FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Multicultural & Indigenous Affairs v SZFDJ [2006] FCAFC 53

IMMIGRATION - Refugee Review Tribunal – jurisdictional error – claim of well-founded fear of persecution by reason of membership of a social group (male homosexuals) in Bangladesh – Tribunal's conclusion based on identification of two sub-groups of homosexuals in Bangladesh and assignment of visa applicant to one of those groups – failure to advert to one of two sources of country information which distinguished between the sub-groups – whether denial of procedural fairness

Applicant A169 of 2003 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 8
Minister for Immigration & Multicultural & Indigenous Affairs v VOAO [2005] FCAFC 50
SFGB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 231
SZBOV v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 1407
SJSB v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 225
Paul v Minister for Immigration & Multicultural Affairs (2001) 113 FCR 396
MZWBW v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 94
Kioa v West (1985) 159 CLR 550
VEAL of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 222 ALR 411
Re Refugee Tribunal; Ex parte Aala (2000) 204 CLR 82
Stead v State Government Insurance Commission (1986) 161 CLR 141

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS -v- SZFDJ and REFUGEE REVIEW TRIBUNAL

NSD 925 of 2005

RYAN, TAMBERLIN and MANSFIELD JJ
28 APRIL 2006
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 925 of 2005**

On appeal from a Judge of the Federal Court of Australia

BETWEEN: **MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS**
Appellant

AND: **SZFDJ**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **RYAN, TAMBERLIN and MANSFIELD JJ**
DATE OF ORDER: **28 APRIL 2006**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent's costs of the appeal, such costs to be taxed in default of agreement.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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AND:	**SZFDJ** First Respondent
	REFUGEE REVIEW TRIBUNAL Second Respondent

JUDGES:	**RYAN, TAMBERLIN and MANSFIELD JJ**
DATE:	**28 APRIL 2006**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal from orders of the Federal Magistrates Court of 19 May 2005 in the nature of certiorari and mandamus directed to the Refugee Review Tribunal ("the Tribunal") quashing a decision of the Tribunal of 13 October 2004 and directing the Tribunal to consider the applicant's application according to law. The decision of the Tribunal had been to affirm a decision of the appellant Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") refusing the applicant, now the first respondent, SZFDJ, a protection visa.

2 SZFDJ is a Bangladeshi citizen who arrived in Australia on 19 February 1999 and applied for a protection visa on 22 March 1999. In his initial statement in support of his application, he claimed to have been actively involved in student politics in Bangladesh as a supporter of the Bangladesh National Party ("BNP") and asserted that, in the course of those activities, he attracted hostility and physical violence from supporters of the Awami League who also looted his home and assaulted his father. He claimed that, after the Awami League's accession to power in 1996, he and a friend were, on 26 March 1997 attacked in a café by Awami thugs. As a result of that attack, he said, he had been hospitalised for nearly a

month in a private clinic. His application for a protection visa based on a fear of persecution by reason of his political opinions was refused by a delegate of the Minister on 20 April 1999.

3 However, before his application for review of that refusal was heard by the Tribunal, he abandoned his reliance on a fear of persecution by reason of political opinions and claimed, instead, to fear persecution in Bangladesh by reason of his homosexuality. His statutory declaration raising that new ground contained these paragraphs;

> *'2. I refer to the statement which I signed on 20 March 1999. This statement was prepared by my previous adviser who advised me what to say. I now advise, the Tribunal that I was never involved in politics and the claims that are contained in that statement from paragraph 3 on relating to my alleged involvement in political activity are not correct. I apologise to the Tribunal for providing this incorrect and misleading information. When I came to Australia, I did not understand what I was doing and relied on the advice that was given to me by my then agent. I now realize that it is very improper to provide misleading information. I can only ask the Tribunal to understand that I was inexperienced with immigration laws and did not understand what I was supposed to do.*
>
> ……
>
> *5. I am the only son of my parents' three children. My father has a small transport business. He and my mother are very religious and pray five times a day and keep all the other Muslim observances. I was brought up in this family home and felt uncomfortable as a teenager, when I began to understand my sexual orientation. I felt sexually attracted to men, not women. I had my first sexual experience when I was studying for my Higher Secondary Certificate at college with a fellow student Himmel, whom I found to be very attractive. I also enjoyed sexual experiences with another fellow student, Russell Mustafizur Rahman, who came to Australia at the same time as me. In Australia, Russell and I continued for a while to maintain a sexual relationship. However, this was not an exclusive sexual relationship. In Australia, I met my cousin Amir Hossain Babu, who is openly gay and is known to be gay by other people in the Bangladesh community. I was attracted to him sexually. Unfortunately, Amir was not in Sydney when I arrived, he only returned after I had lodged my refugee application. He therefore was not able to help me at the time when I was preparing my original application. I started to live with him, also with Russell. After some months, Russell became upset with me and left. I now no longer have any contact with him.*
>
> *6. Since then, I have continued to live with Amir. We maintain a sexual relationship which again is not exclusive. Amir has casual sexual*

contacts with other people and I too have had sexual contact with other men since I have been here. We have both joined the Taxi Club in Flinders Street and we go there regularly, as well as to other gay venues.

7. Other Bangladeshis have started to gossip about me as they gossip about Amir. I know people here think I am gay. I have never exposed. myself to my parents, but I think that they may be aware about me from gossip, which has returned to Bangladesh.

8. As the only son of my parents, Bangladeshi cultural traditions require me to marry and care for my parents when they are old. It is a real disgrace in Bangladesh culture for a son, especially an only son, to break this tradition and to be gay. My parents will certainly force me to marry. I have no sexual interest in women and do not believe that I can fulfill properly the role of a husband. I do not wish to marry.

9. In Australia, I have learnt to be open about my sexual orientation and I do not believe that it will be possible for me to hide myself and my lifestyle if I had to return to Bangladesh.

10. I am afraid of what will happen if I go back to Bangladesh and people find out about me. The police in Bangladesh are corrupt and it is well known that they harass and blackmail homosexuals. I do not believe my life will be safe in Bangladesh if I am exposed as a homosexual there and I ask to be given protection in Australia.'

4 In the course of its reasons for refusing SZFDJ's application for review of the delegate's decision, the Tribunal reviewed the evidence in support of his second claim to a well-founded fear of persecution. The evidence included that of AAAA, a Bangladeshi national now resident in Australia, who is also homosexual and related by marriage to SZFDJ and who has returned to Bangladesh for several extended visits since his arrival in this country in 1989. As well, the Tribunal reviewed a body of "country information" directed to the circumstances of homosexuals in Bangladesh. In the light of the whole of the evidence, the Tribunal formulated its "Findings and Reasons" in these terms;

'….. I cannot, therefore, even be certain that the applicant is homosexual, as he claimed. The documents he submitted in support of this claim are easily obtained. The documents he submitted attesting to his membership of gay clubs, as evidence of his sexual orientation, are dated two years or more after his arrival in Australia and subsequent to his submission of a claim to protection on the basis of his claimed homosexuality. The copy of hand written notes by his agent are written in the second person, which may be the agent's note-taking style, but which could just as easily be what he was telling the applicant/client, rather than the other way round, as they are represented to be. The sequence of events surrounding his two statements of claim is consistent with the suggestion of his first adviser that he changed the basis of his claim for

protection because, after his primary claims were submitted, there was a change in Government in Bangladesh, which undermined the political basis of his primary claims.

However, I cannot be certain that this is what occurred. I cannot be certain that the applicant is or is not homosexual, as claimed. I will therefore decide this Review assuming (without deciding) that this is the case.

It is clear that one has to be careful in characterising the different groups of people involved in different ways in male-on-male sexual activity in Bangladesh. The different groups are clearly identified in the country information above. I accept, for the purposes of considering the applicant's claims, that male homosexuals constitute a particular social group for Convention purposes. This conclusion is reinforced by the section of the Naz report dealing with the formation of the two support organisations, one specifically directed to men with a homosexual identity and the other directed to men within the koti/panthi *frameworks. (I note, however, that country information refers to the possibility of homosexual men marrying while maintaining their homosexual identity. This could be thought to be inconsistent with Australian concepts of homosexual identity. Therefore, gay terminology needs to be used very carefully, as words may not have exactly the same connotations in Bangladesh as in Australia.)*

The country information available to the Tribunal is ample in some areas and very poor in others. This arises from the culture of the country. It is clear that there is flourishing male-on-male sexual activity in Bangladesh and that the (mostly young) male prostitutes are on occasions abused by the police and gangs of thugs. Much of the reporting on the harsh treatment of male homosexuals in Bangladesh concerns these people. Much of the rest of the reporting concerns "kotis" - men who are overtly effeminate and have traditionally assumed the passive role in homosexual intercourse (although this appears to be changing). The country information submitted by the applicant amply documents this abuse.

There is comparatively little reporting on male homosexual relationships (as distinct from sexual activity). There are various reasons for this. From country information, I believe that the main reasons are that Bangladesh is overwhelmingly a male society and that sexual orientation or activity is simply not a common or accepted topic of conversation. It is <u>not</u> that people are forced to be silent; it is that people simply talk about other things (original emphasis).

Nevertheless, there is more than enough information available to assess the applicant's claims. He stated in an "updating statement" submitted on 17 August 2004 that "the situation for gay people in Bangladesh is very bad and dangerous". He referred to facing torture and death. I do not accept these statements. His own evidence and that of his witness show them to be at least a gross exaggeration. In addition to the evidence of the Naz report and the more recent evidence quoted above of gay networking via internet, the applicant himself stated that he had had a relationship for some years before coming to Australia with another male, who came to Australia with him. His witness - who said that he was homosexual - is a frequent visitor to Bangladesh. I am unable to accept, therefore, the applicant's very broad description 1 of the

situation in Bangladesh for male homosexuals. Such evidence as there is regarding abuse of men who have sex with men largely refers to attacks on "kotis" and even this does not occur everywhere in Dhaka - for example, the Naz report quoted above refers to several sites as being pickup spots which are free of this type of harassment.

He claimed that he would be forced to marry. Again, country information which I accept shows this not to be true. It is true that pressure on men and women to marry - both familial and societal - is strong. But it is also clear from the information quoted above that a person may resist it if he or she chooses. I find that the applicant has a choice and would be able to exercise his right to decide not to marry (original emphasis).

There would of course be consequences, whichever way he chose. However, I am unable to accept that those consequences would in themselves constitute harm amounting to persecution. If the applicant were to reject the pressure to marry, there is no evidence before me - the applicant adduced none - that the dismay in his family and the critical reaction of non-family members would result in consequences so serious as to constitute harm amounting to persecution. Such evidence as I do have, quoted above, points to a different conclusion, that such a choice is made on occasions and that families do on occasions accept it, however reluctantly and unhappily.

The applicant stated that he would not be able to involve himself in social or religious activities. Again, this flies in the face of country information. The Naz report specifically states that the "Kotis" in their workshops were regular attendees at the mosque on Fridays. These were the most publicly conspicuous of the participants in the Naz workshops. In addition, pick-up places mentioned above include 3 religious sites (sites 2, 9 and 12).

There is also no independent evidence to support the assertion that the applicant's social life would be adversely affected. Clearly, his witness's social life in Dhaka has not been affected, since he returns there to meet his friends. I accept that there will be people who, knowing, if they do, that he is homosexual, will shun him or even say unpleasant things to him. That situation is regrettably not unique to Bangladesh. It may even be more common in Bangladesh, given that it is, generally speaking, a conservative, male-dominated Muslim society. However, there is no independent evidence before me and I do not accept that this behaviour would be so serious as to amount to persecution.

I do not accept that the applicant will be "treated as a lower class animal", as he claims, or that he will get humiliations and threats or that he would be attacked physically. This did not happen to him while living in Bangladesh, despite his maintaining a homosexual relationship for some years before coming to Australia. The Naz report makes no mention of this as being a problem for any of their workshop participants. The applicant's witness recounted an incident where he was assaulted by two policemen, but, when their officer arrived, he was well treated, was advised that he was in a place where it was not wise to be and was consulted regarding education in Australia. Clearly, the witness's Australian citizenship and knowledge of English played a part in this outcome. But, even in Sydney, being in the wrong place at the wrong time can have serious consequences, whether one is homosexual or not and I do

not accept that this account in itself constitutes proof that there is a real chance that the applicant would suffer physical attack in Bangladesh simply for reason of homosexuality. I note in this context that the witness has not been deterred from making several visits to Bangladesh.

Country information which I accept and which is quoted above shows that gay Bangladeshis, including in particular the very conspicuous "Kotis," are able to look for partners in many places openly and safely. Indeed, this information includes the fact that, adjacent to some pick-up sites, there are rooms for hire for casual sex. I was also struck by the account of one "koti"- quoted above - who lives with his "panthi" as husband and wife - even though he came to miss his friends at the park and returned, including to supplement his income. He has taken drugs to enlarge his breasts, in order to increase his clients' satisfaction. These are not the actions of a person who fears detection or who fears persecution.

As mentioned above, according to country information which I accept, the abuse to which some homosexual Bangladeshis are subject in some places is suffered principally by the "kotis", because of their effeminate manner and, often, appearance. Men who avail themselves of their services, the "panthis" are not so abused. This is because they are seen to be "masculine", in that they are the penetrator and not the penetrated. The claims of the applicant and the photos the applicant submitted show that he does not identify himself as a "koti".

The applicant's adviser's submission of 8 October states that the applicant "fears that he would not be able to fulfil his sexual orientation needs and engage in consensual homosexual activity" in Bangladesh. Taking all the above into account, I do not accept that this fear is well founded and find that the applicant would be able to fulfil his sexual orientation needs and engage in consensual homosexual activity, without suffering harm amounting to persecution.

For all of these reasons, I do not accept that there is a real chance of the applicant suffering harm amounting to persecution in Bangladesh for a Convention reason should he return there in the foreseeable future.

I find that the applicant does not have a well founded fear of persecution for reason of his membership of a particular social group or for any other Convention reason.'

Accordingly, the Tribunal affirmed the delegate's decision not to grant a protection visa.

5 The grounds of SZFDJ's amended application to the Federal Magistrates Court for review of the Tribunal's decision were as follows;

'1. The applicant was denied procedural fairness.

<u>Particulars</u>

(a) The Tribunal failed to disclose the gist of the document upon which it placed considerable reliance in its decision, that being

the document at [sic] *appears at RD 371-501.*

(b) The Tribunal failed to disclose to the applicant its conclusion that he did not identify himself as a "kothi", or to ask him whether he identified himself as a "kothi".

2. The Tribunal failed to address the totality of the applicant's case and so committed jurisdictional error.

Particulars

(a) Failure to address the issue of whether the applicant could live a homosexual "lifestyle" and express his sexual identity openly, as opposed to merely having access to homosexual sex.

(b) The Tribunal failed to consider the bulk of information submitted to it by the applicant's solicitor, and evidence at hearing, as to the experiences of homosexual males in Bangladesh.

3. The Tribunal failed to address an issue which arose squarely from its own findings, and which issue was required to be addressed if the Tribunal was to complete the exercise of its jurisdiction.

Particulars

(a) Failure to address the issue of how the police and petty thugs would perceive the applicant.

4. The Tribunal failed to ask itself a question that was required to be asked if it was to determine whether the applicant had a well founded fear of persecution.

Particulars

(a) Failure to address the issue of how the police and petty thugs would perceive the applicant.

5. The Tribunal drew a conclusion of fact – that the applicant himself could resist pressure to marry and procreate – in the complete absence of evidence probative of that conclusion.'

Ground 2 was abandoned at or before the hearing by the Federal Magistrates Court.

6 In its reasons after hearing the application for review of the Tribunal's decision, the Federal Magistrates Court observed that the evidence before the Tribunal had documented a distinction drawn in Bangladesh between "kothis", a term sometimes spelt "kotis", and described by his Honour as applied to men who are sexually penetrated and "panthis" being "those men who sexually penetrate other men." The learned Federal Magistrate also noted evidence "to the effect that homosexual men are subject to violence, robbery and extortion by the police and by thugs who are known as mastaans" and that "evidence about abuse of men

who have sex with men largely refers to attacks on kothis."

7 The Federal Magistrates Court next recorded that the Tribunal "did not accept the applicant's claims that;

> *'a) he would be forced to marry;*
>
> *b) that the consequences of the Applicant's not marrying would constitute harm amounting to persecution;*
>
> *c) that he would not be able to involve himself in social or religious activities;*
>
> *d) that his social life would be adversely affected; or*
>
> *e) that he would be treated as a lower class animal or would be subject to humiliation, threats or physical attacks.'*

8 The learned Federal Magistrate highlighted this passage from the reasons of the Tribunal;

> *'As mentioned above, according to country information which I accept, the abuse to which some homosexual Bangladeshis are subject in some places is suffered principally by the kothis because of their effeminate manner and often appearance. Men who avail themselves of their service, the panthis, are not so abused. This is because they are seen to be masculine in that they are the penetrator and not the penetrated. The claims of the applicant and the photos submitted show that he does not identify himself as a kothi.'*

9 His Honour then noted that the Tribunal "did not accept that the Applicant had a well-founded fear and found that the Applicant would be able to fulfil his sexual orientation needs and engage in consensual homosexual activity without suffering harm amounting to persecution." It was next observed in the reasons below that Counsel for the Applicant had identified the following three grounds on which the Court could find jurisdictional error;

> *'a) denial of natural justice;*
>
> *b) failure to ask the right question; and*
>
> *c) drawing factual conclusions in the complete absence of evidence.'*

10 The first of those claims, invoking a denial of natural justice, was rejected for the

reason that the "country information" allegedly not disclosed to the Applicant had been put forward by him or would have been well known to him and his solicitor who had been present throughout the Tribunal hearing. Secondly, s 424A of the *Migration Act 1958* (Cth) ("the Act") had no application in relation to the "country information" because it was just about a class of persons of which the Applicant or another person was a member and, accordingly, was excluded by s 424A(3)(a).

11 The learned Federal Magistrate also declined to find that there had been a denial of procedural fairness by the Tribunal's not disclosing its conclusion that the Applicant had not identified himself as a kothi or its failure to ask him whether he so identified himself. His Honour went on to observe that;

> *'… Clearly, there was a considerable amount of evidence of which the applicant was aware that kothis were the more effeminate of the type of homosexuals that are found in Bangladesh. The Applicant put forward photographs showing him and a variety of other people, presumably all or most of whom were homosexual, engaged in social activities. Several of those people appeared to be dressed as women. The Applicant did not appear to be dressed as a woman; he in fact was dressed as a male, albeit wearing a string of beads around his neck. There was one photograph of the Applicant with his arms around another young man who was bare-chested, and the applicant had his arms around him from behind. It was these photographs and the applicant's other material from which the Tribunal drew the conclusion that the Applicant did not regard himself as a kothi but as a panthi and as such would not be subject to the discrimination or the persecution which the Tribunal was prepared to accept was visited upon kothis in Bangladesh.*
>
> *Mr Johnson submits the question of whether the Applicant identifies as a kothi or would be seen as a kothi was an issue which was obviously* [sic] *on the known material, without or without regard to the nature of the decision to be made. As the material plainly raised the question of kothis being at particular risk, there was obviously also an issue whether the Applicant fell within that particular group at risk. It follows that that was not a matter that the Tribunal was obliged to put to the applicant, and the decision of* Commissioner for ACT Revenue v Alphaone Pty Ltd *(1994) 49 FCR 576 at 591-592, supports the Respondent and not the Applicant.*
>
> *In my view, the question which should have been asked is the question which was put by Mr Karp for the Applicant. The question was not whether the Applicant regarded himself as a kothi but how the Applicant would be regarded by other people, the police and these petty thugs known as 'mastaans'. The Applicant was not asked whether he was a kothi but there is force in the suggestion by Mr Johnson of counsel that it was up to the Applicant to make that point. The evidence, to my mind, does not enable the strong conclusion to be drawn by the Tribunal that the Applicant did not identify himself as a kothi. Certainly the photographic evidence shows a small*

number of people dressed as women, in fact a grand total of three, but the vast majority of people were all dressed as men. Whether the Court is meant to accept the fact that only three of those people were kothis and all the others were panthis is a matter that is difficult to accept.

In my view there is some force in the Applicant's submissions, although whilst Mr Karp of counsel regarded this point as stronger than his third point which he argued, in my view this point is only a relatively minor point as far as the applicant's case is concerned. The question of the perception of the applicant by police and petty thugs is, to my mind, a matter that relates to the applicant's fifth ground, the claim of the making of a finding of fact without evidence. In this case, the applicant relies on the decisions of the Full Court of the Federal Court in SFGB v Minister for Immigration & Multicultural & Indigenous Affairs *[2003] FCAFC 231; (2003) 77 ALD 402. He also relies on* Minister for Immigration & Multicultural & Indigenous Affairs v VOAO and VOAP *[2005] FCAFC 50. This is in fact a no evidence ground, or as it was argued, which of course relates to Mr Karp's claim for the Applicant that the Tribunal had made factual conclusions in the complete absence of evidence. They particularly turned on the Applicant's claims about there being extreme pressure on him to marry in Bangladesh.*

In my view, the ground is relevant to another claim arising out of the evidence in support of the applicant that is the evidence of the Applicant's witness in support of the claim that known homosexuals are subject to or can be subject to bashing and humiliation not only by petty thugs but also by the police. For the respondent, Mr Johnson of counsel pointed out that the no evidence ground is unlikely to be a jurisdictional error unless it refers to a matter that is a jurisdictional fact.'

12 After quoting extensively from a judgment of a Full Court of this Court in *Applicant A169 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) FCAFC 8 at [31], the learned Federal Magistrate referred to *Minister for Immigration and Multicultural and Indigenous Affairs v VOAO* [2005] FCAFC 50 and *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231; (2003) 77 ALD 402, and continued, at [20] of the reasons below;

'… it appears to me that the situation in both of those cases was that not only was there no evidence to support a conclusion by the Tribunal, but there was evidence to the contrary. I refer in particular to paragraphs 9 and 10 of their Honours in VOAO *and paragraphs 25 and 28 of their Honours in* SFGB. *In my view the Full Court in* VOAO *characterised the matter accurately at paragraph 13 by saying:*

> The situation that arose in this case might preferably be described as a failure to take account of relevant material rather than no evidence. However, the label does not matter. On any view of the matter, the Tribunal fell into jurisdictional error.

With respect, their Honours words seem to me to apply just as well to the

> *situation in SFGB. In my view the evidence relating to the extreme pressure on the applicant to marry falls into just that situation, that not only was there no evidence to support that conclusion by the Tribunal but there was evidence to the contrary.'*

13 Another example of what the Federal Magistrates Court regarded as the Tribunal's falling into the same type of error was its treatment of the evidence of the witness AAAA to the effect that he had been assaulted in Bangladesh by two policemen but had been spared further mistreatment by the intervention of their superior officer. In respect of that evidence, the Tribunal had commented;

> *'… even in Sydney, being in the wrong place at the wrong time can have serious consequences whether one is homosexual or not. And I do not accept that this account in itself constitutes proof that there is a real chance that the applicant would suffer physical attack in Bangladesh for reason of homosexuality. I note in this context, the witness has not been deterred from making several visits to Bangladesh.'*

14 However, the learned Federal Magistrate regarded the evidence of AAAA as demonstrating a real chance that *SZFDJ*, if returned to Bangladesh, would suffer a physical attack by reason of his homosexuality. His Honour concluded, at [24] of his reasons;

> *'To my mind it is not a fair comment to say that "even in Sydney being in the wrong place at the wrong time can have serious consequences, whether one is homosexual or not". If the Tribunal member is suggesting that there are places in Sydney where one can expect to be assaulted by police of the rank of constable but not subject to the same ill treatment by police inspectors, this is the most extraordinary proposition. The evidence does not support the construction that the Tribunal put on it. It is evidence entirely to the contrary. As such, it is on all fours with the situation in* Minister for Immigration & Multicultural & Indigenous Affairs v VLAR *and* SFGB v Minister for Immigration & Multicultural & Indigenous Affairs. *The very question of suffering violence or humiliation on account of being a homosexual in Bangladesh goes to the very heart of the Applicant's claim. In my view, this is quite clearly a jurisdictional error. I propose therefore to grant the application.'*

The Minister's Contentions on the Appeal

(a) The availability of the "no evidence" ground.

15 Counsel for the Minister contended that, if the Tribunal had made a finding of fact for which there was no evidence, that did not amount to jurisdictional error because none of the facts so found was a "jurisdictional fact". The three findings by the Tribunal for which it might be said there was no evidence as identified by Counsel for the Minister were:

(i) that SZFDJ would not be perceived by police or petty thugs as a kothi;
(ii) that SZFDJ would be able to exercise his right not to marry and any adverse family reaction to the exercise of that right would not amount to persecution;
(iii) that there was not a real chance that SZFDJ would suffer physical attack in Bangladesh for reasons of homosexuality.

16 As to the first of those matters, it was submitted on behalf of the Minister that the Federal Magistrate had himself acknowledged that there was some evidence which supported a finding that SZFDJ did not identify himself as a kothi. Moreover, the Tribunal had discerned some evidence in the photographs described in the first of the paragraphs reproduced at [11] above that supported a finding that SZFDJ would not objectively be identified as a kothi as distinct from simply homosexual. As well, it was submitted that SZFDJ's own description of how his relatives and friends, including his parents, had not known while he was in Bangladesh that he was gay afforded further evidence in support of this finding imputed to the Tribunal.

17 The second matter going to the right not to marry was said to be supported by the statement in SZFDJ's statutory declaration of 1 October 2004 that "I cannot get married and pretend that I am straight either". In any event, it was said to be open to the Tribunal in the absence of evidence supporting the rejection, to reject the first respondent's claim that he would be forced to marry. Finally, in this context it was said that whether the consequences of not marrying would amount to persecution was a question of fact for the Tribunal; *SZBOV v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1407 at [19].

18 In respect of the third question of fact, whether there was a real chance of the first respondent's being physically attacked in Bangladesh simply by reason of his homosexuality,

Counsel for the Minister submitted that there were other inferences available from the evidence of AAAA including that he had been attacked by the police because he had been "in a place where it was not wise to be"; ie, in the wrong place at the wrong time, or had been thought to have been engaged in prostitution.

19 The analysis by Counsel for the Minister of the Federal Magistrates Court's treatment of each of the three matters just discussed was said to support the view that his Honour had acted on his own view of how the evidence should have been treated and had impermissibly strayed into "merits review". The Tribunal was not required to be satisfied by the evidence that SZFDJ was not entitled to a protection visa. Rather, if the Tribunal was not satisfied of the existence of a well-founded fear of persecution for a Convention reason it was bound to affirm the delegate's refusal of a visa; *SJSB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 225. Mere illogicality in the process of reasoning which leads the Tribunal to reject a particular assertion of fact by an applicant does not amount to jurisdictional error. This is not a case where the Tribunal's treatment of particular factual issues either gave rise to the inference that it had asked itself a wrong question or applied inappropriate criteria or created a reasonable apprehension of bias.

(b) Did the existence of evidence to the contrary vitiate the Tribunal's finding as to the existence of pressure to marry?

20 Counsel for the Minister drew attention to the passage from the reasons of the Federal Magistrates Court which is reproduced at [12] above and contended that the mere existence of a competing body of evidence does not constitute "relevant material" which the Tribunal is bound to take into account; *Paul v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 396 which was approved by another Full Court of this Court in *MZWBW v Minister for Immigration and Multicultural Affairs* [2005] FCAFC 94 at [26]-[27]. The present case is distinguishable from *VOAO* (supra) where it was conceded that jurisdictional error will be established if the Tribunal has made a finding of fact or drawn an inference without the support of any probative evidence. In that case it was said, there had been an incorrect finding by the Tribunal that there was no evidence on a particular point. That finding in turn led to a "compulsorily relevant integer" of the claim for a protection visa not being considered. *SFGB* (supra) is not authority for the proposition that a finding which is a crucial step in the Tribunal's conclusion, if made without evidence, will always amount to jurisdictional error. In the present case, the correct test was applied and there was some

evidence to support the Tribunal's finding of fact.

(c) The Federal Magistrate erred in finding (if he did so find) that the Tribunal had asked itself a wrong question or failed to take into account a relevant consideration.

21 It was pointed out in this context that SZFDJ had not claimed that he would be identified as a kothi and the Tribunal was not bound, or jurisdictionally obliged, to ask whether he would be so perceived. In any event, the Tribunal had made a finding that even "very conspicuous kothis are able to look for partners in many places openly and safely". Moreover, by implication, the Tribunal had not been satisfied that SZFDJ would be identified as a kothi if he were returned to Bangladesh.

SZFDJ's response to the Minister's contentions

22 Mr Karp of Counsel for the first respondent submitted that his case before the Tribunal had been based on "his homosexuality per se". The fact that some of the evidence which he adduced in support of that claim permitted a distinction to be drawn between *kothis* and *panthis* did not entail that acceptance of the claim depended on his categorisation as a kothi.

23 The Federal Magistrate's finding that the evidence of AAAA was entirely to the contrary of the Tribunal's finding that there was no proof that SZFDJ would suffer a physical attack by reason of his homosexuality was open to him. It should not be interfered with unless this Court is persuaded that an inference drawn at first instance was not open. If there is no evidence to support a proposition advanced by the Tribunal which is part of a "complex of facts and issues" going to the ultimate question of the decision-maker's satisfaction as to whether Australia has protection obligations to an applicant, that will amount to jurisdictional error; *SFGB v Minister for Immigration and Multicultural Affairs and Indigenous Affairs* (supra) at [19]-[20] and *Minister for Immigration and Multicultural Affairs and Indigenous Affairs v VOAO* (supra).

The first respondent's notice of contention

24 On behalf of the first respondent, it was contended that the orders of the Federal Magistrates Court ought to be upheld on the following four further grounds in addition to the jurisdictional errors found at first instance;

> *'1. That the decision of the Refugee Review Tribunal was made in breach of the rules of procedural fairness.*
>
> *……*
>
> *2. The Tribunal failed to ask itself a question that was required to be asked if it was to determine whether the applicant had a well founded fear of persecution.*
>
> *……*
>
> *3. The Tribunal failed to address an issue that was required to be addressed if it was to determine whether the applicant had a well founded fear of persecution.*
>
> *……*
>
> *4. The Tribunal drew a conclusion of fact – that the applicant himself could resist pressure to marry and procreate – in the complete absence of evidence probative of that conclusion.'*

25 The following particulars have been supplied of the first of those grounds contending that the Tribunal had contravened the rules of procedural fairness;

> *'(a) The Tribunal failed to disclose the gist of the document upon which it placed considerable reliance in its decision, that being the document that appears at folios 371-501 of the Bundle of Relevant Documents filed in the proceedings in the Court below.*
>
> *<u>Further Particulars</u>*
>
> *(i) Contrary to his Honour's finding at paragraph 13 of his judgment, the first respondent would not obviously have been aware of the report which was not disclosed, or of the contents of that report.*
>
> *(b) The Tribunal failed to disclose to the applicant its conclusion that he did not identify himself as a "kothi", or to ask him whether he identified himself as a "kothi".'*

26 Folios 371-501 of the Bundle of Relevant Documents comprised a publication of some 132 pages entitled "*Sex, Secrecy and Shamefulness*" published in 1997 by the "Naz Foundation International" an international HIV/AIDS and sexual health agency working in Asian countries. SZFDJ, through his solicitors, had submitted to the Tribunal a later, 8 page, publication of Naz Foundation International entitled "*Briefing Paper No 7*" which had been published after May 2002.

27 Mr Karp of Counsel for SZFDJ articulated two separate, but related, complaints about

the Tribunal's treatment of the 1997 publication, *Sex, Secrecy and Shamefulness*. The first was that the Tribunal's failure to disclose to the visa applicant or his solicitor the use to which it considered the document could be put in contradicting the risk of harm to which he would be exposed by reason of his homosexuality, if returned to Bangladesh, itself constituted a denial of procedural fairness. In this context, Counsel relied, first, on *Kioa v West* (1985) 159 CLR 550 where Brennan J observed, at 628;

> *'A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise:* Kanda v Government of Malaya *[1962] AC 322, at p 337;* Ridge v Baldwin *[1964] AC, at pp 113-114 per Lord Morris;* De Verteuil v Knaggs *[1918] AC, at pp 560, 561. The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance. Administrative decision-making is not to be clogged by inquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made. Administrative decisions are not necessarily to be held invalid because the procedures of adversary litigation are not fully observed. As Lord Diplock observed in* Bushell v Environment Secretary *[1981] AC, at p 97:*
>
> > *"To 'over-judicialise' the inquiry by insisting on observance of the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair."*
>
> *Nevertheless in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made.'*

28 That passage was cited with approval in the joint judgment of a Full Court of the High Court in Applicant *VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 ALR 411 where it was observed, at 416 [16]-[17];

> *'[16] What is meant by "adverse information that is credible, relevant and significant to the decision to be made"? As is always the case, what is said in reasons for judgment must be understood in the context of the whole of the reasons. Examining sentences, or parts of sentences, in isolation from the context is apt to lead to error. In particular, what Brennan J said about "information that is credible, relevant and significant" takes its meaning from the point his Honour had made [*Kioa v West *(1985) 159 CLR 550 at 628; 62 ALR 321 at 379-380] only a few sentences earlier: that "[a]dministrative decision-making is not to be clogged by inquiries into allegations to which the repository of the power would not give credence, or which are not relevant to*

*his decision or which are of little significance to the decision which is to be made". Moreover, what is meant by "credible, relevant and significant" must be understood having regard also to the emphasis that his Honour had given earlier in his reasons [*Kioa v West *(1985) 159 CLR 550 at 622; 62 ALR 321 at 375] to the fundamental point that principles of natural justice, or procedural fairness, "are not concerned with the merits of a particular exercise of power but with the procedure that must be observed in its exercise". Because principles of procedural fairness focus upon procedures rather than outcomes, it is evident that they are principles that govern what a decision-maker must do in the course of deciding how the particular power given to the decision-maker is to be exercised. They are to be applied to the processes by which a decision will be reached.*

[17] It follows that what is "credible, relevant and significant" information must be determined by a decision-maker before the final decision is reached. That determination will affect whether the decision-maker must give an opportunity to the person affected to deal with the information. And that is why Brennan J prefaced his statement about a person being given an opportunity to deal with adverse information that is credible, relevant and significant, by pointing out that there may be information, apparently adverse to the interests of a person, which can and should be put aside from consideration by the decision-maker as not credible, not relevant, or of little or no significance to the decision to be made. "Credible, relevant and significant" must therefore be understood as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision. And the decision-maker cannot dismiss information from further consideration unless the information is evidently not credible, not relevant, or of little or no significance to the decision that is to be made. References to information that is "credible, relevant and significant" are not to be understood as depending upon whatever characterisation of the information the decision-maker may later have chosen to apply to the information when expressing reasons for the decision that has been reached.'

29 The first respondent's second complaint about the Tribunal's treatment of the information contained in the 1997 Naz Foundation publication was that it had occurred in the face of a representation by the Tribunal to the visa applicant's solicitor that he would have an opportunity to respond to any new material which had not been discussed in the course of the oral hearing before the Tribunal. The making of that representation was said to have occurred in this exchange between Mr Bitel, the solicitor for the visa applicant, and the Tribunal Member;

MR BITEL: *'…… And I have the problem because I don't know. But if there are and if there's anything compelling, can I ask the Tribunal to at least alert us to that so that I can, if it goes to country information, that I can be made aware of it and I can*

perhaps respond.'

TRIBUNAL MEMBER: *'Yeah, I think the country information, look, let me put it this way, if I discover any more country information which is negative from the applicant's point of view and which I will take into account but which has not been the subject of either discussion today or representation by you, I will write to the applicant about it.'*

MR BITEL: *'Thank you'*

TRIBUNAL MEMBER: *'I think that's the best I can do. Quite frankly, I'm obliged to do it anyway but I have no problem with it. That is if I discover anything new which goes against the applicant's claims I will write and tell you about it (indistinct) But I've gone into this fairly thoroughly up to now so it won't be easy to find anything more. Plus you've helped me by sending me plenty of reading material which I've actually been through quickly. I can't say I've read every word.'*

30 It was accepted that mere departure from, or failure to honour, a representation made by an administrative decision-maker will not, in every case, vitiate the decision. The departure or failure must work a positive unfairness to the person affected by the decision; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 12-13. In some cases, the demonstration of such an unfairness may require affirmative evidence that the person affected held a subjective expectation which caused him or her to do or omit to do something. In other cases, the omission to do something like commenting upon, or responding to, particular material may be a necessary inference from the circumstances.

31 In the present case, Counsel for the first respondent demonstrated that several specific findings of fact by the Tribunal were based squarely on passages in the 1997 Naz Foundation publication.

32 The first such finding was that to be found in the second of the paragraphs from the Tribunal's reasons reproduced at p 5 above. That finding was that the visa applicant's statement that he would not be able to involve himself in social or religious activities "flies in the face of country information." The country information to which the Tribunal there referred was clearly that contained at p 43 of the 1997 Naz publication where it was recorded that;

> *'During the workshop, on Friday, the majority of the participants went to the local Mosque for prayers. All those who stated they were Muslim and were questioned and interviewed said that they participated in the religious festivals and community prayers. All accepted Allah as the one God and Mohammed as his Prophet. None could conceive anything else. I say none, but this is not strictly true. Two gay-identified men found Islam oppressive.'*

33 The second finding in this category was that in the third of the paragraphs reproduced at p 5 above that SZFDJ would not be treated as "a lower class animal." The Tribunal expressly referred to the Naz report on the condition of the workshop participants in that study as making "no mention of this as being a problem for any of their workshop participants."

34 Thirdly, the Tribunal found, in the last of the four paragraphs from its reasons reproduced at p 5 above, that "Gay Bangladeshis, including in particular the very conspicuous "*kotis*" are able to look for partners in many places openly and safely." That finding appears to have been based on the review in the 1997 Naz report of some twelve "sites" which were among twenty-five in Dhaka "identified by the survey team where male sexual partners are available at various times during any given week." The anecdotal evidence about the "*koti*" who lives with his "*panthi*" and had taken drugs to enhance his breasts, which was recorded in the same paragraph of the Tribunal's reasons can be traced to the Naz review of "Site One" at p 58 of the 1997 publication where the "*koti*" concerned was identified as a lift boy in one of the larger hotels who "goes to the park 3 or 4 times a week where he averages 5 clients an evening."

35 The final finding of the Tribunal which can be traced to the 1997 Naz publication also contains an express reference to that publication to the effect that;

> *'Such evidence as there is regarding abuse of men who have sex with men largely refers to attacks on "kotis" and even this does not occur everywhere in Dhaka – for example, the Naz report quoted above refers to several sites as being pickup spots which are free of this type of harassment."*

36 That finding was squarely based on the review by the authors of the 1997 Naz report of the "Sites" noted at [34] above. In respect of "Site One" the authors noted;

> *'Sometimes local police will conduct a raid in the park and arrest specific individuals "for causing a nuisance". Often those arrested will be*

> *blackmailed for money and/or for sex. There are also at times, several "mastans" (young thugs), who harass the kotis physically and verbally, and take money from them, sometimes demanding sex as well.'*

37 As to "Site Two", the 1997 Naz publication observed, at p 58;

> *'There appears to be very little harassment either from police or local security.'*

38 In respect of "Site 9", a "major religious site in a suburb of Dhaka" it was recorded that "on Thursday evenings there are about 120-150 civil *kotis*, professional *kotis* and a few *hijras* operating from this site ….. The average number of clients per night for *kotis* will vary between 3-12. *Kotis* and *panthis* here are usually from lower income groups ….. there appears to be no harassment either by police, local people, or worshippers."

39 In relation to "Site 11" it was observed;

> *'The park is busy six days a week (not Fridays) and those using the park for sexual contact tend to be primarily middle class.* Kotis *are not so common here and a number of sexual networks operate from here to* [sic]. *There has been police and* mastans *(local thugs) harassment from time to time.'*

40 The 1997 Naz publication made no reference to harassment or abuse of *kotis* at any of the other sites reviewed at pp 58-61 of that publication under the heading "Sexual Networking."

41 The learned Federal Magistrate appears not to have understood that there were two Naz reports available for recourse by the Tribunal to obtain country information. The first was the larger, 1997, report which the Tribunal apparently had available from its own resources and the second was the 2002 document which had been adduced in evidence or made available to the Tribunal by SZFDJ's legal advisers. His Honour's misapprehension is borne out, we consider, by these paragraphs from the reasons below;

> *'11. Turning to the first of those claims, which relates to the Applicant's claim of being denied natural justice, I note that this report entitled Sex, Secrecy and Shamefulness is a report that was prepared by an organisation call the Naz Foundation. The particular report was one of two reports by the Naz Foundation prepared upon this subject and the report to which Mr Karp refers is the 1997 version, the earlier of the two. The submission by Mr*

> *Johnson of counsel for the Respondent relating to the alleged failure to disclose country information, being an allegation of a breach of natural justice, says at page 5 of the submission that the Applicant's complaint overlooks the fact that the Applicant himself put forward the country information referred to, in particular the Naz report. As well, the Applicant was represented by a solicitor, Mr Bitel, at the Tribunal hearing. Counsel submitted that the Applicant would plainly have been aware that the material would have made reference to the Naz Foundation. The Applicant and the Applicant's solicitor were present throughout the hearing.*
>
> ……
>
> *13. Mr Johnson submits, and again I believe rightly, that the rules of natural justice do not require an applicant to be informed of country information of which the applicant is obviously aware or which has been put forward by the Applicant. At most, natural justice would require the disclosure of the substance of adverse information that has been sourced from elsewhere and of which the Applicant could not be assumed to be aware.'*

42 It is true that the second Naz foundation report prepared in 2002 had been submitted to the Tribunal by Mr Bitel, the solicitor for the visa applicant. However, there is nothing in the material to which our attention has been drawn which establishes that SZFDJ or his advisers had been "obviously aware" or could be assumed to have been aware, of the earlier, 1997, Naz report.

43 Mr Johnson of Counsel for the Minister sought to overcome this difficulty by pointing out that there was no evidence that the first respondent's solicitor was not aware of the 1997 Naz report. Nevertheless, the concerns expressed by Brennan J in the passage from *Kioa v West* quoted at [27] above are not met by showing merely that a person affected was aware of the existence of a piece of information. He or she must have been given an opportunity to deal with that part of the information which the decision-maker proposed to take into account in arriving at a decision adverse to the interests of the person affected. In the present case, the use which the Tribunal made of the 1997 Naz report and which was not conveyed to SZFDJ or his solicitor was to erect a distinction between *kothis* and *panthis* and draw on some passages from the report as establishing that only persons in the former category of Bangladeshi homosexuals were at risk of persecution in the Convention sense.

44 Another argument advanced on behalf of the Minister in opposition to the notice of contention was that the information in the 1997 Naz report was not "credible, relevant and significant to the decision to be made" in the sense explained by the High Court in Applicant

VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (supra) in the passage quoted at [28] above. It was said on behalf of the Minister that the assessment of credibility, relevance and significance is to be made at the time when, objectively, the decision-maker would notionally have assessed whether or not to dismiss the material from further consideration. We are unable to accept this contention. It is true that the High Court in *VEAL* made it clear that credibility, relevance and significance were not to be measured by reference to a statement by the decision-maker in reasons formulated after the making of the decision that he or she dismissed a particular piece of information from further consideration. However, the corollary does not follow. That is to say, if a decision-maker, in subsequently formulated reasons, indicates that a piece of information was accepted and assumed significance in arriving at the decision, it is not open to a reviewing court to disregard that information in deciding whether the person affected should have been given an opportunity, in accordance with *Kioa v West*, to deal with that piece of information.

45 The importance of the distinction between *kothis* and *panthis* which the Tribunal derived from the 1997 Naz report is underlined by the related argument advanced on behalf of SZFDJ that he was not afforded an opportunity to comment on the conclusion which the Tribunal ultimately reached that he was not a *kothi*. That distinction was apparently not adverted to in the course of the oral hearing before the Tribunal. As Counsel for the first respondent pointed out, his case had been solely based on membership of the social group, male homosexuals. The photographs to which the Tribunal referred in the passage quoted at [8] above were apparently adduced in support of that case and had been taken, we were informed from the Bar table, at a venue, the "Taxi Club" in Sydney, where the distinction between *kothis* and *panthis*, if drawn at all, is probably not as clearly defined as in Bangladesh.

46 It may be that the Tribunal's perception revealed by the passage quoted at [8] above that SZFDJ "does not identify himself as a *kothi"* was attributable to the fact that he had lived discreetly as a homosexual in Bangladesh to the extent that he had never revealed his sexual orientation to his parents; see pars 8 and 9 of the declaration reproduced at [3] above. At all events, the Tribunal's reasoning process made it essential, we consider, for the visa applicant to be afforded an opportunity to deal with whether he perceived himself as a *kothi*. There is also, in our view, much force in Mr Karp's contention that it was at least equally important for the Tribunal to have asked whether SZFDJ would be perceived by others as a *kothi* in

Bangladesh and to have given him an opportunity to deal with that question.

47 The following particulars and "further particulars" have been supplied of the question which, it is alleged in ground 2 of the first respondent's notice of contention, the Tribunal failed to ask itself:

> *'(a) whether the police and petty thugs would perceive the applicant as a "kothi" or a "panthi".*
>
> *Further particulars*
>
> *(i) His Honour erred in finding, at paragraph 18 of his judgment, that the failure to ask this question, "was a relatively minor point as far as the applicant's case was concerned."*
>
> *(ii) His Honour should have found that the failure to ask this question itself amounted to jurisdictional error.'*

48 This ground of the notice of contention is really a reflex of the first ground because the Tribunal's finding that the first respondent did not identify himself as a *kothi* made it unnecessary for it to ask whether he would be perceived as a *kothi* by the police or petty thugs ("*mastaans*") if he were returned to Bangladesh. In this sense, the second ground of the notice of contention serves to emphasise the importance for the first respondent and his advisers of having their attention drawn to the use which the Tribunal proposed to make of the 1997 Naz report in drawing a distinction between *kothis* and *panthis* and its inclination to place SZFDJ in the latter category.

49 The third ground of the notice of contention is a restatement of the second ground as the particulars appended to the third ground recite that the issue which the Tribunal had failed to address was "whether the police and petty thugs would perceive the applicant as a *kothi* or a *panthi*.

50 The fourth ground of the notice of contention is unrelated to the first three and raises the question of whether it was open to the Tribunal to find that the first respondent, if returned to Bangladesh, could resist pressure to marry and procreate. That ground was not pressed in the written submissions filed in support of the notice of contention or in the course of oral argument on the hearing of the appeal. It is therefore unnecessary to consider it further as a separate basis supporting the result arrived at by the learned Federal Magistrate.

Conclusion

51 For the reasons explained at [43] above, we consider that the Tribunal failed to alert the first respondent and his adviser to the distinction which it perceived, on the basis of the 1997 Naz report, between *kothis* and *panthis* in Bangladesh. In our view, the information in the report directed to that distinction was "credible, relevant and significant", in the sense explained by the High Court in *VEAL* (supra), to the decision to be made by the Tribunal. Indeed, it could hardly be regarded as otherwise because the Tribunal put it at the forefront of its reasoning when it observed in the third paragraph of the passage quoted at [4] above that;

> *'one has to be careful in characterising the different groups involved in different ways in male-on-male sexual activity in Bangladesh. The different groups are clearly identified in the country information above.'*

52 After recognising the existence of the difference so described, the Tribunal went on, later in the same passage, to say;

> *'It is clear that there is flourishing male-on-male sexual activity in Bangladesh and that the (mostly young) male prostitutes are on occasions abused by the police and gangs of thugs. Much of the reporting on the harsh treatment of male homosexuals in Bangladesh concerns these people. Much of the rest of the reporting concerns "kotis" – men who are overtly effeminate and have traditionally assumed the passive role in homosexual intercourse (although this appears to be changing). The country information submitted by the applicant amply documents this abuse.*
>
> ……
>
> *Such evidence as there is regarding abuse of men who have sex with men largely refers to attacks on "kotis" and even this does not occur everywhere in Dhaka – for example, the Naz report quoted above refers to several sites as being pickup spots which are free of this type of harassment.*
>
> *The Naz report makes no mention of this [ie humiliation, threats and physical attacks] being a problem for any of their workshop participants.'*

53 The unstated implication in those passages is, we consider, that only male prostitutes and the "overtly effeminate" *kothis* are subject to abuse by police or gangs of thugs in Bangladesh by reason of their membership of a particular social group. From that premise, the Tribunal concluded that there was not a real chance of the applicant's suffering persecution by reason of his membership of a particular social group if he were returned to Bangladesh.

54 In our view, the Tribunal's process of reasoning and its recourse, without reference to the visa applicant or his adviser, to material in the 1997 Naz report, amounted to a denial of natural justice in the sense identified by the majority of the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, where McHugh J observed, at 96 [140];

> *'140 A basic principle of the common law rules of natural justice is that a person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his or her interests that the repository of the power proposes to take into account in deciding upon its exercise [*Kioa v West *(1985) 159 CLR 550 at 628, citing* Kanda v Government of Malaya *[1962] AC 322 at 337;* Ridge v Baldwin *[1964] AC 40 at 113-114;* De Verteuil v Knaggs *[1918] AC 557 at 560, 561]. This does not mean that all material which comes before the decision-maker must be disclosed but, "in the ordinary case … an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made." [*Kioa v West *(1985) 159 CLR 550 at 629.] Thus, the Federal Court has held that information of a non-personal nature relating to changed political circumstances that was decisive to the outcome of a refugee decision ought to have been put to the applicant [*Lek v Minister for Immigration, Local Government and Ethnic Affairs *(1993) 43 FCR 100 at 129;* David v Minister for Immigration and Ethnic Affairs *unreported, Federal Court of Australia, 12 October 1995 at 17 per Wilcox J]. Nothing in the Act, or in s 56 in particular, indicates a clear intention to exclude this principle of natural justice.'*

55 The information which we regard as decisive to the outcome of the Tribunal's investigation in the present case was that *kothis*, by contrast with *panthis*, were significantly at risk of harassment and physical abuse by police or gangs of thugs in Bangladesh. That information was derived from the 1997 Naz report which had not been introduced into evidence by the visa applicant. Whether he or his legal adviser was aware of its contents or general import is not to the point. To adapt the language of Brennan J in *Kioa v West* (supra), SZFDJ was not given an opportunity to deal with the specific information about *kothis* and *panthis* which the Tribunal proposed to take into account. Nor was he given an opportunity to deal with the Tribunal's perception that he, the visa applicant, did not identify himself as a *kothi* and would not be so perceived by police or *mastaans* in Bangladesh.

56 In the light of the conclusion which we have just reached, it is unnecessary to consider whether the Tribunal's failure to accord procedural fairness was compounded, or contributed to, by its apparent disregard of the representation or assurance given to the visa applicant's

solicitor, Mr Bitel. That, it will be recalled, was to the effect that, if the Tribunal discovered any more country information adverse to his case which it would take into account and which had not been canvassed in the oral hearing or the visa applicant's representations, the Tribunal would write to him about it. However, it is relevant to point out, in that context, that, in the present case, unlike that in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, the demonstration of a positive unfairness flowing from the accepted denial of natural justice does not require affirmative evidence that, but for the denial, the visa applicant would have taken, or refrained from taking, a particular course. Here, we consider, the inference is compelling that, had SZFDJ or his adviser been alerted to how the Tribunal proposed to use the distinction between *kothis* and *panthis*, they would have advanced reasons why he was likely, if returned to Bangladesh, to be identified as a *kothi*. Alternatively, they would probably have drawn on other parts of the evidence, including the testimony of the witness AAAA, in an endeavour to persuade the Tribunal that it was inappropriate to draw the distinction in assessing the risk to the visa applicant of persecution by reason of his membership of the wider social group of male homosexuals in Bangladesh. It is not necessary to conclude affirmatively that those endeavours on behalf of the visa applicant would inevitably have led the Tribunal to arrive at a different result; it is sufficient that "the denial of natural justice deprived [the prosecutor] of **the possibility** of a successful outcome" (emphasis added); see *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 per Gaudron and Gummow JJ at 116 citing *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147.

57 The first respondent's success on one or more of the first three grounds raised by his notice of contention means that the orders of the learned Federal Magistrate setting aside the Tribunal's decision of 13 October 2004 and remitting the application to the Tribunal for reconsideration according to law must be affirmed. In these circumstances, it is unnecessary to consider whether, as the learned Federal Magistrate held, certain findings of fact by the Tribunal had been unsupported by evidence and whether the making of those findings amounted to jurisdictional error. In the result, therefore, the Minister's appeal must be dismissed with costs.

I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Court.

Associate:

Dated: 28 April 2006

Counsel for the Appellant:	Mr G Johnson
Solicitor for the Appellant:	Australian Government Solicitor
Counsel for the First Respondent:	Mr L Karp
Solicitor for the First Respondent:	Parish Patience Immigration
Date of Hearing:	15 February 2006
Date of Judgment:	28 April 2006