FEDERAL COURT OF AUSTRALIA

SZIFI v Minister for Immigration & Multicultural & Indigenous Affairs [2007] FCA 63

MIGRATION – consideration of whether errors of fact evident on the face of the Decision Record of the Refugee Review Tribunal constitute *jurisdictional errors* – consideration of whether erroneous references in the Tribunal's decision to the nationality of the Appellant as an Indonesian and notions of a well-founded fear of persecution should the Appellant return to the People's Republic of China, in circumstances where the Appellant is a national of Pakistan, constitute errors going to jurisdiction – consideration of additional grounds.

Judgment

The errors of the Tribunal constitute jurisdictional errors.

Migration Act 1958 (Cth), ss411, 412, 414, 415, 420, 422B, 423, 424, 424A, 424B, 424C, 425, 425A, 426, 426A, 427, 430, 476
1951 Convention Relating to the Status of Refugees
1967 Protocol Relating to the Status of Refugees
Administrative Decisions (Judicial Review) Act 1977 (Cth)

SZIFI v Minister for Immigration & Multicultural & Indigenous Affairs & Anor [2006] FMCA 1263 - cited
Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476 - quoted
Craig v South Australia (1995) 184 CLR 163 - quoted
Re Racal Communications Ltd ([1981] AC 374 - cited
R V Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598 - quoted
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 - quoted
SDAV v Minister for Immigration & Multicultural and Indigenous Affairs (2003) 199 ALR 43 - quoted
Minister for Aboriginal Affairs & Another v Peko-Wallsend Limited & Others [1986] 162 CLR 24 - cited
Re Refugee Review Tribunal & Another; Ex parte Aala (2000) 204 CLR 82 - cited
Abebe v The Commonwealth (1999) 197 CLR 510 - cited
Kioa v West (1985) 159 CLR 550 - cited
Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648 - cited
Annette's v McCann (1990) 170 CLR 596 - cited
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 - cited

SZIFI v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS AND REFUGEE REVIEW TRIBUNAL
NSD 1670 OF 2006

GREENWOOD J
7 FEBRUARY 2007
BRISBANE (VIA VIDEO-LINK TO SYDNEY) HEARD IN SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1670 OF 2006**

BETWEEN:	**SZIFI** **Appellant**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**GREENWOOD J**
DATE OF ORDER:	**7 FEBRUARY 2007**
WHERE MADE:	**BRISBANE (VIA VIDEO-LINK TO SYDNEY) HEARD IN SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the Federal Magistrates Court on 21 August 2006 be set aside and in lieu thereof it be ordered:

   (a) a writ of certiorari issue quashing the decision of the Refugee Review Tribunal made on 19 December 2005 and handed down on 10 January 2006;

   (b) a writ of mandamus issue directing the Refugee Review Tribunal to conduct a review of the decision of the Delegate of the Respondent according to law;

   (c) the Respondent pay the Applicant's costs of and incidental to the Application.

3. The 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.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1670 OF 2006**

BETWEEN:	**SZIFI** **Appellant**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**GREENWOOD J**
DATE:	**7 FEBRUARY 2007**
PLACE:	**BRISBANE (VIA VIDEO-LINK TO SYDNEY) HEARD IN SYDNEY**

REASONS FOR JUDGMENT

Introduction

1 In this appeal, the Appellant contends that Federal Magistrate Barnes erred in dismissing (*SZIFI v Minister for Immigration & Multicultural & Indigenous Affairs & Anor* [2006] FMCA 1263) on 21 August 2006 an application for review of a decision of the Refugee Review Tribunal ('the Tribunal') delivered on 10 January 2006 affirming a decision of the Minister's Delegate refusing the Appellant's application for a protection visa.

2 The grounds of appeal recited in the notice of appeal filed on 31 August 2006 are these:

> *'GROUNDS*
>
> *That the Learned Federal Magistrate Barnes did not went in to the question of law and facts. The respondents are showing the appellant as a citizen of Indonesia whereas the appellant hails from different country. The respondents also erred in to question of law as to the persecution and well founded fear of life. This has led to the grave miscarriage of justice.*
>
> *ORDERS SOUGHT*
>
> *The judgment and the order made by the Federal Magistrate Court may*

kindly be set aside. The applicant be allowed to remain in Australia til the decision of the review before this Honourable Court'.

Background

3 The background facts are these.

4 The Appellant is a married Punjabi man born on 7 July 1977 in Sialkot, Pakistan. He is therefore a national of the State of Pakistan.

5 The Appellant arrived in Australia on 10 September 2005. On 29 September 2005 the Appellant lodged an Application for a Protection (Class XA) Visa with the First Respondent. On 18 October 2005, a Delegate of the First Respondent refused the Appellant's application. On 16 November 2005, the Appellant sought review of that decision before the Tribunal. The Appellant contends that he holds a well-founded fear of persecution for the political opinions he holds and articulates concerning the need for a restoration of democracy in the State of Pakistan and that he is unwilling to return to Pakistan owing to such fear. Accordingly, the Appellant contends that Australia has protection obligations under the Refugee's Convention as amended by the Refugee's Protocol (*1951 Convention Relating to the Status of Refugees* and *1967 Protocol Relating to the Status of Refugees*) for the purposes of s 65(1) of the *Migration Act* 1958 (Cth) ('the Act').

6 The Appellant's contentions in support of the application for a protection visa are these.

(a) The Appellant is a Sunni Muslim. The Appellant has had the benefit of seven years of education; speaks, reads and writes the Urdu and English languages; was a self-employed salesman from 1995 to 2005; has a wife, son and daughter resident in Pakistan; and elected to leave Pakistan lawfully without any difficulty in obtaining travel documentation.

(b) The Appellant was a member of the Pakistan *Muslim League Nawaz Group* ('the M L N G'). In documentation lodged in support of the application for a protection visa, the Appellant said that the M L N G was able to secure the maximum seats from the district of Sialkot in both the upper house and the lower house in elections prior to the civil governance of Pakistan by the

military. The Appellant contends that he 'suffered' due to developing tension between the M L N G and the Pakistan People's Party.

(c) After the assumption of power by the military, leaders of the M L N G in Sialkot formed a movement for the restoration of democracy. The Appellant was a 'front line worker' for the M L N G; participated in processions; and distributed flyers and other literature critical of corruption on the part of military generals.

(d) The Appellant contends that the army 'blackmailed' some of the leaders of the M L N G to join the governing regime. The Appellant says he knows some of these persons as the Appellant was the most senior party worker in the M L N G in Sialkot. As a result, the Appellant was persecuted by the leaders of the military governance group and by the military secret service.

(e) The Appellant says that he was taken to a police station and assaulted by the police at the instigation of military authorities. The Appellant was told by the authorities that he should not demonstrate against the military governance group and if he did not comply with these demands, false charges would be brought against him as a result of which he would be declared a terrorist and then executed.

(f) The Appellant contends that he is an activist struggling for the development of a democratic movement in Pakistan; that he was able to obtain a visa through an agent in order to leave Pakistan; and that if he returns to Pakistan he will ultimately be executed because of the opinions he holds and his prior pro-democracy activity.

7 Notwithstanding these contentions, the Minister's Delegate rejected the Appellant's application for a protection visa.

8 An application for review of that rejection was received by the Tribunal on 16 November 2005. The Appellant provided the Tribunal with a residential address as the address for all relevant correspondence. On 23 November 2005, the Tribunal wrote to the

Appellant at his mailing address advising him that the Tribunal had considered all the material before it relating to his application but was unable to make a favourable decision on that information alone. The Tribunal invited the Appellant to give oral evidence and present arguments in support of his application for a review of the decision of the Minister's Delegate at a hearing at 11.30am on Monday, 19 December 2005. The Tribunal advised the Appellant that in the event that the Appellant elected not to attend a hearing, the Tribunal might make a decision on the application for review without further notice to the Appellant.

9 The Appellant did not attend before the Tribunal on the day and at the time and place nominated for the hearing. The Tribunal elected to make a decision on the review without taking any further action to enable the Appellant to appear before the Tribunal. On 20 December 2005, the Tribunal received a 'Response to Hearing Invitation' form from the Appellant by which the Appellant advised that he did not want to attend a hearing. The form is dated 12 December 2005. Those parts of the form dealing with consequential questions should the Appellant have nominated a desire to attend a hearing and call witnesses, were crossed out and marked 'N/A'. The form is signed by the Appellant.

The Tribunal's Approach

10 The Tribunal reached a decision on 19 December 2005 and published its Decision Record on 10 January 2006. In reaching its decision, the Tribunal observed that a mere claim of a fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that such a fear is well-founded. The Tribunal observed that the Appellant must satisfy the Tribunal that he holds, objectively, a well-founded fear of persecution as that term is understood for the purposes of the Act for the reasons articulated by the Appellant, namely, the political opinions identified in the claims, should the Appellant return to his country of nationality. In addition, the Tribunal noted that the Appellant must be unable or unwilling because of his well-founded fear, to avail himself of the protection of his country of nationality or be unwilling to return to his country of nationality by reason of the well-founded fear.

11 The Tribunal then recited a number of the factual contentions identified by the Appellant ([6] of these Reasons) and reached this conclusion:

'There is nothing to support these claims other than the applicant's

> *unsubstantiated assertions. There are insufficient particulars provided by the applicant to enable the Tribunal to be satisfied that these events occurred. Because he did not attend a hearing, the Tribunal has been unable to test the applicant's credibility in this regard. Therefore, the Tribunal is unable to be satisfied the applicant was in danger of being involved in false cases, declared a terrorist, and killed at the hands of the authorities.'*

12 The decision of the Tribunal reflects five pages of reasoning which ultimately lead to a short conclusion on the sixth page. The first two and a half pages of the Decision Record recite matters such as the background, the legislation and a number of determinations of this Court and the High Court of Australia dealing with the definitional elements of a 'refugee'.

13 The particular matter of contention raised by the Appellant in the grounds of appeal is this.

14 In that part of the Decision Record of the Tribunal which recites aspects of the 'claims and evidence' reflecting the contentions of the Appellant, the Tribunal correctly notes that the Appellant is a national of Pakistan born in Sialkot. That statement is consistent with the initial 'Background' statement which commences the Decision Record. However, at the commencement of the 'Findings and Reasons' section of the Decision Record, the Tribunal member observes:

> *'The applicant has claimed, and I accept, that he is a national of* ***Indonesia'***.
>
> [emphasis added]

15 Having considered the circumstances identified by the Appellant said to give rise to a well-founded fear of persecution, the Tribunal makes the following conclusionary observation:

> *'Accordingly, the Tribunal is not satisfied on the evidence before it that the applicant faces a real chance of persecution should he return to the* ***PRC*** *now or in the foreseeable future.*
>
> *The Tribunal is unable to be satisfied, on the evidence before it, that the applicant has a well-founded fear of persecution for a Convention reason'.*
>
> [emphasis added]

16 It can be seen therefore that although the Tribunal has correctly described in parts of

the Decision Record the Appellant as a national of Pakistan and has addressed the facts and circumstances of the claim of a well-founded fear of persecution contained in the material before the Tribunal reciting the events identified at [6], the Tribunal has described the Appellant as an Indonesian national in the section described as 'Findings and Reasons' and in reaching the ultimate conclusion, the Tribunal has concluded that the Appellant faces a real chance of persecution should he return to the People's Republic of China now or in the foreseeable future.

Construction of the Grounds of Appeal

17 In the grounds of appeal [2], the Appellant has made reference to the description of the Appellant as a national of Indonesia in seeking to formulate an error on the part of Federal Magistrate Barnes. Although the grounds of appeal do not accurately formulate the contention, the Appellant's proposition must necessarily be that Federal Magistrate Barnes erred by failing to find that errors of fact contained in the Decision Record as to the nationality of the Appellant and as to the relationship between the Appellant's contended well-founded fear of persecution and the country where that persecution might occur should he return, are jurisdictional errors with the result that the decision of the Tribunal is a nullity. The second proposition is that Federal Magistrate Barnes erred by failing to recognise that the Tribunal, as a question of law, had not properly embarked upon a consideration of the Appellant's claim of a well-founded 'fear of life', namely, a fear of persecution should he return to his country of nationality. The second ground seems to me to be inherently associated with the first ground.

18 If the second ground is intended simply to be a contention that the Tribunal failed to have regard to the elements about which it must be satisfied in reaching a decision as to whether Australia has protection obligations under the Refugee's Convention as amended by the Refugee's Protocol, in respect of the Appellant, I am not satisfied that the Appellant has established that contention.

19 I propose to deal with the second part of the Appellant's ground of appeal as a subset of the first.

The Conclusions of Federal Magistrate Barnes

20 As to these matters, Federal Magistrate Barnes said this at paragraphs [13], [14] and [16] of the Reasons for Judgment.

> *'13. The finding that it* [the Tribunal] *made was that it was not able to be satisfied that the events complained of by the applicant had occurred given the limited particulars and the unsubstantiated assertions. On that basis, the Tribunal was unable to be satisfied that the applicant was at risk of being involved in false cases, declared a terrorist or killed as he had claimed, or that he had a well-founded fear of persecution for a Convention reason. It is not apparent from the claims set out in the protection visa application (which is the only place in which the applicant made such claims) that the Tribunal failed to properly consider the applicant's claims in the manner contended for by him. Insofar as he seeks merits review, merits review is not available in this court.*
>
> *14. There is one issue that might be said to be raised by this ground that needs to be addressed. That is the fact that at the commencement of its findings and reasons the Tribunal found that the applicant was a national of "Indonesia" and later in its reasons for decision it found that it was not satisfied on the evidence before it that the applicant faced a real chance of persecution should he return to the "PRC" now or in the foreseeable future. There is absolutely nothing in the material in the protection visa application, the decision of the delegate or the application for review to suggest that the applicant made any claim to be associated in any way with either Indonesia or the PRC, which I take to be a reference to the People's Republic of China.*
>
> ***Such sloppy references may well be a typographical error or the result of a use of a precedent. The issue is whether they amount to a jurisdictional error.***
>
> *15. …*
>
> *16. In these circumstances, while the Tribunal has clearly made a factual error in referring to Indonesia and the PRC in its reasons for decision, I consider that such factual error is not such as to amount to a jurisdictional error, that the Tribunal has understood the applicant's claims and assessed those claims despite the* ***unfortunate reference to the wrong country on two occasions****. The written submissions for the respondent cited authority to suggest that in circumstances where the Tribunal accurately recorded the applicant's claims and referred to his correct (Pakistani) nationality on numerous occasions, such a typing error or computer error was clearly irrelevant. (See SZFHM v Minister for Immigration & Multicultural Affairs [2006] FMCA 321). While such error does not establish jurisdictional error, it is clearly a matter of concern, particularly where it has occurred on more than*

> *one occasion in the same decision. However, reading the Tribunal decision fairly and as a whole and with an eye not too finely attuned to error (see Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259) it is not apparent that the Tribunal failed to understand or consider the applicant's claims or otherwise erred in a manner constituting jurisdictional error.'*
>
> [emphasis added]

21 The First Respondent supports the Reasons of the Federal Magistrate on the footing that although the Tribunal made a number of references to incorrect considerations, the Decision Record of the Tribunal demonstrates that the Tribunal member took into account the substratum of fact put before the First Respondent by the Appellant in support of the application for a protection visa and determined that having regard to the contentions said to give rise to a well-founded fear of persecution, the Tribunal was unable to be satisfied that the Appellant was in danger of being implicated in false cases, declared a terrorist and executed at the hands of the authorities, should he return to his country of nationality. Accordingly, having regard to the totality of the Reasons, the First Respondent says that it can be seen that the Tribunal member directed his mind to all the relevant matters and that the Tribunal engaged in a bona fide analysis of the factual matters in an attempt to exercise the statutory power.

22 The First Respondent says that to the extent that there was an error, it was an error within jurisdiction.

23 The Appellant contends in the short grounds of appeal that the reference to the Appellant as a citizen of Indonesia rather than Pakistan together with the rejection of the Appellant's claim of a well-founded fear of persecution has led to a 'grave miscarriage of justice'. To the extent that the Tribunal was influenced by any impression or belief that *this* Appellant was an Indonesian national or any well-founded fear of persecution bore any relation to anything that authorities in the People's Republic of China might do, such considerations may constitute errors which reflect a failure to afford *fairness* to the Appellant in the exercise of the review jurisdiction and thus jurisdictional errors. If so, the decision of the Tribunal cannot stand as such a decision is a nullity.

24 The question is whether errors of the kind described considered in the context of the

analysis of the facts and circumstances of the Appellant's claims, on the face of the Decision Record, are jurisdictional errors.

25 The Appellant contends that such errors are jurisdictional errors and sought before Federal Magistrate Barnes the issue of the constitutional writs of certiorari and mandamus to quash the decision of the Tribunal and compel the Tribunal to re-hear and determine the application for review of the Delegate's decision, according to law. The First Respondent contends that because the errors are not jurisdictional errors, the decision of the Tribunal is final and conclusive and not susceptible of challenge before the Court by reason of s 474(1) of the Act and Division 2 of Part 8 of the Act.

The Statutory Provisions

26 Although the provisions of the Act which have a bearing upon the jurisdiction of the Tribunal and the conduct of an application for review are well known, I propose to briefly set out some of the relevant provisions.

27 A decision of the Minister's Delegate to refuse to grant an applicant a protection visa is a decision susceptible of review before the Tribunal (s 411(1)(c)) by the non-citizen who is the subject of the primary decision (s 412(2)). Section 414(1) of the Act provides that subject to subsection (2) [which has no application in the present circumstances], if a valid application is made under s 412 for review of a reviewable decision, 'the Tribunal must review the decision'. In exercising that jurisdiction, the Tribunal may exercise all the powers and discretions conferred by the Act on the person who made the decision (s 415(1)). The Tribunal may affirm or vary the decision, remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations or set the decision aside and substitute a new decision (s 415(2)). If the Tribunal varies the decision or sets the decision aside and substitutes a new decision, the decision as varied or substituted is taken to be a decision of the Minister (s 415(3)).

28 The Tribunal in carrying out its functions is to pursue the objective of providing a mechanism of review that is 'fair, just, economical, informal and quick' (s 420(1)) and in reviewing a decision the Tribunal is not bound by technicalities, legal forms or rules of evidence and must act according to 'substantial justice and the merits of the case' (s 420(2)).

29 Division 4 of Part 7 is by s 422B(1), 'taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with'. The Division deals with the entitlement of an applicant for review to give the Registrar of the Tribunal certain documents (s 423); the power of the Tribunal to seek additional information and have regard to that information if obtained and extend invitations to a person to give additional information by methods prescribed by the Act (s 424); the obligation to provide certain information to the applicant (s 424A) and the specification of the way additional information might be given (s 424B); the entitlement of the Tribunal to make a decision in the absence of additional information (s 424C); the circumstances in which the Tribunal has an obligation to invite an applicant to appear before the Tribunal to give evidence (s 425) and the requirements of notice (s 425A); the entitlement of an applicant to request oral evidence before the Tribunal from a nominated person (s 426); the entitlement of the Tribunal to make a decision should the applicant fail to appear at a hearing (s 426A); and the powers of the Tribunal for the purpose of a review of a decision (s 427), and other provisions.

30 Section 430(1) of the Act provides that where the Tribunal makes a decision on a review, the Tribunal must prepare a written statement that sets out the decision of the Tribunal; the reasons for the decision; the findings on any material questions of fact; and references to the evidence or any other material on which the findings of fact are based.

31 Division 1 of Pt 8 of the Act deals with those decisions under the Act which the Act treats as final. A privative clause decision is final and conclusive, must not be challenged, appealed against, reviewed, quashed or called in question in court and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account (s 474(1)). Section 474 of the Act contains a broadly based description of the elements making up a 'decision' for the purposes of the definition of 'privative clause decision'. A 'privative clause decision' means a decision of an administrative character made, under the Act, or under a regulation or other instrument made under the Act subject to certain exceptions (s 474(2)). Those definitions apply to decisions made by the Tribunal in the conduct of a review pursuant to Pt 7 of the Act of a decision of the Delegate of the Minister. Division 2 of Pt 8 deals with the jurisdiction and procedure of courts and the matters addressed in that division are not to be taken as limiting the scope or operation of a privative clause decision. Section 476(1) confers upon the Federal Magistrates Court the same original

jurisdiction in relation to migration decisions as the High Court exercises under paragraph 75(v) of the Constitution although the Federal Magistrates Court has no jurisdiction by force of s 476(2) in relation to a 'primary decision' which is defined to include a privative clause decision susceptible of review by the Tribunal pursuant to Pt 7 of the Act, among other things.

Consideration of the Issues

32 In considering all of these provisions, it is clear that the Tribunal is to exercise a jurisdiction to review a decision of the Minister's Delegate in a way which secures the objective of providing a 'fair' review under the Act; accommodates the 'substantial justice and merits of the case'; conforms with the natural justice hearing rule in terms of s 422B(1); affords an opportunity to the applicant for a protection visa to receive information the Tribunal considers would be the reason or a part of the reason for affirming a decision having regard to the elements of s 424A; provides an opportunity in defined circumstances for the applicant to attend a hearing; and requires the Tribunal to formulate a written statement of reasons properly identifying findings on material questions of fact and references to the evidence or other material on which the findings are based.

33 Central to the exercise of the jurisdiction is an analytical process that focuses upon a fair, just, economical, informal and quick assessment of the facts and contentions of the applicant so as to ensure that the applicant for a protection visa is afforded substantial justice in the context of the merits of his or her case. Errors which misdescribe an applicant as an Indonesian and reach conclusionary observations that the Tribunal cannot be satisfied that the applicant holds a well-founded fear of persecution should he return to a country which is identified as other than the country of nationality, suggest that the deliberative process going to the merits of the Appellant's case was infused with notions which are erroneous and thus irrelevant to the Appellant's case and suggest that the Tribunal member may have had in mind facts, circumstances and considerations referable to other cases. An inference is open either having regard to the workload before the Tribunal or perhaps because of the proximity of determination of other cases involving nationals from Indonesia and the People's Republic of China that the required immediacy of focus and deliberation of the specific claims of the Appellant and the justice and merits of the case were influenced by erroneous considerations. As a result, the Tribunal failed to afford the Appellant the fairness required by s 420(1) and

failed to act according to the substantial justice and merits of the Appellant's case as required by s 420(2).

34 A question then arises as to whether these failures are jurisdictional failures in which event the decision of the Tribunal is not a decision made 'under the Act' and not within the scope of the protection of the privative clause provisions of the Act (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476).

35 In *Craig v South Australia* (1995) 184 CLR 163 at 179 their Honours Brennan, Deane, Toohey, Gaudron and McHugh JJ said this:

> *'At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise in accordance with the law. That point was made by Lord Diplock in* Re Racal Communications Ltd ([1981] AC 374 at 383):
>
> > *"Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision making power is conferred on a tribunal or authority that is not a court of law, the Parliament did not intend to do so."*
>
> *The position is, of course, a fortiori in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative incompetence to confer judicial power upon an administrative tribunal.* ***If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers.*** *Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it'.*
>
> [emphasis added]

36 The idea that there may be 'degrees' of error on the part of an administrative tribunal or that jurisdictional error is to be found in characterising the error of the Tribunal as a 'manifest' defect or an 'obvious' or an 'incontrovertibly' plain error, has become descriptive of the *conclusions* (*SDAV v Minister for Immigration & Multicultural and Indigenous Affairs*

(2003) 199 ALR 43 at 49 [27]) courts reach in the exercise of supervisory review in determining whether an administrative decision is 'an abuse of discretion' and thus *ultra vires*. At paragraph [13] of *Plaintiff S157/2002 v The Commonwealth* (supra), Chief Justice Gleeson said this:

> *'The concept of "manifest" defect in jurisdiction or "manifest fraud", has entered into the taxonomy of error in this field of discourse. The idea that there are degrees of error, or that obviousness should make a difference between one kind of fraud and another, is not always easy to grasp. But it plays a significant part in other forms of judicial review. For example, the principles according to which a court of appeal may interfere with a primary judge's findings of fact, or exercise of discretion, are expressed in terms such as "palpably misused [an] advantage", "glaringly improbable", "inconsistent with facts incontrovertibly established", and "plainly unjust".*
>
> *Unless adjectives such as "palpable", "incontrovertible", "plain", or "manifest" are used only for rhetorical effect, then in the context of review of decision-making, whether judicial or administrative, they convey an idea that there are degrees of strictness of scrutiny to which decisions may be subjected. Such an idea is influential in ordinary appellate judicial review, and it is hardly surprising to see it engaged in the related area of judicial review of administrative action'.*

37 The Chief Justice also noted at [18] that concepts of 'manifest defect of jurisdiction' and 'manifest fraud' are the obverse of the notion Sir Owen Dixon had in mind in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at p 616 when Sir Owen Dixon observed that invalidity is to be determined as a question of interpretation of the entire legislative instrument in assessing whether steps taken by the administrative tribunal transgress the limits of the instrument. That assessment takes into account whether the Tribunal has acted bona fide in an attempt to properly pursue the power conferred; whether the decision relates to the subject matter of the Act; and whether the decision is reasonably capable of reference to the power. Sir Owen Dixon observed at p 616 in *Hickman* that any decision of the particular Local Reference Board which *'upon its face appears to be within power and is in fact a bona fide attempt to act in the course of its authority, shall not be regarded as invalid'*.

38 The respondent contends that the Tribunal so acted and did not misdirect itself as to the exercise of the power, as the analysis of the facts reveals a consideration of all the circumstances and claims made by the Appellant. However, importantly, an assumption that

the Tribunal acted in the way described by Sir Owen Dixon does not qualify the power of the Tribunal and render within power that which is not. Rather, those considerations might qualify, properly construed in the context of the Act overall, the protection and reach of the privative clause (*Plaintiff S157/2002 v Commonwealth* (supra) per Gaudron, McHugh, Gummow, Kirby and Hayne JJ [99]).

39 A proper construction of the imperative objective of the Act of a 'fair review' and the statutory direction to the Tribunal to exercise the review jurisdiction according to the 'substantial justice of the case' ([27] of these Reasons), suggests that a jurisdictional limitation upon the relevant decision-making power includes both a failure to act fairly and the taking into account erroneous matters, in the course of the analytical process of considering those facts, circumstances and conditions appropriate to the Appellant's claim. Since such failures go to the valid exercise of the power, the proper construction of 'Division 1 – Privative clause' (s 474) of the Act having regard to the legislative instrument overall is that the section does not protect the identified failures of the Tribunal from review.

40 In *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82], McHugh, Gummow and Hayne JJ had regard to the observations of their Honours Brennan, Deane, Toohey, Gaudron and McHugh JJ (noted at [34] of these reasons) in *Craig* and further explained the notion of 'jurisdictional error' in these terms:

> *'It is necessary, however, to understand what is meant by "jurisdictional error" under the* ***general law*** *and the consequences that follow from a decision-maker making such an error.*
>
> *"Jurisdictional error" can [thus] be seen to embrace a number of different kinds of error, the list of which, in the passage cited from* Craig *is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as to the decision-maker both asking the wrong question and ignoring relevant material.* ***What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law****. Further, doing so results in the decision-maker* ***exceeding*** *the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it.'*
>
> [emphasis added]

See also the discussion of supervisory review of administrative decisions and the statutory analogue contained in s 5 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) at pp 39-43 per Mason J, *Minister for Aboriginal Affairs & Another v Peko-Wallsend Limited & Others* [1986] 162 CLR 24.

41 In *SDAV v Minister for Immigration* (supra) Hill, Branson and Stone JJ, observed:

> *'[27] The statement that a particular error is a "jurisdictional error" is a statement of conclusion. The conclusion is that, be the error one of omission or commission, some* ***essential*** *or* ***indispensable*** *requirement for jurisdiction has not been met. An* ***imperative duty*** *has not been discharged or some* ***inviolable limitation*** *has been breached and therefore the action or decision is null and void:* Plaintiff S157 *at [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ. The error may be easy to detect (manifest error) or more difficult but, either way, an action or decision is either one which falls within the decision-maker's lawful authority or it is not. If it falls within the decision-maker's lawful authority then the error is made "within jurisdiction". If it does not fall within the decision-maker's lawful authority then the error is a "jurisdictional error" and as such it cannot be a valid action or decision.'*
>
> [emphasis added]

42 In *Yusuf*, their Honours formulated at [82] (in the quote identified at [40] of these Reasons) an understanding of what is meant by 'jurisdictional error', under the general law. In *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 100 (38) Gaudron and Gummow JJ noted that Gaudron J had left open in *Abebe v The Commonwealth* (1999) 197 CLR 510 at 553 [112] the question of whether procedural fairness is to be seen as a common law duty or an implication from the relevant statute. Their Honours concluded in *Ex parte Aala* that having regard to *Kioa v West* (1985) 159 CLR 550 at 615 per Brennan J, *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652, per Deane J, *Annette's v McCann* (1990) 170 CLR 596 at 604 – 605 per Brennan J, and *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650 [126] per Gummow J, that the exercise of a discretionary power statutorily conferred is constrained by an obligation to exercise the power reasonably (which includes an obligation to provide procedural fairness) as a function of the proper construction of the legislation itself.

43 Once it is established that the Tribunal has asked itself the wrong question by, for

example, asking whether it can be satisfied that the Appellant faces a real chance of persecution should he return to the Peoples Republic of China, or, has identified the wrong issue, or taken into account, in one part of its deliberations, a notion that the Appellant is an Indonesian rather than a Pakistani national, the Tribunal is seen to have failed to provide the Appellant with procedural fairness and thus jurisdictional error arises (*Re Refugee Review Tribunal and Another; Ex parte Aala* (2000) 204 CLR 82 at 109 [59] per Gaudron and Gummow JJ). The repository of the power is constrained by an obligation to act reasonably by providing procedural fairness. A decision made in light of a failure to act reasonably is not a decision made under the Act for the purposes of s 474.

44 The obligation to undertake an un-distracted, focussed and deliberative assessment of only those facts and circumstances referrable to the case of the Appellant is an essential element of the discharge of the review function.

45 Accordingly, the decision of the Tribunal is a nullity (*Minister for Immigration & Multicultural Affairs v Yusuf* (supra)). Notwithstanding that the Tribunal has in its decision record reflected an analysis of the claims made by the Appellant, the erroneous references to Indonesian nationality and the notion of a well-founded fear of persecution should the Appellant return to the Peoples Republic of China can only lead to the conclusion that the errors have affected the exercise of the power. The references to these matters are neither merely typographical errors nor errors of fact at the margin of the Tribunal's review. Since the errors go to the nationality of the Appellant and the source of nation state conduct or nation state tolerance of conduct by others giving rise to a claim of a well-founded fear of persecution, the errors affect the exercise of the power. The errors must be taken to have affected the exercise of the power as the Tribunal has recited the errors as material matters for the purposes of s 430(1) of the Act. The notion of an 'affect' upon the exercise of a power seems to me to comprehend a well placed apprehension on the part of the court in the exercise of supervisory review that the identified errors going to jurisdiction influenced the mind of the decision-maker in purporting to exercise the power. The two errors are central matters in the review of the decision of the Minister's Delegate.

Conclusions

46 Accordingly, Federal Magistrate Barnes erred by failing to find that the errors of the

Tribunal constituted jurisdictional errors and by failing to find that the decision of the Tribunal is a nullity. The appeal is to be allowed and the decision of his Honour must be set aside. The Appellant's application for the issue of the Constitutional writs of certiorari and mandamus quashing the decision and directing the Refugee Review Tribunal to conduct a review of the decision of the Minister's Delegate, according to law is granted and the respondent is ordered to pay the Appellant's costs before the Federal Magistrates Court.

47 The respondent is ordered to pay the Appellant's costs of the appeal.

I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood.

Associate:

Dated: 7 February 2007

Counsel for the Appellant:	Appellant Self-Represented
Solicitor for the Appellant:	Appellant Self-Represented
Counsel for the First Respondent:	Respondent represented by Sparke Helmore Solicitors
Solicitor for the First Respondent:	Mr Michael Snell, Sparke Helmore Solicitors
Date of Hearing:	22 November 2006
Date of Judgment:	7 February 2007