FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZGLL & ANOR v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 631

MIGRATION – Review of decision of Refugee Review Tribunal – whether jurisdictional error – application for Protection (Class XA) visas – whether applicant wife's claims properly and separately considered – whether findings of 'greater generality' suffice – credibility – merits review not the function of judicial review – whether failure to consider whether state protection was denied for a Convention reason – choice, assessment, and weight of country information – whether denial of fair hearing where terms of Article 1A(2) of the Convention, but not s.91R of the Act, provided to applicants – whether Tribunal is constituted under s.422A upon remittal from the Federal Court – s422A and s421 considered.

Judiciary Act 1903, s.39B
Migration Act 1958, ss.5, 36, 65, 91R, 91S, 420, 421, 422, 422A, 424A, 425, 474

WAEE v *Minister of Immigration & Multicultural &Indigenous Affairs* [2003] FCAFC 184
Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham [2000] 168 ALR 407
Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Abebe v Commonwealth (1998) 197 CLR 510
Minister for Immigration and Multicultural Affairs v Khawar (2002) HCA 14
NABD of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 216 ALR 1
NAHI v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 10
NBKT v Minister for Immigration & Multicultural Affairs (2006) 156 FCR 419 (FC)
SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs [2006] HCA 63
NBMB v Minister for Immigration & Citizenship [2008] FCA 149

First Applicant: SZGLL

Second Applicant: SZGNG

First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2558 of 2007
Judgment of:	Orchiston FM
Hearing date:	7 March 2008
Date of Last Submission:	7 March 2008
Delivered at:	Sydney
Delivered on:	20 May 2008

REPRESENTATION

Solicitors for the Applicant:	Parish Patience Immigration Lawyers
Counsel for the Respondent:	Ms T. Wong
Solicitors for the Respondent:	DLA Phillips Fox

ORDERS

(1) The application filed on 20 August 2007, the amended application filed on 5 November 2007, and the further amended application filed on 7 March 2008 are dismissed.

(2) The Applicant pay the First Respondent's costs fixed in the sum of $5,600 payable within five (5) months of the date of these Orders.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2558 of 2007

SZGLL
First Applicant

SZGNG
Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

The Application

1. This is an application pursuant to s.39B of the *Judiciary Act 1903* (Cth) and Part 8 Division 2 of the *Migration Act 1958* (Cth), as amended, (the Act) seeking review of the decision of the Refugee Review Tribunal (the Tribunal) handed down on 26 July 2007 which affirmed the decision of the delegate of the respondent Minister (the delegate) to refuse to grant Protection (Class XA) visas to the applicants.

Background

2. The first applicant (the applicant) was born on 24 December 1955 and was aged 49 years at the time of his application for a protection visa.

3. The second applicant, the applicant's wife, was born on 8 April 1957 and was aged 47 years at the time of her application for a protection visa.

4. The applicants claim to be nationals of Fiji, of Indian ethnicity, and of Hindu faith.

5. The applicants arrived in Australia on 22 December 2004 on Fijian passports issued in their own names, holding 5/C 456 visas, which were valid until 3 March 2005.

6. The applicants lodged an application for protection visas on 21 January 2005 on the basis that they were harassed and assaulted by indigenous Fijians for their membership of the social group called "Savini" which promoted the aims and objectives of Hindu religion. This group was disliked by the local indigenous Fijians who harassed, intimidated and issued death threats to members if they did not terminate their association with the group. In 2001 they broke into the applicants' house and assaulted them. It became virtually impossible for the applicant to run his business so he sold it, came to Australia for some months, but on his return he and his wife were subject to a home invasion and robbery (Court Book (CB) 32–33).

7. On 25 January 2005 the delegate refused to grant the applicants' protection visas on the basis that they were not persons to whom Australia had protection obligations under the Refugees Convention (see **Legislative framework**).

8. On 28 February 2005 the applicants applied to the Tribunal, differently constituted, (the first Tribunal), for review of the delegate's decision (CB 45–48). On 12 April 2005, the first Tribunal affirmed the delegate's decision. The applicants sought review of the first Tribunal's decision, and on 3 November 2005, the Federal Court set aside its decision and remitted the matter to the Refugee Review Tribunal to be reconsidered according to law.

Legislative framework

9. Section 65(1) of the Act authorises the decision-maker to grant a visa if satisfied that the prescribed criteria have been met. However, if the

decision maker is not so satisfied then the visa application is to be refused.

10. Section 36(2) of the Act relevantly provides that a criterion for a protection visa is that an applicant is a non-citizen in Australia to whom the Minister is satisfied that Australia has a protection obligation under the Refugees Convention as amended by the Refugees Protocol. Section 5(1) of the Act defines "Refugees Convention" and "Refugees Protocol" as meaning the 1951 Convention relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees (the Convention).

11. Australia has protection obligations to a refugee on Australian territory.

12. Article 1A(2) of the Convention relevantly defines a refugee as a person who:

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

13. Section 91R and s.91S of the Act refer to the persecution and membership of a particular social group when considering Article 1A(2) of the Convention.

The Tribunal proceedings

14. On 17 December 2006, the Tribunal wrote to the applicants pursuant to s.424A of the Act inviting them to comment on information (CB 118). On 31 January 2007, the applicants responded to the Tribunal's invitation (CB 135).

15. On 6 February 2007, the Tribunal sent a letter to the applicants inviting them to appear before it on 28 February 2007 to give oral evidence and present arguments (CB 157–158). Both applicants attended the Tribunal hearing.

16. On 22 March 2007, the Tribunal again wrote to the applicants pursuant to s.424A inviting them to comment on information (CB 191-196). On 5 April 2007, the applicants responded to the Tribunal's invitation (CB 198-200).

The applicant's claims and evidence (CB 209-231)

17. The Tribunal summarised the applicants' claims in the protection visa application. It further summarised the applicants' claims at the Tribunal hearing, including that:

- they were persecuted in Fiji by indigenous Fijians on the basis of race and religion. In 2001, they were attacked in their house after which time the second applicant moved away from the family home to live with her brothers. The applicant's business was then broken into 3 times and indigenous Fijians sat outside the shop and drove customers away to the point where the applicant could not run the business due to the harassment being suffered

- the applicant first came to Australia on 26 June 2001 and had visited Australia about 8 times as his children were studying here and he wanted to explore the possibility of establishing his business here as well

- the applicant had formed a small social group called "Savini" in Fiji to promote the aims and objectives of the Hindu religion. The indigenous Fijians told them that if they did not stop their activities they would burn them. He was attacked in October 2001 for starting this group and when he reported the attack to the police they did nothing about it

- in 2002 the applicant found someone who was willing to buy his shop and so he sold it. The applicants moved away and rented a house in another area. People found out where they were living and followed them home

- the applicant was attacked for a second time on 24 December 2003. He was beaten and his wife was tied up and the attackers took money, liquor, jewellery and a DVD. After this second attack, both applicants left Fiji and spent most of their time in

Australia before returning to Fiji for over a month in November 2004

- the attacks were reported to the police, but the applicant was surprised that the police did not make more of the reports
- the second applicant said that she had saved herself from assault, which could have amounted to rape.

The Tribunal's findings and reasons (CB 231–234)

18. On 26 July 2007, the Tribunal again affirmed the delegate's decision (CB 206). It rejected the applicants' claims on the basis that they had consistently over time misrepresented their past experiences in Fiji for the purpose of pursuing their application and without regard to what they genuinely believed would happen to them on return to that country.

19. The Tribunal accepted from the documentary evidence provided that the couple owned a shop in Fiji and that on two occasions this was subject to break-ins.

20. The Tirbunal did not believe however that the manifold other harms claimed, including serious assaults and the theft of their car, had affected the applicants. The Tribunal found that the evidence available regarding these claimed additional events had over time "*been substantially inconsistent and no plausible basis for these inconsistencies has been provided.*"

21. The Tribunal pointed to inconsistencies between the applicants' evidence concerning a shoulder injury to the wife. It did not accept that their explanation put forward for the inconsistencies was plausible, given that it was an important and significant matter affecting the health of the wife.

22. Likewise, the Tribunal found that their claim that the applicant's car had been stolen and never recovered supported a conclusion that "*the couple are simply prepared to make any statement to support thier application without regard to the truth*". The Tribunal found that the

car was never in fact stolen in Fiji and that the applicants made up this event to support their claim.

23. The Tribunal also considered the applicants' behaviour after the claimed attack in 2003 and found such behaviour does not support the view that they had ever genuinely held any fear of return to Fiji. After the claimed attack in Decemeber 2003, the couple travelled to and from Australia on three occasions, returning to Fiji at each time. The Tribunal found that if the couple had genuinely experienced the claimed harms in Fiji between 2001 and 2003 they would have made an application for a Protection visa at a much earlier time than they had done. It rejected their explanations for why they returned to Fiji as implausible.

24. The Tribunal concluded that :

> *... the circumstances of the applicants are that they owned a successful business in Fiji which was the subject of two break-ins. They sold this business and their home and moved elsewhere in Fiji. The Tribunal does not accept that after this they were the subject of any harms in Fiji. In pursuing this application, they have misrepresented their past experineces to support their claims of significant harms arising from their race, relgion and possibly an imputed political opinion. The Tribunal does not believe that the couple have ever been fearful of any harm should they return to Fiji.*
>
> *The Tribunal does not believe that the claimed break-ins at the couple's shop had anything to do with their religion, race or related political activity. Commercial premises are not infrequently robbed for the goods and cash held there. Nor does the Tibrunal believe that the assualt on the applicants' son was related to any Convention ground. The failure to mention this at an early stage tends to indicate that it was not regarded as such by the applicants. After selling the shop and moving from Lautoka, the Tribunal does not believe that the applicants experienced any harms in Fiji, nor that they were fearful of any harms befalling them at that time or currently.*
>
> *In the Tribunal's view, the applicants were able to live a secure life in Fiji after the sale of their shop and move from Lautoka in 2001. Their continual travel to and from Fiji and the need to invent claims of harm during this period support this view. The claims in respect of being wealthy Indo-Fijians and subject to*

extortion are not supported by the evidence of the current or foreseeable circumstances in Fiji and, beyond petty theft from their previously owned shop, have not affected the applicants in the past.

There is no material which, in the Tribunal's view, supports a conclusion that the couple would be unable to resume their life in Fiji at the current time or for the foreseeable future without fear of harm for any Convention reason.

In the Tribunal's view, neither the applicant husband or applicant wife holds a well-founded fear of being persecuted for any reason on return to Fiji at the present time, or in the foreseeable future. They are, therefore, not owed protection obligations by Australia and neither is the family unit member of such a person.

The proceedings before this Court

25. The applicants filed the application in this Court on 20 August 2007 setting out 3 grounds of review of the Tribunal's decision. On 5 November 2007 they filed an amended application setting out 4 grounds of review. On 7 March 2008 they filed, in Court, a further amended application setting out 2 grounds of review.

26. On 7 March 2008, Mr Turner appeared before this Court at the hearing on behalf of the applicants. Ms Wong of counsel appeared for the first respondent.

Grounds of application and amended application

27. Mr Turner confirmed at the hearing that the application and amended application were not pressed (Court transcript, 7/3/08, p 7-8).

Grounds of further amended application

28. The two grounds of the further amended application are:

    (1) The Tribunal failed to carry out its statutory duty.

    Particulars:

(a) The Tribunal failed to consider all integers of the applicants' claims

(i) the separate claims made by the second applicant

(ii) that effective state protection was denied to them because of their race, religion, imputed political opinion or membership of a particular social group.

(b) The Tribunal failed to properly advise the applicants of all the issues relevant to the review.

(i) The Tribunal only advised the applicants that their applications would be assessed against 'the definition that's written in from of you".

(ii) The Tribunal failed to advise the applicants of the relevant issues arising under the Act.

(2) The Tribunal lacked the power or authority to carry out its review and make the decision.

Particulars

(a) when the Tribunal is reconstituted following the remittal of the matter by the Federal Court it must be reconstituted pursuant to s.422A of the Migration Act 1958 (the Act) and the procedures set out in that section must be followed.

(b) the Tribunal was not reconstituted under s. 422A of the Act and the required procedures were not followed.

(c) the Tribunal, therefore, lacked the power or authority to carry out the review and make the decision.

Ground 1 of the further amended application.

29. This ground asserts that the Tribunal failed to carry out its statutory duty in two ways, namely:

- *first limb:* by failing in two respects, as set out in the particulars (a)(i) and (a)(ii), to consider all integers of the applicants' claims, and

- *second limb*: by failing, for the reasons set out in the particulars (b)(i) and (b)(ii), properly to advise the applicants of all the issues relevant to the review.

Limb 1: particular (a)(i)

30. In regard to the matter raised in particular (a)(i) of the first limb, (the separate claims by the second applicant) the applicant argues that, although the second applicant did not make separate claims in her primary application, she did raise fears, separate from him, at the Tribunal's hearing, namely, (Tribunal transcript, p 21):

> *[Tribunal]: What do you think might happen if you return to Fiji*
>
> *[Second applicant]: I suffered a lot, more than my husband, and I can't say what will happen and I mean, I saved my life from – we can say rape, and so I can't imagine even what will happen to me if I go back, and I suffered a lot."*

31. According to the applicants' submission as follows, nowhere in the Tribunal's findings and reasons did it consider this separate claim of the second applicant:

> *There is a general description [in the Tribunal's Findings and reasons] of the evidence given by the husband and the wife, some claims about the attacks they suffered were accepted and some weren't, but at no place in the findings and reasons is the applicant wife's fear of assaults possibly amounting to rape. At no point was that fear addressed by the Tribunal* (Court transcript, p 9).

32. The applicant also relies upon accounts given by the second applicant regarding two alleged attacks that she suffered in 2001 and 2003: (Tribunal transcript, pp 22-26).

33. In considering these submissions, I note that the Tribunal in its **Claims and Evidence** referred to the evidence of the second applicant, including her claims that:

> *…..she had suffered a lot, more than her husband, and had been saved from rape* (CB 222).

34. The Tribunal in its **Findings and Reasons** did not specifically refer to the above-quoted statement of the second applicant regarding her fear of assault, or its summary of that evidence. However, as observed by the Full Federal Court in *WAEE* v *Minister of Immigration & Multicultural &Indigenous Affairs* [2003] FCAFC 184:

> *It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons* (at [46]).

Rather:

> *The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected* (at [47]).

35. The Tribunal in the present case made findings of "greater generality" in regard to the claims of physical harm to the second applicant, as well as the applicant, and possible fears in this regard if they returned to Fiji (CB 232). It found that:

> *In the Tribunal's view, the applicants have consistently over time misrepresented their past experiences in Fiji for the purpose of pursuing this application and without regard to what they genuinely believe would happen to them on return to that country…*
>
> *… the Tribunal does not believe that the manifold other harms claimed have affected the applicants. The applicant husband and wife have claimed serious assaults and the theft of their car but they have not been able to provide corroborative evidence of these claimed events as they have been able to in respect of the robberies. Furthermore, the evidence available regarding these claimed events has over time been substantially inconsistent and no plausible basis for these inconsistencies has been provided.*

36. I consider that it was open to the Tribunal on all the evidence and material before it to make adverse findings as to the credibility of the applicants and to assess each of their various claims concerning physical harm in that context. The Tribunal's finding in this regard was a finding of fact par excellence, not open to review by this Court:

> *If the primary decision maker has stated that he or she does not believe a particular witness, no detailed reasons need to be given as to why that particular witness was not believed. The Tribunal must give the reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence. In any event, the reason for the disbelief is apparent in this case from the use of the word "implausible". The disbelief arose from the Tribunal's view that it was inherently unlikely that the events had occurred as alleged: Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham* [2000] 168 ALR 407 at [67] *(and see Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

37. Merely because the applicant disagrees with the Tribunal's factual conclusions and its ultimate conclusion in this case does not amount to an error of law. Furthermore, there is no error of law, let alone jurisdictional error in the Tribunal making a wrong finding of fact: *Abebe v Commonwealth* (1998) 197 CLR 510 at 560 [137].

Limb 1: particular (a)(ii)

38. In regard to the matter raised in particular (a)(ii) of the first limb (alleged denial of effective state protection), the applicant claimed, in a statement filed with the protection visa application, that the applicants were denied effective police protection following a break-in involving a robbery and assault (CB 33). Also, at the Tribunal hearing the applicant stated that the police had failed to provide assistance in finding the perpetrators of a break-in and assault and had taken no action (CB 212).

39. The Tribunal accepted (at CB 232) that the applicants had been subject to two break-ins, involving assaults, which had been reported to the police, but no arrests had been made. Also there was an altercation in which the son was assaulted, which was also investigated by the police,

but no charges were brought. However, the Tribunal did not believe that:

> *the claimed break-ins at the couple's shop had anything to do with their religion, race or related political activity. Commercial premises are not infrequently robbed for the goods and cash held there. Nor does the Tribunal believe that the assault on the applicant's son was related to any Convention ground* (CB 233).

40. The applicant now argues that the Tribunal failed to consider a separate question, namely whether the alleged inaction of the Police in response to the break-ins or alleged assault on the son, was due to the applicants' race, religion, political opinion or membership of a particular social group. The applicant submits in this regard that:

> *Having found that assaults happened and having had put before [it that] effective State protection was denied to them, the Tribunal in my submission has committed a jurisdictional error in failing to make any findings of fact in relation to whether the state protection was denied to them and if it was denied to them, whether it was denied to them for a Convention reason* (Court transcript, p 14).

41. The applicant referred to the High Court decision in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) HCA 14, as follows:

> *Article 1A(2) does not refer to any particular kind of persecutor. It refers to persecution, which is conduct of a certain character. I do not see why persecution may not be a term aptly used to describe the combined effect of conduct of two or more agents; or why conduct may not, in certain circumstances, include inaction* (per Gleeson CJ at [27]).
>
> *That selective and discriminatory treatment, if shown on facts found by the Tribunal, would appear to answer Mason CJ's criterion mentioned in Chan of harm amounting to persecution by denial of a fundamental right otherwise enjoyed by Pakistani nationals, namely access to law enforcement authorities to secure a measure of protection against violence to the person* (per McHugh and Gummow JJ at [85]).
>
> *It follows that I agree with the primary judge and the majority in the Full Court of the Federal Court that the Tribunal committed an error of law in failing to make findings of fact on the*

> *respondent's allegation that she was unable to secure protection of the law and its agencies in Pakistan against the serious harm perpetrated against her and that she was a member of a "particular social group" of at least one of the kinds propounded before the Tribunal* (per Kirby J at [101]).
>
> *Thus, even if the Tribunal in the present matter were of the opinion that one ingredient in the Convention definition of persecution, namely the family threats and violence against the respondent by non-state actors, was not (as it concluded) committed for reasons of the respondent's actual or perceived membership of a particular social group, that would not be an end of the matter. If the respondent could show that her well-founded fear of being persecuted was "for reasons of" her being a member of a particular social group because state protection was unavailable to her, that would be enough to meet the Convention requirement* (per Kirby J at [121]).

42. The applicant then submitted, by reference to the above quoted paragraphs from *Khawar*, that:

> *The error identified [in Khawar] at all levels of the judicial review process was that there was then a failure to consider whether the protection of the State was being denied for a Convention reason, and we say that's very much the case we have here, that on the finding of the Tribunal the harm was not for a Convention reason* (Court transcript, p 23).

43. It is clear from *Khawar* that, in certain circumstances, persecution can take the form of inaction by state authorities in response to violence to a person where that inaction arises by reason of that person being a member of a particular social group.

44. However, I do not consider that the Tribunal failed to make any findings of fact in relation to whether state protection was denied to the applicants for a Convention reason. The Tribunal did not expressly refer to the Police, but clearly considered, and reached a finding, that the rights of Indo-Fijians, which would include the applicants, are not being disregarded by state authorities:

> *The role provided to Mahenda Chaudhry and the general basis for the coup tend to indicate that it is not directed at Indo-Fijian interests and that the rights of Indo-Fijians are being respected* (CB 233).

45. I do not consider that the Tribunal had to go further and make a specific finding in relation to the Police in upholding the rights of Indo-Fijians. As previously indicated, the Full Federal Court in *WAEE* v *Minister of Immigration & Multicultural &Indigenous Affairs* [2003] FCAFC 184 at [46]-[47] made it clear that a Tribunal is not obliged to refer to every piece of evidence and every contention made by an applicant in its written reasons. Rather, the Tribunal was entitled to make a finding of "greater generality" concerning whether the rights of the applicants, as Indo-Fijians, which would include the rights of state protection, would be disregarded by state authorities.

46. In any event, it is well settled that the Tribunal's choice and assessment of relevant country information is a purely factual matter for it: *NABD of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 216 ALR 1 at [8] per Gleeson J. As summed up by the Full Federal Court in *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 10, in the context of assessing country information:

> *Both the choice and the assessment of the weight of such material were matters for the Tribunal. The Court cannot substitute its own view of the material, even if it had a different view from that reached by the Tribunal* (at [13])…
>
> … *the Tribunal was not obliged to comment on every item of material before it, to the extent of saying why it rejected a particular item, or attributed less weight to it than to another item* (at [14]).

47. Furthermore, what weight the Tribunal gives to any particular country information is ultimately a factual matter for it: *NBKT v Minister for Immigration & Multicultural Affairs* (2006) 156 FCR 419 (FC) at [81]. Even if there is evidence to establish that the Tribunal has made an error of fact by relying upon incorrect country information, this would not amount to an error of law, let alone jurisdictional error: *Abebe* at [137].

48. I consider that, in the present case, the Tribunal properly considered all the country information before it and the conclusions that it reached were open to it on this material.

49. I thus detect no jurisdictional error on the above bases in regard to particular (a)(ii) of Limb 1.

50. Accordingly, for the above reasons, the first limb of Ground 1 of the further amended application is not made out.

Limb 2: particulars (b)(i) and (ii)

51. The second limb of ground 1 of the further amended application asserts that the Tribunal failed to properly advise the applicants of all the issues relevant to the review by failing to advise them of the relevant issues arising under the Act.

52. The applicant points to the fact that the Tribunal advised the applicants that, in regard to determining whether they were refugees, it would rely upon "*that definition that's written in front of you*". However, the applicant submits that the "*definition*" referred to by the Tribunal was not the definition as modified by s. 91R of the Act, and that:

> … *by simply putting that definition before the applicant with no further explanation of the matters that are in section 91R, and those matters are not in the transcript, the Tribunal has failed to properly appraise the applicant of the issues and, therefore, denies them the opportunity to effectively make meaningful submissions in relation to it* (Court transcript, p 10).

53. The first respondent submits in reply that the Tribunal did not rely upon s.91R in determining that it would affirm the decision of the Minister's delegate, as follows:

> *The effect of section 91R is to provide further constraints on the circumstances in which a person may not or may be found to not have satisfied those requirements. Now the reason why that's important is that if the definition itself is not satisfied on its face, that is, the definition that was read to the applicants, then there's no need to go to the further requirements that are stated in 91R, and what the tribunal found in this case was that the thefts in the shop were not for a convention reason; in other words, that type of persecution, looking at the definition, did not fall within the definition because it was not for reasons of race, religion, et cetera, and that the other elements of claim, persecution, did not happen, were unfounded* (Court transcript, p 18).

54. The first respondent further argues that the Tribunal rejected the applicants' claims on the basis that they had consistently misrepresented their past experiences in Fiji for the purposes of pursuing the application and that any harm suffered was not for a Convention reason. Therefore:

> *In these circumstances, there was no obligation upon the RRT to alert the Applicant to the requirements of s.91R of the Act, as the matters stated in s.91R did not form part of the "issues arising in relation to the decision under review", pursuant to s.425 of the Act.*

55. The relevant part of the Tribunal transcript for the purposes of the applicant's argument, states as follows:

> *[Tribunal member, addressing both applicants] I think, as you are both aware, the issues that I need to look at is [sic] whether either of you are owed protection by the Australian Government. The Australian Government owes people protection if they are* ***refugees under that definition that's written in front of you*** [emphasis added]. *Have you both read that? All right. Sorry, I'll give you [second applicant] a moment, to read through that … The issues that we'll be talking about today are the issues covered in the definition. As I understand it, you are both citizens of Fiji, and you are fearful of returning there …So what I need to look at are the reasons why you are scared of returning, what you think might happen to you if you do return, and the reasons why you think bad things may happen if you do return …* (Tribunal transcript, pp 2-3).

56. The "*definition*" put before the applicants by the Tribunal, in English and Hindi (Exhibit 2), was the definition contained in Article 1A(2) of the Refugees Convention, as amended by the 1967 Refugees Protocol, as follows:

> *A refugee is defined by the 1951 United Nations Convention relating to the Status of Refugees, as amended by the 1967 Protocol, as a person who:*
>
> > *"… owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or particular opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside*

the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

57. The applicant's complaint is that the Tribunal providing Exhibit 2 to the applicants without also providing them with the terms of s.91R of the Act, which deals with the concept of "persecution" for the purposes of applying Article 1A(2) of the Convention.

58. The question is whether there was any procedural unfairness which militated against a fair hearing on the basis that the applicants were or could have been misled as to the full context of the relevant law and hence may have curtailed the ambit of their claims, or have been confused as to the scope of potentially relevant evidence that they might otherwise have proffered to the Tribunal. It must be borne in mind in this regard that "*what is required by procedural fairness is a fair hearing, not a fair outcome*": *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs [2006] HCA 63; (2006) 231 ALR 592.*

59. The applicants have not sought to put any evidence before this Court to say whether, and if so in what way, they were denied "*the opportunity to effectively make meaningful submissions*" and were thus denied a fair hearing on this basis.

60. Indeed far from the applicants being uninformed as to the terms of s.91R and its relationship to Article 1A(2) of the Refugees Convention, they expressly referred to its significance in their response letter of 5 April 2007 to the Tribunal's second s.424A letter.

61. This response letter, signed by both applicants, was provided to the Tribunal after the hearing, but nonetheless before the Tribunal decision was signed, and is indicative of the state of knowledge of the applicants; that they were not misled by only being provided with Exhibit 2 at the Tribunal hearing; and that they firmly reminded the Tribunal that in the context of s.91R and Article 1A(2) of the Convention, they had exhaustively spelt out their claims. The relevant part of the applicants' response states (CB 200), as follows:

If the Tribunal has substantially no proof that there is no 'real chance' that the Applicants may in the reasonable future face 'serious harm', how could the Tribunal be satisfied that the

> *applicants could return back to Fiji at the present juncture.* ***Could the Tribunal be satisfied that it could satisfactorily overcome its 'jurisdictional commitment' in terms of sec. 91R of the Migration Act 1958?*** [emphasis original]
>
> *The Applicants submit that they have by written claims, documentary evidence and by exhaustive oral and subsequent clarifications by way of several responses made to the Tribunal to its queries have established their claims that they have suffered a well founded fear of persecution while living in Fiji on account of their ethnicity as Fijian Indians.*
>
> *Wherefore the Applicants submit that the Tribunal be pleased to consider their Claims favourably in keeping with Criteria in Article 1(A)(2) of the 1951 UN Convention on refugees and the law relating to "Principles of Relocation" as enunciated by the High Court in RANDHAWA'S case.*

62. No clearer statement could have been made by the applicants on the point. It demonstrates their clear understanding and knowledge of the role of s.91R. Furthermore, they raised no complaint with the Tribunal at this or any other stage of the proceedings to indicate that they had been misled, or were prejudiced in putting forward their claims, or were unfairly treated by any failure on the part of the Tribunal in this regard to provide them with the text of s.91R. In the absence of any evidence to the contrary, I thus detect no procedural unfairness on this basis and am satisfied that the applicants were provided with a fair hearing by the Tribunal.

63. I also note, in this regard, that the applicants were clearly put on notice from the delegate's decision of 25 January 2005 (which was provided to the applicants as an attachment to the letter to them of 25 January 2005 (CB 36-37)) of the terms of ss.91R(1) and (2). Not only were subsections (1) and (2) set out in full, but their interrelationship with Article 1A(2) of the Convention, as well as the delegate's relevant finding of fact pertinent to s.91R were also set out.

64. In this regard, the delegate set out early in the decision, the following matters, so far as is relevant for the present purposes:

> ***Protection obligations***
>
> *The matters generally relevant to determining the existence of protection obligations are:*

- *The existence and causal significance of a Convention ground or grounds, and the related application of section 91R(1)(a) of the Migration Act;*

- *The existence of serious harm amounting to persecution, and the related application of section 91R(1)(b) and 91R(2) of the Migration Act;*

- *Whether the persecution involves systematic and discriminatory conduct and the related application of section 91R(1)(c) of the Migration Act …*

Definition of a Refugee – Article 1 of the Refugees Convention

Encompassed within the matters set out above, and addressed as needed [the delegate then set out Article 1A(2)].

65. Later in the decision, the delegate, in the context of quoting ss.91R(1) and (2) in full (CB 42), stated that:

> *With regard to applicant's alleged fears for his life, it is noted that he does not claim to have suffered any discrimination or serious harm that would amount to persecution for a Convention reason.*
>
> *The Australian Migration Legislation Amendment Act (No 6) 2001 under s.91R Persecution states:*
>
> > *(1) For the purposes of the application of this Act and the regulations to a particular person,*
> >
> > > *Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:*
> > >
> > > *(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and*
> > >
> > > *(b) the persecution involves serious harm to the person; and*
> > >
> > > *(c) the persecution involves systematic and discriminatory conduct.*

> (*2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of serious harm for the purposes of that paragraph:*
>
> *(a) a threat to the person's life or liberty;*
>
> *(b) significant physical harassment of the person;*
>
> *(c) significant physical ill-treatment of the person;*
>
> *(d) significant economic hardship that threatens the person's capacity to subsist;*
>
> *(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;*
>
> *(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.*

66. The delegate proceeded to make the following relevant finding under the heading: "**Finding of fact"**, which again referred specifically to s.91R:

> *(d) I find that [the applicant] does not have a fear of persecution as defined in Section 91R of the Migration Act.*

67. The applicants were therefore clearly put on notice from the delegate's decision of the relevance and importance of s.91R in the context of an expanded definition of 'Persecution' for the purposes of refugee status.

68. For the reasons stated above, the second limb of Ground 1 of the further amended application is not made out.

69. Accordingly, Ground 1 of the further amended application is rejected.

Ground 2 of the further amended application.

70. The applicant argues that where a decision is remitted, as here, by the Federal Court to be reconsidered according to law, the Tribunal must be reconstituted under s.422A of the Act. The applicant submits that

the Tribunal was not properly reconstituted under s.422A in this case since the prescribed procedures set out in that section were not followed. The applicant submits therefore that the Tribunal lacked the power or authority to carry out the review.

71. Section 422A provides that:

> **Reconstitution of Tribunal for efficient conduct of review**
>
> (1) The Principal Member may direct that:
>
> (a) the member constituting the Tribunal for a particular review be removed; and
>
> (b) another member constitute the Tribunal for the purposes of that review;
>
> if the Principal Member thinks the reconstitution is in the interests of achieving the efficient conduct of the review in accordance with the objective set out in subsection 420(1).
>
> (2) However, the Principal Member must not give such a direction unless:
>
> (a) the Tribunal's decision on the review has not been recorded in writing or given orally; and
>
> (b) the Principal Member has consulted:
>
> (i) the member constituting the Tribunal; and
>
> (ii) a Senior Member who is not the member constituting the Tribunal; and
>
> (c) either:
>
> (i) the Principal Member is satisfied that there is insufficient material before the Tribunal for the Tribunal to reach a decision on the review; or
>
> (ii) a period equal to or longer than the period prescribed for the purposes of this subparagraph has elapsed since the Tribunal was constituted.

> (3) If a direction under this section is given, the member constituting the Tribunal in accordance with the direction is to continue and finish the review and may, for that purpose, have regard to any record of the proceedings of the review made by the member who previously constituted the Tribunal.

72. I consider that the applicant has misconstrued the word "reconstitution" in s.422A of the Act as having direct relevance to where a matter is "remitted" to the Tribunal for rehearing. The remittal of a matter to the Tribunal by a Court, following judicial review, does not mean that it demands a "reconstituted" Tribunal to conduct the review in the s.422A sense.

73. I consider that a proper construction of s.422A demonstrates that the rationale of the provision is to empower the Principal Member to direct the removal of a member from a particular review in the interests of achieving the efficient conduct of the review pursuant to s.420(1) objectives, and, where the conditions in ss.(2) have been satisfied, to direct another member to "*continue and finish the review*". Clearly, this relates to an on-going internal review situation and not to a case remitted to the Tribunal following external judicial review.

74. Likewise, s.422 of the Act deals with the "reconstitution" of the Tribunal upon direction by the Principal Member where the presiding member becomes unavailable for the purposes of a particular review due to that member either stopping being a member, or for any reason, not being available for the purpose of the review at the place where the review is being conducted. Again similar to s.422A, the directed incoming member is to continue to finish the review and may, for that purpose, have regard to any record of the proceedings of the review made by the Tribunal as previously constituted.

75. Section 421 of the Act, however, provides a general power residing in the Principal Member to give a written direction to a member for the Tribunal to be constituted by that single member for the purpose of a particular review.

76. Section 421 provides that:

Constitution of Refugee Review Tribunal for exercise of powers

> (1) For the purpose of a particular review, the Tribunal is to be constituted, in accordance with a direction under subsection (2), by a single member.
>
> (2) The Principal Member may give a written direction about who is to constitute the Tribunal for the purpose of a particular review.

77. When a case is remitted to the Tribunal, as in the present case, s.421 applies to the allocation of the member to constitute the Tribunal. This does not preclude the possible scenario that the member allocated to the review by the Principal Member following remittal may not later, during the conduct of the review, become the subject of a removal direction by the Principal Member under s.422A .

78. As relevantly observed by Flick J in *NBMB v Minister for Immigration & Citizenship* [2008] FCA 149, at [40]:

> *There is no reason to impose any constraint upon the power conferred by s 421(2). The decision of the initial Tribunal having been set aside, the exercise of the power conferred by s 421(2) thereafter arose for consideration. It is a power that can be exercised from time to time: Acts Interpretation Act 1901 (Cth), s 33(1). The discretion to be exercised by the Principal Member -- or his delegate -- was a discretion to be exercised in light of all the circumstances, including the order of the Federal Magistrates Court and what is recognised as "justice being seen to be done." Section 421(2) confers a power of appointment upon the Principal Member -- or his delegate: Minister for Immigration & Multicultural Affairs v Wang [2003] HCA 11 at [40], [2003] HCA 11; 215 CLR 518 at 532 per McHugh J. In the present proceedings, that power was exercised by a person with an appropriate delegation.*

79. In the present case, Exhibit 1, being a document entitled *Constitution of the Refugee Review Tribunal for particular reviews*, dated 5 December 2006, states that:

> *I [Principal Member or delegate]* ***constitute or reconstitute*** *the Tribunal for the purposes of particular reviews in accordance with the schedules set out below.*

The applicants' proceedings are then classified under the heading: *"**Newly Constituted** Cases"* [emphases added].

Exhibit 2 is consistent with, and reinforces, the above analysis of the difference between a "newly constituted" Tribunal for a particular review (pursuant to s.421) applicable to the situation of remittal of a matter to the Tribunal, as opposed to an "already constituted" Tribunal (pursuant to s.422A and s.422 where an already allocated member is to be, or must be replaced).

80. For the above reasons, I consider that the Tribunal was properly constituted pursuant to s.421 of the Act and that it had jurisdiction to hear and make the decision in this matter.

81. Accordingly, Ground 2 of the amended application is rejected.

Conclusion

82. The Court finds that the Tribunal's decision is not affected by jurisdictional error and is therefore a privative clause decision. Accordingly, pursuant to s.474 of the Act this Court has no jurisdiction to interfere.

83. The application, amended application and further amended application before this Court are dismissed.

I certify that the preceding eighty-three (83) paragraphs are a true copy of the reasons for judgment of Orchiston FM

Associate: Duncan Maconachie

Date: 20 May 2008