FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v MZYCE [2010] FCA 767

Citation:	Minister for Immigration and Citizenship v MZYCE [2010] FCA 767
Appeal from:	MZYCF & Anor v Minister for Immigration and Citizenship & Anor [2010] FMCA 11
Parties:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP v MZYCE, MZYCF and REFUGEE REVIEW TRIBUNAL**
File number(s):	VID 96 of 2010
Judge:	**GRAY J**
Date of judgment:	22 July 2010
Catchwords:	**MIGRATION** – visa – protection visa – whether Refugee Review Tribunal failed to discharge its function, or reached an unreasonable conclusion – Tribunal refused to accept that newspaper articles tendered in support of applicant's case were evidence of the alleged events reported in them – Tribunal relied on information as to the level of document fraud in India – whether Tribunal bound to make its own inquiries as to genuineness of newspaper articles – whether federal magistrate in error in finding that applicant had asked Tribunal to investigate genuineness of newspaper articles using the internet
Legislation:	*Migration Act 1958* (Cth), ss 5(1), 36, 36(2)(a), 36(2)(b), 65, 91R, 424, 424A(1) *Convention relating to the Status of Refugees done at Geneva on 28 July 1951* *Protocol relating to the Status of Refugees done at New York on 31 January 1967*
Cases cited:	*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 applied *Brown v Minister for Immigration & Citizenship* [2009] FCA 1098 cited *Khant v Minister for Immigration & Citizenship* [2009] FCA 1247 cited *Minister for Immigration and Citizenship v Le* [2007] FCA 1318 (2007) 164 FCR 151 cited *Minister for Immigration & Citizenship v SZIAI* [2009] HCA 39 (2009) 259 ALR 429 applied

	MZYCF & Anor v Minister for Immigration and Citizenship & Anor [2010] FMCA 11 referred to *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 cited *SZLGP v Minister for Immigration & Citizenship* [2009] FCA 1470 cited
Date of hearing:	27 May 2010
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	45
Counsel for the appellant:	Mr S Lloyd SC and Mr R Knowles
Solicitor for the appellant:	Clayton Utz
The first respondent appeared in person	
There was no appearance by the second respondent or the third respondent	

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 96 of 2010**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**MZYCE** **First Respondent**
	MZYCF **Second Respondent**
	REFUGEE REVIEW TRIBUNAL **Third Respondent**

JUDGE:	**GRAY J**
DATE OF ORDER:	**22 JULY 2010**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the Federal Magistrates Court on 27 January 2010 in proceeding number MLG 1224 of 2008 be set aside.

3. There be substituted for those orders orders that:

   (1) The application of the first respondent and the second respondent to the Federal Magistrates Court in proceeding number MLG 1224 of 2008 be dismissed.

   (2) The first respondent and the second respondent pay the appellant's costs of that proceeding.

4. The first respondent and the second respondent pay the appellant's costs of the appeal, save for the costs of and incidental to the application by the appellant to have the appeal heard by a Full Court.

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 Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 96 of 2010**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**MZYCE** **First Respondent**
	MZYCF **Second Respondent**
	REFUGEE REVIEW TRIBUNAL **Third Respondent**

JUDGE:	**GRAY J**
DATE:	**22 JULY 2010**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

The nature and history of the proceeding

1 This appeal raises the question whether jurisdictional error on the part of the Refugee Review Tribunal ("the Tribunal") occurred because the Tribunal did not take steps to check whether certain newspaper articles were genuine, before refusing to accept that they were evidence of events alleged in them. The appeal is from a judgment of the Federal Magistrates Court of Australia, published as *MZYCF & Anor v Minister for Immigration and Citizenship & Anor* [2010] FMCA 11, delivered on 27 January 2010. The learned federal magistrate set aside the decision of the Tribunal, dated 27 August 2008, remitted the matter to the Tribunal for determination according to law, and ordered the appellant, the Minister for Immigration and Citizenship ("the Minister"), who was the first respondent in the Federal Magistrates Court, to pay the costs of the first and second respondents to this appeal, who were the applicants in that court. The Tribunal's decision was to affirm a decision of a delegate of the Minister to refuse to grant to the first and second respondents protection visas. The Tribunal is the third respondent to the appeal.

2 The first and second respondents are citizens of India. They are a married couple. They arrived in Australia on 8 February 2008. On 12 March 2008, they applied for protection visas. The Minister's decision refusing to grant those visas was made on 24 April 2008. The first and second respondents then applied to the Tribunal for review of that decision. The Tribunal conducted a hearing on 1 August 2008, at which the first and second respondents appeared and gave evidence and presented arguments with the assistance of an interpreter. After the hearing, the Tribunal wrote to the first respondent, inviting him to respond to a number of propositions. The first respondent requested more time than the Tribunal had allowed, but the Tribunal rejected this request.

3 The application by the first and second respondents to the Federal Magistrates Court was dismissed on 20 March 2009, because they did not appear on the first occasion on which the application was called on in court. The dismissal order was set aside on 20 March 2009, when orders were made for the preparation of the application for hearing. The hearing was fixed for 24 July 2009. At the end of the hearing, the Minister was directed to file and serve further contentions of fact and law and the first and second respondents were given the opportunity to reply.

4 The appeal to this Court was listed in the ordinary course to be heard by a single judge on 27 May 2010. By letter dated 12 May 2010, the Minister's solicitors requested that the appeal be heard by a Full Court. The letter said that the consideration of the appeal could involve a consideration of what was said in *Minister for Immigration & Citizenship v SZIAI* [2009] HCA 39 (2009) 259 ALR 429 at [25], per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. The letter suggested that single judges of this Court who have considered that passage "have varied in its consideration." Reference was made to *Brown v Minister for Immigration & Citizenship* [2009] FCA 1098, *SZLGP v Minister for Immigration & Citizenship* [2009] FCA 1470 and *Khant v Minister for Immigration & Citizenship* [2009] FCA 1247 as examples. A copy of the letter from the Minister's solicitors was sent to the first and second respondents both by email and post. The postal addresses (one a post office box number and the other a street address) were in Mildura. In response to that letter, my associate advised the Minister's solicitors that I was disinclined to decide whether the appeal should be heard by a Full Court without first giving the first and second respondents an opportunity to be heard on that question. The letter invited the Minister to renew the application for the appeal to be heard by a Full Court when it was called on for hearing on 27 May 2010.

5 Counsel for the Minister did so renew the application. They conceded that, if arguments they proposed to put on the Minister's behalf about errors on the part of the federal magistrate were to be accepted, the appeal could be determined without deciding what was meant by the passage from *SZIAI*. When I invited counsel for the Minister to take me to the variations claimed to have been expressed by single judges about the meaning of that passage, counsel were unprepared to make such a submission, and did not have copies of the judgments in *Brown*, *SZLGP*, and *Khant* with them. When I pointed out that, if the case were to be treated as a test case on the meaning of the passage in *SZIAI*, the first and second respondents would need to be represented, so that there would be a proper contradictor, and asked whether the Minister was prepared to fund the reasonable cost of their representation, counsel said that they did not have instructions on that question. Similarly, they were uninstructed on the question whether the Minister would be prepared not to seek costs, in the event that he succeeded on the appeal, on the basis that he had wished to make a test case out of the appeal, and the request resulted in the abandonment of the hearing date fixed and the fixing of another one. Counsel sought an adjournment for a short time, in order to procure copies of the judgments in *Brown*, *SZLGP* and *Khant*, and to seek instructions about the two issues of costs. I granted the adjournment. On the resumption of the hearing of the appeal, counsel for the Minister abandoned their application for the appeal to be heard by a Full Court.

6 The hearing of the appeal therefore proceeded on 27 May 2010. Only the first respondent appeared to contest the appeal. I elected to proceed with the hearing in the absence of the second respondent (whose entitlement to a protection visa depended upon the outcome of the first respondent's application) and in the absence of the Tribunal (which had filed a submitting appearance in the Federal Magistrates Court, but did not file a notice of appearance in this Court.)

Protection visas

7 Section 36 of the *Migration Act 1958* (Cth) ("the Migration Act") provides relevantly as follows:

> (1) There is a class of visas to be known as protection visas.
>
> (2) A criterion for a protection visa is that the applicant for the visa is:

> (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
>
> (b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:
>
> (i) is mentioned in paragraph (a); and
>
> (ii) holds a protection visa.

8 The terms "Refugees Convention" and "Refugees Protocol" are defined in s 5(1) of the Migration Act to mean respectively the *Convention relating to the Status of Refugees done at Geneva on 28 July 1951* and the *Protocol relating to the Status of Refugees done at New York on 31 January 1967*. It is convenient to refer to these two instruments, taken together, as the "Convention". For present purposes, it is sufficient to say that, pursuant to the Convention, Australia has protection obligations to a person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political 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

The claims of the first respondent

9 The first respondent claimed to fall within the criterion referred to in s 36(2)(a) of the Migration Act, on the basis that he had a well-founded fear of persecution, if he should return to India, for reasons of religion and political opinion. The second respondent relied on the criterion referred to in s 36(2)(b), namely that she is the spouse of the first respondent, and that he is entitled to a protection visa.

10 The first respondent claimed that he had long been a follower of the doctrines of Mahatma Ghandi and Dr Baba Saheb Ambedkar, who worked for lower caste peoples, including untouchables or Dalits. He said he had joined a protest on 16 July 1997 and had been arrested by the police, charged and released on bail. As a result, he became widely known in Ahmedabad. He engaged in social work and meetings with untouchables. He helped to publicise the activities of their organisations.

11 The first respondent claimed that, in January 2004, he became a journalist for a fortnightly newspaper campaigning against corruption of leaders and government officers. As

a result, he was targeted by fanatical Hindu Brahmans and by Bajrang Dal, an extremist organisation. He was threatened with death, and with having the shop in which he conducted a dairy products business burned. He was told by one of the Bajrang Dal leaders that he would have to leave the groups of untouchables and the newspaper if he wished to live in the area. He said that Bajrang Dal believed that it was Christians who financed untouchables and Bajrang Dal was against the spread of Christianity. They threatened to kill his whole family and him. As a result, the first respondent said he decided to close the business and to live elsewhere. To protect himself, he joined an anti-Bajrang Dal organisation. He continued to publish many articles on crucial issues and to expose corrupt practices of government officers. He was offered membership of an organisation of journalists. Bajrang Dal people found out where he lived. He came to Australia briefly in April 2007. When he returned, he was attacked in the street, but saved by members of the public. He believed that the attackers were from Bajrang Dal.

12 The first respondent said that, on 5 September 2007, his daughter answered the phone and received a threat. On 7 September 2007, she went to collect laundry from the eighth floor of a building and fell from there to her death. He claimed that the threat was the cause of her death, on the basis that she would not have fallen if she had not been upset by the threat. He then received another threat by telephone from a Bajrang Dal person, and left for Australia.

13 The first respondent claimed that Bajrang Dal leaders attributed to him some sympathy for Christianity.

14 In support of his application for a protection visa, the first respondent provided a number of documents. They included a substantial amount of material disclosing that, from 2004 until 2007, the first respondent was an accredited journalist, working for a newspaper approved by the government of India and named *Bhrastachar Abhiyan* or *Bhrashtachar Abhiyan*. The material also included a series of press clippings from that newspaper, accompanied by notarised translations of them into English. The first was dated 17 April 2002 and reported riots in Ahmedabad, with a specific reference to an attack on the first respondent's shop and to the consequent adverse effect on his business and his "mentally tension". The next article was dated 14 September 2004 and reported that the first respondent had been appointed as secretary for a particular area of the organisation to which he claimed to have belonged. An article dated 31 July 2006 again reported riots, and reported that the first

respondent (described as "the leading secretary" of the organisation and as a social worker) had been affected by the terror of the riots, which had caused merchants to migrate, even selling their shops and houses. An article dated 24 April 2007 reported that the first and second respondents and their children had been attacked by people on motorcycles armed with knives, who had then escaped. Each of these four articles carried the by-line "By Press Reporter". An article on 25 September 2007, and a separate expression of sympathy on the same date related to the death of the daughter of the first and second respondent. The article emphasised mental torture suffered by the first respondent. It referred to the first and second respondent being in fear and to the fact that they had gone to Singapore and returned. It suggested that threats had been made to the first respondent. The material supplied by the first respondent also included translations of certificates on the letterhead of *Bhrastachar Abhiyan*, recording the first respondent's service with the newspaper as "press reporter", in one case with initial capitals.

15 The material also included articles dated 9 September 2007 from two other newspapers, *Gujarat Samachar* and *The Sandesh*, both dealing with the death of the daughter of the first and second respondent by falling from the eighth floor.

The Tribunal's communications with the first respondent

16 In the course of its hearing on 1 August 2008, the Tribunal asked the first respondent some questions about the newspaper articles he had submitted. In particular, it asked him about the article dated 31 July 2006. The Tribunal member referred to the fact that the first respondent had told her that he had moved from his shop in 2004, and inquired why the fact that he had done so would have been news in July 2006. The first respondent referred to the fact that the article was about riots and mentioned that merchants everywhere were moving due to the riots.

17 The Tribunal member then said:

> I have looked at those newspaper clippings but I'm going to put something to you; that I may find that there is a level of fraud in India and I may find that I don't believe any of them.

The first respondent's reply, as translated by the interpreter, was:

> Yes. If you want then, you can inquire about that one, that newspaper and you can find it out, what's the truth.

18 After the Tribunal's hearing had been completed, the Tribunal sent the first respondent a letter dated 4 August 2008, detailing its concerns about a number of issues, and inviting the first respondent to respond to these concerns, or to make comments. The letter included the following passage:

> **Newspaper Articles**
>
> The Tribunal may also find that given evidence before it of the high prevalent [*sic*] of document fraud in India, the Tribunal may not accept the newspaper clippings are evidence of the alleged events contained therein.

Attached to the letter were documents, including documents concerning the use of fake documents in India, particularly in claims for refugee status.

The Tribunal's reasons for decision

19 The Tribunal accepted that the first respondent may have worked with Dalits, but found that his claim to have been persecuted by Bajrang Dal because of that work lacked plausibility. Relying on information from sources other than the first respondent, the Tribunal rejected the claim that the first respondent would have been perceived to have spread any faith other than Hinduism. It did not accept a claim, raised at a late stage at the hearing, that the first respondent had written articles about Bajrang Dal.

20 The Tribunal found there were a number of inconsistencies between the first respondent's written statement and his evidence at the Tribunal hearing. It concluded that the first respondent was not a witness of truth. It did not accept that the newspaper clipping dated 31 July 2006 was evidence of the alleged damage to the first respondent's business in March or April 2004. It relied on both its concerns in relation to the plausibility of the first respondent's testimony and the evidence before it of fraudulent documents in India. It found that the burning of the shop and the alleged warnings by Bajrang Dal had not occurred.

21 The Tribunal did not accept that the first respondent was targeted in or after April 2007, in the alleged incident when he was waylaid in the street. The Tribunal found the first

respondent was unable to provide any plausible explanation as to how Bajrang Dal would have known that it was he on the bike or that he was on the particular road at the time. He was also unable to provide any plausible explanation as to why Bajrang Dal would not have targeted him before 2007, under easier circumstances. The Tribunal referred to the fact that the first respondent had travelled to Australia in April 2007 and returned to India, and had travelled to Singapore in July 2007 and returned to India. The Tribunal was not satisfied that these returns were consistent with the first respondent's alleged fear at that time. On this basis, the Tribunal also concluded that the first respondent was not a witness of truth and the alleged event in April 2007 did not occur. The Tribunal then said:

> The Tribunal has considered the newspaper article entitled 'Attacked in Bapunagar on the family of Ahmedabad, returned from Abroad' dated 24 April 2007 however given the Tribunal's concerns in relation to the plausibility of the applicant's testimony and given evidence before it of the high prevalence of document fraud in India, the Tribunal does not accept that this article is evidence of the alleged events contained therein.

22 The Tribunal then said:

> The overall lack of plausibility of the applicant's story and the applicant's overall lack of credibility also leads it to conclude that none of the other alleged events, including threats and phone calls, occurred. Again, given the concerns about the applicant's testimony and evidence before it of the prevalence of document fraud in India, the Tribunal does not accept that the many newspaper clippings given to support the alleged threats received by the family after April 2007 are evidence of the alleged events contained therein.

23 The Tribunal then summarised what it accepted and what it did not accept. It accepted that the first respondent may have participated in protests in 1997 and may have been arrested and charged with an offence at that time, but found there was nothing to suggest that the police targeted him or treated him badly for a Convention reason. The Tribunal was satisfied that the first respondent had worked with Dalits and may work with them in the future, but was not satisfied that there was a real chance that, as a Hindu, he would be targeted by Bajrang Dal or by any Brahman caste people simply because of that work. The Tribunal did not accept that Bajrang Dal or Brahman caste people had targeted the first respondent in the past or would do so in the future. It therefore did not accept that he had a well-founded fear of persecution for any Convention reason, if he should return to India in the foreseeable future.

The application to the Federal Magistrates Court

24 The application by the first and second respondents to the Federal Magistrates Court was based on three grounds. The first alleged breach of s 424A(1) of the Migration Act, in that the Tribunal relied on adverse information to affirm the decision under review but did not disclose the information in accordance with s 424A(1). The second ground alleged jurisdictional error constituted by error of law and lack of procedural fairness, no particulars of which were given. The third ground alleged denial of natural justice by failure to provide further time to produce other evidence. The application was accompanied by an affidavit annexing the Tribunal's decision record.

25 On 24 July 2009, when the Federal Magistrates Court conducted its hearing, the federal magistrate made an order permitting the Minister to file further contentions in writing, and the first and second respondents to reply. The date by which the first and second respondents were to file their contentions in reply was 21 August 2009. The first and second respondents did not file any further contentions, whether before or after the expiration of this time limit. Instead, on 4 September 2009, after the time limit had expired, the first and second respondent filed what purported to be a further application, containing different grounds. The first ground alleged that the Tribunal had wrongly applied "the law to the facts as found in relation to the seriousness of harm that constitutes persecution as the newspaper article [*sic*] provide [*sic*] by the applicant are not genuine". There followed references to s 91R and s 424A(1) of the Migration Act. The second ground alleged failure to comply with s 424A(1) of the Migration Act in relation to adverse information used by the Tribunal and not given to the first respondent. The third ground was in the following terms:

> The tribunal has importantly dealt with the aspect of the applicant's claim relating to state tolerance and complicity of the applicants [*sic*] religion and membership of a particular religion or social group and as result of all he faced financial hardship [*sic*], to whom the [*sic*] Australia has protection obligation as a member of such group on base of newspaper article [*sic*] .And [*sic*] therefore the tribunal's decision was [*sic*] involved jurisdictional error and failure of jurisdiction or misapplication of law and procedure [*sic*] The tribunal conclude [*sic*] that the applicant can provide more information about the newspaper article [*sic*] which are true and genuine. The applicant is currently residing in Australia and the [*sic*] Australia has protection obligation [*sic*] under the UN convention [*sic*] and therefore relocation principles is not the correct test by the tribunal. Therefore miss [*sic*] applying the law is in fact failure of the tribunal's jurisdiction. The matter should be remitted to the tribunal for further determination and to decide in accordance with the law and procedures.

26 Accompanying this further application was an affidavit, annexing a number of documents. The first annexure was a further certificate from *Bhrastachar Abhiyan*. In the letterhead of this certificate, the second word of the newspaper's title was spelt "*Abhiiyan*", although the spelling of that word in the seal at the foot of the document matched the spelling in all other documents containing the name of that newspaper. The document certified that the articles dated 17 April 2002, 14 November 2004, 31 July 2006, 24 April 2007 and 25 September 2007 were true and genuine. This was followed by the death certificate and report of post-mortem examination of the daughter of the first and second respondents. There was a document purporting to verify the purchase of a copy of *The Sandesh* newspaper for Ahmedabad for 9 September 2007. There was material downloaded from the internet concerning The Sandesh Limited, including the contact details of its various offices and material concerning its content and history. That material showed at the foot of each page a universal reference locater (URL) for the page concerned. The material then included an internet page referring to *Bhrastachar Abhiyan*, but the URL referred to a site called "corruptionabhiyan.com". There followed internet material from *Gujarat Samachar*, again with a URL for each page. A further affidavit of the first respondent, filed at the same time, produced the newspaper clippings previously relied on, along with their English translations.

The Federal Magistrate's reasons for judgment

27 At [17]-[19] of the federal magistrate's reasons for judgment, his Honour dealt with the grounds stated in the application to that court. In doing so, his Honour identified that the principal concern of the first respondent, as expressed at the hearing in the Federal Magistrates Court, was the Tribunal's use of information relating to fraudulent documents in India in relation to the newspaper clippings he had provided. At [18], his Honour said:

> the second ground relating to procedural fairness and the third relating to a denial of natural justice, again without sufficient particulars, were centred upon his basic complaint that the Tribunal found that the newspaper clippings to be [*sic*] fraudulent in circumstances where the applicant alleged he had produced the originals and had invited the Tribunal to confirm such by searching the internet where these newspapers maintained sites.

28 The federal magistrate pointed out that the Tribunal had complied with s 424A(1) of the Migration Act in relation to a considerable amount of information, and that it was at liberty to hand down its decision despite a request for more time to respond.

29 At [21]-[29], the federal magistrate dealt with what he described as an issue raised in the hearing. His Honour referred to the power of the Tribunal to obtain such information as it considers relevant, pursuant to s 424 of the Migration Act. He also said that there was no general duty on the Tribunal to undertake its own inquiries. His Honour quoted from the judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *SZIAI* at [25]. The whole of the relevant passage is as follows:

> Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a "duty to inquire", that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. It is not necessary to explore these questions of principle in this case.

The portion quoted by the federal magistrate began with the words "a failure to make an obvious inquiry" and finished with the words "manifests itself as jurisdictional error." His Honour also interpolated in the quote the text of a footnote, which I have omitted.

At [23], his Honour said:

> It has been held that a failure to make inquiries in order to discover appropriate material if readily available, in limited instances, may constitute unreasonableness on the part of the Tribunal in a *Wednesbury* sense.

His Honour cited *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 and *Minister for Immigration and Citizenship v Le* [2007] FCA 1318 (2007) 164 FCR 151 and continued:

> I am of the view that where the question of the applicant's credibility was determinant of the outcome and where that credibility was so reliant upon the documentary evidence presented by the applicant, and further, where it was readily open to the Tribunal to determine the authenticity of such documentary evidence, not to make relatively simple inquiries as suggested by the applicant, who had otherwise provided all the authentication reasonably available to him, is so unreasonable that no Tribunal could have not made the inquiry.

The rest of the federal magistrate's reasoning is set out at [24]-[29]:

> [24.] The applicant's principal contention as articulated at the hearing is that he should be believed as he had provided genuine documentary evidence supportive of his claims to the Tribunal, in my view, raises significant issues as to how the Tribunal approached the determination of the issue of the applicant's credibility.
>
> [25.] On the face of the Tribunal's decision, it appears the Tribunal, on finding inconsistencies in the stories told by the applicant, determined that the reliance the applicant placed on his documentary supportive evidence must be ignored because they must be false. This in my view, for the reasons set out below, is unreasonable in a *Wednesbury* sense.
>
> The Tribunal, in my view, should have asked itself, what if the newspaper clippings are true. Had the answer to that question been yes, then it was open to the Tribunal to find the other claims plausible. In my view, on the face of them, they are not so implausible to lead to a conclusion the newspaper clippings should be disregarded if proved to be authentic. Should the clippings prove to be authentic then there is the possibility that the focus on "inconsistencies" would ameliorate and a new understanding of the applicant's claim emerge.
>
> [26.] In support of the Tribunal's conclusion of *"high prevalent [sic] of fraud in India"* it relies on the annexures to the s.424A(1) letter. In themselves, they do not lead to such a conclusion, in my view.
>
> [27.] The applicant asked what more he could do to persuade the Tribunal of their authenticity than what he had done. He had provided original clippings supported, he would say, by translations certified by a notary and stamped as such. It is unclear from the Tribunal's decision whether the translations are said to be fraudulent, or the clippings are, or both; or whether they are authentic translations of forged documents.
>
> [28.] For such a pivotal issue, that is, the authenticity of the translations and the clippings, it is incumbent, in my view, on the Tribunal to take all reasonable steps to determine the issue. In this instance, the first respondent and the Tribunal have available to them the services of a documents authentication unit located in Queensland. A referral to this unit would not have been to ask too much of the Tribunal. In addition, the applicant suggested to the Tribunal that the newspapers involved have websites readily accessible and invited the Tribunal to go to them. Again, although it may have necessitated the services of an interpreter, these sites could have been readily accessed without too much effort on the part of the Tribunal.
>
> [29.] It seems to me the Tribunal formed a view about the credibility of the applicant and had then found it necessary to discredit the applicant's major supportive documentation. The approach taken, in my view, was a reverse of that which should have been taken in this instance, and because of such, the conclusions reached about the credibility of the applicant are not reliable, and unreasonable in a *Wednesbury* sense.

The grounds of appeal

30 The Minister's notice of appeal to this Court contained five grounds. The first ground challenged the finding of the federal magistrate that the Tribunal's conclusions about the credibility of the first respondent were unreasonable in a *Wednesbury* sense, on the basis that the Tribunal's findings about credibility were findings of fact, open on the material before the Tribunal, not capable of substitution by the Federal Magistrates Court, and not giving rise to jurisdictional error. The second ground challenged the finding that a failure to make inquiries was unreasonable in the *Wednesbury* sense, on the basis that it was for the first and second respondents to make their case before the Tribunal, it was wrong to say that the Tribunal had to take all reasonable steps to determine the authenticity of the documents, the Tribunal did not have a duty to inquire in the particular case, and the absence of inquiries did not give rise to jurisdictional error. The third ground challenged the federal magistrate's finding that information before the Tribunal did not support the Tribunal's finding that document fraud was prevalent in India, on the basis that it was open to the Tribunal to find that the information did support that finding, it was a matter for the Tribunal to determine what weight should be given to items of information, and the federal magistrate was not entitled to substitute his own view of the information for that of the Tribunal. The fourth ground challenged the finding of the federal magistrate that the first respondent had lodged original newspaper clippings with the Tribunal and had invited the Tribunal to confirm the authenticity of those documents by searching internet websites maintained by the newspapers from which the clippings had been obtained, on the ground that the evidence before the Federal Magistrates Court did not support such a finding. The fifth ground alleged that the federal magistrate had denied the Minister procedural fairness in making the findings described in the third and fourth grounds, on the basis that those findings were adverse to the Minister, not obviously open on the material before the Federal Magistrates Court and, if the Minister had been put on notice of the possibility of such findings, the Minister would have sought to put further material before the Court about that issue.

Factual errors

31 Counsel for the Minister contended that the federal magistrate was in error in making a factual finding, expressed in [23] and [28] of his reasons for judgment. In the latter, the finding was that the first respondent "suggested to the Tribunal that the newspapers involved have websites readily accessible and invited the Tribunal to go to them." His Honour added

that the sites could have been accessed readily. At [23], his Honour referred to "relatively simple inquiries as suggested by the applicant".

32 In fact, there was nothing before the federal magistrate to indicate that the first respondent had made any reference to internet sites. The exchange in the course of the Tribunal's hearing, set out in [17] above, shows that the first respondent was suggesting that the Tribunal could inquire about the newspaper and find out what the truth was. There was no suggestion from him that a search of the internet, to find the newspaper sites, would have been an appropriate way to inquire. Although the Tribunal allowed the first respondent additional time to provide more material in writing, the first respondent did not avail himself of this opportunity. Further, the Tribunal raised again the issue of document fraud and its bearing upon the reliability of the newspaper articles in its letter dated 4 August 2008. Apart from requesting an extension of time, the first respondent did not provide any further information. The Tribunal had allowed him until 20 August 2008. In a letter dated 20 August 2008, refusing the request for an extension of time, the Tribunal informed the first respondent that it would take into account any information he provided prior to the handing down of the decision. The first respondent had another week from the date of this letter to provide any further information, but did not do so.

33 So far as the material before the Federal Magistrates Court shows, at no time did the first respondent provide to the Tribunal any material containing a URL for any website that the Tribunal could have visited, to determine the authenticity of the newspaper articles. It was not until 4 September 2009, after the Federal Magistrates Court had conducted its hearing, that the first respondent made available any such material. Only in the material filed in the Federal Magistrates Court on 4 September 2009 (detailed in [25] and [26] above) was there any reference to any URL. There were references to the URLs for the articles in *The Sandesh* and *Gujarat Samachar*. There was no provision of a URL for any of the *Bhrastachar Abhiyan* articles. Of course, by that stage, the first respondent was not entitled to be placing any further material before the federal magistrate. Any further material he did provide to the federal magistrate could not have been treated as if it had been available to the Tribunal.

34 It follows that the federal magistrate was in error in finding that the first respondent had suggested to the Tribunal that it make further inquiries about the validity of the newspaper articles by checking on the internet.

The making of inquiries

35 As appears from the passage from *SZIAI*, quoted in [29] above, the Tribunal is not under a general duty to make all inquiries. While it possesses inquisitorial powers, it has no obligation to seek the truth exhaustively. In this respect, it sits rather oddly in any legal system, being neither fully inquisitorial nor at all adversarial. In general, it can choose whether to inquire or whether to refrain from inquiring. It is therefore impermissible, as was said in *SZIAI*, to ask whether the circumstances were such as to give rise to a duty to inquire.

36 The ultimate question for the Court, when exercising its judicial review functions in relation to a decision of the Tribunal, is whether the Tribunal has discharged its statutory function. One aspect of this may be to ask whether the Tribunal could have discharged its function without making some inquiry for the purpose of ascertaining what the facts are. As the High Court made clear in *SZIAI*, the circumstances in which this will have to be done are very limited.

37 In my view, the Tribunal did not fail to discharge its statutory function of reviewing the decision to refuse the first and second respondents protection visas by failing to make inquiries that might have revealed information about the genuineness of the newspaper articles. By its letter dated 4 August 2008, the Tribunal had given to the first respondent clear notice that it might not accept the truth of the allegations contained in the newspaper articles. The first respondent had every opportunity to provide further information to the Tribunal to persuade it otherwise. If he had wished the Tribunal to go to the internet, he could have said so, and could have provided the sort of material that he did provide subsequently, too late, to the Federal Magistrates Court. In the normal course, people are entitled to expect that documents will be treated as genuine and acted upon. It is also true that, in the case of newspaper clippings, the ordinary person would be astonished by a suggestion that their authenticity might be questioned. For all that, however, the first respondent was told clearly that their reliability was in issue. If he failed to provide further information that would satisfy the Tribunal that the newspaper articles were authentic, his case was likely to suffer.

38 Having expressed to the first respondent its concerns, the Tribunal was not then obliged to do what the first respondent did not do, and seek further information about the authenticity of the newspaper articles. To the extent to which the federal magistrate held otherwise, his Honour was in error.

Unreasonableness

39 The original concept of unreasonableness that underlay *Wednesbury* related to the exercise by an administrative decision-maker of a discretion. If the circumstances of the case were such that no reasonable decision-maker, exercising the function that the particular decision-maker was exercising, could have exercised the discretion the way the particular decision-maker did, then the Court would set aside that exercise of discretion. The grant or refusal of a visa is not a matter of the exercise of discretion. By s 65 of the Migration Act, the Minister (and the Tribunal standing in the place of the Minister) must grant a visa if satisfied that the criteria for that visa have been met and must refuse to grant the visa if not so satisfied. Nevertheless, notions of *Wednesbury* unreasonableness have surfaced from time to time in judicial review of decisions relating to the grant or refusal of visas, on the basis that the *Wednesbury* principles can apply by way of conclusion that a failure to be satisfied was so unreasonable that no reasonable decision-maker exercising that function could have been other than satisfied. This is a difficult case to make out. It is particularly difficult when the question of satisfaction or otherwise depends upon findings of fact, with which the Court is not free to disagree. The application of principles of unreasonableness in decision-making cannot be used as a cloak for the assumption by the reviewing court of the fact-finding function of the administrative decision-maker.

40 It was not open to the federal magistrate to disagree with the Tribunal's conclusion that the materials it had before it demonstrated the high prevalence of document fraud in India.

41 The Tribunal's reasoning about the newspaper clippings is not altogether satisfactory. The Tribunal said that it did not accept that the two newspaper clippings with which it dealt specifically were evidence of the events alleged in them. In each case, this conclusion was said to be based on two factual elements. One was the Tribunal's concerns in relation to the plausibility of the first respondent's testimony. The other was the evidence of document fraud in India. It is not clear whether the Tribunal thought that the newspaper clippings themselves had been manufactured, or the translations of them were inaccurate. The criticism might be levelled at the Tribunal, and the federal magistrate certainly appears to have believed, that the Tribunal decided to reject the first respondent's evidence first and then determine that the newspaper clippings were false, because otherwise they would have stood in the way of the Tribunal's refusal to accept the first respondent's evidence. As the federal magistrate said at [25], a different conclusion might have been reached had the Tribunal addressed the question

of the truth of the newspaper clippings first and then, if it found them to be true, regarded them as supportive of the first respondent's credibility.

42 The question for the Federal Magistrates Court was not whether the Tribunal might have adopted another method of reasoning. Nor was it whether another method of reasoning might have been preferable to that adopted by the Tribunal. The question was whether the method of reasoning was so unreasonable that (on the facts as the Tribunal found them) the conclusion reached could not have been reached by a reasonable decision-maker. In the present case, it is not possible to say that a reasonable decision-maker could not have reached the same conclusion that the Tribunal did.

43 It is perhaps unfortunate that the Tribunal missed the obvious point on which it should have been pressing the first respondent in relation to the newspaper articles. The crucial articles on which the Tribunal declined to act, those of 31 July 2006 and 24 April 2007, were both taken from *Bhrastachar Abhiyan*. Each had the by-line "By Press Reporter". Each mentioned the first respondent by name. If accepted, each corroborated his case (although the Tribunal pointed out correctly the discrepancy between the date of the 2006 article and the time at which the first respondent said he had sold his business). The material before the Tribunal showed that the first respondent was a "Press Reporter" for *Bhrastachar Abhiyan*. The obvious question was whether the first respondent had written these articles himself, or had procured a colleague to write them. The Tribunal did not pursue these questions.

44 The question whether the newspaper articles were reliable was a question of fact for the Tribunal. It was not one that the Federal Magistrates Court could usurp to itself. The fact that the reasoning about the question could have been better and that, if it had been, the Tribunal might have reached the opposite conclusion, does not lead to the result that the decision was so unreasonable that no reasonable Tribunal member could arrive at it.

Conclusion

45 For these reasons, the federal magistrate was wrong to set aside the Tribunal's decision. The appeal must be allowed. The orders of the federal magistrate must be set aside. For those orders, there must be substituted orders dismissing the application of the first and second respondents to the Federal Magistrates Court. In any proceeding in a court, the discretion as to the awarding of costs is normally exercised according to the principle that costs

follow the event. This means that the unsuccessful party pays the costs of the successful party to the proceeding. No circumstance was advanced, and none appears to exist, that would oust the application of this principle in the present case. For this reason, the first and second respondents should be ordered to pay the Minister's costs of the proceeding in the Federal Magistrates Court. The first and second respondents should also be ordered to pay the Minister's costs of the appeal. In the assessment of those costs, however, the costs associated with the withdrawn application at a late stage for the appeal to be heard by a Full Court (see [4]-[5] above) should be excluded. There is no reason why the first and second respondents should have visited upon them the costs of that application, which ought to have been made much earlier than it was and which was ill-prepared when it was made. In addition, if the Minister's costs are to be assessed by a registrar, the registrar ought to consider carefully whether the cost of briefing both senior and junior counsel in this appeal was warranted.

I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 22 July 2010