulf region. He also did not detail the fact that his wife was said to have been a candidate for political office.

43 The learned Federal Magistrate who dealt with the application for constitutional writ relief said at [20]:

'20. The Tribunal found the First Applicant was not a witness of truth.'

It does not seem to me that the Statement of Decision and Reasons of the Tribunal member warranted this conclusion. There may have been aspects of the Statement of Decision and Reasons which were consistent with an embellishment by the first appellant of his case, but there were many aspects of the claims made by the first appellant which were plainly accepted by the Tribunal.

44 Another seemingly unusual feature of her Honour's Reasons for Judgment in this case was her extensive use of expressions such as 'A fair reading of the Tribunal's decision record suggests…'. Her Honour used this expression, or a similar one at [32], [33], [36], [53] (twice), [64] (twice), [67] and [72] (twice).

It seems to me that her Honour used this expression as she did because there were deficiencies in the Statement of Decision and Reasons of the Tribunal member which warranted careful consideration and holes in the reasoning of the Tribunal member, as recorded.

45 I am conscious of the fact that a Court should not view the reasons of a Tribunal member with an eye for detail which is alert to minute error. However, I am concerned that, having identified the claims made by the first appellant and recorded by the Tribunal member at [58] of her Statement of Decision and Reasons (see [41] above), the Tribunal member appears to have addressed only one of those claims in any detail. As the Tribunal member said, the first appellant feared persecution firstly on the basis of his religion, secondly on the basis of his political opinion, and thirdly on the basis of his membership of a particular social group.

46 The headings which follow in the Tribunal member's Statement of Decision and Reasons under the heading **FINDINGS AND REASONS** were: '*Political opinion*', '*Harm*', '*State Protection*', and '*Relocation*'. Somewhat curiously, there were no headings '*Religion*' and '*Membership of a Particular Social Group*' after '*Political opinion*'.

47 The learned Federal Magistrate employed her expression 'fair reading of the Tribunal's decision record' at [33] when her Honour said:

'33. The Tribunal accepted that the First Applicant may have suffered some discrimination because of his wealth and the fact that he owned a business, however, was not satisfied that the First Applicant was targeted by reason of his political opinion. Neither did the Tribunal accept that the First Applicant was beaten because of his political opinion. A fair reading of the Tribunal's decision record suggests that this finding is a rejection of any Convention based persecution of the First Applicant by reason of his membership of a particular social group of wealthy business owners who are also members of the Indian National Congress Party.'

48 It is true that in her Statement of Decision and Reasons, the Tribunal member in her ultimate summary of her findings on the first appellant's claims, dealing with them compendiously, said, at [75]:

'75. Having considered all the issues and the claims made by the applicant individually and cumulatively, and based on the evidence currently before it, the Tribunal is not satisfied that the applicant suffered past persecution or that he faces a real chance of being persecuted now or in the reasonably foreseeable future if he returns to India in relation to his race, his religion, his nationality, political opinion or membership of a particular social group, actual or imputed. The Tribunal is not satisfied, on the evidence before it, that the applicant has a well-founded fear of persecution.'

49 It is clear that the Tribunal was not satisfied that the first appellant was an 'active member of the' Indian Congress Party or that he involved himself in its activities such that opposition party members would target him specifically. It is not surprising, in the circumstances, that at [67], the Tribunal members said:

'67. … the Tribunal does not accept that the applicant was targeted for his political opinion. The Tribunal does not accept that the applicant was beaten because of his political opinion. … The Tribunal finds that the applicant has embellished his claims for the purposes of supporting a protection application and does not accept that he suffered harm amounting to persecution.'

50 Under the heading 'Harm' the Tribunal member said at [65] - [66]:

'65. The Tribunal accepts that whilst Christians form a significant religious minority in Kerala, sectarian and inter-religious violence nevertheless occurs and it is not implausible that the applicant may become a victim or (sic) *random acts of violence in such circumstances. However this would make him a victim of civil disorder or generalised sectarian violence and not necessarily a refugee from persecution.*

66. The Tribunal accepts that the applicant may have been singled out and pressured to employ certain people because he is considered a wealthy man and owns a business. He is also a returnee from the Gulf and also imputed as a wealthy man as a result. The Tribunal accepts that the applicant may have experienced bullying, threats, and extortion in trying to run his business. It accepts that there have been clashes between Hindus and Christians and the applicant may have at some stage witnessed such clashes or been a victim of such clashes.'

51 However, it is apparent from the above that the Tribunal member accepted that the first appellant was a Christian and that inter-religious violence occurred in Kerala. She also accepted that it was 'not implausible' that the first appellant may become a victim of random acts of violence in such circumstances. She further was of the opinion that his victimisation may be as a 'refugee from persecution' which was recognised by her use of the words 'not necessarily' at [65] of her Statement of Decision and Reasons.

52 It is also apparent that the Tribunal member acknowledged that the first appellant was a member of a particular social group, being returnees from the Gulf who were imputed to be wealthy as a result. The Tribunal member accepted that the first appellant may have experienced bullying, threats and extortion in trying to run his business, apparently in the context of him being a member of a particular social group.

53 Unfortunately, the Tribunal member did not record her finding as one of satisfaction or dissatisfaction in relation to the fear of persecution which the first appellant claimed to have experienced by reason of his membership of the particular social group.

54 The Tribunal member then proceeded to find that the first appellant 'may have … been a victim of … clashes [between Hindus and Christians].'

55 Unfortunately, the Tribunal member failed to specifically address the question of whether or not, owing to a well-founded fear of being persecuted for reasons of religion and/or membership of a particular social group, the first appellant was outside the country of his nationality and unable or, owing to such fear, unwilling to avail himself of the protection of India.

56 I am not satisfied that the words of paragraph [75] of the Tribunal member's reasons deal with these issues, given that the words of paragraph [75] are inconsistent, at least in part, with the words of paragraphs [65] and [66]. It is hard to understand how the Tribunal could on the one hand accept that there had been clashes between Hindus and Christians and that the first appellant may have been a victim of such clashes, and, at the same time, not be satisfied that the applicant 'suffered past persecution.'

57 In relation to State protection, the Tribunal member seems to have focused mainly upon the fact that the first appellant did not seek State protection. The answer proffered by the first appellant was that the police would not help him because they were close allies with the CPI(M) and that the police consorted with that political party. It must be recalled that in his original application for a protection visa, the first appellant asserted, as I understood it, that whilst the CPI(M) was in power, the Kerala police were slow to protect persons who experienced the problems and the escalating violence which he asserted.

58 The Tribunal member proceeded to deal with relocation at [73] – [74] of her Statement of Decision and Reasons. She concluded, effectively, that it was reasonable for the first appellant to relocate within India.

59 As previously indicated, what is 'reasonable' in the sense of 'practicable' must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality.

60 If the Tribunal member focused her attention primarily upon the first appellant's claim to refugee status by virtue of his claimed political opinion and failed to address satisfactorily the claims to refugee status based upon his religion and upon his membership of a particular social group, being wealthy returnees from the Gulf (in his case, after spending eight years working in the Gulf) undermines, in my view, the finding made by the Tribunal member on the reasonableness of relocation within India.

61 It may well be that for the reasons proffered by the first appellant, relocation within India was not as simple a matter as it may otherwise have been thought to be. One would have thought that it would be necessary, at the least, to consider the reasonableness of relocating to another state within India where there may also have been claims made on Gulf returnees which might constitute serious harm, in the form of significant economic hardship or physical threats if demands for the payment of money were not met. If extortionate demands were placed upon the first appellant, wherever he lived, because he belonged to the particular social group mentioned, it may be that relocation within India was not a reasonable alternative.

62 In my opinion, the appeal should be allowed, the orders of the Tribunal quashed and a writ of mandamus issued requiring the second respondent to determine the application made on 17 April 2008, according to law.

I certify that the preceding sixty-two (62) numbered paragraphs are a true copy of the Reasons

for Judgment herein of the Honourable Justice Graham.

Associate:

Dated: 27 August 2009

The First Appellant appeared in person.

The Second Appellant did not appear.

Counsel for the First Respondent:	M P Cleary
Solicitor for the First Respondent:	Clayton Utz

The Second Respondent filed a submitting appearance.

Date of Hearing:	17 August 2009
Date of Judgment:	17 August 2009