

# FEDERAL COURT OF AUSTRALIA

**Applicant S1983 of 2003 v Minister for Immigration and Citizenship**

**[2007] FCA 854**

**MIGRATION** – appellant claimed in his protection visa application to fear persecution because he was low caste – discussion at Tribunal hearing as to whether appellant claimed persecution on basis of being a Sindhi or a Dalit (low caste) – whether Tribunal misunderstood distinction between being a Sindhi and a Dalit – whether Tribunal considered appellant’s claim to fear persecution on basis of being a Dalit – whether further evidence permitted to be received on appeal regarding the meaning of the terms Sindhi and Dalit – **Held:** further evidence received on appeal – Tribunal failed to address the claim advanced by the appellant

*Evidence Act 1995 (Cth) s 144*

*Federal Court of Australia Act 1976 (Cth) s 27*

*Migration Act 1958 (Cth) s 91(R)*

Federal Court Rules O 52 r 36

*Camden v Commissioners of Inland Revenue* [1914] 1 KB 641 cited

*CDJ v VAJ* (1998) 197 CLR 172 cited

*Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 cited

*Fodare Pty Limited v Official Trustee in Bankruptcy* [2000] FCA 1721 cited

*MZWVH v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 1016 cited

*State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 cited

**APPLICANT S1983 OF 2003 v MINISTER FOR IMMIGRATION AND  
CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL  
NSD 144 OF 2007**

**BRANSON J  
8 JUNE 2007  
SYDNEY**

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY**

**NSD 144 OF 2007**

**ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA**

**BETWEEN:           APPLICANT S1983 OF 2003  
                          Appellant**

**AND:                 MINISTER FOR IMMIGRATION AND CITIZENSHIP  
                          First Respondent**

**REFUGEE REVIEW TRIBUNAL  
Second Respondent**

**JUDGE:             BRANSON J**

**DATE OF ORDER:   8 JUNE 2007**

**WHERE MADE:      SYDNEY**

**THE COURT ORDERS THAT:**

1.     The appeal be allowed.
2.     The orders made by the Federal Magistrates Court on 18 January 2007 be set aside and in lieu thereof it be ordered that:
  - (a)    an order issue in the nature of *certiorari* quashing the decision of the Refugee Review Tribunal; and
  - (b)    an order issue in the nature of *mandamus* requiring the Refugee Review Tribunal to determine the appellant's application for review of the decision of the delegate of the Minister according to law.
3.     The first respondent pay the appellant's costs in the Federal Magistrates Court and on appeal.

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

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**JUDGE:             BRANSON J**

**DATE:              8 JUNE 2007**

**PLACE:             SYDNEY**

### **REASONS FOR JUDGMENT**

#### **INTRODUCTION**

1           The appellant is a citizen of India who arrived in Australia in 1994 and applied for a protection visa in September 1997. It is a matter of concern that his entitlement to be granted that visa has not yet been finally determined.

2           A delegate of the then Minister for Immigration and Multicultural Affairs in October 1997 refused to grant the applicant a protection visa. This decision was affirmed by the Refugee Review Tribunal. However, the decision of the Tribunal was set aside on judicial review and the matter remitted to the Tribunal for redetermination. The Tribunal, constituted by a different member, again reviewed the decision of the delegate and again affirmed it. The appellant's application to the Federal Magistrates Court for judicial review of this decision of the Tribunal was dismissed. The appellant has appealed to this Court from the judgment of the Federal Magistrates Court.

3           For the reasons set out below I have concluded that the appeal should be allowed.

## CLAIMS MADE AT TIME OF APPLICATION

4 The appellant provided a written statement in support of his application for a protection visa. In that statement he claimed to have been born in Kandivli, Bombay-67 in Maharashtra State, India. He described himself as belonging '*to the Sindhi Community living in the midst of the local Maharashtrians*'.

5 He stated:

*'My father was killed by the Shiv Sena hooligans, the fundamentalist Hindu religious groups who hated me and my families being Sindhi community since we belong to the low caste.'*

After advancing claims of harassment, serious threats and property damage, the statement concluded:

*'I am afraid to go back to India since the Maharashtra police, secret police and Indian authorities cannot protect me.'*

*I do not trust the Indian authorities after all these sad incidents that happened in my life.'*

*I seek asylum in Australia and protection from the Shiv Sena and Hindu fundamentalist people since the Indian government encourages fundamentalist people to kill and eradicate low caste people like me.'*

## DECISION OF DELEGATE

6 The delegate noted that the appellant, a Hindu, claimed to be a member of the Sindhi community in Maharashtra and further claimed that Shiv Sena had killed his father and hated his family, because they '*belong to the low caste*'.

7 The delegate was not satisfied that the appellant had a genuine fear of Convention related persecution if he should return to India. He drew a negative inference from the fact that, despite having been in Australia for almost three years, the appellant did not apply for a protection visa until he was taken into detention as an unlawful non-citizen. The delegate found no evidence that Shiv Sena targeted low caste Hindus/Sindhis and concluded that, if the appellant and his family had suffered at the hands of Shiv Sena, it was not for a Convention reason. The delegate rejected as fanciful the claim that '*the Indian government encourages fundamentalist people to kill and eradicate low caste people*'.

## THE TRIBUNAL HEARING ON REMITTAL

8           The transcript of the Tribunal hearing reveals that the appellant identified himself to the Tribunal as a low caste Sindhi. The Tribunal member then said:

*'I've been provided with a lot of material that refers to the Dalits, you are not a Dalit?'*

After a number of exchanges on this topic, the appellant, through an interpreter, responded:

*'That is the same, Dalit and low caste is the same.'*

When asked to confirm whether he was saying that he was a Dalit, the appellant, as the transcript shows, responded:

*'Yes, Sindhi, low caste Dalit.'*

9           When asked by the Tribunal member about the circumstances of his father's death the appellant replied:

*'The first problem was that we were actually low caste people and we used to – we grew up in the Shiv Kana [sic] community. We were actually not ... welcomed by the community because we were low caste people and we had been facing this problem when my father was alive for many years.'*

10          Later in the course of the hearing the following exchange occurred:

**TRIBUNAL MEMBER:**     *I've done quite a bit of research and I asked our staff to [do] a lot of research for me about the Sindhi community in your area in particular.*

**INTERPRETER:**           *Yes, there is a class system among the Sindhis also.*

**TRIBUNAL MEMBER:**     *Yes, I understand that.*

**INTERPRETER:**           *They have been suffering a lot because of being low caste people.*

**TRIBUNAL MEMBER:**     *I could not find any information in particular that indicated to me that there's widespread persecution and/or harassment of the Sindhi people in your area. Please, this is very important and you need to listen to it. If I don't tell you what I'm going to tell you, you may not*

*have the benefit of some of my findings and that's not fair so you do need to hear what I have to say. In fact there was a report that one of the leaders in the Shiv Sena that ran the party was in fact a Sindhi. I acknowledge that just because I couldn't find reports of persecution that does not necessarily mean there isn't. On the other hand the reports I found did not describe a persecutory picture to me. Now, you've been here for almost 13 years and things have changed in India. What I need to think very carefully about is whether being a Sindhi without more means that there is a real chance of you being persecuted.'*

11 Subsequently the appellant's legal adviser sought to make plain to the Tribunal member that, although the appellant comes from a Sindhi family, his claim to be entitled to a protection visa was not based on his being a Sindhi as such. The legal adviser said there are many castes within the Sindhi community. He explained that although '*Sindhis are seen as outsiders coming from Pakistan*', the appellant's claim to be entitled to a protection visa was based on fear of persecution as a Dalit; that is, as a low caste person.

#### **DECISION OF THE TRIBUNAL**

12 Under the heading '*Findings and Reasons*' the reasons for decision of the Tribunal include the following passage:

*'The applicant arrived in Australia about eleven years ago and subsequently lodged an application for a protection visa claiming persecution on the basis of being a member of the Sindhi community in Maharashtra State. He has now claimed that he is also a Dalit and fears persecution on this basis as well. In the course of the hearing, the applicant contended that being Sindhi and Dalit is essentially the same as both groups are low caste.'*

13 I interpolate that, as [5] above illustrates, a fair reading of the appellant's statement in support of his visa application does not support the conclusion that he claimed persecution on the basis of being a member of the Sindhi community in Maharashtra State. As can be seen from [5] above he claimed that the Shiv Sena hooligans, the fundamentalist Hindu religious groups, '*hated [him] and [his] families being Sindhi community since we belong to the low caste.*' (emphasis added). The delegate whose decision the Tribunal was reviewing had plainly understood that the appellant claimed to fear persecution because he belonged to the

low caste (see [6] above). Further, as discussed below at [29]-[30], the transcript of the Tribunal hearing when read as a whole does not support the statement that the appellant ‘contended that being Sindhi and Dalit is essentially the same as both groups are low caste’.

14 After noting some issues capable of reflecting adversely on the credibility of the claims advanced by the appellant, the Tribunal decided nonetheless:

*‘to give the [appellant] the benefit of the doubt and assess his claims on the basis that he is a Sindhi and Dalit, and as such he is of low caste in India.’*  
(emphasis added)

15 The Tribunal went on to note that since the appellant’s arrival in Australia there have been a number of relevant changes, and information available on Sindhi websites and from other sources suggests that generally speaking the Sindhi community in Maharashtra State is not ill-treated. It further noted that:

*‘While the region’s Sindhi community have, to some extent, continued to be represented as outsiders, and even refugees, in Maharashtra, the Sindhis have, nonetheless, not figured prominently within the xenophobic discourse of Shiva Sena (in fact some Sindhis have even held senior positions in the Shiva Sena membership).’*

16 The Tribunal then reviewed country information from a number of sources which touched on the relationship between Shiv Sena and Sindhi Hindus.

17 The Tribunal thereafter turned its attention for the first time to the position of Dalits in India. It noted that:

*‘In relation to Dalits, the applicant has provided various reports of the ill-treatment of Dalits in India. In Amnesty International, India’s Unfinished Agenda: Equality and Justice for 200 Million Victims of the Caste System (6/10/05), it is reported that “... dalits are routinely subjected to beatings, mutilation, murder, rape, and destruction of property by members of the upper-castes and the police, a culture of impunity ensures that most of the perpetrators go unpunished ... Abuses against dalits are numerous and take many different forms ...”.’*

18 The critical reasoning in support of the Tribunal’s decision to affirm the decision under review follows immediately after the above reference to the Amnesty International report. That reasoning was as follows:

*'In light of the above country information, the Tribunal is satisfied that whilst there remained some problems concerning the ill-treatment of Dalits in particular, there have [sic] changes in the applicant's state concerning the Shiv Sena, which was essentially the group feared by the applicant. In consideration of the evidence as a whole, the Tribunal is not satisfied that being low caste (Dalit and Sindhi), without more, means that there is a real chance of the applicant being persecuted as contemplated by the Convention, by the Shiv Sena, and/or the Indian authorities, and/or upper caste people. There are many Indian low caste people who achieved eminent status in India; Not all low caste people are persecuted in India. The Sindhi community in Maharashtra State are not generally ill-treated. In Maharashtra, the Sindhis have not figured prominently within the xenophobic discourse of the Shiva Sena. Some Sindhis have even held senior positions in the Shiva Sena membership. In consideration of the evidence as a whole, whilst the Tribunal is satisfied that the applicant has suffered what would amount to serious harm as contemplated by the Act, there have been changes, especially in relation to the Shiv Sena and the Sindhi community in Maharashtra State, over the eleven year period during which the applicant has been in Australia which leads the Tribunal to be satisfied that there is no real chance of the applicant being persecuted if he were to return to his State or indeed any other parts of India.'* (emphasis added)

## **APPLICATION TO THE FEDERAL MAGISTRATES COURT**

19 The reasons for judgment of the learned Federal Magistrate record that the appellant filed a further amended application on the day that his application was heard. This version of the appellant's application for judicial review of the decision of the Tribunal is not reproduced in the Appeal Book prepared for this appeal by the Minister although it does appear in the Appeal Book prepared by the appellant. The further amended application for judicial review identified three grounds of review. The following two grounds are relevant to this appeal:

- (1) The Tribunal made jurisdictional error as it failed to deal with the claim the [appellant] put to the Tribunal and dealt with the claim on a different basis.

### Particulars

*The [appellant's] claim is mainly was [sic] that he was a Dalit and he was persecuted because of that.*

...

*The Tribunal's focus was whether as a Sindhi he has a well founded fear of persecution instead of considering whether he has a well*



*founded fear because he was a Dalit.*

- (2) *The Tribunal made jurisdictional error as it misapplied the real chance test in finding that there is no real chance that simply as a Dalit he will be persecuted in India.*

*Particulars*

*The main information about Dalit relevant to the Applicant that the Tribunal accepted and stated within its decision states that simply being a Dalit is sufficient to be persecuted. All other country information provided to the Tribunal by the [appellant] support this as well.*

...

*A real chance is that not remote or insubstantial or a farfetched possibility ... Had the Tribunal considered the test properly it may have decided that the chance of [the appellant] being persecuted as a Dalit is not remote or insubstantial.'*

## **REASONS FOR JUDGMENT OF THE FEDERAL MAGISTRATES COURT**

20 The reasons for judgment of the Federal Magistrates Court at [11] refer to material provided to the Tribunal which concerned the disadvantaged situation of 'low caste people' in India generally and referred to members of the 'untouchable' Dalit caste. The following observation follows:

*'There was no material submitted which generally explained the caste system in India. The [appellant's] solicitor appears to have assumed a general knowledge of this on the part of the Tribunal, and the transcript and decision of the Tribunal suggests that it had such knowledge. This Court does not have such a knowledge, and neither party has sought to provide it to the Court to assist its understanding of the evidence.'*

21 The learned Federal Magistrate rejected the contention that the Tribunal failed properly to identify and address the claims made by the appellant. His Honour's reasons for doing so are expressed as follows:

*'[H]e did not present to the Tribunal that there was any distinction which he sought to rely upon between his position and the position generally of "low caste people" who were "low caste Sindhi".'*

*... I do not accept that the applicant himself, or his solicitor, presented to the Tribunal a separate claim requiring the Tribunal to isolate a subgroup of*

*Dalit people, whether Sindhi or otherwise, and address them separately. The [appellant's] evidence to the Tribunal shows him describing his concerns by reference to low caste people generally in India, and his solicitor's submissions also did that at several passages ....*

*The [appellant's] solicitor relied in particular on a passage from his oral submissions to the Tribunal ... where he submitted: "his complaint is not as a Sindhi but as a Dalit or a lowest of class person, that's his complaint, as a low caste person that he is going to be persecuted, not as a Sindhi".*

*However in my opinion, this did not accurately identify to the Tribunal the claims which were, in fact, before it. The solicitor's ensuing submissions themselves presented the risk to his client as those of low caste persons generally ....*

*In my opinion the first ground is not made out.'*

22 The Federal Magistrate also rejected the contention that the Tribunal did not properly apply the 'real chance' test. His Honour was satisfied that, when the sentence in which the Tribunal referred to many low caste people achieving eminent status in India and stated that not all low caste people are persecuted in India was read in context, it was intended to provide some explanation of the preceding sentence. For convenience these two sentences have been highlighted in the passage from the Tribunal's reasons for decision extracted in [18] above.

23 His Honour found that the Tribunal's ultimate conclusion was framed in terms of the 'real chance' test and did not reveal error of law. That conclusion is set out in the final eight lines of the passage extracted in [18] above.

## **NOTICE OF APPEAL**

24 The appellant's notice of appeal calls for consideration of whether the Federal Magistrate erred in rejecting the two grounds, which are substantially reproduced in [19] above, on which the appellant sought judicial review of the decision of the Tribunal. In written submissions to the Court before the commencement of the appeal, the appellant's representative indicated that the third ground of appeal set out in the notice of appeal would not be pursued.

## CONSIDERATION

### Preliminary Observations

25 The *Macquarie Dictionary* contains the following definitions:

**'caste**

noun

1. ...
- 2.a. *one of the divisions or social classes into which the Hindus are separated and by which privileges or disabilities are inherited.*
- b. *the system or basis of this division.*
3. ...
4. *the position or rank conferred by the Hindu social system ...'*

**'Sindh**

noun

*a province in south-eastern Pakistan, consisting mainly of the Indus valley below the Punjab; formerly a province of British India ...'*

**'Sindhi**

Adjective

1. *of or relating to Sindh, its inhabitants, or the Sindhi language.*
2. *a native or inhabitant of Sindh.*
3. ...'

(see the *Macquarie Dictionary Online*)

26 The above definitions assume significance in this case in part by reason of s 144 of the *Evidence Act 1995* (Cth). Section 144 provides:

- (1) *Proof is not required about knowledge that is not reasonably open to question and is:*
  - (a) *common knowledge in the locality in which the proceeding is being held or generally; or*
  - (b) *capable of verification by reference to a document the authority of which cannot reasonably be questioned.*
- (2) *The judge may acquire knowledge of that kind in any way the judge thinks fit.*
- (3) *The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.*
- (4) *The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.'*

27 I see no reason to doubt that the *Macquarie Dictionary* is 'a document the authority of which cannot reasonably be questioned' within the meaning of s 144. Judges regularly refer to authoritative dictionaries such as the *Macquarie Dictionary* for the purpose of determining

or confirming the meaning of English words. Indeed, the common law rule is that evidence is not admissible for the purpose of interpreting ordinary English words (*Camden v Commissioners of Inland Revenue* [1914] 1 KB 641; *Cross on Evidence*, 6<sup>th</sup> Australian Edition at [11010]). It is unnecessary to give consideration here to whether this rule has survived the enactment of the Evidence Act.

28           It was open to the Federal Magistrate to refer to the above definitions. It goes without saying that it has always been open to the Minister's legal representatives to refer to them.

29           The above definitions of '*Sindh*' and '*Sindhi*' confirm that an assertion by a citizen of India that he is a Sindhi is an assertion of geographic significance; it is a statement that his, or his family's, geographic origin is in Sindh province which now forms part of Pakistan. The above definition of '*caste*' confirms that an assertion by a Hindu that he is of a particular caste is an assertion of social significance; it is a statement as to the social class into which, as a Hindu, he was born. The Tribunal plainly understood that the appellant claimed to be of the Dalit caste and that Dalit is a low caste.

30           As the words *Sindhi* and *Dalit* denote personal attributes of entirely different characters, it would be surprising if the appellant had contended before the Tribunal that '*being Sindhi and being Dalit is essentially the same*' (see [12]-[13] above). To determine whether or not he did so assert it is necessary to review the transcript of his Tribunal hearing.

31           A transcript of evidence is not to be analysed and construed as though it were a legislative instrument. The spoken words of even well-educated, articulate and confident individuals frequently evidence errors of syntax. A visa applicant responding to questions from a Tribunal member, even when he or she has the assistance of an interpreter, cannot be assumed to enjoy these advantages. Where a transcript is not proof-read by the witness whose oral evidence it records, its punctuation will reflect judgments made by the transcript provider rather than the witness. The appropriateness of those judgments may well prove contestable – particularly if the transcript provider has limited understanding of the subject matter of the evidence.

32           The appellant is an educated man but the transcript of his Tribunal hearing records the Tribunal member expressing concern about his being anxious. The transcript additionally

records the appellant's legal advisor, who understands some Hindi, questioning whether the appellant's answers were being completely interpreted. On occasions the appellant responded to the Tribunal member's questions in English, a language in which he is apparently not fluent. Having regard to all of these considerations, the true import of the appellant's evidence to the Tribunal is to be understood having regard to the totality of that evidence. It is not appropriate to isolate any single answer recorded in the transcript and construe it devoid of the context in which it is found. Nor is it appropriate to attribute undue significance to punctuation in the transcript.

33 Having read carefully the transcript of the appellant's evidence to the Tribunal I am satisfied that he did not contend that '*being Sindhi and Dalit is essentially the same*' (see [12] above). Nor do I consider that anyone who understood the respective denotations of the words *Sindhi* and *Dalit* could reasonably have concluded that he did (see [8]-[11] above).

### **Conduct of the Appeal**

34 I had the benefit of the written outlines of submissions of the appellant and the Minister respectively some days ahead of the day on which the appeal was listed for hearing. The transcript of the first day of the appeal hearing records the following exchange between me and counsel for the Minister at the commencement of the hearing:

*'HER HONOUR: I am concerned about whether the appellant's case was not misunderstood below and possibly before the Magistrate. I have your written submissions. Am I right in thinking that your client understands the Tribunal to have proceeded on the basis that the expression "Sindhi" and "dalit" essentially meant the same thing?*

*MS SIRTES: Not that those terms were interchangeable for the same caste but rather that they were both indicative of a low caste and that the appellant claimed to be members of both but overall to overarchingly centre his claims on being a member of a lower caste. There is a discernible difference between the two.'*

35 The above response from the Minister's counsel fed, rather than diminished, my concern that the appellant's evidence to the Tribunal may have been misunderstood – both by the Tribunal and subsequently by the Minister's legal representatives.

36 After confirming with the appellant's legal representative my understanding that being a Sindhi is to be someone who comes from the Sindh, and that a Sindhi could be of high caste, I asked counsel for the Minister if she would like time to consider her client's position with respect to the appeal. Counsel indicated that she might but expressed criticism of the appellant's failure to call expert evidence before the Tribunal as to the distinction between being a Sindhi and a Dalit. She submitted that the appellant had first claimed to be a Sindhi and then sought to change his position by reformulating that claim to a claim to be a Dalit with the consequence that his claims did not make much sense. She further submitted that the appellant's legal representative had failed in his attempt to clarify the position, that the appellant's grounds of appeal were unclear, and that the appellant's legal representative could not '*simply adopt propositions [identified by the Court] simply because he perceives that that may be something that [the Court] might look upon, favourably.*'

37 The nature of the above submissions suggests that counsel for the Minister did not entertain the possibility of an error of understanding on her own part. It would have been both wiser and more courteous in the circumstances for her to have refrained from advancing submissions of the above character until she had taken the opportunity to confirm the meaning of the terms *Sindhi* and *Dalit* and, so informed, to review (a) the transcript of the Tribunal hearing, (b) the appellant's application to the Federal Magistrates Court, and (c) his notice of appeal, with a fresh and open mind.

38 Ultimately the hearing of the appeal was adjourned to allow the Minister to further consider his position.

39 The hearing of the appeal resumed approximately four weeks later.

40 At the commencement of the resumed hearing the appellant's legal representative sought to read two affidavits. The first was sworn by Associate Professor Rajagopalaiyer Jayaraman of the School of Humanities and Languages, University of Western Sydney. It contained further evidence that the appellant sought to adduce on his appeal. The second was sworn by an employee of the appellant's solicitors. It contained evidence that was relevant only to the application to adduce further evidence on appeal. The second affidavit explained the relevance of the affidavit sworn by Professor Jayaraman (ie that it concerned the nature of the Sindhi community in India and explained the caste system) but did not explain why

evidence of this kind had not been adduced before the Federal Magistrates Court. The appellant's legal representative advised the Court, as I understood him, that the need to adduce such evidence below had not been recognised.

41 Counsel for the Minister opposed the receipt into evidence of the affidavit evidence of Professor Jayaraman. She did so on two bases. First, that it had not been shown that the evidence was not available, and could not with reasonable diligence have been obtained, at the time of the hearing in the Federal Magistrates Court. Secondly, that the appellant had provided no explanation for not adducing the evidence before the Federal Magistrates Court and for not making an earlier application to this Court to adduce further evidence on appeal (see O 52 r 36 of the Federal Court Rules).

42 She submitted:

*'Now, it must be the case in the instant proceeding in circumstances where my friend appeared not only in the Court below but also before the Tribunal that it cannot be said that there is any reason other than that it was a forensic decision. To the extent that my friend has attempted to provide your Honour with evidence from the bar table today, he seems to indicate that for whatever reason he didn't think it was important in the Court below and, as a result, some of [sic] sort of forensic decision was taken not to adduce that evidence.'*

43 Counsel for the Minister also submitted that the appellant was making a *'veiled attempt to raise a fresh ground'* before this Court. She argued that the appellant now sought to highlight the distinction between being a Sindhi and being a Dalit when no ground of complaint of this kind was relied on before the Federal Magistrates Court.

44 The latter of these two submissions is, in my view, without substance. It may be that counsel for the Minister overlooked that the Federal Magistrate granted the appellant leave to file a further amended application. There is complete consistency between the first two grounds of that document and the appellant's grounds of appeal to this Court. In any event, the appellant's amended application to the Federal Magistrates Court, which was the final version of the application included in the Appeal Book prepared by the Minister, complained that:

*'The Tribunal's focus was whether as a Sindhi he has a well founded fear of persecution instead of considering whether he has a well founded fear*

*because he was a Dalit.'*

That complaint, as it seems to me, was plainly calculated to highlight the distinction between being a Sindhi and being a Dalit.

45           The submission identified in [42] above is capable of being understood as challenging the frankness of the legal representative of the appellant and as suggesting that a positive decision had been made that it would not be in his client's interest to adduce evidence before the Federal Magistrates Court to clarify the distinction between *Sindhi* and *Dalit*. If the submission is properly to be understood in this way it ought not, in my view, to have been made. Nothing has come to my attention which has caused me to conclude other than that the appellant's legal representative has consistently sought to draw to the attention of decision-makers in this matter the distinction between being a Sindhi and being a Dalit. That he may not have appreciated until late that expert evidence might be required to elucidate the distinction does not strike me as in any degree unlikely. I refer particularly to the content of [25]-[27] above.

### **Receipt of Further Evidence**

46           An appeal to this Court from the Federal Magistrates Court is an appeal by way of rehearing (*MZVWH v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 1016). Section 27 of the *Federal Court of Australia Act 1976* (Cth) provides that, in an appeal, the Court should have regard to the evidence given in the proceeding out of which the appeal arose and has power, in its discretion, to receive further evidence.

47           Order 52 r 36 of the Federal Court Rules, subject to any dispensation from compliance (see O 1 r 8), governs the practice of the Court where further evidence is sought to be adduced on appeal. Ordinarily the Court requires an application to adduce further evidence on appeal to be supported by an affidavit that explains why the further evidence was not adduced below (*Fodare Pty Limited v Official Trustee in Bankruptcy* [2000] FCA 1721). However, I accept the submissions of the appellant's legal representative that the circumstances in which this Court, in the exercise of its appellate jurisdiction, may receive evidence not adduced below are to be determined as a matter of statutory construction rather than by reference to common law principles (*CDJ v VAJ* (1998) 197 CLR 172 per McHugh,



Gummow and Callinan JJ esp at [100]-[102]). The interests of justice must always be the paramount consideration (*State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 155).

48 Having regard to the subject matter of the proceeding with which this appeal is concerned (i.e. a decision as to the entitlement of the appellant to remain in Australia where he has lived for well over a decade), the fact that the evidence sought to be adduced is not disputed by the Minister, and the nature of that evidence (i.e. that it confirms and expands upon information available to any person able to consult the Macquarie Dictionary), I consider it appropriate to receive the further evidence contained in the affidavit of Professor Jayaraman.

49 Professor Jayaraman has been engaged in academic work in Australia for 30 years. He holds a PhD and Master of Arts degrees from Delhi University, India and teaches in a number of discipline areas including South Asian (Indian Subcontinent) Studies. In his affidavit Professor Jayaraman explains that:

- (a) the term *Sindhi* comes from the place name *Sindh* which is a province of Pakistan;
- (b) in India a *Sindhi* is someone whose family came from the Sindh province before the Partition;
- (c) the Partition was the division of colonial India into India and Pakistan by the British rulers at the time of Independence in 1947;
- (d) if someone says he is a Sindhi it is like someone saying he is a Scot or Welsh;
- (e) in the caste system in India which is based on *Varna* (colour model) there are four castes called high caste; at the top are the *Brahmin*, the priest and arbiter of what is right and wrong in matters of religion; next come the *Kshatriya*, the soldier and administrator; then the *Vaisya*, the artisan and commercial class; and finally the *Sudra*, the farmer and peasant class;
- (f) beneath the four main castes is a fifth category, the *Dalits*, consisting of people who were traditionally excluded from religious and ritual practice; they are also called the *Low Castes*, the *Untouchables*, the *Harijans* or the *Scheduled Castes*;
- (g) *Dalits* means oppressed, downtrodden and exploited social group and includes *Low*

*Castle Sindhis*; and

(h) in normal usage *Low Caste* has become synonymous with *Dalits*.

### **The First Ground of Appeal**

50 The appellant, in his visa application and before the Tribunal, claimed to fear persecution in India because he was low caste. He also drew attention to the fact that he was a Sindhi; that is, that to some degree he is an outsider in his home state of Maharashtra. However, his legal representative, perhaps because of the provisions of s 91R(1) of the *Migration Act 1958* (Cth), sought to make clear to the Tribunal that the appellant did not advance a claim to be entitled to a protection visa on the basis that he was a Sindhi.

51 In the circumstances the Tribunal was required to determine whether low caste Hindus (ie Dalits) were capable of constituting a social group for the purposes of the *Convention Relating to the Status of Refugees 1951* as amended by the *Protocol Relating to the Status of Refugees 1967* (together 'the Convention'). If it answered that question affirmatively, it was required to determine whether the appellant was a member of that social group. If it answered that question affirmatively, it had then to deal with the questions whether the appellant feared persecution if he returned to India, whether his fear was well-founded and whether his fear was by reason of his membership of the social group constituted by Dalits (*Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 per Gummow and Callinan JJ, with whom Hayne J agreed, at [26]).

52 The reasons for decision of the Tribunal reveal that it did not follow the above process of reasoning. Rather it either accepted or assumed that the appellant was a member of a social group for the purposes of the Convention. It seems that the social group that it had in mind was either constituted by, or included in its membership, both Sindhis and Dalits as it proceeded on the basis that it was essentially the same to be a Sindhi and a Dalit. It then had regard to information concerning the treatment in India of members of the Sindhi community, including information which suggested that, generally speaking, the Sindhi community in Maharashtra State is not ill-treated. It thereafter noted, and apparently accepted, an Amnesty International report that Dalits '*are routinely subjected to beatings, mutilation, murder, rape, and destruction of property*'. It then concluded, consistently with its assumption that it was essentially the same to be a Sindhi and a Dalit, that it was:

*'not satisfied that being low caste (Dalit and Sindhi), without more, means that there is a real chance of the [appellant] being persecuted as contemplated by the Convention, by the Shiv Sena, and/or the Indian authorities, and/or upper caste people.'*

53 In my view, it is plain that because the Tribunal proceeded on the basis that it was essentially the same to be a Sindhi and a Dalit, it took into account material concerning the treatment in India of Sindhis when determining whether the appellant had a well-founded fear of persecution for reason of his membership of a particular social group. In doing so the Tribunal misunderstood and failed properly to deal with the claim advanced by the appellant. The social group of which the appellant is to be understood to have claimed membership was constituted by Dalits only; it did not include all Sindhis. Dalits and Sindhis are not the same and, as I have concluded above, the appellant did not assert that they are the same. In proceeding as it did the Tribunal constructively failed to exercise its jurisdiction because it did not address the claim advanced by the appellant (*Dranichnikov* 197 ALR at [25]-[32]).

54 In retrospect it can be seen that both the Minister and the appellant could have provided greater assistance to the Federal Magistrate. His Honour would almost certainly have benefited from evidence of the kind now contained in the affidavit of Professor Jayaraman. However, more informal ways of clarifying the meaning of the terms Sindhi and Dalit were open to the parties.

55 For the reasons outlined above his Honour erred in concluding that the Tribunal addressed the claim advanced by the appellant. The first ground of appeal is made out.

### **The Second Ground of Appeal**

56 The second ground of appeal is properly understood, it seems to me, as an alternate ground to the first ground of appeal. On the assumption, which is contrary to my finding, that the Tribunal did recognise that being a Sindhi and being a Dalit was not essentially the same, it made no finding as to why, having regard to the Amnesty International report which it apparently accepted, the appellant did not have a well-founded fear of persecution as a member of the social group constituted by Dalits. The explanation for its apparent failure to apply the real chance test in this regard is to be found, in my view, in its failure to distinguish between the two social groups, Sindhis and Dalits.

## CONCLUSION

57 The appeal will be allowed and the orders made by the Federal Magistrates Court on 18 January 2007 set aside. In lieu thereof it will be ordered that orders issue in the nature of *certiorari* quashing the decision of the Tribunal and in the nature of *mandamus* requiring the Tribunal to determine the appellant's application for review of the decision of the delegate of the Minister according to law. The first respondent will be ordered to pay the appellant's costs in the Federal Magistrates Court and on appeal.

I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Branson.

Associate:

Dated: 8 June 2007

Counsel for the Appellant: Mr T Silva

Solicitor for the Appellant: Silva Solicitors

Counsel for the First Respondent: Ms SA Sirtes

Solicitor for the First Respondent: Clayton Utz

Counsel for the Second Respondent: The Second Respondent filed a submitting appearance

Date of Hearing: 2 May 2007 and 28 May 2007

Date of Judgment: 8 June 2007