FEDERAL COURT OF AUSTRALIA

SZLGP v Minister for Immigration and Citizenship [2009] FCA 1470

MIGRATION – Judicial review – Appeal from Federal Magistrates Court – Protection visa – Failure to apprehend document of critical importance to Appellant's case – Overlooking of relevant consideration – Whether failure on part of Tribunal to consider critical document amounted to jurisdictional error – Held Tribunal committed jurisdictional error – Held Federal Magistrates Court failed to apprehend Tribunal's act of jurisdictional error – Held appeal allowed

Migration Act 1958 (Cth) ss 414, 424A, 424AA, 425

SZLGP v Minister for Immigration & Citizenship [2008] FCA 1198 considered
SZBYR v Minister for Immigration and Citizenship (2007) 81 ALJR 1190 cited
H v Minister for Immigration and Multicultural Affairs (2000) 63 ALD 43 cited
Coulton v Holcombe (1986) 162 CLR 1 considered
VUAX v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 158 applied
Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 74 ALJR 405 considered
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 considered
Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002; *Applicant S106/2002 v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1165 considered
WAHP v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 87 considered
SZDFO v Minister for *Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1192 considered
Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 77 ALJR 1088 applied
SZIFI v Minister for *Immigration and Multicultural and Indigenous Affairs* (2007) 238 ALR 611 considered
WAIJ v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 80 ALD 568 considered
NAJT v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51 considered
Minister for Immigration and Citizenship v SZIAI (2009) 83 ALJR 1123 applied

Aronson M, Dyer B, Groves M, *Judicial Review of Administrative Action* (4th ed, Law Book Co, 2009)

SZLGP and SZLGQ v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL

NSD 655 of 2009

LOGAN J
11 DECEMBER 2009
BRISBANE (VIA VIDEOLINK TO SYDNEY)

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 655 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZLGP**
First Appellant

SZLGQ
Second Appellant

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

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **LOGAN J**
DATE OF ORDER: **11 DECEMBER 2009**
WHERE MADE: **BRISBANE (VIA VIDEOLINK TO SYDNEY)**

THE COURT ORDERS THAT:

1. The notice of appeal is deemed to have been amended by the insertion of the following ground:

   "The decision of the Federal Magistrates Court that the Second Respondent's decision was not affected by jurisdictional error was wrong in law in that one or more of the following errors are apparent:

   (a) the Second Respondent denied the Appellants procedural fairness in the hearing and determination of their review application and thereby failed to afford them a hearing and to determine the decision under review as required by the *Migration Act 1958* (Cth) (Migration Act) in that:

      (i) the Second Respondent questioned the male Appellant at the hearing and came to make findings concerning his credibility for the purpose of deciding whether it was satisfied as required by the Migration Act in

respect of the protection visa sought on the false premise that he was not an addressee of a letter dated 6 March 2007 tendered by the Appellants at the hearing;

(ii) failed to make an inquiry either of its own motion or when requested by the Appellants, in circumstances where it was obliged so to do having regard to the nature of the protection visa claim, prior inquiries conducted by the First Respondent's department and the letter of 6 March 2007;

(iii) the Second Respondent failed to engage with the Appellants' claim for a protection visa as made and presented at the hearing it conducted.

(b) the Second Respondent's decision to affirm the decision under review was illogical, arbitrary, perverse and otherwise unreasonable such that it was not a decision authorised by the Migration Act.

2. The appeal is allowed.

3. The decision of the Federal Magistrates Court is set aside.

4. In lieu of that decision, the decision of the Second Respondent is quashed and the matter is remitted to the Second Respondent to hear and determine the Appellants' application for review according to law.

5. On the rehearing of that application for review, the Second Respondent must not be constituted by a member who has hitherto heard and determined that application.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 655 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZLGP** **First Appellant**
	SZLGQ **Second Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**LOGAN J**
DATE:	**11 DECEMBER 2009**
PLACE:	**BRISBANE (VIA VIDEO LINK TO SYDNEY)**

REASONS FOR JUDGMENT

1 The Appellants are each citizens of the People's Republic of China. They are husband and wife. The male Appellant came to Australia on 21 December 2006. His wife preceded him. The male Appellant appeared on his own behalf and on behalf of his wife. He made oral submissions with the assistance of a court appointed interpreter.

2 On 2 February 2007, the Appellants lodged with the Department of Immigration and Citizenship an application under the *Migration Act 1958* (Cth) (Migration Act) for protection visas. The principal applicant was the male Appellant. The female Appellant's claim for this class of visa was derivative in the sense that she advanced no separate basis for the granting a protection visa from that advanced by her husband, relying on the fact that she was a member of a family unit.

3 A delegate of the Minister for Immigration and Citizenship (Minister's Delegate) refused the Appellants' protection visa application. They sought the review of that decision by the Refugee Review Tribunal (the Tribunal). The Tribunal affirmed the refusal decision by the Minister's Delegate.

4 The Appellants then sought the judicial review of the Tribunal's decision by the Federal Magistrates Court. That court dismissed their application. They then appealed to this Court against the decision of the Federal Magistrates Court.

5 The appeal came on for hearing before Gordon J. On 2 September 2008, for reasons which her Honour then published, the appeal from the Federal Magistrates Court was allowed. The matter was remitted to the Tribunal to be heard and determined according to law: *SZLGP v Minister for Immigration & Citizenship* [2008] FCA 1198.

6 On 19 February 2009, a differently constituted Tribunal decided to affirm the refusal decision made by the Minister's Delegate. The Appellants made a further judicial review application to the Federal Magistrates Court.

7 On 15 June 2009, for reasons given that day, the Federal Magistrates Court dismissed the Appellants' judicial review application. It is from that decision that the Appellants appeal once more to this Court.

8 The basis upon which the male Appellant claimed a protection visa was set out in a statement annexed to the visa application. In her judgment in the first appeal Gordon J offered (at [5]) the following summary of the basis of the claim, which I gratefully adopt:

> 1. The first appellant was born in 1960. He claimed he owned and ran a freshwater fish farm in Fujian province near Fuqing city and that his life was uneventful until he was contacted by a distant cousin in August 2006. That cousin was in dispute with local authorities from Putian city over the alleged confiscation of his land and a failed promise by the government to deliver compensation to the landholders whose land had been confiscated. The first appellant claimed that at that time he gave this cousin a job working on his fish farm.
>
> 2. In October 2006, the first appellant claimed that his cousin's brother (who had organised for local farmers near Putian city to protest about the confiscation of his land) had been arrested by the Public Security Bureau ("the PSB"). The first appellant's cousin was required to return to his

> hometown. The first appellant gave his cousin some money (10,000 Yuan) and a letter to a friend (Mr Zhou) whom the first appellant knew in Putian City, and who worked for the local government. The first appellant also telephoned Mr Zhou to plead for his help 'to save' the cousin's brother, who was soon released.
>
> 3. The cousin and his brother continued to be embroiled in disputes with the local authorities over the land confiscation. On 11 November 2006, the first appellant was contacted by Mr Zhou who informed him that there had been a major conflict and that some farmers had been injured. Later that day the first appellant's cousin contacted him and told the first appellant that he and his brother were in hiding. The first appellant picked them up and took them to a 'secret place'.
>
> 4. The next day (12 November 2006) the police attended the first appellant's farm and questioned him for two hours. The police came again five to six times, but they could not find anything. The first appellant told them nothing. The first appellant was scared and 'had to start applying' to go overseas for his own safety.
>
> 5. The first appellant helped to arrange for the safe passage for his cousin and cousin's brother out of China to Taiwan on a fishing boat. However, the cousins were discovered by the navy and immediately arrested.
>
> 6. The first appellant was concerned that he would be exposed by his cousins and immediately went to Guangzhou. On 17 December 2006, the first appellant left China from Guangzhou.
>
> 7. The first appellant claimed that since leaving China the police have come to his home with an arrest permit on three occasions and he has been denounced as a protector of political dissidents.
>
> 8. The first appellant claimed he is on the blacklist of the PSB and will be arrested as soon as he returns to China.

I have chosen to refer to the person whom her Honour has described as the "first appellant" in the passage quoted as the "male Appellant".

9 No different claim was made before the Tribunal on the second review hearing. However, as will be seen, the evidentiary foundation for that claim at that hearing differed in a crucial respect from that provided to the Tribunal at the time when it first reviewed the Minister's Delegate's visa refusal decision.

10 On this occasion, the Appellants advanced the following grounds of appeal from the decision of the Federal Magistrates Court:

> Grounds
>
> The Federal Magistrates erred in law.

> The Federal Magistrates was wrong in finding that the Refugee Review Tribunal ("the Tribunal") acted properly in its findings.
>
> Particulars
>
> The Tribunal failed to comply with its obligations under s 424A of the Act.
> The Tribunal failed to comply with its obligations under s 425 of the Act.
> The Tribunal failed to consider my claims properly and fairly. Tribunal made its finding actually based on unwarranted assumption; the Tribunal ignored or failed to consider a claim I made to it; the Tribunal ignored other relevant materials which was before it; and the Tribunal misunderstood my claim or made a mistake in relation to an important finding of fact.
>
> [sic]

11 The so-called grounds of appeal are so vaguely stated as to be devoid of meaning. That position is not really ameliorated by the so-called particulars, which are noteworthy not only for their generality of expression but also for their failure to focus upon what is alleged to be error on the part of the Federal Magistrates Court, as opposed to the Tribunal.

12 The Minister, very fairly, did not seek the summary dismissal of the appeal on the basis of want of meaningful grounds of appeal. Instead, he advanced submissions directed to demonstrating that there had been no error in the way in which the Federal Magistrates Court had disposed of such of the grounds of review which had also alleged jurisdictional error on the part of the Tribunal constituted by a failure to comply with s 424A and s 425 of the Migration Act. The latter was not an identified ground of review in the Appellant's judicial review application as filed, but rather an interpretation made by his Honour of an oral submission by the Appellants that the Tribunal had not conducted the review of their visa application fairly.

13 Before the Federal Magistrates Court, the Appellants had also alleged jurisdictional error on the part of the Tribunal constituted by a failure to comply with s 424AA of the Migration Act. The Federal Magistrates Court concluded that there had been no such contravention. That conclusion was not challenged in the appeal. It is not therefore necessary to further to consider it.

14 On the hearing of the appeal the Appellants did not advance any submissions in support of an error on the part of the Federal Magistrates Court in failing to find that the Tribunal had not complied with s 424A of the Migration Act.

15 The learned Federal Magistrate (at para 7) had observed: "There was no obligation on the Tribunal to make a disclosure pursuant to s 424A in this case. That is because the Tribunal decision turned upon the applicants' own evidence, both oral and written." The reason assigned by the Tribunal accurately, if generally, describes what came to govern the fate of the Appellants' review application before the Tribunal. A more precise description was offered by the Minister in his submissions: "The Tribunal relied upon internal inconsistencies and inconsistencies in the oral evidence provided by the [male Appellant] to the differently constituted Tribunals". As the Minister correctly submitted, "such reliance does not invoke s 424A obligations": *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190. There was no error in the learned Federal Magistrate's dismissal of the judicial review application insofar as it relied upon an alleged breach of s 424A of the Act by the Tribunal.

16 Subject to exceptions not presently relevant, s 425 of the Migration Act obliged the Tribunal to invite the Appellants to appear before it, "to give evidence and present arguments relating to the issues arising in relation to the decision under review". The Tribunal extended such an invitation to the Appellants. They accepted that invitation and appeared before the Tribunal. The learned Federal Magistrate's description of and conclusion with respect to what then transpired was as follows (at para 11):

> It is plain from the record of what occurred at the hearing that the Tribunal entertained serious credibility concerns about the first applicant's claims and his evidence. The Tribunal proceeded on a somewhat different basis than the delegate. The delegate's decision centred on the vagueness of the applicants' claims and the lack of supporting detail. The first applicant attempted to deal with that defect before the Tribunal by providing details, both orally and in the form of documents. The Tribunal did not accept either the plausibility of his evidence or the authenticity of his critical documents. I am satisfied from the detailed recitation of what occurred at the Tribunal hearing that the Tribunal put the applicants on notice of the essential and significant issues upon which the review would turn.

On this basis, the learned Federal Magistrate concluded that the Appellants had been given a fair opportunity to present their case and expressed satisfaction that there had been no breach by the Tribunal of s 425 of the Migration Act.

17 It is evident from the learned Federal Magistrate's reasons for judgment that the Appellants filed no written submissions in advance of the hearing and that the male Appellant

made a general complaint about a lack of fairness attending the proceedings before the Tribunal.

18 That the learned Federal Magistrate treated the complaint as a ground of review at all was a humane concession and surely in the interests of justice on the premise that, if indeed there was a contravention of s 425, the Tribunal had committed a jurisdictional error with the practical consequence that the Appellants had been deprived of an opportunity of pressing on the merits a claim that they had a well founded fear of persecution. Nonetheless, the course taken exemplifies the difficulties presented when a layperson whose first language is not English and whose cultural background is quite different from ours is confronted with a right of judicial review confined to identified jurisdictional error. Behind a general complaint of unfairness may lurk any one or more of any number of disparate grievances, for example: dissatisfaction with the outcome on the merits before the Tribunal; disappointment at not being believed; dissatisfaction with the way in which the Tribunal conducted the hearing or a perception that the Tribunal has not truly come to grips with the claim advanced. Humane though the course taken by the learned Federal Magistrate was, care needs to be taken in adopting such a course that the judicial officer does not thereby become the contradictor and that the respondent Minister is afforded procedural fairness in relation to a further ground of review given legal form by the Court from the generalised complaint of a litigant in person. The Minister did not suggest in his submissions on the appeal that the learned Federal Magistrate had transgressed in this way.

19 Similar considerations apply, in the circumstances, in relation to the hearing and determination of the appeal.

20 At the level of abstraction at which, seemingly, the issue of fairness was raised by the Appellants in that court, I do not see any error in the learned Federal Magistrate's conclusion that there had been no contravention of s 425 of the Migration Act. The Tribunal's reasons do indeed offer a detailed recitation of events at the hearing. Those reasons make evident that the Appellants were offered a full opportunity to present their case. The Tribunal appears to have been assiduous in drawing perceived contradictions or inconsistencies in the male Appellant's evidence to his attention and in offering him an opportunity to give further explanation. It was just that, as the learned Federal Magistrate accurately summarised in the

passage quoted, "The Tribunal did not accept either the plausibility of his evidence **or the authenticity of his critical documents**" (emphasis added).

21 Absent a consideration arising from a reading of one of what the learned Federal Magistrate termed "critical documents" I should have dismissed the appeal for reasons given ex tempore on the day of hearing. In so doing and again absent that consideration, I should have been inclined to accept the Minister's submission that it was not possible sensibly to address the remaining ground of appeal because it made "sweeping reference to various types of jurisdictional error, but provides no particulars". Further, and save only to the extent that it complained of a want of "fairness" in the proceedings in the Tribunal, that ground traversed matters which were not grounds of review before the Federal Magistrates Court.

22 The "critical document" of particular interest is a letter which, omitting certain particulars which might impermissibly identify the Appellants, is in the following terms (at AB 178):

> [Specified locale] Aquatic Farm
>
> Tel: [specified] Postal Code: [specified]
>
> ---
>
> TO: [Same Locale] Public Security Bureau
> [Same locale] Department of Justice
> [Same locale] Industrial & Commercial Administrative Bureau
>
> The respected leaders of the above mentioned Authorities
>
> [Same locale] Aquatic Farm, a people-run enterprise has been observing the Law and Rules since its establishment in [specified month and year].
>
> With the joint efforts by all the staff on farm, the business has been going up every day, making great contributions to the development of aquatic farming industries in the local area.
>
> However, we admit that because we have put too much emphasis on our production and business profits for a long time, we have ignored the political studies, paying less attention to our loyalty to the Communist Party or educating our staff to love our Socialist Motherland. As we ignored our ideological reform, we provided the chances for those dissidents like [the male Appellant] to be against the Party and the Socialist motherland. We are willing to do a thorough self-criticism and self examination. We will take the incident as a lesson to amend the damages and we will carry out a full scale campaign in ideological re-education on form.
>
> In the meantime, the Farm Director Board have made the decision to dismiss [the

> male Appellant] from the Board and all his positions on farm for good, and in particular, to sell all of his Aquatic Farm shares and confiscate them. Also we will actively take the investigations in cooperation with the Public Security organizations into [the male Appellant's] anti-CCP and anti-Socialist motherland activities.
>
> Regards,
>
> [Same locale] Aquatic Farm (sealed)
> Date: 6th March 2007
>
> (**Duplicates are to be delivered to** [Same locale] Labor and Social Security Bureau, Civil Affairs Administrative Bureau **and [the male Appellant]**. (Emphasis added)

23 Having regard to the learned Federal Magistrate's reasons for judgment, it seems unlikely that the letter of 6 March 2007 featured expressly in the submissions which the Appellants made to that Court in elaboration of their complaint of "unfairness". On the appeal, the male Appellant was adamant in submissions that the events set out in the claim made in the visa application did happen, that he had helped a relative to escape from China, that the conclusion reached by the Tribunal was wrong, "based on suspicion" as he put it, and that the Tribunal ought to have made inquiries, having regard to what he had put forward, which I understood to include the letter of 6 March 2007.

24 In part, these submissions were an impermissible solicitation to conduct merits review. Otherwise, they raised grounds not taken below. These were firstly that the Tribunal had erred in failing to make inquiries concerning the foundation of the Appellants' claim and the authenticity of supporting documents. Secondly, to the extent that any jurisdictional error content could be given to the allegation that the Tribunal's decision was "wrong" and "based on suspicion" that could perhaps be characterised as the reaching of a conclusion that was illogical or unreasonable or, alternatively, that the Tribunal had not truly engaged with the claim as made in the protection visa application or, in the further alternative, had conducted the hearing and made its decision on a false premise, thereby denying the Appellants procedural fairness. Necessarily, because this is an exercise of appellate, not original, jurisdiction, that would entail attributing error to the Federal Magistrates Court in failing to appreciate that one or more of these errors lurked behind the general complaint of "unfairness".

25 Because these were not express bases of challenge in the Federal Magistrates Court to the Tribunal's decision in respect of the rehearing of the review application, leave to raise

these grounds would be necessary: see *H v Minister for Immigration and Multicultural Affairs* (2000) 63 ALD 43. In their joint judgment in that case (at para 7, p 45) Branson and Katz JJ draw attention to an observation earlier made in the High Court in *Coulton v Holcombe* (1986) 162 CLR 1 at 7:

> It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so, the main area for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.

26 Leave to add a ground of appeal not raised below should only be granted where it is expedient in the interests of justice so to do: *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158 at [46]. Inevitably, whether or not to grant leave to add such grounds to the notice of appeal requires some exploration of their merits. For reasons which follow, that exploration persuades me that, in the particular circumstances of this case, the Appellants should have leave to raise the grounds identified in para 24 above.

27 The consideration arising from the letter of 6 March 2007 which prompted me not to dismiss the appeal peremptorily but rather to adjourn the hearing so as to afford the Minister an opportunity to make further submissions and thereafter to reserve my decision arose from the words emphasised at the foot of the letter of 6 March 2007. It is evident on the face of this letter that, at least purportedly, it was created after the Appellants had both left China and lodged their protection visa application here, that it is referring to steps which have just been taken in light of recent events with which the male Appellant was concerned and that a duplicate of the letter is to be sent, materially, to him as well as to the addressees of the letter.

28 While, if genuine, the letter of 6 March 2007 does not corroborate the detail of the claim made by the Appellants, it does corroborate the claim in the general sense of confirming that the male Appellant had held a responsible position at the Aquatic Farm, had been involved in some sort of "dissident" activity and had, in so doing, come to the adverse attention of the People's Security Bureau (PSB). It is truly, in this sense, a "critical document".

29 To give context to why the emphasised words at the foot of the letter in relation to its distribution may have importance it is necessary to record two features of the Tribunal's reasons. Though the letter of 6 March 2007 is mentioned, not only do those reasons show no appreciation of the fact that, on the face of that letter, a duplicate is apparently being sent by its author to the male Appellant but also the Tribunal uses the male Appellant's inability to explain how that letter, addressed as it is to the authorities, could come into his possession as part of a chain of reasoning to discount his credibility overall. To give further context it is necessary to set out a lengthy extract from the Tribunal's reasons in which that reasoning is exposed:

> 111. The Tribunal referred the Applicant to the two documents he had brought to the hearing. One of these is a purported original of a letter addressed by the fishery board to the PSB and to other state bodies. It is not addressed to the Applicant or to his family that, he claimed, had sat on it before sending it to him.
>
> 112. The Tribunal put to the Applicant that it needed to consider documents from Fujian with a critical eye because independent country information indicate that there is a high incidence of fraudulent documentation in the PRC generally, and in Fujian in particular.
>
> 113. In a recent May 2007 advice DFAT stated there is a "high incidence of fraudulent documentation in China" (Department of Foreign Affairs and Trade, DFAT Report No. 644-RRT Information Request: CHN31695, 17 May 2007):
>
> > In September 2005 the Canadian Immigration and Refugee Board provided information on fraudulent documents in China. According to sources cited by the Board, fake documents are easy to obtain in China, including birth certificates, university diplomas and hospital documents. Procurement of fraudulent documents is facilitated by corrupt local officials.
> >
> > (Immigration and Refugee Board of Canada, CHN100510.E – China: The manufacture, procurement, distribution and use of fraudulent documents, including passports, hukou, resident identity cards and summonses; the situation in Guangdong and Fujian particularly (2001-2005), 8 September 2005).
>
> 114. DFAT also advised in October 2004 that:
>
> > As a general comment on the value of Chinese official documents, this embassy's experience is that many official documents (especially identity documents) are forged and that irregular or improper issue of documents is widespread.
> >
> > (Department of Foreign Affairs and Trade, DFAT Report No 327 –

RRT Information Request: CHN17017, 7 October 2004).

115. Earlier DFAT advice, dated 5 June 2000, states that:

> As a general comment on the value of Chinese official documents, this embassy's experience has shown that any official document can be either bought or forged in china. Irregular or improper issue of documentation is widespread. Thus, we would suggest that little evidentiary weight can be placed on any official Chinese document, including summonses.
>
> (DIAC Country Information Service, Country Information Report No 301/00 – Summonses in China, (sourced from DFAT advice from 5 June 2000), 20 June 2000).

116. The Applicant invited the Tribunal to check the authenticity of the document he had presented, presumably with its authors. The Tribunal considered the suggestion. The Tribunal then put to the Applicant that the letter from the fishery to the police was not addressed to the family that had passed it on to him.

117. In response, the Applicant said the letter was given to this mother.

118. The letter is question is typed in Chinese characters on letterhead printed in red print ink and stamped with a red ink stamp. No signature appears on the document.

119. The Tribunal asked the Applicant if the letter his mother obtained and sent to him was an original.

120. In reply, the Applicant said the document was an original as produced by the fishery.

121. As the Applicant has been a proprietor in the fishery, one could reasonably entertain the impression that this letter might as easily have been provided to the Applicant through his mother by friends at the fishery. For this reason, the Tribunal was concerned to ascertain how the Applicant could be in possession of it.

122. Having now been told that the letter was an original, the Tribunal asked the Applicant why his mother, to whom the letter was not addressed, would have come to receive an original of the same. In reply, the Applicant now said it was a copy. The Tribunal considered this response, but also considering that the letter was typed on what appeared to be original letterhead. This gave the letter the appearance of an intended or purported original, rather than as something that had been copied for the eyes of a third party.

123. The Tribunal put to the Applicant that it had doubts as to the authenticity of the document purporting to be the letter from the fishery to the authorities. In reply, the Applicant said, "What can I say?"

124. As the "fishery" letter refers to the Applicant's shares having been confiscated, the Tribunal asked the Applicant to say when he first learned of his shares having been seized in this way. He gave two different answers;

first, he said he found out from the documents themselves, presumably when he first saw them, which said was recently; then he said "they told me before" and indicated he had not mentioned the fact because he did not at the time have any documents to support the facts.

125. When the Tribunal put to the Applicant that he had just given two mutually exclusive answers to its question, he said he did not know how to talk about the matter.

126. The Tribunal then asked the Applicant to clarify, then on or around what date he had first found out that his shares had been seized. In reply, he said, "After I came here." He said shareholders went to the fishery every few days. He said he found out after he came here from other villagers back home that his shares had been confiscated.

127. The Tribunal asked the Applicant if he ever contacted his family for confirmation of the seizure of his shares, and he said he never did. He said this was because he did not often contact his family.

128. The Tribunal put to the Applicant that this picture of everybody in his family not being inclined to contact each other did not seem to sit with the concern that, he suggested, existed in his family. In reply, he said he did not contact his family because he did not want to implicate it in his problems with the authorities. The Tribunal put to him that this was not the reason he initially gave for not having contacted his family: he had simply said he did not commonly contact his family.

129. The Applicant did not indicate with any clear commitment that he even tried to contact his workplace after hearing that others had confiscated his shares.

130. The Tribunal asked the Applicant to explain how it could have ever been possible that *other shareholders* could confiscate his shares. In reply, he said he did not know. He said he "did not write". The Tribunal asked him what he meant by this and he seemed to wander in his speech, eventually saying that he never had a certificate (or anything written, perhaps) registering his shares and that they were merely part of an agreement of some kind.

131. The Tribunal asked the Applicant how the agreement could be breached. He gave no clear answer.

…

159. The Applicant's position is that the documents he has provided add weight to the story he has told. The Tribunal finds that they do not. The Applicant provided evidence of having left the fishery on good terms, with people there working for him and with him deriving profit from their work. The Applicant then tried to argue that the fishery somehow confiscated his shares in order to distance itself from the police investigation into his role in sheltering his relatives and smuggling them across the Taiwan straits. This reaction to the police does not make sense, and the Applicant was unable to illustrate even vaguely how other shareholders could sell or appropriate his shares; the best he could do was to suggest that the shares were never certified or registered shares, and this explanation was unconvincing and struck the Tribunal as improvised.

> 160. In addition to all this, the Applicant was not able to explain plausibly how a purportedly original letter on purportedly original letterhead that was addressed to the police and other state instruments came into the hands of the Applicant's family. The Applicant told the Tribunal that the fishery simply gave the letter to his family, but in the claimed circumstances this does not help to argue that the letter is genuine. Then, the Applicant gave unconvincing evidence as to why it took so long for this letter to be sent to him, and made inconsistent oral claims as to when and how he first learned of the action taken by his fellow shareholders. He seemed to suggest that as soon as the letter came to him, he took action quickly to submit it to the Tribunal and yet, having claimed at one stage that he learned about the share stripping back in early 2007, he took no action to gather any information about it from anyone back in the PRC.
>
> 161. **The whole story of the share-stripping is dismissed by the Tribunal as a concoction. For this reason the Tribunal gives no weight to the first of two documents submitted by the Applicant just prior to the 10 November 2008 hearing.**
>
> 162. As to the other document, the Tribunal sees no reason to dismiss as implausible that the Applicant himself may have had the use of land that has since expropriated. The phenomenon has been quite common in recent years. However, in view of the Applicant's lack of consistency as a witness, the Tribunal gives no weight to this particular claim, and does not accept it. The only evidence of it is the second letter, and since the Applicant has not been a reliable oral witness, and since the Tribunal finds that the first letter is fraudulent, it ultimately gives no weight to the second letter.
>
> 163. It is fair to observe that the share-stripping story, which the Tribunal dismisses as false, is not central to the Applicant's account as to why he fled the PRC. Similarly, the story about the more recent land resumption, as fleetingly referred to in the second letter, is not central to the same amount.
>
> [Emphasis added]

The letter which the Tribunal describes as "the first of the two documents" is that of 6 March 2007. The Tribunal's reference to the "Applicant" is a reference to the male Appellant.

30 It should additionally be recorded that the Tribunal accepted that the male Appellant:

(a) was a "partner" in a fish farm or fishery in his home town;

(b) maintained a proprietary interest in that fishery.

The Tribunal also accepted that relatives of the male Appellant were employed at the fishery. The material before the Tribunal included file notes of telephonic inquiries made by Australian immigration officers of the fish farm when seeking to confirm that the male

Appellant held a position there for the purpose of determining a separate student visa application made by the Appellants' children. The Tribunal did not have any evidence before it, one way or the other, as to whether, under Chinese law, a share or interest in a fish farm might be forfeited because its owner had engaged in dissident activity.

31 The different complexion which awareness of the manifest intention of the author of the letter of 6 March 2007 to provide the male Appellant with a duplicate might have upon the chain of reasoning in the passage quoted, leading to the Tribunal's conclusion that the share stripping was a "concoction", is obvious. Equally obvious though is that the male Appellant did not, in terms, draw this fact to the Tribunal's attention.

32 The Tribunal conclusion about the authenticity of the letter of 6 March 2007 and the explanations given by the male Appellant to questions posed at the hearing concerning that letter interplayed with inconsistencies which the Tribunal found in other evidence given by him. This is not a case where the worth of a potentially corroborative document was discounted just on the basis of separately reached findings with respect to a visa applicant's credibility. Further, though the Tribunal had the benefit of general cautionary advice from the Department of Foreign Affairs and Trade concerning the incidence of forged documents not just in China but also in the locale from which the Appellants came, it had no material before it, derived from forensic document examination or otherwise, that the letter of 6 March 2007 and its companion document tendered by the Appellants were forgeries.

33 In responding to the ramifications of the Tribunal's failure to appreciate that the Appellants had tendered a document which was a duplicate intended by its author to be sent to the male Appellant the Minister submitted that, just to overlook this fact was not an error going to jurisdiction.

34 This was a particularly powerful submission, which has occasioned me quite some angst with respect to whether it is open to find any error in the decision of the Federal Magistrates Court, having regard to the proper role of that court as a reviewing court on judicial review. Ordinarily, a conclusion reached by the Tribunal concerning the credibility of a visa applicant is a finding of fact "par excellence" for the Tribunal to make: *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at [67]. Further, when addressing the subject of the judicial review of findings of fact in

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 356 (*Bond's case*) Mason CJ observed:

> [At] common law, according to the Australian authorities, want of logic is not synonymous with error of law So long as there is some basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place

35 Since *Bond's Case, Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002; Applicant S106/2002 v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1165 has, materially, been decided. The implications of the judgments delivered in that case in relation to the judicial review of fact finding form the centrepiece of a valuable discussion by Aronson M, Dyer B, Groves M in their work, *Judicial Review of Administrative Action* (4th ed, Law Book Co, 2009) (*Judicial Review of Administrative Action*) at p 265 et seq on the subject "Challenging seriously irrational or illogical fact finding". While the whole of that discussion repays study in the present context, the following passage (at pp 271-273) is, in my opinion, particularly apposite:

> Lee J dissented as to the result in *WAHP v Minister for Immigration and Multicultural* and Indigenous Affairs, but his Honour's statement of the relevant principles was not affected:
>
> > 'The [Refugee Review] Tribunal obtains power to make a determination under the Act where the determination is based on findings or inferences of fact that are grounded upon probative material and logical grounds. A determination that is *based* on illogical or irrational findings or inferences of fact may be shown to have no better foundation than an arbitrary decision and accordingly the review process will be unfair and will not have been conducted according to law. Here, of course, the words "irrational" or 'illogical' are used with their proper meaning of devoid of, or contrary to, logic; or ignorant or negligent of, and not in conformity with, the laws of correct reasoning, and are analogues of arbitrary or perverse. They are not sued with a lesser colloquial meaning that may be applied where the words are introduced in debate to emphasise the degree of dissent from a disputed conclusion or point of view. Illogical or irrational findings or inferences of fact upon which a determination is based examinable as part of the matter that is subject to judicial review pursuant to the application for a prerogative or constitutional writ.'
>
> The Federal Court accepts that whether a decision is sufficiently irrational to meet *S20's* standard 'will, in our view, always be a matter of degree", but it rejects the English approach to *Wednesbury*, which sets a more demanding standard of reasonableness where import human rights are at stake. Allsop J gave the following summary: 'There may be circumstances where the findings of fact are so irrational or capricious as to display a failure of the Tribunal to attend conscientiously and appropriately to its statutory obligations.'

> [4.435] A real question now arises as to whether the courts will or should continue to stretch the procedural fairness rule of natural justice to accommodate a complaint that the decision-maker has made a serious factual mistake. It might be helpful to explore that question in the context of the House of Lords decision in *R v Criminal Injuries Compensation Board; Ex parte A*. The board had disbelieved the applicant's story, without hearing directly from her or at all from the police doctor who had examined her. The police had encouraged the applicant to adopt a passive role, on the assurance that they would do everything necessary at the board hearing. However, the police grossly misrepresented the doctor's report, innocently as the House was prepared to assume. With no blame attaching to the board, their Lordships granted review on either of tow bases, namely, fundamental error of fact and breach of natural justice. Natural justice was their preferred ground, but Ex parte A has since been endorsed for its recognition of fact review.
>
> If the English position does indeed allow review for fundamental error of fact, it goes considerably further than *S20*, because such error can occur without procedural unfairness, irrationally or illogicalilty. We doubt that Australian common law will go that far. The High Court has doubted *Ex Parte A's* reasoning, at least so far as it was based upon natural justice, and quite possibly on the "error of fact" basis as well. The High Court suggested that *Ex Parte A* might be better analysed as involving a procedural error on the part of the police, thereby attracting review under *ADJR's* "procedural error" ground where *ADJR* applies.
>
> [Footnote references omitted]

36 Like the learned authors of *Judicial Review of Administrative Action*, I conceive that the passage quoted from the judgment of Lee J in *WAHP v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 87 contains an accurate statement of relevant Australian principle in light of *S20/2002*.

37 With all due respect to the Tribunal and in the sense they are used by Lee J, the adjectives "ignorant", "arbitrary" and "perverse" aptly apply to a process of reasoning which damns a man's credibility by reference, materially, to a false factual premise concerning a critical document. What follows from this, to take up sentiments voiced by Allsop J (in *SZDFO v Minister* for *Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1192 at [10]) in the passage I have quoted from *Judicial Review of Administrative Action*, is that the Tribunal has failed to attend conscientiously and appropriately to its statutory obligations and the Federal Magistrates Court has failed to apprehend this.

38 An alternative way of approaching matters is also exposed by the learned authors of *Judicial Review of Administrative Action* under the heading "Fact review by the imaginative uses of other grounds" (at p 273 et seq). While I should respectfully question the aptness of

the descriptor, "imaginative", it is nonetheless, in my opinion, a denial of procedural fairness to a visa applicant for the Tribunal to subject him to questioning, upon the answers to which findings as to credibility come to be made, upon a false factual premise with respect to a critical document. That false premise is that the letter of 6 March 2007 was not addressed to him. In a narrow sense that is true but, reading the letter as a whole, it is plain on its face that he was an intended addressee insofar as the dispatch of duplicates was concerned.

39 In their discussion of *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 (*Dranichnikov*) in the passage in their work to which I have drawn attention, the learned authors of *Judicial Review of Administrative Action* observe (at p 275) that this decision "has the effect of extending the procedural fairness rule to the situation where the decision-maker has substantially 'switched off' during an important phase of the pre-decisional process". I respectfully agree. That, with respect, is precisely what the Tribunal as constituted for the rehearing in this case did. To make that observation is not in any way to diminish the very real difficulty under which a tribunal dealing with an unrepresented layperson not fluent in English must labour when conducting a review on the merits but is to acknowledge that such a tribunal must nonetheless at least come to grips with the claim as made.

40 In a footnote (p 275, fn 606) in this part of their work the learned authors of *Judicial Review of Administrative Action* instance *SZIFI v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 238 ALR 611 (*SZIFI*) as a case which, even though *Dranichnikov* is not mentioned, offers a good example of the type of procedural fairness error for which they contend *Dranichnikov* stands. In *SZIFI* Greenwood J observed (at 614, [43]):

> [43] Once it is established that the tribunal has asked itself the wrong question by, for example, asking whether it can be satisfied that the appellant faces a real chance of persecution should he return to the People's Republic of China, or has identified the wrong issue, or taken into account, in one part of its deliberations, a notion that the appellant is an Indonesian rather than a Pakistani national, the tribunal is seen to have failed to provide the appellant with procedural fairness and thus jurisdictional error arises (*Refugee Review Tribunal and Another; Ex parte Aala* (2000) 204 CLR 82 at [59] per Gaudron and Gummow JJ). The repository of the power is constrained by an obligation to act reasonably by providing procedural fairness. A decision made in light of a failure to act reasonably is not a decision made under the Act for the purposes of s 474.

41 The present case, in my opinion, is a variant of this same type of jurisdictional error. The Tribunal has asked itself the right question in the broad sense of asking whether it should be satisfied that Australia owed protection obligations to the Appellants on the basis of the assistance that the male Appellant claimed that he had offered to particular relatives but done so on the basis of a blatant misapprehension with respect to a critical document capable of offering corroboration of why the male Appellant had a well founded fear of persecution.

42 It was conceded on behalf of the Minister that jurisdictional error could be constituted by the Tribunal's overlooking of a relevant consideration but that to make this out it had to be demonstrated that a whole aspect of a visa applicant's case had been overlooked, not just a particular document. Examples of this were said to be found in *WAIJ v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 80 ALD 568 (*WAIJ*) and *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51 (*NAJT*).

43 I do not accept that the basis for this type of jurisdictional error is as confined as the Minister has propounded or that regard to the cases cited bears this out. Rather, each of these cases offers but another example of a procedural fairness error on the part of the Tribunal in failing truly to engage with the claim as presented by the visa applicant. That this is so is, in my opinion, starkly evident in the following passage from the joint judgment of Lee and Moore JJ in *WAIJ* (at 580, [53] – [54]):

> [53] It is a denial of a fair process to purport to dismiss documents from consideration where the material therein supports an applicant's case in substantive respects and no ground for such a course is provided by the documents on their face or by other facts.
>
> [54] It follows that the tribunal did not accord to the appellant practical fairness and justice in the tribunal's conduct of the review. Accordingly, the decision of the tribunal involved jurisdictional error and was not a decision authorised by the Act: see *Dranichnikov v Minister for Immigration and Multicultural Affairs* … at [24], [32] per Gummow and Callinan JJ.

Here, the Tribunal has discounted the letter of 6 March 2007 on the basis of credibility findings concerning the male Appellant but these findings, in turn, are tainted by responses to questions put to the male Appellant at the hearing and subsequent reasoning, which questions and reasoning were each grounded in a false premise concerning that letter. Significantly, in *WAIJ*, Lee and Moore JJ each conceived that the procedural fairness they described gave rise to the same type of jurisdictional error as that found by the High Court in *Dranichnikov*.

44 In contrast to *WAIJ*, *Dranichnikov* is not expressly mentioned in the reasons of the majority (Madgwick J, Conti J agreeing) in *NAJT*. However, that part of those reasons in *NAJT* which upholds the allegation that there had been a jurisdictional error constituted by a failure on the part of the Tribunal to "have regard" to a corroborative letter (147 FCR at 92-93, [212] – [213]) is consistent with the error found in *Dranichnikov* and with the classification by the learned authors of *Judicial Review of Administrative Action* of that error as a type of procedural fairness error. Further, the letter concerned in that case had not been completely ignored but rather the subject of "fleeting, uncritical references".

45 On this alternative basis also the Tribunal committed jurisdictional error.

46 What remains is to consider whether some separate jurisdictional error is constituted by a failure on the part of the Tribunal either to take up the male Appellant's invitation (evident at para 116 in the passage quoted from the Tribunal's reasons) to investigate the authenticity of the letter of 6 March 2007 or to do so of its own motion.

47 The Tribunal's power to seek information is found in s 424 of the Migration Act.

48 For the Minister, attention was appropriately and necessarily directed to the then pending decision of the High Court in *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 (*SZIAI*), judgment in which came to be delivered on 23 September 2009. The outcome in that case served to underscore the correctness of the submission made on behalf of the Minister in the present case, which was that, though the Tribunal was a type of inquisitorial forum, it was not under any general duty to conduct inquiries of its own motion. Given the reasoning and outcome in *SZIAI*, it is not necessary to refer to the predecessor authorities which the Minister called in aid in support of that submission in the present appeal.

49 It was further submitted for the Minister that, insofar as the male Appellant had invited the Tribunal so to do, it did not follow from this that the Tribunal was bound to take up that invitation, although it was evident that the Tribunal had given the invitation due consideration. I agree that the mere extending by a visa applicant of an invitation to the Tribunal to conduct inquiries itself does not thereby convert a course of action that it would be permissible but not obligatory for the Tribunal to undertake into one which it is bound to

undertake. Rather, the singular circumstances of a particular case may, exceptionally, give rise to an obligation on the part of the Tribunal in that case to make its own inquiry with respect to a critical fact. A failure so to do could in such a circumstance give rise to a conclusion that the Tribunal had failed to exercise the review jurisdiction consigned to it and thereby made a jurisdictional error: *SZIAI* at [25]. In allowing for the possibility of such a jurisdictional error the language employed in the joint judgment in *SZIAI* counsel's restraint in concluding that it is present, "a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained".

50 In practice, with respect, whether such restraint has been observed by a reviewing court may be controversial for, in cases at the margin, reasonable minds might reasonably differ as to whether a particular inquiry was "obvious". The present may well be a case in point. The Tribunal had before it evidence in the form of the Departmental file notes to which I have referred of the facility with which telephonic inquiries had been able to be made at the fish farm in respect of the male Appellant's employment status in relation to what must have been the routine processing student visa applications. Especially given the nature of the class of visa sought by the Appellants and the impact which it would have on an assessment as to whether the Tribunal was satisfied in the way the Migration Act required for the granting of such a visa, it does not seem to me a transgression of the restraint counselled in *SZIAI* to hold that the making of a telephonic inquiry of the fish farm as to whether there had been a forfeiture or confiscation of an interest which the male Appellant had at that farm or perhaps just as to why he was no longer employed there was an obvious inquiry about a critical fact.

51 As it happens, there are, for the reasons set out above, other bases upon which it is possible to conclude that the Tribunal's decision was tainted by jurisdictional error. However, this is also, in my opinion, one of those exceptional cases in which it is possible in the circumstances to conclude that the Tribunal constructively failed to exercise the review jurisdiction consigned to it by s 414 of the Migration Act because it failed to make an obvious inquiry about a critical fact.

52 For these reasons, the appeal must be allowed, the orders made by the Federal Magistrates Court set aside and the matter remitted to the Tribunal to hear and determine the review application according to law. For that purpose, the Tribunal should not be constituted by a member who has hitherto heard and determined that review application.

I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 10 December 2009

Counsel for the Appellants:	The Appellants appeared in person
Counsel for the Respondents:	Ms L Clegg
Solicitor for the Respondents:	Clayton Utz Lawyers
Date of Hearing:	18 and 19 August 2009
Date of Judgment:	11 December 2009