FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLGF & ANOR v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 254*

MIGRATION – Review of decision of the Refugee Review Tribunal – adverse credibility finding – no misapplication of the terms "well-founded fear of persecution" and "refugee" – no evidence of what occurred at the hearing apart from that contained in the decision record – no requirement to consider relocation – no evidence of bias of bad faith – determinative issue raised with the applicants at the hearing – no failure to provide an adequate level of interpretation before the Tribunal – no jurisdictional error in respect to applicant husband – jurisdictional error in relation to applicant wife – discretionary nature of relief – no utility in granting relief to applicant wife – applications dismissed.

Migration Act 1958 (Cth), ss.36, 422B, Division 4 of Part 7, 424A,424, 424C, 425, 425A, 441A, 441C, 426A, 427
Migration Regulations 1994 (Cth), cl.866.21, 866.222(b)

Re Minister for Immigration and Multicultural Affairs; Ex Parte Durairajasingham (2000) 168 ALR 407
SZHPD v Minister for Immigration and Citizenship [2007] FCA 157
SCAA v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 668
Re Refugee Review Tribunal; Ex parte H (2001) 179 ALR 425
Minister for Immigration Multicultural Affairs v Jia (2001) 205 CLR 157
SBBS v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 194 ALR 749; [2002] FCAFC 361
Minister for Immigration and Multicultural and Indigenous Affairs v SBAN [2002] FCAFC 431
VFAB v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 131 FCR 102
NAEA v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 341
V120/00A v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 116 FCR 576
Dranichnikov v Minister for Immigration and Multicultural Affairs (2001) 109 FCR 397
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152; [2006] HCA 63
SZJUB v Minister for Immigration and Citizenship [2007] FCA 1486
SZEFM v Minister for Immigration and Multicultural and Indigenous Affairs

[2006] FCA 78
Mahzar v Minister for Immigration and Multicultural Affairs [2000] FCA 1759; (2000) 183 ALR 188
Xiao v Minister for Immigration and Multicultural Affairs [2000] FCA 1472
Appellant P119/2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 230
Perera v Minister for Immigration and Multicultural Affairs [1999] FCA 507

Applicants:	SZLGF & SZLGG
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2711 of 2007
Judgment of:	Nicholls FM
Hearing date:	4 March 2008
Date of Last Submission:	4 March 2008
Delivered at:	Sydney
Delivered on:	19 March 2008

REPRESENTATION

Counsel for the Applicant:	Nil
Solicitors for the Applicant:	Nil
Counsel for the Respondents:	Mr J A C Potts
Solicitors for the Respondents:	Clayton Utz

ORDERS

(1) The application made on 3 September 2007, and amended on 2 January 2008, is dismissed.

(2) The applicants pay the first respondent's costs set in the amount of $5,000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2711 of 2007

SZLGF & SZLGG
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application made under the *Migration Act 1958* (Cth) ("the Act") on 3 September 2007, and amended on 2 January 2008, seeking review of the decision of the Refugee Review Tribunal ("the Tribunal"), signed on 1 August 2007, and handed down on 21 August 2007, which affirmed the decision of the delegate of the first respondent to refuse to grant protection visas to the applicants.

Background

2. The first respondent has filed a bundle of relevant documents in this matter, which I will refer to as the Court Book ("CB"), from which the following background can be discerned.

3. The applicants before the Court are husband ("SZLGF") and wife ("SZLGG") and are both citizens of India who arrived in Australia on 17 March 2007. On 1 May 2007 they applied for protection visas. The

application is reproduced at CB 1 to CB 29. The applicant husband submitted claims to be a refugee (see CB 12). The applicant wife applied as a member of the applicant husband's family unit. At that time she did not have her own claims to be a refugee (see CB 24).

4. The applicants were assisted in the making of their applications by a registered migration agent (see CB 9). The applicant husband's claims to be a refugee were (see CB 18):

> *"The applicant claims subject to persecution in the hand of non-private agents, 'criminals, thugs, extortionists' as a result being 'businessmen' and the state refused protection as a result of unwillingness to comply with unlawful demands demand of bribes."* (Errors in original)

5. On 19 May 2007 a delegate of the first respondent refused the grant of protection visas to the applicants (see CB 32 to CB 38 for the decision record). In relation to the applicant husband, the delegate found that he did not have a real chance of Refugee Convention-based persecution if he returned to India, and that his fear of persecution on return was consequently not well-founded (see CB 37).

6. In relation to the applicant wife, the delegate found that as the applicant husband had not been granted a protection visa, and with reference to clause 866.222 of Schedule 2 to the *Migration Regulations 1994* (Cth) ("the Regulations") (which must be seen in the context of s.36(2)(b) of the Act), the applicant wife, although the spouse of the applicant husband, and therefore a part of his family unit, could not satisfy the relevant criterion because the applicant husband had not been successful in his application for a protection visa, and had not been granted a protection visa (see CB 38).

The Tribunal

7. The applicants applied to the Tribunal for review of the delegate's decision on 6 June 2007 (CB 39 to CB 42). Attached to the application was a hand-written statement, which although it appears to be signed by both applicants, is written from the perspective of the applicant husband. The statement asserts in part that (see CB 43):

> *"The story which was written by the migrating* (sic: migration) *agent was wrong."*

8. The applicant husband then put forward that he had met the applicant wife in the "sex market", that he took her away and married her, and that the "people of the market" came looking for them seeking the return of the applicant wife. The applicant husband claimed that his parents "were not accepting my wife", and that they went to "many different cities", but were pursued by those seeking the applicant wife. Ultimately: "[a]t last they tried to kill me, once they tried to kill me with knife" (in context this was a reference to the applicant husband). The statement ends: "I was alive, and at last I have to come to Australia to save our both lifes (sic: lives)" (CB 44).

9. Both applicants were invited to a hearing before the Tribunal, initially scheduled for 11 July 2007, but which ultimately took place on 26 July 2007 following a request for an adjournment by the applicant husband. Both applicants attended at the hearing (see CB 56). The only account of what occurred at the hearing put before the Court is that contained in the Tribunal's decision record (see CB 82.5 to CB 88.7).

10. The Tribunal accepted the applicant husband's later claim that what had been put in his application for a protection visa contained incorrect information due to an error by the applicants' then migration agent, and that the applicants did not wish to rely on this information. The Tribunal accepted this, and disregarded these claims (CB 89.2).

11. However, the Tribunal found the applicant husband was not a "credible witness" (CB 89.3). The Tribunal gave reasons for this and also found that its finding in relation to the applicant husband's credibility caused it to "question the authenticity of the applicants' claims" (CB 89.4). The Tribunal found many of the applicant husband's claims to be implausible, and gave examples of the implausibility of his claims and the applicant husband's lack of credibility (see CB 89.5 to CB 91.1). On this basis, the Tribunal rejected the applicant husband's claims (CB 91.2).

12. In relation to the applicant wife, the Tribunal noted that her claims (plainly a reference to claims to be a refugee) arose from the same facts

as her husband's claims, and given that she had relied on her husband's evidence, the Tribunal also rejected what it said were her refugee claims. The Tribunal specifically addressed each of those claims as presented by the applicant wife's husband and found that there was not a real chance that the applicants (both) would face serious harm if they were to return to India (CB 91.5). It ultimately concluded that it was not satisfied that the applicants were persons to whom Australia owed protection obligations.

Application to the Court

13. In an amended application filed on 2 January 2008, the applicants put forward (with particulars) three grounds:

> "***Ground 1.*** *The Refugee Review Tribunal made a jurisdictional error when it misapplied the express and implied meaning of term 'well founded fear' and 'refugee' from the UN Convention. The Applicants claim that the Tribunal erred in adopting an unduly harsh approach to the Well-founded fear.*
>
> …
>
> ***Ground 2*** *The Tribunal identified wrong issue, asked itself wrong question, failed to consider relevant and relied on irrelevant materials.*
>
> …
>
> ***Ground 3.*** *The Applicant husband claims that they were denied procedural fairness when the Tribunal member formed the view about the Applicant's status before hearing."*

Hearing Before the court

14. At the hearing before the Court, the applicant husband appeared in person. He was assisted by an interpreter in the Gujarati language. The applicant wife did not appear. The applicant husband explained that she was "sick", and did not wish to come to the Court because she was "scared". He confirmed however, that he had come prepared (I understood with her knowledge) to represent her before the Court. Mr J A C Potts of Counsel appeared for the first respondent.

15. The Court also has before it the applicant husband's affidavit of 3 September 2007 putting the Tribunal decision record before the Court, and an outline of written submissions filed on 29 February 2008 which is in almost identical terms to what is set out in the amended application. It further contains a short historical background.

16. Mr Potts took objection to paragraph two in the affidavit. I understood that objection to be an objection initially as to form. The paragraph states that: "the grounds given in the application to the Court are true". I agree with Mr Potts that this statement is inadmissible in that form and does not go to any of the grounds of review. I understood it simply as the applicant husband's assertion that he wished to strongly press his claims before the Court and treated it as a submission by the applicant husband.

17. In addition to the Court Book, the Minister has also filed a response in this matter, and an outline of written submissions on 28 February 2008.

18. At the hearing before the Court, the applicant husband relied on the written material that had been given to the Court ("I have given you everything in written"). The applicant husband stated that he was dissatisfied with the Tribunal's decision and wanted "justice".

Ground One – "Well-founded fear" and "refugee"

19. The applicant's first stated ground in the amended application appears to put forward three complaints about the Tribunal's decision.

20. The first is that the Tribunal "misapplied" the meaning of the term "well-founded fear" and the term "refugee" by adopting "an unduly harsh approach".

Ground – Application of well-founded fear

21. As Mr Potts submits, in my view correctly, the Tribunal's decision did not turn upon any misapplication of the meaning of "well-founded fear" or the notion of "refugee" as it is understood pursuant to the UN Convention Relating to the Status of Refugees. Any plain reading of the Tribunal's decision record reveals that the Tribunal rejected the applicants' claims because of the adverse view that it took of the

applicant husband's evidence. On what is before the Court now, this finding was open to the Tribunal as the finder of fact, including findings of fact on credibility (*Re Minister for Immigration and Multicultural Affairs; Ex Parte Durairajasingham* (2000) 168 ALR 407 (at [67], per McHugh J).

22. Further, the Tribunal gave reasons for the adverse view that it took of the applicant husband's claims and these are dealt with comprehensively in the Tribunal's analysis. I cannot see error in this regard given the Tribunal's decision did not turn on any misunderstanding or misapplication of the meaning of "well-founded fear of persecution", nor any misunderstanding of the definition of "refugee" (as it is said to be contained in Article 1A(2) of the Refugees Convention).

Ground – Manner of Tribunal's questioning

23. The second complaint appears to be a criticism of the way the Tribunal questioned the applicant husband at the hearing. The complaint being that the questioning was allegedly designed to focus on why the applicant wife would be harmed, rather than "addressing as to the motive".

24. I agree with Mr Potts that the lengthy stated particulars to this complaint do not assist in understanding exactly what the applicants complain about. I nonetheless considered the following.

25. First, I note that if this is a complaint about what occurred at the hearing before the Tribunal, then the applicants have not provided any evidence to the Court, for example, by way of transcript, for what they say occurred at the hearing. The only account before the Court is that contained in the Tribunal's decision record (CB 82.6 to CB 88.7). There is nothing in this account to justify any complaint about the manner in which the Tribunal questioned, or dealt with, both applicants such as to reveal jurisdictional error on its part.

26. Second, that the Tribunal is alleged to have "adopted a line designed to establish the harm from the perspective of the applicant ...". That is, designed to achieve a particular outcome. This then may be understood as a complaint that the Tribunal acted in bad faith.

27. It is established that an allegation of bad faith, or bias, on the part of the Tribunal must be distinctly made and clearly proven (*SZHPD v Minister for Immigration and Citizenship* [2007] FCA 157 ("*SZHPD*") at [22]). It is a rare and exceptional case where bias can be discerned from the reasons for decision alone (*SCAA v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 668 ("*SCAA*") at [38], per von Doussa J). There is no evidence before the Court now to establish that the Tribunal acted in bad faith, or with bias, in relation to the decision under review (*Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 ("*Ex parte H*"), *Minister for Immigration Multicultural Affairs v Jia* (2001) 205 CLR 157 ("*Jia*"), *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749; [2002] FCAFC 361 ("*SBBS*"), *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431 ("*SBAN*"), *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 102 ("*VFAB*")). With regard to relevant authorities, I cannot see that any such complaint would succeed.

Ground – The applicant wife as the "main applicant"

28. The third complaint is that the Tribunal "made a jurisdictional error when it made mistake (sic) in understanding the whole case". The applicants' complaint is that the Tribunal should have considered the applicant wife as the "main applicant", and should have considered her claims in the context of her belonging to a social group, that of "forced prostitution".

29. The Minister's response to this complaint (the Tribunal's alleged failure to have dealt with the applicants' claims as now said to be restated in the application before the Court), is that given the manner, that is the basis, in which each of the applicants applied for protection visas then the Tribunal was not able to deal with the applicant wife in the manner as now put forward by the amended application.

30. Mr Potts referred the Court to *NAEA of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 341 ("*NAEA of 2002*"). In that case, Gyles J considered a matter where a husband and wife had made applications for protection visas and where

the husband had put forward claims to refugee protection, and the wife made an application for a protection visa as a member of his family. These applications were refused and subsequently the husband and wife applied for review of the delegate's decision to the Refugee Review Tribunal. The husband then died. The Tribunal received submissions from the solicitor for the applicant wife advising of the death of the husband and putting forward a claim for protection on behalf of the applicant wife, that is, refugee claims in her own right. The Tribunal then proceeded to a hearing with the applicant wife and heard evidence as to the fears that she had of persecution upon return to her home country. Ultimately, the Tribunal decided that it had "no jurisdiction to hear the application for review" (see [1]-[10] of *NAEA of 2002*). The Court noted that by the time of the Tribunal's decision, s.36 of the Act had been amended ([11]), and the provisions of cl.866.21 in Schedule 2 to the Regulations ([12]). (Those provisions referred to by his Honour continue to be in force and are relevant to the matter before the Court now.)

31. In *NAEA of 2002*, the Court found at [14]:

> *"In the present case, it is quite plain that the applicant deliberately applied for a protection visa on the basis that she was a family member of her husband claimant and not in her own right. There is a fundamental difference between the two bases for a protection visa. In my opinion, the Act and the Regulations require separate and specific applications for each. It would not be open for the Tribunal to grant a protection visa to a person who had applied as a family member on the basis that that person was a refugee. I agree with the reasoning of Kenny J in* V120/00A *at [59]."*

32. In *V120/00A v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 116 FCR 576 ("*V120/00A*"), Kenny J held:

> *"56. In the present case, it was the deceased who, at the time of application, sought a Protection (Class AZ) visa and who made the specific claims under the Refugees Convention. His wife and children made application for protection visas solely as members of his family.*
>
> *57. This is made clear by the different versions of Form 866 completed by the deceased and his family. The deceased completed a Form 866 entitled 'Application for an applicant*

who wishes to submit their own claims to be a refugee'. His wife and children completed applications entitled 'Application for a member of the family unit', which carried the following notation: 'This part is for a member of the family unit of who does NOT have their own claims to be a refugee, but is included in this application. The deceased and his family completed their 866 forms substantially in accordance with the instructions on them, and no question arises about the validity of their applications … .

58. As the respondent's delegate held that the deceased was 'not a person to whom Australia has protection obligations under the Refugees Convention', it followed that the delegate found that none of the deceased's family met the criterion set out in cl 866.222(b) of the Sch 2 of the Regulations. It was this decision that the deceased and his family challenged on review. Was it open to the Tribunal to decide the review application as if each living application had made an application for a Protection (Class AZ) visa?

59. As the Full Court of this Court noted in Li *at 535, the Act 'places great emphasis on the need for a visa applicant to complete a prescribed application form'. The Regulations do not, so it seems to me, permit the Tribunal to treat the applicants as if they had each sought a Protection (Class AZ) visa in her or his own right. As we have seen, the Regulations prescribed the application to be made by a family member of an applicant for a Protection (Class AZ) visa. This is the form that the applicants completed."*

33. Mr Potts also relied on what was said by a Full Court in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 397 which held that (a prior version of) s.48A of the Act provides that a person who had applied as a "secondary" applicant, that is, as a member of the family unit, was not precluded from lodging a fresh application for a protection visa as a "primary" applicant, given that the bar existing in s.48A to lodging a second protection visa application (without the bar being lifted pursuant to s.48B) did not apply to a person who had applied as a family member, and had not applied as a refugee in their own right. Mr Potts submitted that this also supports (certainly by inference) what was expressed in *NAEA of 2002* and *V120/00A*.

34. In the case currently before the Court, the applicant husband applied for a protection visa on the basis of being "an applicant who wishes to submit their own claims to be a refugee" (see CB 12). The applicant wife applied as a member of his family unit. At CB 24 is reproduced her application for a protection visa. I note in particular what is set out at CB 24.1:

> *"This part is for a member of the family unit who does NOT have their own claims to be a refugee, but is included in this application.*
>
> *If you DO have your own claims to be a refugee, complete a Part C instead."*

("Part C" is a reference to the type of application, or that part of the documentary forms available for use by applicants for protection visas, filled out by the applicant husband. "Part D" relates to what the applicant wife filled out and is the relevant heading in the document reproduced at CB 24.)

35. Mr Potts' submission was that, based on the authorities which the Minister says bind this Court, and on the Act as it now stands, there was no obligation on the Tribunal (or indeed any entitlement by the applicant wife), to deal with the applicant wife's application other than as an application for a protection visa as a member of the family unit of the applicant husband. The Minister's answer therefore to the applicants' complaint now, that the Tribunal should have considered the applicant wife as the "main applicant" and considered her claims to be a refugee, is that the Tribunal was not able to treat the applicant wife in that way.

36. The alternative submission was that, in any event, the Tribunal had dealt with the substance of what was said to be the applicant wife's claims. (See the Tribunal's analysis at CB 91.3: "[a]s the applicant wife's claims arose from the same facts as her husband's claims and since she relied on her husband's evidence, the Tribunal also rejects the applicant wife's claims … . As no other claims were made by the applicants, the Tribunal finds that there is no real chance that the applicants will face serious harm if they return to India now or in the reasonably foreseeable future.")

37. I agree with Mr Potts that in applying what was said in *NAEA of 2002*, and the reasoning in *V120/00A*, to the circumstances of this case that the Tribunal (in answer to the complaint as made by the applicants in the amended application) was not obliged to deal with the applicant wife's claims in the way put forward by the applicants now. I follow what was said in those cases and apply what was said there to the circumstances before the Court now.

38. I note in particular the similarity in the applications made by the husband and wife respectively in *NAEA of 2002* and in the case currently before the Court. That is, the applicant husband made an application using a "Part C Form" putting forward his own claims to be a refugee. The applicant wife put forward her claims as being the member of the family unit of a person who has put forward their own claims to be a refugee. While the applicant husband passed away while the matter was before the Tribunal in *NAEA of 2002*, and this can be distinguished from the circumstance in the current case, this does not alter the circumstance that the reasoning of the Court in *NAEA of 2002* (and in *V120/00A*) relied on the distinction between the two different sets of criteria relevant to the applications of each of the applicant husbands and each of the applicant wives. Differences in criteria arising from the different basis on which each of the applicant husband, and applicant wife, respectively, applied for protection visas. As Mr Potts helpfully described it in submissions before the Court, two separate and distinct "doors" leading into the "room" containing protection visas.

39. Section 36 of the Act is as follows:

> *"(1) There is a class of visas to be known as protection visas.*
>
> *(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 or a dependant of a non-citizen who:*

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

(ii holds a protection visa."

40. Clause 866.21 ("Criteria to be satisfied at time of application") of Schedule 2 to the Regulations provides as follows:

> *"866.211 The applicant claims to be a person whom Australia has protection obligations under the Refugees Convention and:*
>
> *(a) makes specific claims under the Refugees Convention; or*
>
> *(b) claims to be a member of the same family unit as a person (the **claimant**) who:*
>
> *(i) has made specific claims under the Refugees Convention; and*
>
> *(ii) is an applicant for a Protection (Class XA) visa."*

41. The criteria to be satisfied at time of decision provides, amongst others:

> *"**866.22 Criteria to be satisfied at time of decision***
>
> *866.221 The Minister is satisfied that the applicant is a person to Australia has protection obligations under the Refugees Convention.*
>
> *866.222 In the case of an applicant referred to in paragraph 866.211(b):*
>
> *(a) the Minister is satisfied that the applicant is a member of the same family unit as a claimant referred to in that paragraph; and*
>
> *(b) that claimant has been granted a Protection (Class XA) visa."*

42. In the case currently before the Court, I agree with Mr Potts that it is an answer to the applicants' complaint as stated in the amended application that the Tribunal was not obliged (in addition – not able – see further below) to consider the applicant wife's claims in the manner as asserted in the amended application. The applicant husband applied for a protection visa. In his application for a protection visa he stated

that he was submitting his own claims to be a refugee. The applicant wife's application for a protection visa stated that she did not have her own claims to be a refugee but was included as a member of her husband's family unit and depended on the outcome of his application.

43. Based on the authorities to which this Court has been referred, and the reasoning contained in those authorities, I agree with Mr Potts that the applicant wife had no entitlement to have her claims dealt with other than in accordance with the criteria relevant to the application she had made. Section 36(2)(b) of the Act provides that a criterion for a protection visa, as an alternative to the criterion set out in s.36(2)(a) of the Act, is that the person is, relevantly, the spouse of a person who has applied for a protection visa, and in respect of whom the Minister is satisfied that Australia has protection obligations under the Refugees Convention, and holds such a protection visa. The Tribunal therefore was not required to consider the applicant wife as the "main applicant", nor to consider her claims as if she were.

44. I agree with Mr Potts that there is a fundamental difference between the two sets of bases on which a protection visa may be applied for, and granted. One is as an applicant who has refugee claims in their own right, and the other, quite distinctly, an applicant who has no refugee claims in their own right, but applies only as a member of the first applicant's family. In the case currently before the Court the applicant wife clearly applied on that basis, and not on the basis that she had refugee claims in her own right. As was said by Gyles J in *NAEA of 2002*, the Act and Regulations require separate and specific applications for each. It would not be open to the Tribunal to grant a protection visa to a person who had applied as a family member on the basis that that person was a refugee.

45. Noting also that in the case before Gyles J the applicant wife subsequently put forward in writing to the Tribunal her own separate claims to be a refugee. A parallel can be drawn with the case currently before the Court. In the present case, at the hearing before the Tribunal (based on the Tribunal's own account of what occurred at the hearing see CB 88.4 – "Applicant Wife" – where the applicant wife said that: "her life was in danger"), although she relied on her husband's evidence in support of this claim, nonetheless this could be seen as a

claim that the applicant wife was a refugee in her own right, and at that subsequent time pressing her claims in this regard. This is a direct parallel with what occurred in *NAEA of 2002* (and *V120/00A*).

46. The applicants' complaint, as stated as part of ground one in the amended application therefore, on the application of relevant authorities, does not succeed.

47. The Tribunal therefore was required to deal with the applicant wife's application for a protection visa on the basis that she was a member of the family unit of the applicant husband, that is relevantly, his spouse and to consider, in relation to her application, whether the applicant husband could be granted a protection visa on the basis that he came within the Convention definition of "refugee". During the hearing before the Court I raised with Mr Potts the concern that the Tribunal had not addressed itself to this relevant statutory (and regulatory) criterion in relation to the applicant wife.

48. In contrast to the delegate, the Tribunal appears not to have understood the relevant criteria against which the applicant wife's claims to a protection visa were to be assessed.

49. The delegate's decision record is set out at CB 32 to CB 38. The delegate specifically addressed his mind to the relevant situation of the applicant wife and found that she was the spouse of the applicant husband, and therefore met the relevant regulatory definition of "member of the family unit". Having found that the applicant husband was not a person to whom Australia had protection obligations under the Refugees Convention, and therefore refusing his application for a protection visa (see CB 38.2), the delegate then turned his mind to the applicant wife and found that, as the applicant husband had not been granted a protection visa, the applicant wife therefore could not meet the prescribed criterion relevant to her set out in "clause 866.222 of the Migration Regulations" (plainly also in reference to s.36(2)(b) of the Act). The applicant wife's application for a protection visa was therefore refused on this basis.

50. The Tribunal however did not address the relevant criterion in relation to the applicant wife. Contrary to the applicants' assertions in the amended application (and written submissions), the Tribunal did

address the applicant wife's claims as if she had applied for a protection visa with refugee claims in her own right. The Tribunal's analysis in relation to the applicant wife is set out in this regard at CB 91.3. The Tribunal found that the "applicant wife's claims arose from the same facts as her husband's claims".

51. At the hearing (see CB 88.5), the applicant wife plainly claimed that although she relied on her husband's evidence, that she sought shelter in Australia because her life was in danger, that she had been under mental torture (along with her husband), and that if she went back to India "they would not leave her" (in context, plainly a reference to those whom the applicant husband had said had confined the applicant wife for the purposes of prostitution). When read in context with the Tribunal's analysis at CB 91, this plainly shows that the Tribunal did consider the applicant wife's subsequently made claims to be a refugee in her own right.

52. On the authorities referred to above, the Tribunal was not entitled to proceed in this way. Importantly, however, the Tribunal does not appear to have directed its mind to the relevant criterion relating to the resolution of the applicant wife's application for a protection visa, namely, whether she was a member of the family of a person who had been granted a protection visa because the relevant decision maker had been satisfied that that applicant, in effect, met the Convention definition of "refugee". In my view, had the Tribunal properly addressed this criterion in its analysis, then notwithstanding that it also sought to consider the applicant wife as a refugee claimant in her own right, jurisdictional error may have been avoided.

53. However, the Tribunal did not address the criteria relevant to the disposition of the applicant wife's application. (Section 36(2)(b) of the Act and cll.866.211(b) and 866.222 of Schedule 2 to the Regulations.) In that sense, the Tribunal has committed jurisdictional error in the way in which it resolved the application of the applicant wife. The Tribunal does not appear to have turned its mind to the relevant consideration, that is, the relevant criterion, in relation to the applicant wife. In this sense, the stated ground two (albeit, not as particularised) would succeed in relation to the applicant wife, in that the Tribunal did identify the wrong issue in relation to the applicant wife by asking

itself the wrong question as to the relevant criterion that it should apply in the determination of the application she had made. Further, in that consideration it failed to consider the relevant issues, namely, that she was a spouse, and failed to address whether the applicant husband had, or had not, been granted a protection visa.

54. Mr Potts submitted that, notwithstanding that the Tribunal may have sought to deal with the applicant wife's claims on the basis of her having made claims to be a refugee in her own right, in its conclusion the Tribunal did refer to ss.36(2)(a) and 36(2)(b) (see CB 91.7 – "Conclusions"). In that away, he submitted, that notwithstanding what appears earlier, it did address the relevant legislative provision, and that the Tribunal's decision, ultimately in terms of its conclusion, could be read as saying that the applicant husband did not satisfy the criterion set out in s.36(2)(a), and the applicant wife did not satisfy the criterion as set out in s.36(2)(b).

55. I do not agree with this submission. The Tribunal's "Conclusion" in my view is formulaic in presentation. When the "Conclusion" is read in context with what plainly precedes it, the Tribunal did deal with the applicant wife as if she was a refugee claimant in her own right. Further, and importantly, the wording of the "Conclusion" does not distinguish between the two applicants and the different criteria relevant to each. The Tribunal states that it: "is not satisfied that the applicants are persons to whom Australia has protection obligations". It then states: "the applicants do not satisfy the criteria set out in s.36(2)(a) for a protection visa." This was the relevant criteria for the applicant husband, but not the applicant wife. It then continues: "Nor can they satisfy the alternative criterion in s.36(2)(b) of the Act." This was the relevant criterion for the applicant wife but not the applicant husband.

56. I am not satisfied that the wording of the "Conclusion", nor when it is read in context, represents an understanding, or an application of, the different criteria relevant to each of the applicant husband and applicant wife. A distinction, it must be said, which would have been apparent to the Tribunal had it properly read the delegate's decision, which after all was the decision which it was required to review. That the applicant husband disowned his refugee claims before the delegate

did not alter the situation that in respect to the decision under review the applicant wife had applied for, and been refused, a protection visa on the basis of her membership of the applicant husband's family and not as a refugee in her own right.

57. In respect to the applicant wife the Tribunal did not apply the relevant criteria and this reveals jurisdictional error in its decision relating to her. But not in the separate decision (albeit contained in the one record) relevant to the applicant husband.

Ground Two – Failure to Consider Relocation

58. As particularised, the stated ground two asserts that the Tribunal failed to consider the reasonableness of relocation, given that the applicant wife was: "known as a prostitute" and "she would face the same problems" elsewhere in India. As particularised, this ground does not succeed.

59. The Tribunal rejected the applicant husband's claims (and for that matter, the applicant wife's claims to be a refugee which were based on her husband's evidence to the Tribunal (see CB 88.5 and CB 91.3)), because the Tribunal found that the applicant husband was not truthful in his evidence. It rejected his claims to fear harm if he was to return to India in the reasonably foreseeable future on this basis. Plainly, the issue of relocation would only become relevant to the Tribunal's consideration if the Tribunal had found that there was a well-founded fear of persecution for a Convention reason in the applicant's home area. The Tribunal made no such finding, and as such, there was therefore no requirement for it to consider the issue of relocation.

Ground Three – Denial of Procedural Fairness

60. The third ground in the amended application asserts a denial of procedural fairness because the Tribunal member was said to have formed: "the view about the applicant's status before hearing" (in context this is a reference to the applicant husband).

61. On its face, I saw this as an assertion that the Tribunal's decision was affected by bias, or that the Tribunal acted with bad faith. The

complaint that the Tribunal formed a view about the applicant's case before the hearing would infer that the complaint is that the Tribunal did not bring an open mind to the consideration of the applicant husband's claims at least from some time prior to the hearing that it conducted with him.

62. I note relevant authorities in relation to bias (even apprehension of bias), and bad faith, set out above ((*SZHPD*, *SCAA*, *Ex parte H*, *Jia*, *SBBS*, *SBAN*, *VFAB*). I cannot discern from the material that has been put before the Court that any of the relevant tests to establish bias, apprehension of bias, or bad faith can be made out.

63. The ground also refers generally to a denial of procedural fairness. To the extent that this may be a reference to such denial beyond the claim of bias, and a claim of a lack of procedural fairness at general law, I note that this is a case to which s.422B of the Act applies to make Division 4 of Part 7 (as it existed prior to the *Migration Amendment (Review Provisions) Act 2007* (Cth) which came into effect on 29 June 2007) the exhaustive statement of the natural justice hearing rule for the purposes of this case (*Minister for Immigration and Multicultural Affairs v Lay Lat* (2006) 151 FCR 214; [2006] FCAFC 61 at [59]-[67], *SZCIJ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 62 at [8], *SZFDE v Minister for Immigration and Citizenship* (2007) 237 ALR 64; [2007] HCA 35 at [48]).

64. In that regard, I note that the Tribunal did send a letter to the applicant husband pursuant to s.424A of the Act seeking his comments on certain information relating to his travel movements, and the timing of his application for a protection visa, and indeed even provided the opportunity to the applicant husband to provide additional information pursuant to s.424 of the Act relating to his educational and employment background and family composition (see CB 47 to CB 48). The applicant husband did not respond to this letter, but in any event the Tribunal proceeded to conduct a hearing even though, as Mr Potts correctly submits, it could have proceeded pursuant to s.424C of the Act and not done so.

65. For the purposes of s.425 of the Act, both applicants were invited to a hearing, both attended, and both were given the opportunity to give evidence and make submissions in support of their application.

66. Nor can I see any error in relation to the applicant husband as it could arise from what the High Court said in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; [2006] HCA 63 ("*SZBEL*").

67. In his evidence to the Tribunal (the Tribunal's account is not challenged by the applicants now), the applicant husband told the Tribunal that his then migration agent had made a "mistake" and whatever information had been given to the first respondent was "incorrect", and the applicant husband raised a new set of claims for the first time before the Tribunal. In relation to the applicant husband therefore, it is clear that, as Mr Potts submits, he would have understood that the Tribunal was starting "afresh", and could not have assumed that any of the determinative issues before the delegate would identify for him the issues that arose in relation to the decision (*SZJUB v Minister for Immigration and Citizenship* [2007] FCA 1486 at [16] and [21]).

68. In any event, the determinative issue in relation to the applicant husband in the disposition of the application for review was his lack of credibility before the Tribunal. The only account of what occurred at the hearing that has been put before the Court, that is the Tribunal's own account, shows very clearly that the Tribunal squarely raised this issue with the applicant husband. Following a number of instances where, in my view, the Tribunal sufficiently indicated (with reference to *SZBEL* at [47]) its concerns with the applicant husband's evidence (see CB 84.4, CB 84.8, CB 85.2, CB 85.9, CB 86.7), it ultimately squarely raised with the applicant husband its concerns about the credibility of his evidence. See CB 86.8, and ultimately, CB 87.6 where the Tribunal stated:

> *"The Tribunal noted its concerns with the application …. These concerns may cause the Tribunal to find that the applicant is not truthful in his claims."*

69. In relation to the applicant wife, the determinative issue in the Tribunal's mind was that the applicant wife had relied on her husband's evidence (CB 88.5), and that because the Tribunal found that evidence not to be credible, it rejected her refugee claims as well. It appears from what is before the Court that the applicant wife was present at the hearing (CB 56.4 and CB 88.4), and therefore would have been on

notice as to the Tribunal's view of the applicant husband's credibility. Noting of course that in relation to the applicant wife the relevant issue (given what I have already set out above) was whether she was a member of the family unit of a person who had been granted a protection visa. Plainly, following the delegate's decision, the applicant wife would have been on notice of this issue which should have been the determinative issue in relation to her application for a protection visa. (That it was not is already the subject of the finding above of jurisdictional error in the Tribunal's decision on the applicant wife's application.)

70. On what is before the Court now, I cannot see that reference to any other part of Division 4 of Part 7, as it existed at the relevant time, would reveal jurisdictional error on the part of the Tribunal. Noting also in this regard that the applicants were invited to a hearing before the Tribunal by letter dated 14 June 2007 (CB 45 to CB 46). This letter invited the applicants to a hearing scheduled on 11 July 2007. On the material before the Court (and this is not disputed by the applicants now) the Tribunal's letter did comply with the relevant provisions set out in ss.425 and 425A of the Act. For the purposes of s.425A of the Act, the letter was sent by one of the methods specified in s.441A (namely, s.441A(4)). For the purposes of s.425A(4), it contained a statement to the effect of s.426A of the Act. For the purposes of s.425A(3), bearing in mind the provisions contained in s.441C(4) and reg.4.35D of the Regulations, the prescribed period of notice was given.

71. I note that the applicant husband had sought an adjournment of the hearing, and the hearing was rescheduled for 26 July 2007, at which time both applicants attended. Plainly, the Tribunal agreed to exercise its power (pursuant to s.427 of the Act) to adjourn the hearing date. I note that this was done at the specific request of the applicant husband (and in context, on behalf of the applicant wife). In these circumstances, no error is revealed (see *SZEFM v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 78, per Bennett J).

72. I also note that the Tribunal properly gave the applicant wife the opportunity for a further adjournment at the hearing given that she had

indicated to the Tribunal that she was not feeling well. But given that the applicant wife told the Tribunal (CB 88.5) that she had nothing further to add to that which her applicant husband had put to the Tribunal, that it was plainly open to the Tribunal, in those circumstances, to proceed to make a decision without providing a further opportunity to the applicant wife to attend at a further hearing.

Ground Three – Particulars

73. The particulars to ground three in the amended application appear to raise a separate complaint to that stated in the ground. The particulars assert that the applicant husband had a very limited knowledge of English and that for this reason he could not understand the issues that arose at the time of the hearing.

74. Taking the applicants' complaint on its face as stated, while the applicant husband may have had "very limited knowledge of English" at the time of the hearing it is clear that an interpreter in the Gujarati language was provided at the hearing as requested by the applicant (see CB 55.7 and CB 56.7; see also CB 82.6). In these circumstances, there is nothing before the Court to show that the applicant husband's very limited knowledge of English would have prevented him from understanding the relevant issues.

75. Although not expressed as such, and certainly there are no particulars in support, it may be that the applicants are seeking to complain about the level of interpretation provided by the interpreter before the Tribunal. Whether this issue is considered as an allegation of a breach of s.425 of the Act, that is, that the applicant was not able to give evidence and present arguments, or even whether this is viewed as an allegation of a denial of procedural fairness at general law, then with reference to relevant authorities there is no evidence put before the Court to reveal that the applicant husband was not able to give evidence and present arguments, or that there were such errors in the standard of interpretation such that there was a failure to provide an adequate level of interpreting at the hearing (see *Mahzar v Minister for Immigration and Multicultural Affairs* [2000] FCA 1759; (2000) 183 ALR 188, *Xiao v Minister for Immigration and Multicultural Affairs* [2000] FCA 1472, *Appellant P119/2002 v Minister for Immigration*

and Multicultural and Indigenous Affairs [2003] FCAFC 230, *Perera v Minister for Immigration and Multicultural Affairs* [1999] FCA 507).

76. The only account of what occurred at the hearing put before the Court, that is, the Tribunal's own account, does not reveal that the applicant husband was prevented from giving his evidence and making submissions. Nor that the level of interpretation was inadequate. There is nothing in the material to show that the applicant husband, or for that matter the applicant wife, complained about the level of interpretation either during the hearing, or in the time that was available to them to do so following the hearing (26 July 2007) until the handing down of the Tribunal's decision on 21 August 2007.

77. This complaint does not succeed.

Summary

78. The applicant husband had applied for a protection visa on the basis that he had refugee claims in his own right. Ultimately, the applicant husband put a new set of claims before the Tribunal at a hearing which the Tribunal conducted with him. On the material before the Court, the Tribunal considered the applicant husband's claims and, because of the adverse view that it formed of his credibility as a witness, rejected these claims, and found that he was not a person to whom Australia had protection obligations. In effect, this was a finding that the applicant husband did not satisfy the criterion set out in s.36(2)(a) of the Act. For the reasons set out above, I cannot discern jurisdictional error in the Tribunal's decision record as it relates to its decision on the application for a protection visa made by the applicant husband.

79. The applicant wife also applied for a protection visa. She did so on a basis separate to that of her husband. Namely, she did not put forward claims to be a refugee in her own right in her application for a protection visa, but applied as the member of the family of the applicant husband. For the reasons set out above, I find that the Tribunal did not deal with the applicant wife's claim consistent with the basis on which the application for a protection visa was made by her. It did not assess the applicant wife's claim to a protection visa as against the relevant criterion applicable to her given the basis of her

application. For the reasons set out above, the Tribunal's decision record, insofar as it relates to the decision made in relation to the applicant wife, does reveal jurisdictional error on the Tribunal's part.

Conclusion – Applicant Husband

80. The Tribunal made two decisions, albeit presented in the one record. Given that I cannot discern jurisdictional error in the decision relating to the applicant husband, the application made by him to this Court is accordingly dismissed.

Applicant Wife – Relief Sought

81. The Tribunal also made a decision in relation to the applicant wife. Given that this decision is affected by jurisdictional error, I considered whether the relief sought by the applicant wife should be granted.

82. It is well established that the relief that the applicant wife seeks is discretionary. Mr Potts submitted that in the event of a finding that the Tribunal's decision as it related to the applicant husband did not contain jurisdictional error, and the application to the Court by the applicant husband be dismissed, then if jurisdictional error was found in relation to the decision relating to the applicant wife, then granting the relief that she seeks by sending the matter back to the Tribunal for reconsideration would lead to her application before the Tribunal in any event, inevitably having to fail. The reason being that her application is wholly dependent upon there being a member of her family unit who is found to have been a refugee, and entitled to a protection visa, and granted a protection visa, on that basis. I agree with Mr Potts' submission that it would serve no purpose for this Court to grant the relief sought by the applicant wife.

83. If the matter of the applicant wife's application were returned to the Tribunal it would inevitably fail because, given that she applied on the basis of being a member of a family unit of a person who had applied for a protection visa solely on the basis of having refugee claims in his own right, given that the applicant husband has been determined as a person to whom Australia does not owe protection obligations, that is, a person who does not have a protection visa, and no jurisdictional error

is apparent in that decision, then the applicant wife cannot possibly succeed before the Tribunal in meeting this necessary criterion relevant to the disposition of her application. On that basis it would be futile of this Court to send back to the Tribunal the applicant wife's matter.

Conclusion – Applicant Wife

84. On that basis I decline to grant the relief sought by the applicant wife.

85. Accordingly, I will make orders dismissing the application to the Court made by the applicant wife.

I certify that the preceding eighty-five (85) paragraphs are a true copy of the reasons for judgment of Nicholls FM

Associate: A Douglas-Baker

Date: 19 March 2008