FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v SZNPG [2010] FCAFC 51

Citation:	Minister for Immigration and Citizenship v SZNPG [2010] FCAFC 51
Appeal from:	SZNPG v Minister for Immigration & Anor [2009] FMCA 1033
Parties:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP v SZNPG and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 1442 of 2009
Judges:	**NORTH, LANDER AND KATZMANN JJ**
Date of judgment:	4 June 2010
Catchwords:	**MIGRATION** – review of a decision of the Refugee Review Tribunal (RRT) – Federal Magistrate quashing a decision of the RRT and requiring the RRT to review the application according to law – claim that the decision maker was biased or that there might be apprehension of bias was based upon the decision maker's refusal to give certain evidence sufficient weight to overcome concerns arising from consideration of all other evidence – no merits review of the RRT's decision – wrong finding of fact is not an error of law – unsound reasoning is not an error of law – brevity with which the RRT dealt with the corroborative evidence is unsatisfactory but it did not fall into jurisdictional error
Legislation:	*Migration Act 1958* (Cth)
Cases cited:	*Anderson v Director General of the Department of Environmental and Climate Change* [2008] NSWCA 337; (2008) 251 ALR 633 *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 *Belmorgan Property Development Pty Ltd v GP Re Ltd* [2007] NSWCA 171; (2007) 153 LGREA 450 *Bruce v Cole* (1998) 45 NSWLR 163 cited *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23; (2006) 142 LGREA 277 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986)

	162 CLR 24 *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16 *Minister for Immigration and Multicultural Affairs v Anthonypillai* [2001] FCA 274; (2001) 106 FCR 426 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 *Minister for Immigration and Multicultural Affairs, Re; Ex parte Durairajasingham* [2000] HCA 1; (2000) 168 ALR 407 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 *Minister for Immigration and Multicultural Affairs, Re; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 198 ALR 59 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 *Refugee Review Tribunal, Re; Ex parte H* [2001] HCA 28; (2001) 179 ALR 425 *Reg v The District Court; Ex parte White* (1966) 116 CLR 644 *Rezaei v Minister for Immigration and Multicultural Affairs* [2001] FCA 1294 *SBBS v Minister for Immigration and Multicultural and Indigenous Afffairs* (2002) 194 ALR 749 *Smith v New South Wales Bar Association* (1992) 176 CLR 256 *Thirukkumar v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 268 *WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 568 *Waterford v The Commonwealth* (1987) 163 CLR 54
Date of hearing:	2 March 2010
Date of last submissions:	8 March 2010
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	53
Counsel for the Appellants:	Mr S. Lloyd SC & Mr T. Reilly
Counsel for the Respondents:	Mr B. O’Donnell
Solicitor for the Appellants:	DLA Phillips Fox

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1442 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
Appellant

AND: **SZNPG**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **NORTH, LANDER AND KATZMANN JJ**
DATE OF ORDER: **4 JUNE 2010**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders of Driver FM of 25 November 2009 be set aside and in lieu thereof:

   (a) The first respondent's application in the Federal Magistrates Court be dismissed; and

   (b) The first respondent pay the appellant's costs of that application in the Federal Magistrates Court.

3. The first respondent pay the appellant's costs of the appeal.

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
NEW SOUTH WALES DISTRICT REGISTRY
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ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Appellant**
AND:	**SZNPG** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**NORTH, LANDER AND KATZMANN JJ**
DATE:	**4 JUNE 2010**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

NORTH & LANDER JJ

1 This is an appeal by the Minister for Immigration and Citizenship (the Minister) from orders of a Federal Magistrate made on 25 November 2009 granting the first respondent's application for the issue of a writ of certiorari quashing a decision of the Refugee Review Tribunal (RRT) made on 16 April 2009 and a writ of mandamus requiring the RRT to re-determine the review application before it according to law.

2 This appeal was heard together with *Minister for Immigration and Citizenship v SZNSP* [2010] FCAFC 50 in which the reasons for judgment were handed down and orders made today. As it happened, the separate appeals did not raise exactly the same issues but it was convenient for both appeals to be heard together by the same Court.

3 On 14 July 2008 the first respondent, who claims to be a citizen of India, arrived in Australia. On 26 August 2008 he applied to the Department of Immigration and Citizenship (the Department) for a Protection (Class XA) visa. On 19 November 2008 a delegate of the Minister notified the first respondent of the delegate's decision made the same day to refuse

to grant the second respondent a Protection (Class XA) visa. On 18 December 2008 the first respondent applied to the RRT for a review of the delegate's decision. On 16 April 2009 the RRT affirmed the delegate's decision not to grant the first respondent a Protection (Class XA) visa. On 14 May 2009 the first respondent applied in the Federal Magistrates Court for a review of the RRT's decision.

4 On 25 November 2009 a Federal Magistrate published his reasons for making the orders referred to above. The Minister appeals against those orders relying on two separate grounds in the amended notice of appeal (particulars omitted):

> 1. The Court erred by finding that the Tribunal's decision was vitiated by an apprehension of bias.
>
> 2. The Court erred in failing to recognise that the weight to be attached to evidence proffered to it was within the Tribunal's jurisdiction.

5 The Minister seeks orders setting aside the issue of the writs of certiorari and mandamus, and an order that the application to the Federal Magistrates Court be dismissed. The Minister also seeks an order that the first respondent pay the Minister's costs of the proceeding in the Federal Magistrates Court and on this appeal.

6 The second respondent claimed that he was a member of a Christian association in Vishakhapatnam in Andhra Pradesh in India and was under a duty to preach Christianity. He discharged that duty but in doing so said that he came under the notice of the two political parties in India, BJP and Congress, who attempted to stop his activities. He said he was threatened. His wife, child and father were beaten badly by four people who came to his house as a result of his preaching. He said on another occasion he, his children and his father were attacked by Hindus who also threatened to kill him. He said he was a member of the Baptist Church which was attacked because he was present and during that attack he was beaten.

7 The RRT interviewed the first respondent and obtained further evidence from him in relation to his complaints. It wrote to him in discharge of its obligations under s 424A of the *Migration Act 1958* (Cth) (the Act) raising with him three particular matters: first, when he was baptised; secondly, his knowledge of the Christian religion; and thirdly, how many times

he had been imprisoned. It advised the first respondent that it might make adverse findings in relation to each of those three matters.

8 In response to that letter the first respondent provided the RRT with two documents. The first was dated 19 May 1994 under the letterhead of "The First Baptist Church – Hyderabad", which purported to be a baptism certificate which certified that the first respondent had been baptised on 20 March 1979. He also provided the RRT with a document under the letterhead of the "Australian Indian Christian Fellowship", which certified that the first respondent attended that Church and that the Reverend John Pillay found him to be "friendly and of Good Character".

9 It found that the first respondent's evidence on this issue was not "plausible". It was recorded that the first respondent told the Department he was baptised "at around 15 years of age". At the RRT hearing he said he was baptised when he was young and he could not remember how old he was and could not remember if he was a baby. It was after the hearing that he produced the baptism certificate. The RRT then addressed a number of apparent weaknesses in the first respondent's evidence about his claim to be a Christian. The RRT was not satisfied that the first respondent was baptised or practised the Christian religion. It said of the baptism certificate:

> The Tribunal has considered the baptism certificate given its concerns with the applicant's knowledge of his own baptism, it is not prepared to give this document sufficient weight to overcome its concerns with the applicant's evidence.

10 It rejected his evidence as to the number of times he was put in gaol. It was not satisfied that he attended a Christian Church in Australia and held that the letter from the Australian Indian Christian Fellowship was inconsistent with his own evidence which was to the effect that he was attending another Church but did not go regularly. The RRT doubted without deciding the authenticity of the letter. It said at [38]:

> Given the Tribunal's concerns with the applicant's knowledge of Christianity it is not prepared to give this document sufficient weight to overcome its concerns with the applicant's evidence.

It concluded at [39]:

> In conclusion, the Tribunal is not satisfied the applicant is Christian or that he has suffered any of the alleged past harm. In the Tribunal's view, there is no chance of

> the applicant coming to harm for any reason specified in the refugees convention should he return to India.

11 The RRT affirmed the decision of the delegate not to grant the first respondent a Protection (Class XA) visa.

12 The first respondent applied to the Federal Magistrates Court for a review of that decision. The Federal Magistrate rejected the first respondent's claim that the RRT had by causing confusion not complied with s 424A of the Act. The first respondent no longer contends that the RRT failed to comply with s 424A of the Act and no more needs to be said about that.

13 The Federal Magistrate accepted that this case was "one in which the appellant's credibility had been rejected at the time of the Tribunal hearing": *SZNPG v Minister for Immigration & Anor* [2009] FMCA 1033 at [20]. The Federal Magistrate also accepted in his reasons at [23] that the provision by the first respondent of the two documents "did not allay the Tribunal's credibility concerns and, indeed, in relation to the second document, it added to them". He observed that the Tribunal was not satisfied that the first respondent had been baptised even though he provided documentary evidence of baptism. The Federal Magistrate noted that the RRT had not decided that the baptismal certificate was a fabrication, but merely held that it could not give sufficient weight to the document to rebut the conclusion that the first respondent was not honest about his evidence in relation to his faith.

14 The Federal Magistrate described the RRT's reasoning as "problematic in that it fixes on what the Tribunal saw as an inconsistency in the applicant's oral evidence (which might have been explicable) rather than documentary evidence of baptism": at [25]. He described the reasoning as wanting in logic. He said there was no inconsistency in the oral evidence and on the face of it the baptism certificate provided a complete answer to the RRT's concern. He concluded that the RRT demonstrated "pre-judgment by refusing to give weight to the documentary evidence of baptism": at [28]. He rejected the appellant's submission that after the RRT hearing and before submission of the baptism certificate the first respondent was a person without credibility. He referred to the decision of the High Court in *Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002* (2002) 198 ALR 59

and to a later decision of the Full Court of this Court in *WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 568 and said:

> 30. The circumstances in which a case falls within the category of "poisoned well" cases identified by the High Court in *Applicant S20/2002* are (and should be) confined. The Tribunal needs to make comprehensive findings of untruthfulness against an applicant in order to avoid having to grapple with corroborative evidence bearing upon the credibility of the applicant. While I accept the Minister's submission that the Tribunal formed the view, after the hearing conducted by it, that the applicant's claims lacked credibility, and those concerns were expressed in the letter sent to the applicant pursuant to s.424A, there is a real difficulty in this case that there were no comprehensive findings of untruthfulness against the applicant in the Tribunal's reasons for its decision. Indeed, it is hard to identify in the Tribunal's reasons any finding at all of untruthfulness against the applicant. The closest the Tribunal gets to such a finding in its reasons is a finding at [37] (CB 80) that the applicant was not credible in connection with his claim about the number of times he was put in gaol. Further, the Tribunal's decision is internally inconsistent. At that point (dealing with how many times the applicant was put in gaol) the Tribunal states that it had found that the applicant is not a Christian, but that was not what the Tribunal found. In dealing with that issue at [35] (CB 80) the Tribunal simply found that it was not satisfied that the applicant is a Christian or had been baptised. It made no positive finding that he was not a Christian and had not been baptised. It made no finding of untruthfulness against the applicant either overall or in relation to that aspect of his claims. Neither did the Tribunal make any adverse finding in relation to the baptismal certificate. It simply stated that it was "not prepared" to give the document "sufficient weight" to overcome its concerns with the applicant's evidence. The Tribunal gives no reasons as to why it was so unwilling. While the allocation of weight to particular evidence is a matter for the Tribunal, the Tribunal must engage in an active intellectual process. It cannot simply make an unexplained reference to weight in relation to a document which, on its face, provided a complete answer on an issue of substance.

15 The Federal Magistrate contended that by failing to deal with the baptismal certificate "in any meaningful way" and absent any comprehensive findings of untruthfulness, the RRT fell into jurisdictional error.

16 He addressed the second document. He noted the RRT's reservations about the authenticity of that document and said that the flavour of the RRT's reasons is "suggestive of a decision maker searching for reasons to avoid having to deal with a material document": at [33]. He said that the RRT's reasons raised the issue whether the RRT's decision was vitiated by a reasonable apprehension of bias. He discussed the authorities and said:

> 37. As noted above, in considering an issue of an apprehension of bias, two steps are required. The first is the identification of what it is said might lead a decision maker to decide a case other than on its legal and factual merits and secondly, the articulation of the logical connection between the matter and the feared deviation from the course of deciding a case on its merits. The test is an objective one based upon the consideration of a hypothetical fair-

> minded lay observer. The observer is taken to be "reasonable", and must be neither complacent nor unduly sensitive or suspicious.
>
> 38. ... However, as I have already pointed out, the Tribunal in its ultimate reasons, was unwilling to characterise the applicant as being wholly untruthful so as to place the case within the parameters of the "poisoned well" class of case identified by the High Court in *Applicant S20/2002*. Having declined to so characterise the case, the Tribunal needed to engage in an active intellectual process of considering the corroborative material produced in response to the invitation to comment so as to avoid the apprehension that the Tribunal's mind was prejudiced. This the Tribunal failed to do. First, it failed to engage in any meaningful consideration of the purported baptism certificate which, on its face, provided a complete answer to the Tribunal's concern about the applicant's evidence as to when he was baptised. Secondly, the Tribunal appeared to be searching for reasons to discount the letter from the Australian Indian Christian Fellowship in order to avoid engaging with the proposition that the applicant might have become a practicing (sic) Christian in this country. The technical basis upon which the Tribunal sought to justify discounting that letter was not only unconvincing but was, in part, inexplicable.
>
> 39. The combination of the Tribunal's unwillingness to make comprehensive findings of untruthfulness against the applicant, its unwillingness to engage in a proper consideration of the corroborative evidence advanced on his behalf and the Tribunal's apparent determination to adhere to its view that the applicant had never been baptised and was not at any stage a Christian, in my view supports a conclusion that a fair-minded lay observer, properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias would apprehend that the Tribunal may not have brought an unprejudiced mind to bear on its decision. (Footnotes omitted.)

17 The Minister's grounds of appeal attack those findings and the conclusions of the Federal Magistrate.

18 It is a rare case in which a Court will find that a decision maker has breached the natural justice hearing rule by exhibiting bias based simply upon the decision maker's reasons: *SBBS v Minister for Immigration and Multicultural and Indigenous Afffairs* (2002) 194 ALR 749 at [44]. The same is the case in relation to apprehended bias. Ordinarily a party would need to show some conduct on the part of the decision maker, apart from the decision maker's expression of the decision maker's reasons, which would indicate that the decision maker has been guilty of pre-judgment or was in any way biased.

19 There was no suggestion on appeal in this case that the RRT did not comply with Division IV of Part 7 of the Act in the conduct of the inquiry both before and during the

hearing. The claim that the decision maker was biased, or that there might be an apprehension of bias, was based simply upon the decision maker's refusal to give the baptismal certificate sufficient weight to overcome its concerns with the applicant's evidence.

20 It was not for the Federal Magistrates Court, nor for this Court, to review the merits of the RRT's decision: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611. A wrong finding of fact is not an error of law: *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77. Unsound reasoning is not an error of law: *Reg v The District Court; Ex parte White* (1966) 116 CLR 644 at 654; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356.

21 In this case, the RRT was persuaded at the conclusion of the hearing that the first respondent was making a claim for recognition as a refugee on an untenable ground. The RRT was of the opinion that the first respondent's claim that he was baptised in the Christian religion; that he was a Christian; and that he promoted Christianity publicly was not made out. The RRT was of the opinion that the first respondent's claims were not credible. The first respondent produced a baptismal certificate to which the RRT had regard, as it stated in its reasons. However, the RRT was not prepared to give the document such weight as would have been necessary to dismiss the concerns that the RRT had in relation to the rest of the evidence which was before it, including the first respondent's own evidence. The RRT did not find, as the Federal Magistrate said, that the first respondent had lied or fabricated the whole of the evidence. It did however find that the evidence which the first respondent gave, coupled with the rest of the evidence which was before it, was not sufficient to establish to the degree of satisfaction necessary that the first respondent was baptised in the Christian religion, a Christian and a promoter of Christianity. There was evidence to support that finding. The first respondent knew of Christmas Day but was unaware of any other important day in the Christian calendar. He had a very shallow knowledge of the Christian religion. Those matters were taken into account by the RRT in considering whether the claims made by the first respondent were credible.

22 The Federal Magistrate considered the decision of the High Court in *Applicant S20/2002* 198 ALR 59, particularly the passage at [49] in the joint reasons of McHugh and Gummow JJ:

> In a dispute adjudicated by adversarial procedures, it is not unknown for a party's credibility to have been so weakened in cross-examination that the tribunal of fact may well treat what is proffered as corroborative evidence as of no weight because the well has been poisoned beyond redemption. It cannot be irrational for a decision-maker, enjoined by statute to apply inquisitorial processes (as here), to proceed on the footing that no corroboration can undo the consequences for a case put by a party of a conclusion that that case comprises lies by that party. If the critical passage in the reasons of the tribunal be read as indicated above, the tribunal is reasoning that, because the appellant cannot be believed, it cannot be satisfied with the alleged corroboration. The appellant's argument in this court then has to be that it was irrational for the tribunal to decide that the appellant had lied without, at that earlier stage, weighing the alleged corroborative evidence by the witness in question. That may be a preferable method of going about the task presented by s 430 of the Act. But it is not irrational to focus first upon the case as it was put by the appellant.

23 However, this was not a case of the kind to which the High Court there referred. This is not a case where the decision maker gave no weight to the evidence proffered as was the case in *Applicant S20/2002* 198 ALR 59. In this case the decision maker was of the opinion that the evidence was not of sufficient weight to allow a finding that the first respondent was a credible witness notwithstanding the glaring weaknesses in the first respondent's evidence.

24 The weight to be given to the baptismal certificate was a matter for the RRT. The RRT was not precluded from giving the baptismal certificate little weight because it had not first decided that the first respondent was a liar. Indeed, in our opinion, the RRT should not be encouraged to make findings of that kind: c.f. *Smith v New South Wales Bar Association* (1992) 176 CLR 256 at 271. It is enough if the RRT is not persuaded that the claims which have been made out for the RRT to say so. It is not a precondition to the consideration of the weight to be given to any particular evidence that the RRT find that the particular applicant is a liar.

25 Where the RRT has conducted an inquiry in accordance with Division IV of Part 7 of the Act and considered all of the evidence which has been adduced in relation to the claims proffered by the applicant for the Protection (Class XA) visa, and has reached a state of satisfaction that the claims have no foundation in fact, the RRT is not obliged to reach a different conclusion because there is a piece of evidence which supports the applicant's case.

Moreover, if the RRT rejects the applicant's claims and fails to give sufficient weight to the piece of evidence relied upon so as to allow the applicant's application, that is not evidence of either pre-judgment or apprehended bias.

26 Neither does the RRT fall into jurisdictional error if it fails to express its reasons for rejecting corroborative evidence with full clarity. In the present case, the RRT dealt with the evidence of a baptismal certificate by saying that it was "not prepared to give this document sufficient weight to overcome its concerns with the applicant's evidence". It would have assisted if the RRT had explained its rejection in greater detail. As we have said, it was implicit in the reasoning of the RRT that it did not regard the baptismal certificate as genuine. It was desirable that the RRT set out the basis of the doubts concerning the baptismal certificate beyond simply its doubts concerning the first respondent's evidence generally. This deficiency in the way the RRT articulated its reasoning may explain why the federal magistrate said the RRT failed to engage in "an active intellectual process of considering the corroborative material", and that the RRT "failed to engage in any meaningful consideration of the purported baptismal certificate". The brevity with which the RRT dealt with the corroborative evidence is unsatisfactory, but does not justify the conclusion drawn by the Federal Magistrate that the RRT fell into jurisdictional error.

27 Of course, if the RRT failed to consider an element of an applicant's claim, that would amount to jurisdictional error because Division IV of Part 7 of the Act requires a review of the whole of the applicant's claims. In that case, the RRT would have failed to discharge its "imperative duties": *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1.

28 However, an error of fact based on a misunderstanding of evidence or even overlooking an item of evidence in considering an applicant's claims is not jurisdictional error, so long as the error, whichever it be, does not mean that the RRT has not considered the applicant's claim: *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630; *Thirukkumar v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 268; *Rezaei v Minister for Immigration and Multicultural Affairs* [2001] FCA 1294.

29 In our opinion, the RRT did not fall into jurisdictional error in this case. It weighed a particular piece of evidence against other evidence, but was not persuaded by that particular piece of evidence enough to alleviate its concerns in relation to the whole of the first respondent's evidence.

30 The first respondent filed a notice of contention in which he contended that the judgment below could be upheld for what he said were two reasons apart from those given by the Federal Magistrate:

> 1. The Second Respondent fell into jurisdictional error by giving no weight to the corroborating evidence of a baptism certificate, which supported the First Respondent's claims to have been baptised as a Christian, because it had already found that the First Respondent lacked credibility in circumstances where the corroborative evidence was not dependent upon and could not be shown to be undermined by findings as to the First Respondent's credibility.
>
> 2. For the reasons given by the Federal Magistrate and for the reason in para 1 above, the decision of the Second Respondent was affected by jurisdictional error in that it was affected by:
>
> (1) the failure to act judicially;
> (2) irrationality and/or *Wednesbury* unreasonableness; or
> (3) a failure to take into account a relevant consideration.

31 The first ground has to fail for the reason that it is not right to say that the RRT gave no weight to the baptismal certificate. As has already been explained, the RRT gave it some weight but was not prepared to give it "sufficient weight to overcome its concerns with the applicant's evidence". That was a matter for the RRT.

32 The second ground must fail because it relies upon the Federal Magistrate's reasons which in our opinion cannot be upheld and paragraph 1 of the notice of contention which we have already dismissed. The second ground is also contrary to the reasons already expressed.

33 In our opinion, the Federal Magistrate was wrong to conclude that the RRT had fallen into jurisdictional error. The application to the Federal Magistrate should have been dismissed.

34

In those circumstances, the appeal should be upheld. The orders made by the Federal Magistrate should be set aside. In lieu thereof there should be an order that the application to the Federal Magistrates Court be dismissed. The first respondent should pay the appellant's costs in the proceedings in the Federal Magistrates Court and on appeal.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices North & Lander.

Associate:

Dated: 4 June 2010

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BETWEEN: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
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JUDGE: **KATZMANN J**
DATE: **4 JUNE 2010**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

KATZMANN J

35 I have had the privilege of reading a draft of the reasons of North and Lander JJ. I agree with their Honours' orders for the reasons their Honours give and also for the reasons which follow.

36 The Federal Magistrate's decision was based on the way the Tribunal had dealt with two pieces of allegedly corroborative material the first respondent submitted to it after he received its letter foreshadowing its concerns about his credit. Those concerns arose from deficiencies in his evidence in the Tribunal and inconsistencies between his evidence and his interview with the Minister's delegate.

37 There was no justification for the Federal Magistrate's finding of apprehended bias, namely, that a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the questions to be decided, particularly

a fair-minded lay person properly informed as to the nature of the proceedings, the matters in issue and the conduct said to give rise to the apprehension (*Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28; (2001) 179 ALR 425 at [27]-[28]). Bias (actual or apprehended) was one of Applicant S20's complaints (*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 198 ALR 59 (***Applicant S20***). As Gleeson CJ said in that case at [4], where, as here, the argument about bias was based on the way the Tribunal couched its reasons, if the reasoning process withstands scrutiny as being neither illogical nor irrational, there is no foundation for a conclusion that the decision is tainted by actual or apprehended bias.

38 The first of the documents was a letter from the Australian Indian Christian Fellowship. With respect, his Honour's concerns about the way the Tribunal dealt with the letter were unjustified. The Tribunal noted that the letter stated the first respondent attended church in Fairfield when he had given evidence of attending another church. The Tribunal also made observations about the letterhead and its relationship to the text, suggesting that it had doubts about its authenticity. The Tribunal stated that given the concerns it had with the first respondent's knowledge of Christianity, it was not prepared to give the letter sufficient weight to overcome its concerns with the first respondent's evidence. That statement was unremarkable. Counsel appeared to concede that the Tribunal's finding was open to it in relation to his document. Indeed, he sought to distinguish the Tribunal's treatment of it from its treatment of the second document. His argument focussed on the second document.

39 The second document purported to be a baptismal certificate. The first respondent argued that "the perfunctory way" in which the Tribunal dealt with "such a critical piece of evidence" indicates that it did not in truth give the "certificate" any weight. Rather, he submitted, it simply adverted to it but did not take it into account. Instead, it relied on its conclusion that he was not a Christian to dismiss evidence that he had been baptised as a Christian, something counsel for the first respondent described as "bootstrapping". In the alternative, counsel submitted, the weight the Tribunal gave to the certificate was so inadequate that it infringed the particular application of the *Wednesbury* principle discussed by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (***Peko-Wallsend***) at 41. In the notice of contention filed on his behalf this argument appeared as "unreasonableness or irrationality".

40 Despite the sophistication of the argument, I am unable to accept it.

The Tribunal's approach to the baptismal certificate

41 The Tribunal dealt with this question under the heading "[w]hen the applicant was baptised and knowledge of Christianity".

42 The Tribunal noted that when he was interviewed by the Department the applicant said he was baptised when he was around 15 years of age but before the Tribunal he said he was baptised when he was young, he could not be sure how old he was and did not remember whether he was a baby. He said his father told him he had been baptised. After the hearing he provided what the Tribunal called "an alleged baptism certificate" stating that he had been baptised on 20 March 1979, when he was 15. The Tribunal found it was not plausible that someone who told the Department when he was baptised could not be sure or not remember when asked by the Tribunal.

43 The Tribunal went on to observe that, although he said he was a Baptist, he was unaware if his church originated overseas and was unaware of any other Baptist groups in Andhra Pradesh where he lived virtually all his life.

44 Then the Tribunal commented that he demonstrated a scant level of awareness of Christian teachings and traditions. It pointed out that he was only able to nominate one miracle Jesus performed. When asked to name annual Christian celebrations he answered Christmas on 25 December and "fasting". When it was put to him that there was a really important day in the Christian calendar celebrated each year, he said that was when Jesus came back, but he told the Tribunal he did not know the name of the event.

45 The Tribunal found that at the hearing he did not display knowledge of Christianity or the Baptist church that was consistent with his alleged exposure to that religion or to the Bible. The Tribunal member then stated:

> This means that the Tribunal is not satisfied that the applicant is Christian or has been baptised. The Tribunal has considered the baptism certificate given [sic] its concerns with the applicant's knowledge of his own baptism, it is not prepared to give this document sufficient weight to overcome tis concerns with the applicant's evidence.

The "lip service"/"bootstraps" argument

46 The Full Court has held that a failure by the Tribunal to give "proper, genuine and realistic consideration" to the merits of an application for a protection visa does not give rise to an available ground of review under Part 8 of the Migration Act: *Minister for Immigration and Multicultural Affairs v Anthonypillai* [2001] FCA 274; (2001) 106 FCR 426. The NSW Court of Appeal, particularly Basten JA, has criticised the use of the formulation to permit judicial review for a failure to take into account a relevant consideration where a decision-maker purports to take the matter into account. See, for example, *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23; (2006) 143 LGREA 277 at [74]-[75] and *Belmorgan Property Development Pty Ltd v GPT Re Ltd* [2007] NSWCA 171; (2007) 153 LGERA 450 at [76]. See also *Bruce v Cole* (1998) 45 NSWLR 163 at 186E per Spigelman CJ and *Anderson v Director General of the Department of Environment & Climate Change & Anor* [2008] NSWCA 337; (2008) 251 ALR 633 at [58].

47 Counsel for the first respondent shied away from embracing the "proper, genuine and realistic" formulation. Rather, he relied on some remarks of Tobias JA (with whom Spigelman CJ and Macfarlan JA agreed) in *Anderson* (above). There, after criticising the use of the formulation to justify judicial review for failure to take into account a relevant consideration – which his Honour described as 'fraught with danger' (the danger being the impermissible slide into merits review) – his Honour said:

> Of course, the relevant matter must be more than adverted to or given mere lip service. Nor would it be sufficient to advert to the matter and then discard it as irrelevant: *Elias v Federal Commissioner of Taxation* [2002] FCA 845; (2002) 50 ATR 253 at 265 [62] per Hely J. But whether or not it can be judged that a matter has been considered is essentially an evaluative process based exclusively on what the decision-maker has said or written.

48 I acknowledge there is a distinction between referring to something and taking it into account. However, there is no justification for concluding that the baptismal "certificate" was merely adverted to and then discarded as irrelevant. Similarly, it would be wrong to characterise the Tribunal's reason for according insufficient weight to the baptismal certificate as "bootstrapping". The Tribunal did not rely on its conclusion that the first respondent was not a Christian to dismiss evidence that he had been baptised as a Christian. It pointed out that the evidence about his baptism was all over the place. It pointed to evidence inconsistent with the statement in the certificate that he had been baptised. There is

no reason to suppose that it did otherwise than what it said it did, namely accord the document some, but insufficient, weight to overcome its concerns with the first respondent's unsatisfactory oral evidence. It is true that a genuine certificate attesting to a fact would generally be decisive proof of that fact. However, the Tribunal made no finding about the authenticity of the certificate. On the contrary, it referred to it as an alleged certificate. Counsel for the first respondent accepted that the Tribunal could legitimately conclude that his client's story was so implausible or so full of problems that it could not be satisfied of the authenticity of the baptismal certificate and for that reason could not give it sufficient weight. In my view, there is no other way to read the Tribunal's decision. Whilst it might have been preferable that the Tribunal made this clear, such a deficiency in the expression of its reasons does not constitute jurisdictional error: *Re Minister for Immigration and Multicultural Affairs: Ex parte Durairajasingham* [2000] HCA 1; (2000) 168 ALR 407.

Decision not manifestly unreasonable or irrational

49 Counsel for the respondent submitted that, even if it were accepted that the Tribunal had done as it said and given the baptismal certificate some weight, the weight it gave it was so inadequate that the resulting decision displayed the kind of unreasonableness identified by Mason J in *Peko-Wallsend*. In other words, the weight given to the document was such that the decision was so unreasonable that no reasonable decision-maker could have reached it.

50 In my opinion, the better view is that, where the substance of an applicant's grievance is, as here, that the decision-maker has made a factual determination after giving inadequate consideration to some or all of the evidence before it, the proper review ground is the kind of irrationality identified in *Applicant S20*: see Santow JA's discussion in *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388 at [58]-[59]. Perhaps this accounts for the way the notice of contention was framed.

51 As Crennan and Bell JJ recently observed in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16 at [130], "not every lapse of logic will give rise to jurisdictional error". No matter how the ground of review is framed, if reasonable minds might differ in the result, the decision cannot be set aside for jurisdictional error as illogical, irrational or unreasonable merely because one conclusion has been preferred to another.

52 In this case I do not need to decide the proper review ground, or the standard to be met to make it out, as, in my opinion, the Tribunal's finding that the first respondent had not been baptised was not of this order. It was open to the Tribunal to conclude that he had not been baptised, notwithstanding his presentation of a certificate which, on its face, suggested otherwise. The first respondent had given inconsistent evidence on the subject and had demonstrated both a lack of knowledge about the Baptist Church and an extremely poor appreciation of the teachings of Christianity which the Tribunal was entitled to find was inconsistent with both his alleged exposure to the religion and his alleged exposure to the Bible. It is implicit in that finding that the statement in the certificate was as implausible as the first respondent's case. It should be remembered that the "certificate" purported to show that he had been baptised, not as an infant, but as a 15 year old.

Conclusion

53 No matter that the Federal Magistrate was understandably troubled by the Tribunal's somewhat dismissive treatment of the baptismal certificate, it did not give rise to jurisdictional error. It is difficult to avoid the conclusion that, despite the language he used, the Federal Magistrate overstepped the mark in this case and engaged in impermissible merits review.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann.

Associate:

Dated: 4 June 2010