FEDERAL COURT OF AUSTRALIA

Minister For Immigration And Multicultural And Indigenous Affairs v SZANS
[2005] FCAFC 41

CORRIGENDUM

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS v SZANS
N 1291/2004

WEINBERG, JACOBSON AND LANDER JJ
17 MARCH 2005 (CORRIGENDUM 17 MARCH 2005)
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 1291 of 2004**

BETWEEN:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **APPELLANT**
AND:	**SZANS** **RESPONDENT**

JUDGE:	**WEINBERG, JACOBSON & LANDER JJ**
DATE OF ORDER:	**17 MARCH 2005**
WHERE MADE:	**SYDNEY**

In the Judgment of the Honourable Justices Weinberg, Jacobson and Lander delivered on 17 March 2005 make the following amendment:

On page 7 of the Judgment, at [33] change "414" to "327".

I certify that the preceding one (1) paragraph
is a true copy of the Corrigendum to the
Reasons for Judgment of the Honourable Justices
Weinberg, Jacobson and Lander.

Associate:

Date: 17 March 2005

FEDERAL COURT OF AUSTRALIA

Minister For Immigration And Multicultural And Indigenous Affairs v SZANS
[2005] FCAFC 41

MIGRATION – appeal from Magistrates Court – whether the pressure on homosexual to marry amounts to persecution for a Convention reason – whether Refugee Review Tribunal failed to consider essential element of claim

PRACTICE AND PROCEDURE – judgments of single judges of Federal Court not binding on Federal Magistrates where not exercising appellate jurisdiction - stare decisis - judicial comity

Migration Act 1958 (Cth), s 36(2)
Federal Court of Australia Act 1976 (Cth), s 25(1A)

Applicant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112 referred to
Businessworld Computers Pty Ltd v Australian Telecommunications Commission (1988) 82 ALR 499 referred to
Chief Executive Officer of Customs v Tony Longo Pty Limited (2001) 52 NSWLR 458 referred to
Cooper v Commissioner of Taxation (2004) 210 ALR 635 referred to
Favelle Mort Ltd v Murray (1976) 133 CLR 580 referred to
Hope v Bathurst City Council (1980) 144 CLR 1 referred to
Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 applied
Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002 (2003) 211 CLR 441 applied
Minister for Immigration and Multicultural Affairs v Haji Ibrahim (2000) 204 CLR 1 referred to
Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 referred to
Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 205 ALR 487 referred to
Minister for Immigration and Multicultural and Indigenous Affairs v VFAY [2003] FCAFC 191 applied
MMM v Minister for Immigration and Multicultural Affairs (1998) 90 FCR 324 considered
NAAT v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 196 ALR 376 discussed
Vetter v Lake Macquarie City Council (2001) 202 CLR 439 referred to

R Cross & J Harris, *Precedent in English Law*, Oxford University Press, Oxford, 1991

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS v SZANS
N 1291/2004

WEINBERG, JACOBSON AND LANDER JJ
17 MARCH 2005
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 1291 of 2004**

BETWEEN:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **APPELLANT**
AND:	**SZANS** **RESPONDENT**

JUDGE:	**WEINBERG, JACOBSON & LANDER JJ**
DATE OF ORDER:	**17 MARCH 2005**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The judgment of the Federal Magistrates Court of 13 August 2004 be set aside.

3. The application under s 39B of the *Judiciary Act 1903* (Cth) to review the decision of the Refugee Review Tribunal be dismissed.

4. The Respondent pay the Appellant's costs of this appeal and of the proceedings in the Federal Magistrates Court.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 1291 of 2004**

BETWEEN:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **APPELLANT**
AND:	**SZANS** **RESPONDENT**
JUDGE:	**WEINBERG, JACOBSON & LANDER JJ**
DATE:	**17 MARCH 2005**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 The Minister appeals against the orders and judgment of a Federal Magistrate quashing a decision of the Refugee Review Tribunal ("the RRT") for jurisdictional error.

2 The respondent is a 43 year old male Bangladeshi who claims to have a well-founded fear of persecution in Bangladesh by reason of the fact that he is homosexual.

3 On 29 August, 2002, the RRT handed down its decision affirming the decision of a delegate not to grant the respondent a protection visa.

4 The respondent claimed in the RRT that he did not wish to marry but that, because of the social customs in Bangladesh, his family would impose a heterosexual marriage on him if he returns to that country.

5 The RRT asked itself the question whether the pressure to marry would amount to persecution for a Convention reason. It found that any pressure from the respondent's family would be as a result of a universal expectation of parents that their children would marry. Thus, it found that any pressure on the respondent to marry could not be persecution for a

Convention reason.

6 The RRT also found that the respondent was discreet about his homosexuality and it noted that he made no claims to have suffered because of his homosexuality. The RRT specifically found that he would not come to the adverse attention of people in Bangladesh should he return there.

7 The RRT considered that, as a discreet man whose pattern of behaviour would not change, there was no real chance that the respondent would be exposed as homosexual if he returned to Bangladesh. It found that he did not have a well-founded fear of persecution. Accordingly, it was not satisfied that he was a person to whom Australia had protection obligations under the Convention.

8 In his application for review before the Federal Magistrates Court, the respondent did not contend that the RRT fell into the error identified by the High Court in *Applicant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112 ("*S395*"). Rather, the gravamen of the respondent's case before the Federal Magistrate was that the RRT had overlooked an essential element of his claim, namely that he faced a serious risk of harm, not simply from the pressure on him to marry, but from the consequences of a heterosexual marriage. It was said that the RRT fell into error in determining that the pressure to marry did not involve the necessary Convention nexus.

9 The learned Magistrate found that the RRT had failed to consider whether the applicant would be persecuted if he succumbed to the pressure of marriage and that the consequences of being forced to enter into a heterosexual marriage constituted persecution for a Convention reason. He found that the consequences of a homosexual man being forced to enter into a heterosexual marriage constituted persecution which he appears to have assumed to be persecution for a Convention reason.

10 There are three principal issues in the appeal. The first is whether the RRT impliedly considered and rejected any claim that the respondent would succumb to pressure to enter into a heterosexual marriage. The second is whether the learned Federal Magistrate was in error in failing to recognise that the RRT correctly found that there was no Convention nexus and that this, together with the finding that the appellant's homosexuality would not be

revealed, precluded any further consideration of the matter. The third is whether the Magistrate, in finding that the consequences of a heterosexual marriage amounted to persecution made a finding which was one of fact for the RRT and not for the Federal Magistrate to make.

The decision of the RRT

11 The respondent's claims were set out in a 14 paragraph statutory declaration which the RRT reproduced in full.

12 It is unnecessary to refer to the statutory declaration in detail. The respondent stated that he was homosexual but that he had had very few sexual experiences. He had lived in Japan and South Korea for a considerable period of time but had not, either in Bangladesh or overseas, lived openly as a homosexual.

13 The respondent referred in the statutory declaration to the pressures he expected to face from his family to enter into a heterosexual marriage. He did not say that he feared this would lead to exposure of his homosexual orientation. He merely stated that he would not be able to meet any wife's needs, and that such a marriage would not be fair to her.

14 The statutory declaration also dealt with the respondent's lifestyle in Australia where he said that he had been living with a "broadminded man" who was aware of his homosexuality.

15 In his evidence in the RRT the respondent claimed to have entered into a homosexual relationship with a man who also gave evidence at the hearing. The RRT did not accept that the relationship was genuine. However, it did accept that the respondent was homosexual, and that homosexual men in Bangladesh constitute a particular social group.

16 The RRT found that Bangladeshi society, while not open to homosexuality, does not oppress gay men; rather it pretends that homosexuality does not exist.

17 The RRT's finding was that the only homosexual men who are at risk of persecution are those who are openly gay. It was for this reason that the RRT then proceeded to determine the manner in which the respondent lived as a gay man.

18 The RRT noted that on the respondent's evidence no one in Bangladesh, including his immediate family, is aware that he is gay. It then made the following findings:-

> *"I find that, by choice, regardless of whether it is [in] Bangladesh or abroad the Applicant is discreet by nature. He is not promiscuous and he has never come to the adverse attention of anyone anywhere for reasons of his homosexuality.*
>
> *He is currently forty years of age and I find that there is no basis for me to consider that his pattern of behaviour would change in the reasonably foreseeable future and accordingly find that he would not come to the adverse attention of people in Bangladesh should he return there."*

19 The RRT then turned to the respondent's claim that he did not wish to marry and that his family could impose this on him. It accepted that marriage was a social norm in Bangladesh, and that the respondent would be expected to marry in accordance with that norm . It accepted that marriage would be difficult for a gay person. It asked itself the question to which we referred earlier, namely whether the pressure to marry would amount to persecution for a Convention reason.

20 The RRT accepted that the expectation that offspring will marry is universal and non-discriminatory. It made the following findings:-

> *"I find that any efforts on the part of the Applicant's family to get him to marry would be for this universal societal expectation and for no other reason.*
>
> *By his own account no one in the country is aware that he is Gay and this includes all members of his own family.*
>
> *As discussed above I find he would not at any time in the reasonably foreseeable future either act in a manner which would identify him as being Gay, nor would he open up to his family and tell them he is.*
>
> *This being the case, I find that the expectation or pressure for him to marry is not an act of harm or detriment based on any Convention reason, nor is there any discriminatory element to it."*

The Federal Magistrate's Decision

21 The learned Magistrate accepted at [17] that *S395* was not applicable to the present case. He said that the issues raised by the application were twofold: first, whether the RRT erred in

finding that there was no Convention nexus by failing to consider the differential impact of the pressure upon the respondent to marry and, second, whether the RRT erred by failing to take into account a relevant consideration, namely the respondent's claim that he would suffer persecution if forced to marry.

22 The learned Magistrate was of the view at [19] that resisting the pressure to marry would not constitute persecution. But he said that the same did not apply to the consequences of succumbing. He rejected a submission made on behalf of the Minister that the RRT found, impliedly, that the respondent would be able to resist the pressure. He accepted at [20] that it was a part of the respondent's claims that the respondent had a well-founded fear of being potentially forced into a heterosexual marriage.

23 Thus, the Federal Magistrate held at [24] that the failure by the RRT to consider that he faced persecution by being forced into a heterosexual marriage was a failure to consider an integer of the respondent's claims. However, it was then necessary, as his Honour said, to consider whether the application should be dismissed in the exercise of his Honour's discretion because of the RRT's finding that there was no Convention nexus.

24 His Honour referred at [25] to a decision of Madgwick J in *MMM v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 324 ("*MMM*") which appears to provide clear support for the approach taken in the RRT. Nevertheless, the Federal Magistrate said that the decision was not binding on him. He appears to have considered that the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 ("*Ibrahim*") involved a departure from the principle stated by Madgwick J in *MMM;* see at [27] – [28]. The learned Magistrate said at [28] that the question was not whether the relevant harm has a differential impact on an individual but whether the individual faces persecution. This, his Honour said, leads inexorably to the question of what is persecution, to which he then turned.

25 In his Honour's view, it should be accepted that a breach of an internationally recognised fundamental human right can establish persecution for the purposes of the Convention; see at [30]. Two High Court authorities were said to support this proposition; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 and *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 205 ALR 487 at [19]

– [21].

26 His Honour then referred to Article 23 of the International Covenant on Civil and Political Rights and Article 16 of the Universal Declaration of Human Rights to demonstrate that the respondent was asserting a fundamental human right of freedom of marriage; see at [31] – [32].

27 The following passage, at [34] contains his Honour's finding:-

> *"I find that the right to refrain from entering into a marriage, except as an act of free choice, is an internationally recognised and fundamental human right. The applicant was asserting before the RRT that a fundamental human right he enjoyed would be impugned should he return to Bangladesh. He was asserting that there was a risk that he would be forced into a marriage without his consent. In my view, the consequences of a homosexual being forced to participate in a heterosexual marriage not freely entered into constitutes 'serious harm' for the purposes of s.91R."*

28 His Honour said at [35] that the issue then becomes whether effective state protection is available in Bangladesh. He observed that this issue had not considered by the RRT because it was unnecessary for it to do so, the finding having already been made of the absence of Convention nexus.

29 The learned Magistrate's conclusions were summed up at [36]. He repeated his finding of a failure to consider an integer of the claim and considered that a different outcome might result if the matter were returned to the RRT. The issues before the RRT, on his Honour's findings, would be whether the respondent would be persecuted if he succumbed to marriage and whether effective state protection was available.

Appeal Ground 1 – whether the RRT considered the claim that the respondent would succumb

30 In our view there is no substance in this ground. It is clear that the RRT did not consider this claim. The passages from the decision of the RRT to which we have earlier referred make it plain that the application was dismissed purely upon the ground of absence of Convention nexus.

31 The appellant placed particular emphasis on the RRT's finding that the respondent would not change his pattern of behaviour. But this is plainly a reference to the discreet way in which he lives as a homosexual person. It does not address the question of whether he would succumb to the pressure from his family to enter into a heterosexual union.

Appeal Ground 2 – failure to find that the claim was "logically excluded" by other findings of the RRT

32 The Minister submitted that nothing turned on the failure of the RRT to consider the question whether the respondent would succumb to the social or familial pressure to marry. This was because in order for the Minister to reach the necessary state of satisfaction under s 36(2) of the *Migration Act 1958* (Cth) ("the Act"), she had to be satisfied that two conditions existed. The first was a well-founded fear of persecution. The second was that this fear was held for a Convention reason. If one of the two elements did not exist, the claim failed. Here, the RRT found that there was no Convention nexus. It was therefore unnecessary to consider the other element.

33 This was the approach which Madgwick J took in *MMM*. There his Honour said at 414:-

> *"While the impact of familial pressure to marry would likely fall harder on an unwilling homosexual than an unwilling heterosexual, it seems to me to be correct, as the Tribunal held, that the pressure is nevertheless not exerted "for reasons of" membership of the social group of homosexuals. In Bangladsesh, the pressure falls on all single men, and it did not appear that it was applied differentially as between homosexuals and others. For that reason, fear of Convention persecution was correctly held not to have been shown."*

34 In our view, Madgwick J's analysis of the question was correct and ought to have been followed by the learned Magistrate.

35 In *NAAT v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 196 ALR 376 ("*NAAT*") at [27] Raphael FM held that the judgments of single judges of this Court, are not binding on Federal Magistrates when those judgments are not delivered as an exercise of the Court's appellate jurisdiction from Federal Magistrates. However, his Honour observed that ordinary principles of comity required Federal Magistrates to follow judgments of single judges of this Court unless they were considered to be wrong.

36 The authorities to which Raphael FM referred in *NAAT* certainly lend some support to his Honour's analysis. They suggest that the principle of *stare decisis* requires a court lower in the particular judicial hierarchy to follow a decision of a court higher in that hierarchy only where that higher court is exercising appellate jurisdiction; see *Favelle Mort Ltd v Murray* (1976) 133 CLR 580 at 591 (Barwick CJ); *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499 at 504 (Gummow J); *Chief Executive Officer of Customs v Tony Longo Pty Limited* (2001) 52 NSWLR 458 at [51] – [52] (Heydon JA). See R Cross & J Harris, *Precedent in English Law*, Oxford University Press, Oxford, 1991, p 123.

37 This limitation on the principle of *stare decisis* can lead to odd results. For example, had Madgwick J been sitting on appeal from a Federal Magistrate in *MMM*, his judgment would have been binding upon all Federal Magistrates. However, because he was exercising original jurisdiction, a matter of sheer chance, at least in relation to migration cases, his judgment was not strictly binding.

38 Even if the Federal Magistrate was correct in holding that the judgment of Madgwick J was not binding upon him, he most certainly was not correct in refusing to follow it. The judicial comity which ought to apply between the Federal Magistrates Court and judgments of single judges of this Court (when not exercising appellate jurisdiction) should at the very least be the same as that which exists between single judges of this Court. The correct principle is that a judgment ought to be followed unless it is plainly wrong. Lander J referred to the relevant authorities in *Cooper v Commissioner of Taxation* (2004) 210 ALR 635 at [46].

39 It seems to us that the application of this principle contributes to the predictability of outcome of proceedings which is a necessary feature of the exercise of jurisdiction by all Chapter III courts. This must be so for the Federal Magistrates Court, particularly where appeals from judgments of that Court may be dealt with by a single judge in the appellate jurisdiction of this Court; see *Federal Court of Australia Act 1976* (Cth), s 25(1A).

40 As stated above, the learned Federal Magistrate apparently considered that there was a conflict between the decision of Madgwick J in *MMM,* and the decision of the High Court in *Ibrahim*. If that view were correct, his Honour would have been bound to follow *Ibrahim* in preference to *MMM*.

41 However, in our view the reasoning of the High Court in *Ibrahim* casts no doubt whatever on the correctness of *MMM.* It is true that Madgwick J used the words "applied differentially" in the passage set out above. However, his Honour did not fall into the error identified by Gummow J in *Ibrahim* at [146] – [147]. All that Madgwick J intended by those words was that there was no "singling out" of homosexuals as persons on whom pressure to marry is applied.

42 In *Minister for Immigration and Multicultural and Indigenous Affairs v VFAY* [2003] FCAFC 191, a Full Court (French, Sackville and Hely JJ) pointed out at [55] – [56] that High Court authorities establish that the reason for the persecution must be found in the singling out of one or more of the five attributes expressed in the Convention definition. There was no such singling out on the facts in *MMM*. Nor was there in the present case. That was the finding made by the RRT. There was no error in that finding, let alone jurisdictional error.

43 Indeed, upon an examination of the respondent's claims, it is difficult to see how there was any claim of a subjective fear of persecution put before the RRT for consideration. This can be seen from the respondent's application for a protection visa and the supporting statutory declaration.

44 The application for a protection visa contained the following statement:-

> *"This will create an impossible situation for me and the poor woman forced to marry me. How can I be forced to live this miserable existence? See statement to follow."*

45 The statutory declaration referred to the social and familial pressure on the respondent to marry, and to the effect of marriage on any prospective wife. The respondent said he was concerned about the effect on such a person of his not being able to fulfil her needs, and said that his conscience would be troubled by such an arrangement . It was correctly conceded by counsel for the respondent that concern for the welfare of another was not relevant when considering whether the respondent had the relevant fear of persecution.

46 Counsel for the respondent urged upon us the proposition that once there was a finding that the respondent would be pressured to marry, it was necessary for the RRT, in order to complete the exercise of its jurisdiction, to consider whether he would succumb to that

pressure.

47 There are two answers to this. First, the respondent did not claim that he would succumb to any such pressure. Thus, the RRT was not obliged to deal with a hypothesis that was not raised; see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at [31] – [32]. Second, any consideration of this hypothesis would involve speculation as to what the consequences may be. A well-founded fear cannot be based upon speculation. The evidence must indicate a real ground for believing that an applicant is at risk of persecution; see *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 572 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

48 The RRT's findings that the respondent would not change his pattern of behaviour, that he would not come to the adverse attention of people in Bangladesh and that there was no Convention nexus, effectively disposed of the respondent's claim. There was no jurisdictional error in finding an absence of any Convention nexus. The learned Magistrate could not properly have determined that the judgment of Madgwick J in *MMM* was plainly wrong, and ought to have followed that decision.

49 In our opinion, the appellant must succeed on this ground.

Appeal Ground 3 – the finding that a forced heterosexual relationship constituted serious harm

50 We set out the finding earlier in this judgment. The appellant submits that the question whether a forced heterosexual relationship would constitute serious harm was a question of fact for the RRT, and not a matter for the Federal Magistrate to determine.

51 Where the question is whether the material which was before the Tribunal reasonably admits of different conclusions as to whether it falls within the ordinary meaning of a statute, the question is one of fact; see *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [24] – [27].

52 Here, the question of whether the consequences of a homosexual being forced to participate in a homosexual marriage constituted "serious harm" for the purposes of the Convention, was

plainly a question of fact, or of mixed fact and law, within the test stated in the authorities.

53 Counsel for the respondent very fairly, and properly, all but conceded that this ground of appeal had been made out.

Appeal Ground 4 – failure to consider whether effective state protection was available

54 It was unnecessary for the RRT to consider this question once it had determined that there was no Convention nexus. There was no jurisdictional error in the RRT's failure to consider the question. The learned Magistrate's finding that the RRT erred in not dealing with the question cannot stand.

Orders

55 We propose to make orders in terms of [1] – [4] as set out in the Notice of Appeal as follows:

i. The appeal be allowed.

ii. The judgment of the Federal Magistrates Court of 13 August 2004 be set aside.

iii. The application under s 39B of the *Judiciary Act 1903* (Cth) to review the decision of the Refugee Review Tribunal be dismissed.

iv. The Respondent is to pay the Appellant's costs of this appeal and of the proceedings in the Federal Magistrates Court.

I certify that the preceding fifty five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Weinberg, Jacobson & Lander.

Associate:

Dated: 17 March 2005

Counsel for the Appellant: R J Bromwich

Solicitors for the Appellant: Clayton Utz Lawyers

Counsel for the Respondent:	L J Karp
Solicitors for the Respondent:	Parish Patience Solicitors
Date of Hearing:	25 February 2005
Date of Judgment:	17 March 2005