

# FEDERAL COURT OF AUSTRALIA

## SZJSS v Minister for Immigration and Citizenship

[2009] FCA 1577

**MIGRATION** — protection visa — jurisdictional error — applicant for protection visa provided 2 letters, from a former employer and headmaster of his children's school, from home country in support of his claim of persecution by Maoist insurgents — DFAT investigated the letters, at the request of an earlier tribunal, and found them to be genuine — tribunal member accepted that letters were bona fide — tribunal gave the letters "no weight" because applicant had "solicited" them in support of his claim — giving no weight constituted a failure to give proper, genuine and realistic consideration to the objective, credible, third party material corroborating the applicant's claim of the applicant's claim and thus fell into jurisdictional error

**ADMINISTRATIVE LAW** — bias — apparent bias — applicant for protection visa provided 2 letters, from a former employer and headmaster of his children's school, from home country in support of his claim of persecution by Maoist insurgents — tribunal member described the applicant's evidence as "back-tracking" and a "baseless tactic" — the claim and evidence in support was made consistently throughout the application and review process — characterisation of applicant's claims as "baseless tactic" was made without evidence and conflicted with the objective evidence — a fair minded lay observer or properly informed law person would regard the tribunal's characterisation of the applicant's claims as apparently biased

*Anderson v Director-General of the Department of Environmental and Climate Change* (2008) 251 ALR 633 discussed

*Lafu v Minister for Immigration and Citizenship* [2009] FCAFC 140 applied

*Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 applied

*NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 discussed

*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 applied

*Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 cited

*Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 applied

*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 applied

*SZJIF v Minister for Immigration and Citizenship* (2008) 102 ALD 366 cited

*Telstra Corporation Limited v Australian Competition and Consumer Commission* (2008) 176 FCR 153 applied

*Telstra Corporation Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 cited

**SZJSS and SZLFG v MINISTER FOR IMMIGRATION AND CITIZENSHIP and  
REFUGEE REVIEW TRIBUNAL  
NSD 1085 of 2009**

**RARES J  
24 NOVEMBER 2009  
SYDNEY**

**IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION**

**NSD 1085 of 2009**

**ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA**

**BETWEEN:           SZJSS  
                          First Appellant**

**SZLFG  
                          Second Appellant**

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

**REFUGEE REVIEW TRIBUNAL  
                          Second Respondent**

**JUDGE:             RARES J**

**DATE OF ORDER:   24 NOVEMBER 2009**

**WHERE MADE:      SYDNEY**

**THE COURT ORDERS THAT:**

1.     The appeal is allowed.
2.     The orders of Federal Magistrates Court made on 11 September 2009 be set aside, and in lieu thereof it be ordered that:
  - 2.1    a writ of certiorari in the first instance issue quashing the decision of the second respondent signed on 15 October 2008.
  - 2.2    the second respondent hear and determine the application for review of the decision of the delegate of the first respondent according to law.
  - 2.3    the first respondent pay the applicants' costs.
3.     The first respondent pay the appellants' costs.
4.     These orders not be taken out until the revised reasons for judgment are made available.

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

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                          First Respondent**

**REFUGEE REVIEW TRIBUNAL  
                          Second Respondent**

**JUDGE:             RARES J**

**DATE:              24 NOVEMBER 2009**

**PLACE:             SYDNEY**

**REASONS FOR JUDGMENT  
(REVISED FROM THE TRANSCRIPT)**

1           The appellants are husband and wife who are citizens of Nepal. They entered Australia in late February 2006. In early April that year they applied for protection visas. The basis of their claims are those of the husband, his wife's being entirely derivative upon his establishing an entitlement to protection.

2           Their application has had a difficult history through no fault of their own. They sought that the Refugee Review Tribunal review the delegate's decision given on 3 July 2006 to refuse them protection visas.

3           They were unsuccessful before the first member of the tribunal who dealt with their application in October 2006 and affirmed the delegate's decision. The Federal Magistrates Court set aside that decision in August 2007, after a hearing in which it found that a

jurisdictional error had been made. A second member of the tribunal next decided to affirm the delegate's decision in December 2007. But, that decision, too, was set aside by consent in the Federal Magistrate's Court in July 2008 and remitted to the tribunal for a third hearing. This appeal concerns a decision given in October 2008 by the third tribunal following a hearing that occurred in August 2008, once again affirming the decision of the delegate

4           The appellants applied for constitutional writ relief to the Federal Magistrate's Court. That application was rejected: *SZJSS v Minister for Immigration* [2009] FMCA 886.

### **ISSUES IN THE APPEAL**

5           The essential bases on which the appellants challenged the decision of the tribunal and his Honour's rejection of those challenges were that:

- in assessing the husband's evidence, the tribunal failed properly to take into account the effects of the delay in his application for review being dealt with and the consequences of his having to repeat his evidence to each new tribunal member including the appearance of some inconsistencies in his various accounts;
- the failure of the tribunal to give any weight at all to letters from schools in Nepal that had been found to be genuine by the Australian Embassy in that country when those letters supported the husband's claims that, in answer to a specific enquiry by the tribunal, Maoists with whom he had feared, had continued to pursue him after they left their village in late 2005;
- there was an apprehension that the tribunal was biased;
- the tribunal's decision was one that no rational decision-maker would have made.

### **THE HUSBAND'S CLAIMS FOR PROTECTION**

6           The appellants' claims for a protection visa were made reasonably articulately in the husband's original application. These were repeated by each of the three tribunals in their

recitations of facts. The third tribunal set out verbatim recitations of those facts made by the first two tribunals.

7           The husband said that since 1990 he had worked as a permanent teacher in the same high school. He claimed that because he found it hard to maintain his family on his teacher's salary, his wife and he started a small retail shop business selling agricultural products and medicines for pets. The husband had claimed he was actively involved in a pro-democracy committee in the teachers' union and participated in many activities to bring about the 1990 restoration of democracy in Nepal. When that occurred, there were democratic elections. He claimed that he continued to be politically involved thereafter. He claimed that, at some point in this century, after the Maoist version of the Communist Party in Nepal began its revolutionary campaign, Maoists began to demand donations from teachers in his school, including from him. Originally he had claimed that this began around the middle of 2002. Subsequently he gave different dates for the commencement of that activity. However, as the third member noted, this discrepancy did not matter. This was because the third tribunal accepted that those demands had been made under the threat of violence that could have amounted to convention-based harm.

8           The husband also claimed that the Maoists created what he described as "mental torture". This, he claimed, was because they knew he was a teacher who had faith in the democratic system and values, and was also an active member of the Amnesty International human-rights group. He claimed that this "mental torture" was part of their program of:

    "... giving "revolutionary education teaching style" as a training package to the teachers. They took me many times in their program forcefully. Some of those programs were in the forest of my own district, and some time around the other remote villages where they kept me some time over night and other times for up to 5 to 7 days. I had to listen them and participate in their programs other wise they would threaten me to harm physically and on the other side my absence in the school was noted by army and police and they started looking on me on the suspicious ground as if I was involved in terrorist activities (or supporting Maoists)."

9           He claimed that this also placed emotional pressure on his wife and children because they did not know where he was or why he had been taken, and there were many cases in which teachers had been forcefully taken and killed if they did not agree to do what the rebels required. The husband provided the tribunal with instances of that occurring in independent country information from Nepal. He also claimed that the Maoists had required him and his

wife to make mandatory donations from the business, so that in effect they were being taxed twice, one by the government and once by the Maoists. He said that, from time to time, the army would ask him if he had paid the Maoists and, likewise, the Maoists interpreted his conduct in paying taxes as being supportive of the government.

10 He claimed that the Maoists had sought to use his house as a form of shelter and had asked his wife to cook for their troops. He claimed that their three daughters had been sent to a private boarding school in the area in which they lived. He asserted that India was not a safe refuge, a claim which the third tribunal accepted.

11 The husband claimed that once they had left their village they could not go back because this would “be big issue for Maoists, as well as royal army”. He and his wife obtained a visa and travelled here ostensibly to visit his sister, who lived in Sydney and had just given birth to twins. They left their children in Kathmandu. He claimed that he and his wife had left for Kathmandu in around November 2005 and stayed there.

#### **THE DELEGATE’S DECISION**

12 The delegate rejected the husband’s claims on the basis that Kathmandu was not then an area under Maoist control and independent country information did not suggest that in Kathmandu, particularly during the post-ceasefire period, businesses and residents had been forced to donate money to the Maoists. The delegate noted that the appellants had not provided an explanation of why they would be unable to live in Kathmandu free from systematic persecution, and that he had left Nepal three weeks after their visas had been granted.

#### **THE THREE CORROBORATIVE LETTERS**

13 Prior to the hearing before the first member, the husband provided the tribunal with a number of documents, including newspaper accounts and, critically, three letters. There were two letters from his school and one from his daughters’ school. The first letter from the husband’s school was in English, dated 20 March 2006 and signed by the headmaster. It read as follows:

“Subject – about information. Dear sir, [Husband’s name]

Having been unsatisfied with the social work and teaching you had been performing in VDC, Turang Majuwa Gulmi. We hereby inform you that, the place you have been hiding can be protective.

After your leave acceptance, too, they have been searching through dictators and some times by arm forces. Therefore we would like you not to come out and just stay at where you are.

14 The second letter from his school was dated and written in Nepalese but an accredited translation was provided to the tribunal. The letter, as translated, read:

“18 May 2006

Subject: Information [husband’s name] [school address]

This is to inform you [husband] that your position as a teacher in [the school] is no longer exist as you have not joined the school after taking leave for three months until ... 16 February 2006 ... due to your safety reason and various threats given to you. You are not required to come back and continue your job as a teacher in this school.”

15 The third letter from the daughter’s boarding school, Polaris Secondary Boarding School, was dated 20 March 2006 and read:

“Subject: For not been able to serve your kids.

Dear [Husband]

We had been teaching your kids for nine years long period. [The three children] who had been studying at this institution for 9, 7 and 6 years accordingly. We are now unable to be accepted as the boarders students for Maoists, the terrorists, have been challenging us time and again not to admit in this institution. Therefore, we hereby request you to manage your children wherever you feel comfortable and safe.”

16 In giving his evidence to the first member, the husband was asked about the letter of 18 May and whether he had requested it. He said that he had not and that his brother had sent the letter to him. He also said that his brother had not asked for the letter. The first member commented that someone must have requested it.

17 The second member caused an inquiry to be made of the Australian Embassy in Nepal about scanned copies of two of the three letters. The tribunal’s inquiry referred specifically to the letter from the husband’s school warning him to go into hiding (which appears to be the letter of 20 March 2006) and to the letter from the Polaris school. The request sought



confirmation by the Embassy that the letters, appearing to be signed respectively by the headmaster and principal, were genuine. The embassy reported that it had contacted both signatories and that they:

“... confirm[ed] the authenticity of the documents. The Headmaster and Principal of both schools confirmed that both documents were genuine.”

The Embassy also supplied the tribunal with the names and contact details for each of the headmaster and principal.

### **THE THIRD HEARING BY THE TRIBUNAL**

18 After the matter was remitted to the tribunal for the third hearing, the husband's solicitor and migration agent sent the tribunal a detailed submission. It contained a large amount of independent country information on the position in Nepal and a number of submissions about the husband's application for review. The submission claimed that in August 2008 the Maoists were then in control of all the organs of government in Nepal following the recent election and removal of the monarchy. These made clear that his claims were put on the basis, among others, that as a businessman and a teacher the husband was a member of two particular social groups and that members of each group were required to pay taxes to the Maoists as well as to the Government in the ordinary course. The submission claimed that the Maoists forced people to pay them those taxes under threat. The husband also made a third claim for protection on the basis of political opinion. This was because he was a supporter of democracy and did not agree with communism.

19 The third tribunal held a hearing in August 2008. According to its records this lasted around one and a half hours. As I have indicated, the third tribunal's decision record set out at length the record of the husband's evidence before each of the first two members, some of which was repetitious. This repetition included the first member's record that the husband had claimed to fear that the Maoists would harm him should he return to Nepal, because he would be suspected of betraying them. The first member set out the husband's claim that in around September 2005 he had been detained by the Maoists, taken to and mistreated at a training camp for about seven days. It also recorded his claim to have left the village and gone to Kathmandu.

20 He explained to the first member that the Maoists would be aware that he had reported this incident to a cousin of his who was in the army because, he claimed, “they had spies in the army”. He also explained to the first member that his personal safety could not be guaranteed in his home village. When the first member asked him why he feared that he would not be able to reside safely in Kathmandu as his brothers were doing, the tribunal recorded that the husband said that:

“... he had not “followed Maoist directions” and had left his home village without advising anyone; and that he believed he may be suspected of betraying the Maoists.”

21 It can be seen immediately from this quotation from the first tribunal’s decision record how significant the three letters were that I have set out, since these documents were somewhat contemporaneous with the time and circumstances in which he claimed he had left his village, and later, Nepal. The third tribunal member said that he had:

“... devoted much attention at the 13 August 2008 hearing to the [husband’s] documents, in particular the letter from his school dated 18 May 2006.”

22 The language of the third member’s decision is not happily expressed. He referred to the submissions the husband’s advisers made to it in relation to the first tribunal’s relocation findings as “an attack”. And as I discuss later, he described the husband’s evidence as “back-tracking” and, at one point, “a baseless tactic”. These are matters on which the appellants rely in support of their claim of apprehended bias.

23 The third member described the letters in a way that suggested that he doubted their genuineness. It does not appear that the letter of 18 May 2006 was sent to the Embassy. However, so far as I understand the third tribunal’s reasons, it did not distinguish in any way the authenticity of that letter from the investigation of the authenticity and genuineness of the other two letters. The third tribunal said that the text of the 16 February letter from the husband’s school appeared to be somewhat confused. However, having regard to the fact that it is written by someone obviously not using English as their first language, its terms were transparently clear. The letter indicated the very meaning that the second member had put to the Embassy for the purposes of determining whether the letter was “genuine”.

24           The third member then set out the account of the oral evidence taken from the husband by the first member. This gave the husband's explanation of his fear that he would not be able to reside safely in Kathmandu, unlike his brothers, because, he claimed, they were not teachers. The third member recorded that the husband had been asked to state specifically who amongst the Maoists' former enemies faced ongoing relevant harassment. The third member recited that the husband had referred to people who had not supported the Maoists at village level. The third member then put to the husband that he was apparently making a differentiation between what happened to non-Maoists in the villages as opposed to what happened to them in Kathmandu. The husband responded that it was the same for non-Maoists in Kathmandu. The third member then asserted that the husband:

“... seemed, therefore, to be back to saying that all non-Maoists everywhere face serious relevant harassment from the Maoists, in such form as being bashed.”

25           The third tribunal recorded that it had asked the husband about how the 18 May letter had come to him through his brother, and that the husband had said that he had asked his brother to send it to him. The third tribunal noted that throughout its questioning of the husband concerning the letters, his position had been that they were truthful and genuine.

### **THE THIRD TRIBUNAL'S FINDINGS AND REASONS**

26           In its findings and reasons the third tribunal purported to summarise the husband's claims. It asserted that the husband had claimed that he had been singled out by the Maoists for abduction and forced training because of his particular somewhat outspoken style as a teacher, who was also a member of the local chapter of Amnesty International.

27           In my opinion, that was not a proper characterisation of his claim. At all times his claim was that because he did not believe in the Maoist philosophy, he suffered “mental torture” by being forced to participate in their education events with all of the teachers, both Maoist supporters and others. If that forced indoctrination were found to be true, it would support his claim of being denied his entitlement to freedom of political opinion. However, the third member simply reasoned that the husband had been treated the same as all teachers by the Maoists. While the husband did say this, he did so in the context that that he was known to be a pro-democracy supporter, and had later joined Amnesty International.

28           The third member accepted that the husband had been forced to participate in a local Maoist insurgent school program and that this involved him being forced to attend training camps. It found “that *subjectively* this could feel persecutory to anti-Maoists like the [husband]”.

29           The tribunal then found that it did not accept that if he returned and became a school teacher in Nepal now, or in the reasonably foreseeable future, he would be subjected to such treatment, although it accepted that there may be instances in remote rural areas of Nepal where that could still occur.

30           The third member asserted that the husband had back-tracked from the position that the cities were different to rural areas when the third member had put to him “... potentially negative overall inferences that might be drawn from that information”. The third tribunal found this “... back-tracking on the [husband’s] part disingenuous, and it goes against him overall as a reliable witness in the present matter”. The third tribunal found that the husband had exaggerated the role of his membership in Amnesty International in the way he had been treated, and rejected his claim of having had any political profile imputed to him because of that membership.

31           It concluded that his claim in reliance on his membership of Amnesty International was a substantial exaggeration and unreliable. The third tribunal said that it gave no weight to the husband’s claims about having been *singled out* for his pro-democracy values or human rights activism generally or for his Amnesty International or Red Cross membership in particular. It rejected his claim of having been kidnapped and detained by the Maoists just prior to his move to Kathmandu. It found that he had invented that story to give weight to his narrative in circumstances where he and his wife had already applied for and obtained their passports in October 2005 evidencing their intention to travel abroad.

32           The third tribunal noted that the husband had said the authorities had done no more than make inquiries about his activities in relation to the Maoists and that that was, on the evidence, understandable given the activities of the Maoists themselves. The third tribunal said that it gave no weight to, but apparently did not reject, the husband’s unsupported claim that local Maoist insurgents had sometimes occupied their house and eaten their food. It said

that at best this kind of activity was peculiar to the village level and that since the ceasefire and his move to Kathmandu, he was no longer exposed to that threat.

33           Significantly, however, the tribunal made a number of findings that accepted parts of the appellant's account, including his feeling of persecution from the treatment of him as a teacher. It found that the local Maoist insurgents had obliged him to attend occasional training camps. But, it gave "no weight" to his claim that they targeted him because of his perceived support for democracy or being an active member of a human rights group. It said that this was because the husband had told the third member that the local Maoists insurgents had begun their programs at the school in 2000, whereas he had not joined Amnesty International until September 2005. The third member said that on that evidence it gave:

“ ... no weight to the suggestion that the [husband's] claimed pro-democracy, pro-human rights activism had anything to do with the local Maoist insurgents requiring him to attend teacher training camps. It was, on his evidence, the Maoists *generic* schools program”.

34           Next, the third tribunal found that the local Maoist insurgents had targeted the husband and wife for payment of revolutionary taxes in two ways: indirectly, through the school's payroll system, along with every other teacher in the school; and directly through demands on both of them at their shop. It accepted that the increasing payments of money to the local Maoist insurgents were onerous but these did not, on their own, constitute serious harm, for the purposes of the Refugees Convention. However, the third tribunal then did find that the threats attending the requirements to make those payments were capable of being reasonably regarded as serious harm or persecution for the purposes of the Convention because it accepted the husband's evidence that the threatened treatment involved physical violence.

35           The third tribunal also accepted that if the husband and wife had ceased to pay those taxes in those days and continued living and working where they were, they would have been disclosing to the Maoists a substantial degree of opposition to their political project and that this would have attracted negative imputations to their political opinion. It accepted that the harm threatened by the Maoists in those circumstances would be sufficient to deter the husband and wife from resisting payment of the revolutionary taxes and that that was Convention-related harm. However, the tribunal noted that once the appellants had left their

home and gone to Kathmandu this harm ceased and that any risk of it resuming depended on the Maoist activities in individual localities.

36 The tribunal rejected the husband's claim that by moving to Kathmandu he would still be pursued by Maoists from his home. It said that it was not satisfied that Maoists in Kathmandu might commence to tax his salary as a teacher again. The third tribunal was not satisfied that such activity was currently being experienced by school teachers in Kathmandu. It then made the following significant findings and observations ([140]-[146]):

“For that matter, the Tribunal is not satisfied on the evidence before it that, irrespective of where he might reside in Nepal, the Applicant would face a real chance of the resumption in forced donations to the Maoists upon his becoming a businessman or shopkeeper again. When the Tribunal asked him why he could not come out of hiding in Kathmandu now and live there like his brother, he did not suggest that this was because he is a businessman and because his brother is not, or suggest that businessmen in Kathmandu face a real chance of Convention-related harm. He cited, as the only distinguishing factor, the fact that he is by vocation a school teacher.

The Tribunal is of the view that to a very large part, the Applicant's reference to being a school teacher at this point **was a baseless tactic to help him address the potentially adverse impression** the Tribunal disclosed to him after he said that people who used to be in hiding from the Maoists are now living out in the open.

The Applicant's claim to the effect that he would still face harm even in Kathmandu stems partly **from his claim that the Maoists have been searching for him since he left Gulmi because they suspect he spied on** them to the local authorities back there. **Although his claim appears supported by the text in the Gulmi headmaster's letters dated 20 March and 18 May 2006, the Tribunal gives no weight to it.** It is undermined by the Applicant's evidence at the 13 August 2008 hearing about the local Maoist insurgents having treated pro- and imputed anti-Maoist teachers the same, requiring all of them to attend the training camps and incorporate the Maoist curriculum into their own. The claim also appears dependent on the Applicant's suggestion that he had been a member of AI long enough for him to become or appear to be an activist, and this claim is already dismissed.

Although the Tribunal accepts that these two letters originated from the relevant school, **the Tribunal gives no weight to their content in view of evidence the Applicant has presented the Tribunal over time undermining his claims about his purported political and social activism.**

The Tribunal gives the two “headmaster” letters **no weight for an additional reason.** In regard to the second letter the Applicant told an earlier Tribunal that he had not asked for the letter, that his brother had sent it to him and that his brother too had not asked for it. It seems odd that it could have come into the hands of the Applicant's brother since it was addressed to the Applicant at the school and with the author of both letters suggesting he had no idea where the Applicant was hiding. **Much more significantly though, the Applicant was inconsistent in his evidence at to the provenance of the letter, and this goes directly to the question of its**

**bona fides: he told the presently-constituted Tribunal that he did ask for the letter several times.** On this evidence, the Tribunal has come to the view that both of the headmaster's letters and their particular **contents were solicited.**

Although the "Polaris" school letter does not refer to the Applicant being a political activist, and is therefore not undermined by the Applicant's oral evidence to the Tribunal over time, the Tribunal **still gives this no weight.** Even allowing for the possibility that the local Maoist insurgents in Gulmi stopped schools from having boarders, no evidence before the Tribunal suggests that such action in itself was, or would be indicative of a real chance of, Convention-related persecution. The letter speaks of an action undertaken in the past in a particular location prior to the recent chance [sic] in the socio-political map in Nepal. The Tribunal gives weight to the fact that the Applicant's children are all attending private schools in Kathmandu, and facing no pressure from the Maoists. The Applicant has not satisfied the Tribunal that their situation as students and resident of Kathmandu is in any even remote danger of changing.

Ultimately, the Tribunal does not accept that the Applicants left Gulmi for Kathmandu, and then for Australia, or seeks to remain here, because the Maoists were and are searching for them. The Tribunal does accept that the Applicants became exasperated with having to pay revolutionary taxes, **and that the Applicant himself did not like attending the training camps and participating in the Maoist school curriculum,** and moved away from where these practices were *at the time* being conducted. As other findings in this decision address, however, the Tribunal does not accept that the situation the Applicants moved away from in 2005 is indicative of a real chance of their facing Convention-related persecution in Nepal in the reasonably foreseeable future." (emphasis added)

37 The third tribunal then concluded that the position for people living in Nepal, in particular in Kathmandu, had changed significantly. It found that the husband was improvising his claims as he went along by relying on the danger he feared from being a teacher, distinguishing his position from his brother, ie, the "baseless tactic." It found that the husband had never had the profile of a person who had opposed the Maoists even in their own eyes nor had he the profile of a teacher who had opposed the Maoists. The third tribunal, however, accepted that he and his wife had felt subjectively exasperated by the Maoist presence and practices in their home village and had moved their family away from there. It then said:

"The evidence before the Tribunal supports the conclusion that the Applicant's family is already somewhat established in Kathmandu. The Tribunal has considered his arguments against relocation but in view of the very local character of the harm he claims to rear, in view of finding that as far as the cities are concerned he does not face the harm he claims to face, and **in view of the lack of reliability of a significant number of his claims,** the Tribunal is satisfied that both the Applicant and his wife can safely and practically join the rest of their family residing in Kathmandu." (emphasis added)

## **THE IMPACT OF THE THIRD TRIBUNAL'S FAILURE PROPERLY TO CONSIDER THE LETTERS**

38           The assertions in the passages I have emphasised from [140]-[142] of the third tribunal's decision record are significant in relation to the ground of appeal relating to the treatment of the letters. As the third tribunal recognised, the appellant's claim that the Maoists had been searching him for him since he left his village was corroborated by the letters. It asserted that it gave "no weight" to this powerful corroboration that had been investigated and found to be genuine by the Australian Embassy in Nepal. Instead, the third tribunal asserted effectively that because the husband had solicited the letters, for some unexplained reason, they were not "bona fide." That is, that they did not genuinely set out what the headmaster and principal who signed them believed to be the true position.

39           The assessment of credibility is of course a matter "par excellence" for a decision-maker. The question whether or not a person ought be believed or accepted on his or her account of events necessarily involves a decision maker arriving at an ultimate determination as to the state of satisfaction of the person's account in their own mind: *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at 423 [67] per McHugh J.

40           Accepting that to be so, a decision-maker ordinarily will be required to weigh all of the evidence before coming to a final conclusion as to the acceptability of the different parts of it. The process of reasoning exhibited by the third tribunal member involved him losing sight of the essential claim that the husband did not agree with the Maoists' political philosophies and felt persecuted by them. The third tribunal in fact found this to be so. The husband and wife escaped that persecution by leaving their home in about November 2005. The third tribunal found, that he had given the reason for his continuing fear that he would continue to be pursued by the Maoists as being, in the words he had used (recorded in the first tribunal's account), because he would be suspected of having betrayed the Maoists. He had claimed that they would see him as having betrayed them because he had not advised anyone of his departure and had not followed their directions. Accordingly he had claimed he would continue to hold that fear that if he applied to be a teacher in Kathmandu. As the third tribunal recognised, the letters corroborated that the husband's fear had a real basis. They showed on their face that the Maoists were looking for him after he had left his home.



The third tribunal also accepted that the husband had believed in democratic principles. But it then wholly discounted that finding as having no weight, because of his use of his September 2005 Amnesty International membership.

41           The third tribunal found that the husband felt persecuted by what the Maoists had done at the training camps by imposing their will on him in common with all other teachers. Yet it asserted that because the husband had sought or, as it found, “solicited” evidence from persons who actually knew him and knew what was happening in his village, that evidence had no weight merely because he had sought it.

42           It is impossible to understand how this could be a rational decision that gave proper, genuine or realistic consideration to the appellant’s claims, or to the evidence before the third tribunal supporting them. Any person who seeks to get evidence from their home country, from former colleagues or friends, will always “solicit” the material; that is of its nature. Nonetheless, the second tribunal had investigated the provenance of those letters and determined that they were genuine. The Australian Embassy had spoken to the authors, a headmaster and school principal, who were apparently persons in responsible positions.

43           The third tribunal did not find that the two headmasters were prepared to write falsehoods in the letters. I cannot conceive how any rational, reasonable approach to the evaluation of that evidence could give it “no weight”. I am satisfied rather that the third tribunal was not genuinely considering the appellants’ claims as corroborated by the letters on the material before it. It used the formula of giving material “no weight” as a basis on which it might ignore probative, relevant and highly supportive material corroborating the factual basis of the fears which the husband claimed. It did this simply as a basis for putting the evidence to one side, having said that it had looked at it. In *Telstra Corporation Limited v Australian Competition and Consumer Commission* (2008) 176 FCR 153 at 181-182 [106]-[107] (approved in *Telstra Corporation Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 at 242 [267] per Jacobson, Lander and Foster JJ and *Lafu v Minister for Immigration and Citizenship* [2009] FCAFC 140 at [47] per Lindgren, Foster JJ and myself) I said:

“A decision-maker must give proper, genuine and realistic consideration to the merits of the case: *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 at 292 per Gummow J; *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 at

[62] where Spigelman CJ collected the authorities; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [138] per Kirby J; *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51 at [212] per Madgwick J, [229] per Conti J; *SZEJF v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 724 at [39], [60] where I applied this principle. In *Tickner v Chapman* (1995) 57 FCR 451 at 462C-D, Black CJ said that where a decision-maker was required to consider material, the process of consideration "involves an active intellectual process" directed at the nominated subject-matter: see too per Burchett J at 476F-477E, per Kiefel J at 495F-G and *Tobacco Institute of Australia v National Health & Medical Research Council* (1996) 71 FCR 265 at 277G per Finn J; *Australian Retailers Association* 148 FCR 446 at [526] per Weinberg J.

Where a decision-maker must consider matters prescribed by law, generally, he or she cannot jettison or ignore some of those factors or give them cursory consideration only in order to put them to one side: *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at [52] per Gleeson CJ, Heydon and Crennan JJ. As Gummow and Hayne JJ, in concurring observed (*East Australian Pipeline* 233 CLR 229 at [102]):

It was not enough for the ACCC to say in its final determination that it had considered those matters in the sense of having looked at but discarded them."

44           There has been some recent criticism of the use of the "proper, genuine and realistic consideration" formula by the Court of Appeal of the Supreme Court of New South Wales in *Anderson v Director-General of the Department of Environmental and Climate Change* (2008) 251 ALR 633 at 648-651 [51]-[60]. Tobias JA with whom Spigelman CJ and Macfarlan JA agreed, said that this formulation should not be turned into an assessment of the adequacy of the consideration accorded to the particular case so as to permit an intrusion into the administrative decision-maker's assessment of the merits.

45           Nonetheless, the Court must be able to consider the way in which an administrative decision-maker has used its powers to evaluate evidence while respecting the distinction between the role of the decision-maker to adjudicate on the merits and the court's function to determine whether, in the process that the decision-maker has followed, he or she has adhered to their legal obligations. And, the formula has been recently approved twice by Full Courts of this Court.

46           I am of opinion that when the third member said that he gave no weight to the three letters, he simply recited that he had considered them only to discard them. This was not a proper, genuine or realistic evaluation of this material.

47           In *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at 233 [27]-[28] Gleeson CJ referred (see also at 241 [58] per Gaudron and McHugh JJ and 250 [97] per Kirby J) with approval to what Lord Wilberforce had said in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and 1047. Lord Wilberforce said that if a judgment required, before it could be made, the existence of some facts then, although the evaluation of those facts was for the decision maker alone, the court had to inquire whether the facts existed and whether they had been taken into account, whether the judgment had been made on a proper self-direction as to the facts and whether it had not been made upon other facts which ought not to have been taken into account. If those requirements were not met, his Lordship said, then the exercise of the judgment, however bona fide it might have been, became capable of challenge. And, Gaudron and McHugh JJ observed in *Rajamanikkam* 210 CLR at 241 [58] that whether a decision would or would not have been made without a particular factual finding depends on indications to that effect in the decision, the reasons for decision or the decision-making process. They said that unless it was possible to say on a proper analysis of the decision and the reasons for decision or the decision-making process, that if a particular factual finding had not been made the decision in question would not have been reached, then it was impossible to say that the decision was based on that finding.

48           Here, the tribunal indicated that it would give “no weight” to objective credible, third party material that corroborated the husband’s claim of fear that the Maoists were still looking for him after he had both left the village and, indeed, had arrived in Australia. These were facts expressed by the headmaster of his own school and the principal of another school. And the Australian Embassy at the second tribunal’s request had specifically enquired of those two persons whether their letters were genuine.

49           The husband had asserted that because of his position as a teacher he was different to his brother even in Kathmandu. This assertion was not capable, in my opinion, of being characterised as “a baseless tactic”. It was but a repetition of the claim that he had consistently made from the outset. Nor was it a matter that could be given no weight simply for the reasons that the third tribunal asserted. While the husband may have given inconsistent accounts as to whether he had or had not sought to solicit these letters or any of them that was irrelevant to the evaluation of the probative material in them. There is, of

course, an imperative that judicial review proceedings do not descend into fact finding on the merits. I am conscious of the bounds which are permitted in that regard. The minister forcefully put in submissions that the third tribunal's findings were open to it. I reject that argument.

50           The third tribunal rejected the appellant's claims on the basis that he could safely relocate to Kathmandu. That rejection depended upon its earlier rejection of what the third tribunal recognised was the corroboration of the husband's claims in the letters. At least at the time the letters were written, he claimed that he was in fear of facing harm there because the Maoists had been searching for him, as the letters corroborated.

51           The third tribunal also said that it gave no weight to his claims because it found that the husband had only recently claimed that the local Maoist insurgents had treated pro and anti-Maoist teachers the same. However, the material in the record demonstrated that this was not a recent assertion by the husband at all; it had always been his claim. The husband resented being required to do what all the other teachers were being made to do. And, as the tribunal found, he was entitled to think that was conduct persecutory of him.

#### **THE EFFECTS OF DELAY AND THE REQUIREMENT TO REPEAT EVIDENCE**

52           I am also of opinion that the third tribunal's reasons do not recognise expressly the effects of the delay that had been occasioned in the determination of the appellants' claims through no fault of their own and the consequential need for the husband to repeat his evidence on at least three occasions to the three differently constituted tribunals. This was a factor that Weinberg J noted could have significance in the evaluation of whether the tribunal had made a jurisdictional error in particular circumstances: *SZIFF v Minister for Immigration and Citizenship* (2008) 102 ALD 366 at 380 [83].

53           Here the husband had been required to give his evidence orally to three different tribunals. It would scarcely be surprising for him to have diverged in the expression of his claims or his recollections of some events, including ones such as the provenance of, or circumstances surrounding how, the letters came to be written by the school principals. In such circumstances it is important for decision makers to have regard to the fact that human memory is not the same as a tape recording or a photocopy of a document. It cannot be

expected, and indeed, it would be remarkable for witnesses to give their evidence some time apart, in exactly the same terms, or to remember events verbatim. This is so even when witnesses have given their evidence as honestly as possible, with the same degree of care and precision on each occasion.

54 Weinberg J discussed in *SZIFF* 102 ALD 336 the position of a third tribunal assessing evidence where the appellant had given seven different accounts. He held that the decision-maker had to take particular care to ensure that it did not overlook, in assessing the witness' overall consistency, the combined effect of delay and the disadvantage to the appellant of having to repeat on several occasions a detailed account of past mistreatment. He was also mindful of the fact that there had been, as the third tribunal in this case also found, persecutory treatment of the appellant. And, as Gleeson CJ observed in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at 475 [8] people who claim to fear for their lives admit to having told lies in an attempt to advance their claims for protection, but that did not necessarily destroy their credibility. He observed that that might simply demonstrate their fear. There, his Honour noted that the tribunal had rejected evidence that was not inherently improbable or contradicted by objective facts as "implausible". The High Court overturned the decision.

55 Here the third tribunal did not reject the account given by the headmasters in the letters. Nor did it suggest that their account was untruthful or inaccurate, albeit that it commented on the infelicities of expression of the two versions written in English. Rather, the third tribunal, accepting that those letters gave credible support to the husband's claim of having a real well-founded fear of persecution after moving to Katmandu, dismissed them as having no weight. I am of opinion that this dismissal was a misuse of the decision-making powers of the tribunal. It was not proper, genuine or realistic consideration of the claims.

56 Ultimately, it was the third tribunal's function to consider the actual claims the appellants were making based on the evidence before it. It was entitled to select and give such weight as it considered appropriate to parts of that evidence. But, in my opinion, it was not entitled to do what I consider it plainly to have done in this matter, namely to ignore genuine, credible and relevant evidence without evaluating it, particularly when that evidence supported the appellants' case as the third tribunal recognised.

57 This was not a case in which such evidence could be put to one side as incapable of assisting the appellants' claims because their credibility had been so destroyed that such other material was incapable of restoring their credit or supporting their claims. The letters were not in that category: *NAIS 228 CLR at 526 [172]* Callinan and Heydon JJ observed:

“The answer to these arguments is that unfairness can spring not only from a denial of an opportunity to present a case, but from denial of an opportunity to consider it. Failure by the Tribunal to consider a case can arise not only from obstruction by the Tribunal of its presentation but also from self-disablement by the Tribunal from giving consideration to that presentation by permitting bias to affect its mind: either way the case is prevented from having a fair impact on the Tribunal's mind. Another way in which the Tribunal can disable itself from giving consideration to the presentation of a case arises where it permits so much time to pass that it can no longer assess the evidence offered.”

58 Here, the third tribunal disabled itself from assessing the husband's case in relation to his fear of persecution in Katmandu, by putting to one side as having no weight, letters that corroborated his claim that he continued to be pursued in Katmandu and by characterising as “a baseless tactic” the continued maintenance of his original claim that as a teacher in Katmandu he feared suffering persecution because the Maoists were still pursuing him.

### **APPREHENSION OF BIAS**

59 The Minister did not seek to defend the third member's use of the term “baseless tactic”. However, the Minister relied on the way in which the trial judge below discussed this issue. His Honour held that because there was no transcript of the third tribunal's hearing in evidence, and there was no positive evidence that school teachers were treated differently from other members of the population in large cities like Katmandu, the third member's observations were acceptable. He said that the passage complained of in [141] of the third tribunal's decision did not contain a rejection that the appellant was a school teacher. Rather, the trial judge said that his attempt to demonstrate a significant difference between himself and his brother as a ground for his claim of fear of persecution, was made without evidence of that claim and was, in that context “a baseless tactic” ([61]). He found that this could not sustain a claim of apprehended bias.

60 I am of opinion that his Honour erred in that conclusion. Not only was the attribution of a “baseless tactic” made without evidence, it was contrary to the evidence. The letters clearly supported the husband's assertion of on going behaviour by the Maoists in relation to

him, even after he left Nepal. This claim was one that the husband had been making from the time of his application for a protection visa onwards. It was not, as the tribunal sought to characterise it, a last resort to which the husband had been driven in providing an explanation as to why he would be treated differently to his brother, given the questioning of the third tribunal. Indeed, the assertion in [141] that that was some “tactic” to “address the potentially adverse impression the tribunal disclosed to him after he said that people who used to be in hiding from the Maoists were now living out in the open”, was, in my opinion, an unfair characterisation. A person with an open and fair mind, in evaluating the appellant’s claims, would not have been able to express that view.

61           A fair-minded lay observer or properly informed lay person would find the use of the language “baseless tactic” disturbing in the context of this tribunal’s reasoning. Coupled with the third member using the “no weight” formulation to shut out powerfully corroborative independent evidence, verified at the tribunal’s earlier request by the Australian Embassy in Nepal, I am satisfied that a fair-minded lay observer or properly informed lay person would regard this tribunal member as having an apparent bias against the husband’s account: *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 at 435-436 [32]-[34] per Gleeson CJ, Gaudron and Gummow JJ.

62           In the course of giving these reasons, I have not deliberately ignored the trial judge’s decision on a number of the points. Rather, his Honour accepted the minister’s submissions made to him in respect of the claims of delay and repetition. I have dealt with his Honour’s consideration of the apprehension of bias and the use of “baseless tactic”. His Honour also accepted the minister’s submissions in relation to taking into account relevant considerations. His Honour considered that it was logical for the tribunal to give no weight to the two letters from the husband’s school, because their contents conflicted with other evidence that the appellant gave. As I have indicated, I do not consider that the contents conflicted with that evidence, nor did the tribunal so find. Rather, its findings that all teachers were treated alike were based on a misapprehension of the appellant’s original claims. He claimed that he had been subjected to persecutory treatment because of that generic-like treatment that forcibly denied his right to freedom of political opinion.

63           It was common ground between the parties that this was not a case in which the husband's evidence was so undermined that anything offered as corroboration could be treated as part of a poisoned well, so that the corroboration in the letters was beyond redeeming him: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at 70 [49] per McHugh and Gummow JJ. Likewise, his Honour, having concluded that it was acceptable for the third tribunal to treat the letters as having no weight, the trial judge found that the third tribunal had adequately set out reasons demonstrating that it had given genuine consideration to those letters. I am satisfied that finding was erroneous for the reasons I have given.

64           It follows that I am satisfied that the tribunal made jurisdictional errors in its constructive failure to exercise its jurisdiction and in its apparent bias in the way in which it dealt with the letters and the evidence of the husband in relation to his claims, calling it a baseless tactic.

65           I am of opinion that the appeal should be allowed. The decision of the tribunal must be quashed.

I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated:       22 December 2009

Counsel for the First and Second       J R Young  
Appellants:

Solicitor for the First and Second       Simon Diab & Associates  
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Solicitor for the First Respondent: DLA Phillips Fox

Date of Hearing: 23 November 2009

Date of Judgment: 24 November 2009