FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZILP v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 592

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming political persecution in Nepal – Tribunal rejecting applicant's claims as fabricated – assumption by Tribunal that the Nepalese Maoists would not tolerate the work of western funded NGOs, where the applicant said his NGO employment gave him temporary protection from the Maoists – whether Tribunal able to make a finding based on the presiding member's own opinion considered – Tribunal not bringing an independent mind to bear on the issue – apprehended bias established.

Administrative Appeals Tribunal Act 1975 (Cth), s.33
Migration Act 1958, ss.424A, 422B, 430

Applicant M164/2002 v Minister for Immigration [2006] FCAFC 16
Collector of Customs (Tasmania) v Flinders Island Community Association (1985) 8 ALN N102; (1985) 7 FCR 205; 60 ALR 717
Daniel Huluba v Minister for Immigration (1995) 59 FCR 518
Dranichnikov v Centrelink [2003] FCA 133
McGale v Glad (1981) 36 ALR 81
Military Rehabilitation and Compensation Commission v SRGGGG [2005] FCA 342
Minister for Immigration v Yusuf [2000] HCA 30; (2000) 206 CLR 323
Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal [2002] HCA 30
NADH of 2001 v Minister for Immigration (2004) 214 ALR 264
Re Ernst and Repatriation Commission (1988) 15 ALD 93
Re Minister for Immigration; ex parte Applicant S20 of 2002 (2003) 198 ALR 59
Rodriguez v Telstra Corp Ltd (2002) 66 ALD 579; [2002] FCA 30
Ruiz v Canberra Rex Hotel Pty Ltd (1974) 5 ACTR 1
SZIOK v Minister for Immigration [2007] FMCA 618
Teisdall v Health Insurance Commission [2002] FCA 97
VCAT of 2002 v Minister for Immigration [2003] FCAFC 141

Applicant:	SZILP
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG668 of 2006
Judgment of:	Driver FM
Hearing date:	18 April 2007
Delivered at:	Sydney
Delivered on:	11 May 2007

REPRESENTATION

Counsel for the Applicant:	Mr L Karp
Solicitors for the Applicant:	Parish Patience Immigration Lawyers
Counsel for the Respondents:	Mr J Smith
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) The Court directs that the title of the first respondent be amended to the Minister for Immigration & Citizenship.

(2) A writ of certiorari shall issue, quashing the decision of the Refugee Review Tribunal signed on 24 January 2006 and handed down on 2 February 2006.

(3) A writ of mandamus shall issue, requiring the Refugee Review Tribunal to reconsider the application before it according to law before a differently constituted Tribunal.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG668 of 2006

SZILP
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal ("the Tribunal") handed down on 2 February 2006. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant is from Nepal and claimed a fear of persecution on account of actual or imputed political opinion.

2. The following statement of background facts is taken from the applicant's outline of submissions filed on 4 August 2006. The applicant is now thirty two years of age. He arrived in Australia on 18 July 2005 (court book, "CB" 33) and filed an application for a protection visa on 15 August 2005 (see Index to Court Book).

3. In that application he made a general claim that he feared for his life in Nepal (CB 19), at the hands of both the Royal Nepalese Army and members the Communist Party of Nepal (Maoist) (CB 21). His statement in Nepalese was attached to this application, but it has not been reproduced in the Court Book (see CB index).

4. On 31 August 2005 the applicant's solicitor wrote to the Onshore Protection Section of the Department on behalf of a number of his Nepalese clients, requesting that decisions not be made until he had obtained translations of their evidence and documents (CB 35). The reply, dated 21 September 2005, stated that decisions would not be made prior to close of business on Friday 23 September 2005 (CB 36).

5. The primary decision was in fact made on 11 October 2005 (CB 39-45), apparently prior to submission of translated documents. The delegate found that the applicant had put forward no detail (at least in English) of his claims (CB 45). His application to the Tribunal was lodged on 11 November 2005 (CB 47-50).

6. It was not until 6 December 2005 that the applicant's statement, as translated, was lodged. In it (CB 53-4) he made claims to the following effect:

- He was a member of the Limbu caste, which he described as a "backward and low caste tribe".
- After the 1990 democratic reforms, elected leaders were motivated by self interest, rather than serving the needs of the people.
- As the Maoists were the only party that opposed such activities, he joined the Maoists.
- Whilst working openly as a volunteer teacher he explained the Maoist cause to the poor. He also assisted with meals and accommodation for visiting Maoists, and helped them set fire to the office building of the Village Development Committee.
- He came to oppose Maoist methods of murder, kidnapping, destruction of infrastructure and collecting financial contributions by force. He also opposed the bombing of the control tower of

the local airport, arguing that there should be an airport in that area. After the airport was bombed he quit the party.

- After King Gyanendra began to rule by proclamation on 1 February 2005 the army was given increased power. Many of the applicant's Maoist friends were killed and some were arrested. The applicant's name was extracted from these people, and the army was seeking him out. To save himself he moved to Kathmandu for 2½ months before leaving the country through Tribhuvan Airport.

- He also fears the Maoists, because they normally do not accept people leaving the party.

7. The Tribunal reported that at hearing the applicant said that he had received a letter from the Maoists, demanding that he return to face his punishment. It recorded that he tendered the letter, written in Nepali with a Maoist letterhead, to the Tribunal (CB 88.7[1]). He also said that he left the party after the airport was bombed in March 2004, and that he stayed in the village for another year before moving to Kathmandu. In response to the Tribunal's question as to why he had not been attacked by the Maoists while he was still in the village he stated that the organisation that he was working with was a health clinic with overseas funding. It was looking after villagers' health and water supply. The Maoists, he said, were happy with the work being done for poor people (CB 88.8).

8. The Tribunal also said that it discussed independent evidence with the applicant, including that the authorities could easily detain the applicant when he departed Nepal using his own passport, and that he could relocate to India (CB 89).

The Tribunal decision

9. After discussing the applicant's evidence the Tribunal moved to extract the independent information. This was in the form of summaries of the political and military situations in Nepal, the possibility of relocation to India, which ultimately played no part in the actual reasons for

[1] The tendered letter is also not in the Court Book.

decision, and the use of fraudulent documents by Nepalese asylum seekers.

10. In its findings and reasons the Tribunal dismissed the applicant's claim to have suffered because of his caste (CB 94.2). It then addressed the more substantive claims regarding his problems with the Maoists and the government. It did not accept these claims for the following reasons:

    i) It did not accept that he would have left the party and yet stayed in the village for a further year, and that only when he left the village did he become targeted as an enemy of the Maoists.

    ii) His activity with a western funded NGO, in the light of the aims of the "Peoples War", would have been unacceptable to the Maoists, particularly after he left the party.

    iii) Rather, the Tribunal found that he had fabricated his claims and produced a fraudulent document.

    iv) Had the government been pursuing the applicant it would have detained him at the airport upon his departure.

The judicial review application

11. The present proceeding began with a show cause application filed on 2 March 2006. In that application the applicant asserted actual notification of the Tribunal decision on 2 February 2006. On that basis I find that the application was filed within time. The application was supported by a short affidavit by the applicant's solicitor, annexing a copy of the Tribunal decision. An amended application was filed on 24 March 2006. The applicant now relies upon a further amended application filed on 8 September 2006.

12. The grounds in the further amended application are as follows:

    1. The decision was capricious, arbitrary, and made according to humour or private opinion rather than reason and justice.

Particulars

(a) The Tribunal neither produced or referred to any evidence whatsoever that could support a conclusion that the applicant's work with a western funded NGO would have been unacceptable to the Maoists, in the light of the aims of the "Peoples War",

(b) The Tribunal neither produced or referred to any evidence whatsoever to the effect that Nepal had any means of detecting people who were wanted by the authorities, when such people were leaving the country through Tribhuvan Airport in Kathmandu.

(c) The Tribunal reasoned from a premise that many Nepalese documents are fraudulent directly to a conclusion that the applicant's document was fraudulent.

2. The Tribunal's approach to the issues in the applicant's case would engender a reasonable apprehension in the mind of a hypothetical observer that the Tribunal had prejudged those issues.

Particulars

See particulars to ground 1 above.

13. The final hearing of the application commenced on 8 September 2006 but was adjourned to permit the applicant's legal advisers to consider a possible further amendment to the application to raise the issue of compliance by the Tribunal with s.424A of the *Migration Act 1958* (Cth) ("the Migration Act"). A further adjournment was necessitated by my unavailability in December 2006 and the hearing resumed on 18 April 2007. In the event, there was no further amendment to the application. The applicant's legal advisers decided no issue should be raised in relation to compliance with s.424A in the light of an affidavit by Melissa Jolley, solicitor, filed on behalf of the Minister on 6 December 2006.

The evidence

14. I received as an exhibit[2] the court book filed on 21 March 2006. The court book is evidence of the Tribunal decision, the process followed by it and the material available to it at the time of its decision. In addition, I accepted three documents tendered by the applicant as evidence of country information before the Tribunal or available to it which was not included in the court book but which was referred to in the index of "CIS material" set out on page 96 of the court book[3].

Submissions

15. The applicant concedes that there may be a rational basis for the Tribunal findings that it did not accept that the applicant would have left the Maoists yet stayed in his village for a year and that only when he left the village did he become targeted as an enemy of the Maoists. This is qualified by the fact that that finding depends in part for support on the latter findings that the applicant's activity with the western funded NGO, in the light of the aims of the "People's War" would have been unacceptable to the Maoists, particularly after he left the Party and that the applicant was thus found to have fabricated his claims and produced a fraudulent document. The applicant complains that that purported letter from the Maoists was found to be fraudulent without any analysis of the document itself, but rather by reference to generalised information about document fraud in Nepal. The applicant further complains that the Tribunal's finding that the Nepalese government would have detained him at the airport at the applicant's departure from Nepal if it had been pursuing him was based on "mere assumption".

16. The applicant further submits as follows:

> *The Tribunal has a duty to give reasons for its decision (s 430 Migration Act).Included in that duty is that of making findings on material questions of fact (s 430(1)(c)) and referring to the evidence or other information upon which those findings are based (s 430(1)(d)). The High Court said in* Minister for Immigration v Yusuf *(2000) 206 CLR 323 that if the Tribunal*

[2] exhibit C1
[3] exhibits A1, A2, A3

does not make a finding on a fact it may be inferred that it did not consider that fact to be material. I submit that by parity of reasoning, if the Tribunal has not referred to evidence or other material upon which findings of fact are based, a Court can reasonably conclude that it had no such material, and that indeed this is the situation here.

In NADH of 2001 v Minister for Immigration *(2004) 214 ALR 264, Allsop J said, with the concurrence of Moore and Tamberlin JJ*

> 12. The existence in any given case of arbitrary unreasoned conclusions made without a scintilla of evidence may lay a foundation for an argument that the decision-maker moulded his or her fact finding to reach a particular result. Such may also lay the foundation for argument that the decision reached was capricious, arbitrary, made according to humour or private opinion rather than reason and justice, or that it was unreasonable: see *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 189; *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 430; *Bankstown Municipal Council v Fripp* (1916) 26 CLR 385, 403; *Foley v Padley* (1984) 154 CLR 349, 353, 370; *Buck v Bavone* (1976) 135 CLR 110, 118-19; *Corporation of the City of Enfield v Development Assistance Commission* (2000) 199 CLR 135, 150. "Unreasonableness" in this context may be seen as embodying, at least, what Starke J said in *Boucaut Bay Co (In liq) v The Commonwealth* (1927) 40 CLR 98, 101, approved by Windeyer J in *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28, 57. See also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360.

This case is not as factually complex as NADH of 2001. *However, the Tribunal's findings of fact as to points 9(ii) and 9(iv) can fairly be characterised as, "…arbitrary unreasoned conclusions made without a scintilla of evidence". In that respect it may also fairly be said that the decision was made, "…according to humour or private opinion rather than reason and justice, or that it was unreasonable." It may also engender a reasonable apprehension in the mind of a hypothetical observer that the Tribunal had prejudged the issue.*

> *The same may be said of the Tribunal's conclusion about the Maoist letter. To reason from a premise that many Nepalese documents are fraudulent directly to a conclusion that a particular document is fraudulent without saying anything about the document itself is at the very least arbitrary and capricious. It may also engender a reasonable apprehension in the mind of a hypothetical observer that the Tribunal had prejudged the issue.*

17. The Minister submits that the reasons of the Tribunal should not be subjected to over zealous scrutiny. The Minister submits that even if the Tribunal made an error of fact, that does not establish jurisdictional error: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 387. The Minister also stresses the high threshold that must be met before the Court can find jurisdictional error on the basis of no evidence: *Schmidt v Comcare* (2003) 77 ALD 782 at 786. The Minister further submits that in order to establish error by the Tribunal in drawing inferences of fact the applicant must establish that the inferences were not reasonably open to the Tribunal.

18. The Minister's submissions continue:

> *There are two findings of fact under attack. Both were reasonably open on the material. The first fact was:*
>
> > "(the applicant's) activity with a Western-funded NGO would have, in the light of the aims of the Maoists' People's War, to have been unacceptable to the Maoists, particularly once he had allegedly broke with them over their violent activities." [CB 94.6]
>
> *There were two sources for this which are set out in the Court Book: first, from the applicant himself, that the Maoist Party normally takes action against party leavers [CB 64.3]; and secondly, that the Maoists are "fighting to install a single-party communist republic" in Nepal [CB 91.5]. It doesn't take much general knowledge to infer from these two pieces of information that assistance from a former Party member given to a Western-funded aid organization (the success of which would lead to greater political stability) would be anathema to the Maoists. Recent experience in both Afghanistan and Iraq supports this reasoning (although the insurgents there are not even communists). Thus, two things may be said in respect of the attack on this finding: while there is no express statement to the effect of the finding, there does not need to be; and, the inference drawn by the Tribunal was reasonably open to it.*

The second finding under attack is that the letter relied on by the applicant was fraudulent because there was material to suggest that the use of false documentation is very common among Nepali expatriates. The argument is that this was an error of law because of the unspoken reasoning that "since many Nepalese documents are fraudulent, this one must be fraudulent". However, this argument not only misstates the evidence and erroneously describes the reasoning process but also confuses error of logic with error of law.

The evidence went much further than is suggested by the applicant. The evidence goes to the "use of false documentation" by "Nepali expatriates", a much narrower focus than simply "Nepali documents". While the difference is really only one that goes to the relevance and weight of the information, it is important because to ignore it would be to arrive too easily at a conclusion that there was an error of law.

The true reasoning process starts with a finding that the applicant's story was unconvincing. In other words, the Tribunal found issue with his credibility. Next, it had before it information that the use of false documents was "very common" amongst Nepali expatriates. The applicant was a Nepali expatriate and relied on documents. The information was thus probative of a finding that the document was false. There is no suggestion that the Tribunal reasoned from the information that it must be false, only that it was.

However, even if the Tribunal had employed the reasoning suggested by the applicant, that is, fell into the logical error of the undistributed middle[4]*, it was only an error of logic and not one of law.*

Reasoning

19. The applicant's protection visa claims are set out on pages 63 and 64 of the court book. In his protection visa application at page 18 of the court book, the applicant identified employment as a volunteer at a "friendship clinic" between May 1997 and December 1998. This was apparently the NGO referred to by the applicant before the Tribunal. The applicant identified his employment with NGO as the reason why

[4] Any form of categorical syllogism in which the middle term is not distributed at least once; e.g. All crows are black, I am black, therefore I am a crow.

the Maoists had not attacked during the year in which he remained in his village after he left the Party (court book, page 88).

20. The Tribunal considered general country information relating to the political and security situation in Nepal (as well as the possibility of Nepalese receiving protection in India, which was not relied on by the Tribunal). The Tribunal also had regard to information from *The Nepali Times* in 2001 that the use of false documentation was "very common" among Nepali expatriates.

21. In its findings and reasons the Tribunal noted the applicant's claim to fear harm from both the Maoists, whom he claimed would take retribution on him for having left the Party, and the Nepalese authorities in their then current crackdown on Maoists. The Tribunal dealt with a particular social group claim, which is not in issue in this proceeding, and then accepted, on the basis of independent country information, that the political situation in Nepal was then marked by violence and instability and that the Maoists and the military had committed human rights abuses and had targeted those whom they considered to be their enemies. The following paragraph in the Tribunal decision is the crux of its decision at issue:

> *The Tribunal found the applicant's evidence with regard to his claims of having been a Maoist member who subsequently left the party and is now being targetted by them, to be unconvincing and does not accept his claims. The Tribunal finds as implausible, and does not accept, that he should have left the party and then stayed in the village for a further year and that only after having left the village, that he became targetted as an "enemy" of the Maoists. The Tribunal finds his activity with a Western-funded NGO would have, in the light of the aims of the Maoists' People's War", to have been unacceptable to the Maoists, particularly once he had allegedly broke with them over their violent activities. Rather, the Tribunal finds that the applicant has fabricated this claim, and to have tendered a fraudulent document purporting to be from the Maoists, in order to remain in Australia. In making this finding, the Tribunal also rejects his claim that his previous alleged membership of the Maoists would be the reason the Nepalese authorities are now allegedly pursuing him. The Tribunal notes he departed Nepal using a passport issued in his own name and the authorities, had they been pursuing him, would have apprehended him at the airport upon his departure.*

22. I accept that a tribunal decision which is capricious, arbitrary, made according to humour or private opinion rather than reason and justice is thereby unreasonable in a sense demonstrating jurisdictional error: see *NADH* at [12], [130] and [135]-[136]; *Re Minister for Immigration; ex parte Applicant S20 of 2002* (2003) 198 ALR 59 at [34]-[37] and *Minister for Immigration v Yusuf* [2000] HCA 30; (2000) 206 CLR 323 at [69]. There is also no doubt that pre judgement is sufficient to establish jurisdictional error by reason of bias: *Dranichnikov v Centrelink* [2003] FCA 133 at [40]. Likewise, a reasonable apprehension by a fair minded observer that the decision maker may not bring an impartial mind to bear on the question to be decided establishes apprehended bias: *Applicant VCAT of 2002 v Minister for Immigration* [2003] FCAFC 141 at [36]. The question to be resolved is whether the Tribunal did so grievously err.

23. In considering the Tribunal's reasons, regard must be had to the complete decision. The impugned reasoning must be considered by reference to the rest of the decision.

24. It was reasonable for the Tribunal to be concerned about the applicant's claim that the Maoists only threatened to harm him after he left his home village, more than a year after he left the Party. Country information, and the applicant's own claims, showed that the Maoists had a reputation for violence and that they dealt harshly with defectors. The Tribunal was entitled to find that that claim, on its own, was implausible. However, the applicant had advanced an explanation. His explanation was that he was protected from the Maoists' vengeance while he worked with a western funded NGO. The Tribunal dismissed that explanation on the curious basis that working with a western funded NGO would have, in light of the "aims of the Maoists' peoples war", have been unacceptable to the Maoists. Counsel for the Minister suggested that the rationale for this finding was that the Maoists wished to destabilise Nepal and that the operations of NGOs tended to enhance stability and hence would have been unacceptable to the Maoists. The difficulty is that none of the country information supported that proposition. There was nothing to suggest that there was any general objection, by the Maoists, to the operations of western funded NGOs.

25. The Tribunal seems to have made its finding on the basis of the opinion of the presiding member. The finding is critical as, without the explanation advanced, the applicant's claim was implausible and liable to be rejected. This raises a further question whether decision makers are entitled to base a decision upon their own opinion.

26. There are several key principles which are relevant to the issue where a decision-maker uses information in the decision-making process which he or she has authored, or where a decision-maker has based their decision on their own knowledge. A tribunal is able to use its own knowledge in the making of a decision, however depending on how that knowledge is used there is a risk the decision-maker may breach the rules of procedural fairness.

27. The authorities support the principle that, under the general law, a decision-maker may use their own knowledge if that use is fully disclosed to the applicant such that the applicant can comment upon it, and only where the conclusion reached on the basis of that knowledge is of probative value and not an issue about which expert evidence should be sought. A decision-maker must not, therefore, use his or her own authored document or knowledge as a basis for the decision without disclosing that use to the applicant, and allowing the applicant to comment on the material during the hearing.

28. This accords with the principle that a decision-maker must bring an independent mind to the inquiry: *Daniel Huluba v Minister for Immigration* (1995) 59 FCR 518. Arguably the use by the decision-maker of information of which s/he is the author, for example, or using pre-existing opinions or knowledge without considering that information in the context of the case at hand is not bringing an 'independent mind' to the inquiry.

29. In *Huluba* the issue was whether the applicant was denied procedural fairness on the grounds that the decision-maker had not brought an independent mind to the review where there was a substantial coincidence in the language of the primary and secondary decision-makers – the second decision being given upon remittal of the proceedings to the Tribunal. The Court held that it was obvious the second decision-maker used substantial portions of the first decision-maker's report, due to coincidental language, where those portions

related to "critical findings". Given that, the court found that it was *"more probable than not that the second decision-maker did not apply an independent mind to the decision-making process"*, and accordingly there was a breach of procedural fairness.

30. Beazley J states at [38]:

> *Procedural fairness requires a decision-maker to apply an independent mind to the application subject of administrative action. A decision-maker is entitled to have regard to research and investigations carried out by others as well as to assessments and reports and recommendations prepared by others in the course of the administrative process. A decision-maker may have regard to and adopt, if thought appropriate, the reasoning of some other person involved in the administrative process. Thus a decision-maker could accept the reasoning of an officer whose function it had been to provide a recommendation and could adopt verbatim, such report or recommendation, provided at all times that the decision was the independent decision of the decision-maker. This case is different. The second decision-maker's task was to make a new determination. In doing so there would have been no breach of the rules of procedural fairness for the second decision-maker to read and consider the findings of the first decision-maker. However, procedural fairness required that she reach an independent decision in the matter.*

Where a decision-maker has placed reliance on their own expertise

31. The *Australian Administrative Law Service* discusses the applicable principles where a decision-maker has placed reliance on their own expertise, in the context of a discussion of the Administrative Appeals Tribunal.

32. At [239A] the learned authors note:

> *The cases indicate that it is legitimate for AAT members to rely on their own background knowledge whether it be derived from their training or from acquired experience on the AAT. If, however, a Tribunal proposes to reach a conclusion based on the knowledge of the members of a particular fact or in reliance on particular expertise, it is necessary for the AAT to indicate this to the parties so that no question of a breach of the rules of natural justice arises:* Rodriguez v Telstra Corp Ltd *(2002) 66 ALD 579;* Teisdall v Health Insurance Commission *[2002] FCA 97.*

33. The learned authors go on to state:

> *It has been suggested that the expertise that may be relied upon can only be that which has been derived from service on the AAT itself:* Re Ernst and Repatriation Commission *(1988) 15 ALD 93. However, provided that the basis of the expertise and the intention to rely on it is disclosed, it does not seem that this qualification is necessary. Persons are appointed to the AAT because of their expertise. There must, however, be some basis for the matter relied upon:* Collector of Customs (Tas) v Flinders Island Community Assn *(1985) 8 ALN N102 (reliance by Tribunal of own knowledge of traditional Aboriginal concepts of communality of property);* Rodriguez v Telstra Corp Ltd, *above, at 585 (reliance on personal medical knowledge where expert evidence necessary).*

34. In *Rodriguez v Telstra Corporation Ltd* [2002] FCA 30 the AAT reached a decision in regard to a medical issue which no doctor actually expressed in evidence. The Federal Court overturned the decision of the AAT on several grounds, concluding that the issue about which the AAT had made a decision on their own knowledge was one which was required to be relegated to an expert. Further, if the Tribunal had acted upon its own medical opinion it had not disclosed that to the parties which would have given them the opportunity to address it, which formed an error in the circumstances that their conclusion was not supported by probative evidence.

35. Kiefel J noted at [24]:

> *…In any event if a view is formed by a tribunal which goes beyond the opinions expressed by the experts in evidence, fairness requires that it be disclosed and the parties permitted an opportunity to address it.*

36. And at [25]:

> *The Tribunal is not bound by the rules of evidence (s.33 of the* Administrative Appeals Tribunal Act 1975 *(Cth)) and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force…*

37. Kiefel J stated at [25] that a jurisdictional error will be shown "when the tribunal bases its conclusion on its own view of a matter which requires evidence." Her Honour then in the same paragraph adopted the reasoning of the Full Court in *Collector of Customs (Tasmania) v Flinders Island Community Association* (1985) 7 FCR 205 at 210; 60 ALR 717 at 722 saying:

> *…a Full Court of this court held that it was unjustifiable, and therefore legally erroneous, for a tribunal to base its conclusion upon its own understanding of traditional aboriginal concepts of community ownership and interests, in the absence of any evidence on the matter.*

38. In that case Sheppard, Wilcox and Everett JJ held that it was clear that the Tribunal's understanding of aboriginal concepts of community ownership was critical to its ultimate decision, but that there was no evidence before the court in this regard. Their Honours state at page 722:

> *The Tribunal is, of course, entitled to inform itself on any matter in such manner as it thinks appropriate; it is not bound by the rules of evidence:s.33 AAT Act. However, it has long been recognized as the proper practice that a tribunal of fact which takes advantage of such an entitlement should disclose its action and the sources of its information: see* Ruiz v Canberra Rex Hotel Pty Ltd *(1974) 5 ACTR 1 at 7-8;* McGale v Glad *(1981) 36 ALR 81 at 91.*

39. Kiefel J's reasoning was adopted by Madgwick J in *Military Rehabilitation and Compensation Commission v SRGGGG* [2005] FCA 342. In that case the Commission claimed the AAT had erred in its decision for, *inter alia*, making a decision in regard to certain medical information on which it based its compensation award for psychiatric illness. The AAT assessed the medical evidence provided by various doctors in the context of the factual evidence of the incidents which had occurred whilst the respondent was at ADFA. The Court held that the AAT had not erred, and, relevantly for the present matter, discussed the use a decision-maker can make of their own knowledge.

40. Madgwick J stated at [52]:

> *A decision-maker such as the Tribunal, at least one not bound by the rules of evidence, is entitled to reason logically and to draw inferences from expert opinions before it.*
>
> …
>
> *…if the decision-maker introduces a new view of the facts without proper notice to the parties, a denial of their right to be heard may occur. Subject to such matters, however, decision-makers are not obliged to leave their capacity for reasoning and drawing inferences behind them when they come to deal with the evidence of expert witnesses. Where, as here, the tribunal includes a member with a medical background, a conclusion that the permissible scope of the drawing of inferences as to medical matters has been exceeded should not be readily reached by a supervising court. Nor does it appear that the tribunal's reasoning could properly be said to have taken either of the parties by surprise, so as to constitute a denial of procedural fairness.*

41. Madgwick J at [54] accepted the reasoning of Kiefel J in *Rodriguez* but found that in this case the tribunal had not *"[gone] beyond the opinions expressed by the experts in evidence"*, but

> *the Tribunal merely accepted some of those opinions over others and logically applied the logic and doctrines inherent in those opinions to a history of disturbing events at ADFA….There was a basis for the tribunal's decision in evidence that had probative force. In the circumstances, the tribunal did not commit the error of basing its conclusion on its own view of a matter which, being expert, required expert evidence.*

42. In *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* [2002] HCA 30 Justice Callinan said at [291]:

> *There are also these aspects of the jurisdiction of the Tribunal. There is no contradictor in the ordinary sense. As I have observed, the proceedings are essentially inquisitorial. The Tribunal is not bound by the rules of evidence. As this case shows, it goes to many sources of information and acts upon material that courts would not ordinarily receive and use. The Tribunal is a specialist tribunal: its members hear many cases and can be expected to have accumulated a great deal of knowledge, so far as it is ascertainable, about other peoples and other countries. And the Act makes clear distinctions, in the ways to which I have referred, between what the Tribunal must do and what it may, in*

its discretion, do in relation to the gathering, hearing and use of evidence.

43. It would have been procedurally unfair under the general law for the Tribunal to base its decision upon the presiding member's opinion, without disclosing that opinion to the applicant. I have no evidence whether the opinion was disclosed or not. In any event, s.422B of the Migration Act excludes the common law fair hearing rule. Further, s.424A does not require disclosure of the Tribunal's reasoning processes. It is certainly arguable that an opinion by the presiding member, if used instead of evidence, may in circumstances like the present be "information" for the purposes of s.424A(1) but the applicant has chosen not to advance that argument.

44. Nevertheless, s.422B does not exclude the apprehended bias component of procedural fairness. The authorities referred to above establish in my view three things:

a) procedural fairness requires that a decision maker must bring an independent mind to bear on the issue to be decided;

b) a reasonable apprehension that the decision maker failed to bring an independent mind to bear equates to an apprehension of bias, because a mind which is not independent may be prejudiced; and

c) reliance by a decision maker on his own opinion may establish a failure to bring an independent mind to bear, where an examination of evidence is reasonably called for.

45. In my view, a fair minded observer would apprehend that the presiding member did not bring an independent mind to bear on the issue to be decided because he so lightly dismissed the applicant's critical explanation as to the reason why he was not harmed while he remained in his home village, based upon nothing but an assumption by the presiding member as to the political motives and likely actions of the Maoists. This finding is reinforced by the manner in which the presiding member dealt with the letter which, on its face, was a threat from the Maoists. The Tribunal assumed that the letter must be fraudulent because it had found that the applicant had fabricated the claim which the letter supported. There was no analysis of the

appearance or contents of the letter. Rather, there was a complete unwillingness to pay regard to the letter.

46. Further, the presiding member's assumption that the applicant would have been unable to depart Nepal using his own passport if the Nepalese authorities had been pursuing him was not supported by the available country information. The finding was a secondary one in the context of this case but there was no real consideration given to the ability of a person wanted by the Nepalese authorities to leave the country legally. Rather, there was an assumption that such was not possible. Raphael FM dealt with a factually similar case in *SZIOK v Minister for Immigration* [2007] FMCA 618 where His Honour said at [18]:

> *If the Tribunal expresses itself as failing to be satisfied that the applicant was a Maoist and was not a person in whom the authorities had an interest because he was able to leave the country, then the manner of his leaving the country must become an integer of his claim. This is particularly the case when the independent country information appears to corroborate the applicant. The Tribunal is not bound to believe the applicant but it is bound to indicate why it does not do so and absent the* "poisoned well of testimony" *discussed in* Re Minister for Immigration; Ex parte Applicant S20/2002 *(2003) 183 ALR 58 or other contradictory evidence this requires the Tribunal to embark upon an investigation with the applicant of that part of the claim that relates to those matters. The Tribunal cannot use as the reason for rejecting evidence that contradicts its basic assumption that assumption itself. I am of the view that to do so fails to conduct a hearing in a manner that allows the Tribunal to reach its state of satisfaction in a reasoned manner or to give genuine or real consideration to the material before it. A decision reached in the absence of these requirements is not a decision made within jurisdiction:* Applicant M164/2002 v Minister for Immigration *(supra) per Lee J at [63]-[69]; per Tamberlin J at [117]-[118]*.

47. Considering these issues in combination, I am satisfied that apprehended bias in this case has been established. The applicant is therefore entitled to receive relief in the form of the constitutional writs of mandamus and certiorari.

48. I will hear the parties as to costs.

I certify that the preceding forty-eight (48) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 11 May 2007