

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*SZLRD v MINISTER FOR IMMIGRATION & ANOR* [2008] FMCA 462

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming political and religious persecution in India – Tribunal finding applicant did not have a well-founded fear of persecution by reference to country information – whether the Tribunal breached s.425 of the *Migration Act 1958* (Cth) considered – applicant seeking opportunity to comment on country information referred to at Tribunal hearing – Tribunal supplying partially inaudible sound recording of the hearing – Tribunal failing to offer alternative means of dealing with the country information referred to – Tribunal apparently extending an invitation to comment but not providing the means to do so – jurisdictional error established.

*Federal Magistrates Court Rules 2001* (Cth)  
*Migration Act 1958* (Cth), ss.422B, 424A, 425, 430

*Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 180 ALR 1  
*NAFF v Minister for Immigration* [2004] HCA 62; (2004) 221 CLR 1

Applicant:	SZLRD
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3598 of 2007
Judgment of:	Driver FM
Hearing date:	11 April 2008
Delivered at:	Sydney
Delivered on:	16 May 2008

## **REPRESENTATION**

Counsel for the Applicant: Ms N Walker

Counsel for the Respondents: Mr M Cleary

Solicitors for the Respondents: Australian Government Solicitor

## **ORDERS**

- (1) The Court directs that the name of the applicant is not to appear on the transcript of proceedings.
- (2) A writ of certiorari shall issue, quashing the decision of the Refugee Review Tribunal signed on 25 October 2007 and handed down on the same day.
- (3) A writ of mandamus shall issue requiring the Tribunal to redetermine the review application before it according to law.
- (4) The first respondent shall pay the applicant's costs and disbursements of and incidental to the application in the sum of \$5,000 in accordance with rule 44.15(1) and item 1(c) of part 2 of schedule 1 to the *Federal Magistrates Court Rules 2001* (Cth).

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
SYDNEY**

**SYG 3598 of 2007**

**SZLRD**  
Applicant

And

**MINISTER FOR IMMIGRATION & CITIZENSHIP**  
First Respondent

**REFUGEE REVIEW TRIBUNAL**  
Second Respondent

**REASONS FOR JUDGMENT**

**Introduction and background**

1. This is an application to review a decision of the Refugee Review Tribunal (“the Tribunal”). The decision was handed down on 25 October 2007. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant is from India and had made claims of religious and political persecution. Background facts relating to the applicant’s protection visa claims and the Tribunal’s decision on them are set out in the Minister’s written submissions filed on 8 April 2008 and the applicant’s written submissions filed on 3 April 2008. The following statement of background facts is derived from those submissions.
2. The applicant is from the Punjab state of India, born on 6 December 1964, arrived in Australia on 28 March 2007 and applied for a Protection (Class XA) visa on 3 May 2007.

3. A delegate of the Minister refused the visa application on 1 June 2007, and on 26 June 2007 the applicant applied to the Tribunal for a review of the delegate's decision.
4. On 6 July 2007 the applicant was invited to attend a hearing before the Tribunal<sup>1</sup>, and on 20 September 2007 he attended a hearing and gave oral evidence with the assistance of an interpreter in the Punjabi language and his representative, a migration agent<sup>2</sup>.
5. At the end of the hearing on 20 September 2007 the applicant's agent was given a copy of the hearing CD<sup>3</sup>.
6. On 24 September 2007 the applicant made a request for a new copy of the Tribunal hearing CD<sup>4</sup>.
7. On 26 September 2007 the applicant's agent was advised that the Tribunal's decision would be handed down on 4 October 2007<sup>5</sup>.
8. A new copy of the Tribunal hearing CD was sent to the applicant agent under cover of a letter dated 28 September 2007<sup>6</sup>.
9. On 3 October 2007 the applicant's agent sent a fax to the Tribunal advising he was still waiting for a copy of the hearing tapes and the one he received "*has noise and errors*". The agent also advised he would not be attending the handing down of the decision on 4 October 2007<sup>7</sup>.
10. The 3 October 2007 fax from the applicant's agent included a statutory declaration from a witness not called at the hearing.
11. The Tribunal wrote to the applicant's agent on 3 October 2007 and deferred the handing down of the decision for 3 weeks (until 25 October 2007)<sup>8</sup>.
12. On 24 October 2007 the applicant's agent sent a fax to the Tribunal advising the new hearing CD was "*very bad with errors*".

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<sup>1</sup> Court Book ("CB") 49-50.

<sup>2</sup> CB 91.

<sup>3</sup> CB 90-91.

<sup>4</sup> CB 138.

<sup>5</sup> CB 134-135.

<sup>6</sup> CB 138.

<sup>7</sup> CB 140-141.

<sup>8</sup> CB 144-145.

13. On 25 October 2007 the Tribunal handed down its decision affirming the delegate's decision.

### **The Tribunal's decision**

14. In its decision the Tribunal first reviewed the applicable refugee law. It then set out the claims and evidence, and analysed the evidence. Next it set out certain independent country information. Finally, it set out its findings and reasons.
15. In its findings and reasons, the Tribunal first set out the concerns raised by the applicant's agent about the quality of the CD recording of the Tribunal hearing. The Tribunal considered the CD to be audible. It decided to proceed with the handing down of its decision regardless of the concerns raised by the applicant's agent about the CD recording.
16. Next, the Tribunal accepted the applicant was a citizen of India and a Sikh. The Tribunal accepted that the applicant had been involved in political efforts, including through membership of Shiromani Akali Dal, to establish a separate Sikh state in the Punjab region of India. The Tribunal accepted that on occasions prior to 2002 the applicant had been detained by police, sometimes without charge, and had been persecuted by the police<sup>9</sup>.
17. However, the Tribunal did not accept that the applicant faced a real chance of persecution for reasons of his Sikh religion, or political activities or opinion (real or imputed) now or in the reasonably foreseeable future, on the basis of independent country information that was before the Tribunal<sup>10</sup>.
18. For this reason the delegate's decision was affirmed.

### **The application**

19. These proceedings began with a show cause application filed on 20 November 2007. The application has been amended several times since then. The applicant now relies upon a further amended

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<sup>9</sup> CB 160-161.

<sup>10</sup> CB 161-162.

application filed on 11 April 2008. In that application the following three grounds are raised:

1. *Failure to allow the applicant the opportunity to give evidence and present arguments in accordance with s.425 of the Migration Act (the Act).*

*Particulars*

- (a) *The applicant was provided with an inaudible audio tape of the purported hearing, heard on 20 September 2007.*
  - (b) *The applicant raised immediate concern that the first CD recording was inaudible and requested a second tape.*
  - (c) *The applicant raised immediate concern with the Tribunal that the second audio tape recording provided by the Tribunal was also virtually inaudible.*
  - (d) *Despite being notified in advance, the Tribunal proceeded to make its decision without providing the applicant with a complete audio tape of the hearing.*
  - (e) *The failure to provide the applicant with an audible audio transcript of the hearing denied the applicant with an opportunity to give evidence and present arguments.*
2. *The Tribunal failed to set out its findings on material questions of fact contrary to s.430(1)(c) and thus committed jurisdictional error.*

*Particulars*

- (a) *The applicant informed the Tribunal at the hearing of the persecution on political grounds of Samranjit Singh Mann, political leader of Shiromani Akali Dal, to which the applicant was a member.*
  - (b) *In failing to accept or reject a claim that Samranjit Singh Mann was persecuted and the effect that such persecution if accepted would have on the applicant's claim of fear of persecution on political grounds was a failure to accept or reject evidence going to a material issue in the proceedings.*
3. *The Tribunal erred in law and thus committed jurisdictional error by determining the applicant's claim on the basis that the relevant social group was persecution as a religious Sikh or a Sikh in a Sikh/Hindu conflict when the claim by the*

*applicant was based on persecution as a high profile political figure and member of a political party (Shiromani Akali Dal) opposed to Indian rule over Khalistan to which the leader of the political party was subjected to persecution.*

## **The evidence**

20. I received as evidence the book of relevant documents filed on 25 January 2008. I also received the affidavit of Elizabeth Warner Knight filed on 10 March 2008, to which is annexed a purported transcript of the hearing conducted by the Tribunal. I did not receive as evidence the affidavit of the applicant filed on 20 November 2007 concerning the quality of the audio disc supplied by the Tribunal. However, I did receive a document annexed to that affidavit, being a letter from Spark & Cannon dated 12 November 2007. In the letter Suzanne Smith, the administrative co-ordinator of Spark & Cannon states that her company was unable to prepare a transcript from the audio CD due to the poor sound quality of it. She states:

*When we accessed the CD there was significant background noise which resulted in the speakers' voices not being able to be heard by our typists. We tried to convert the audio to a different file format to improve the sound quality without success.*

## **Submissions**

21. Counsel for the applicant made the following submissions in relation to the grounds in the further amended application:

*Ground 1: Failure to allow the applicant the opportunity to give evidence and present arguments in accordance with s.425 of the Migration Act (the Act).*

*The affidavit affirmed by Ms Warner Knight (undated) at Annexure A annexes a typed copy of the transcript of the Tribunal hearing (referred to just as the 'transcript'). This affidavit is in stark contrast to the affidavit affirmed by ... (the applicant) that annexes a letter from Sparks & Cannon (the transcript service) stating that they were unable to transcribe the CD due to 'poor sound quality of the audio file contained on the disc'.*

*At Annexure B to the affidavit of Ms Warner Knight, Auscript also state that the CD is very poor with buzzing and cracking sound throughout.*

*Prior to handing down the decision the Tribunal was informed by the applicant's representative Mr Ram Ravi Singh Khalsa by facsimile dated 24 October 2007 of the poor quality sound of the second CD audio recording of the hearing provided by the Tribunal. ([CB] page 147).*

*The 'Independent Information' formed the reason or part of the reason for the decision of the Tribunal in denying the Protection visa to the applicant.*

*In the Tribunal decision under the heading 'Findings and Reasons' the Tribunal Member states that he actually relied on the country information to base his finding.*

*Not only was the applicant through his advisor unable to make submissions on the country information, but also having regard to the transcript it is clear that whatever country information was put to the applicant at the hearing was very sketchy.*

*It is difficult to tell whether the Tribunal Member put some or all of the country information to the applicant. The transcript is incomplete.*

*The transcript also lacks detail in regard to responses by the applicant concerning his fear of persecution. For example, on page 15 of the affidavit the applicant appears to be stressing the persecution he has experienced by the inspector of police but most of his answer is left out. Similarly, in response to a question by the Tribunal member asking the applicant "Why do you see you as the key political figure when you say you were just a member?" the applicant's answers as provided in the transcript are not completely transcribed. This is particularly the case in response to a question from the Tribunal Member whether he would favour militancy or peaceful means in achieving an independent Khalistan. His response is barely transcribed and cannot be said to be a fair recording of what he actually said.*

*The applicants answers are significant because they actually articulate the applicants complaint of persecution, namely that he is a key political figure subjected to ongoing surveillance and death threats by the police.*

*The High Court in the matter of SZBEL v MIMIA (2006) 228 CLR 152 allowed an appeal on the basis that a person likely to be*



*affected by a decision must be given an opportunity of ascertaining the relevant issues arising in decision. Similarly, the judgement of SZBEL stressed that what is required by procedural fairness is a fair hearing not a fair outcome. In SZBEL the applicant was not given sufficient opportunity to give evidence, or make submissions.*

*In a further case the High Court in SZFDE v MIAC (2007) 237 ALR 64 reiterated that the requirement in s425 of the Migration Act that the Tribunal must provide procedural fairness to an applicant. In SZFDE it was the agent's fraud that corrupted the Tribunal's decision-making process making the Tribunal's decision in law no decision at all.*

*In the unreported Federal Court case of SZGYM v MIAC [2007] FCA 1923 Graham J allowed an appeal on the basis that there was a failure to provide an interpreter speaking the appellant's own dialect. His Honour found there was denial of procedural fairness.*

*Had the applicant or his advisor been provided with a complete audible tape recording of the hearing then a submission would have been made to clarify the applicant's claim and any conflicting country information.*

*It is respectfully submitted that the applicant in this case was not given sufficient opportunity to give evidence or make submissions.*

*Ground 2: The Tribunal failed to set out its findings on material questions of facts contrary to s430(1)(c) and thus committed jurisdictional error.*

*The applicant claimed at the hearing that the leader of the political party to which he was a member, a Mr Simranjit Singh Mann, had recently been subjected to persecution by the Indian police in the Punjab (page 5 and page 14 of the transcript).*

*The claim of persecution of the leader of the party was significant in that it substantiated the applicant's claim that no one member of the party was free from persecution including the leader.*

*The failure of the Tribunal member to make a finding as to whether this evidence was correct or credible was a failure to make a finding on a material question of fact.*

*Although the Tribunal adverted to country information about Sikhs in India and about the applicant's membership of the political party, the Tribunal failed to take into account the claim*

*of persecution of the leader of the party and it was not addressed in the reasons for decision. This failure to make a finding had a direct impact on the reasoning processes of the Tribunal as to whether the applicant had a real chance of persecution if he were to return to the Punjab.*

*Ground 3: The Tribunal erred in law and thus committed jurisdictional error by determining the applicant's claim on the basis that the relevant social group was persecution as a religious Sikh or a Sikh in a Sikh/Hindu conflict when the claim by the applicant was based on persecution as a high profile political figure and member of a political party (Shiromani Akali Dal (Mann)) opposed to Indian rule over Khalistan to which the leader of the political party was subjected to persecution.*

*On page 12 of the transcript annexed to the affidavit of Ms Warner Knight the Tribunal Member put to the applicant that Sikhs are able to practice their religion.*

*On page 13 of the transcript the Tribunal Member put to the applicant that since Manmohan Singh has become Prime Minister the conflict between Sikhs and Hindus had ceased.*

*Also throughout the decision, the Tribunal discusses the bridging of the Sikh / Hindus conflict and the constitutional guarantees that Sikhs are able to practice their religion and seek protection from the legal system.*

*Similarly the Tribunal Member relied on various country information to show that the Sikhs could be members of Shiromani Akali Dal (Mann) political party and hold political views supporting the independence of Khalistan.*

*However the applicant's primary claim for a Protection visa is based on his claim that he is a Sikh activist and a high profile political figure since 1984. Secondly, he is a member of Shiromani Akali Dal (Mann), a political party opposed to India's rule over Khalistan. Thirdly, that the leader of the party, Siranjit Singh Mann has recently been subjected to persecution and this persecution is relevant to the threat of persecution to members of the party led by Siranjit Singh Mann.*

*The applicant claimed at the hearing that he had been involved in politics since 1984 and that he had been detained and tortured over a long period of time. He claimed to have been detained for 10 days tortured and interrogated in 1987; again on 1 January 1991 he was arrested with two associates and tortured, his two*

*associates died as a result of the torture; and again he was arrested and detained from 17 June 1991 to Jan 1993 on charges that were dismissed at hearing; in 2001 he was again detained and tortured with no charges laid; in 2001 he was required to report to the police every 15 days and then once a month for a five month period; thereafter until his departure he claimed to be under constant surveillance and harassment and threats by the police and particularly the police inspector of the area. He claimed his reason for leaving his home was due to the threat by the police inspector that he would put the applicant in jail forever.*

*At the hearing the applicant claimed that he was subjected to ongoing persecution before and after 2002 due to the fact that he was a key political figure and not just a member of Shiromani Akali Dal (Mann).*

*The Tribunal Member in his reasons appears to have accepted that prior to 2002 the applicant had been detained on various occasions sometimes without charge and sometimes for substantial periods of time. The Tribunal Member also appears to have accepted that the applicant was subjected to convention-based persecution prior to 2002.*

*However the Tribunal appears to have failed to consider the persecution that the applicant claimed to fear, that is, that the applicant was not simply a member of Shiromani Akali Dal (Mann) party nor simply that he was a Sikh activist. He claimed to be a key political figure, well known, and with many contacts that resisted India's rule over Khalistan.*

*Independent country information relied on by the Tribunal Member particularly that from Ravi Nair on page 8 of the decision shows that high profile individuals are subject to persecution, particularly those suspected of anti-state activities.*

*The applicant is a high profile individual involved in anti-state activities. His claim of ongoing surveillance, harassment and threats by the police including the police inspector to jail him for life indicates that he he suspected of carrying out anti-state activities.*

*The Tribunal did not make a finding as to the claim of persecution of the leader of the party despite independent information provided to the Tribunal by the applicant. This failure to make a finding on a material fact in part supports the applicant's claim that the Tribunal Member failed to consider his actual claim of persecution.*

22. Counsel for the Minister relevantly submits as follows:

*Ground 1*

*In this ground the applicant is in essence asserting a denial of procedural fairness.*

*The applicant's written submissions make no complaint about what occurred at the oral hearing itself. Rather, the applicant complains about the purported quality of the CD recording of the hearing provided after the oral hearing.*

*The applicant seems to be complaining that he was denied procedural fairness because he was not given an opportunity to provide submissions after the oral hearing and after receiving a copy of the transcript. In particular the applicant is asserting he was denied the opportunity to comment on certain independent country information relied upon by the Tribunal in its decision.*

*This ground of review should be rejected for the following reasons.*

*The common law natural justice rule does not apply to this case. That rule has been abrogated by s422B of the Act. Accordingly the only procedural fairness obligations owed to the applicant are those contained in Part 7 Division 4 of the Act. The only two potential sources of procedural fairness obligation in this particular case are ss425 and 424A of the Act.*

*So far as s425 is concerned, the applicant was invited to attend an oral hearing on 6 July 2007 and did attend such a hearing at the Tribunal on 20 September 2007. At that oral hearing the applicant had the assistance of an interpreter who translated in the Punjabi and English languages. Further, at the oral hearing the applicant was represented by a registered Migration Agent, Mr Ram Ravi Singh Khalsa of Superior Migration.*

*In support of his submissions that there has been a breach of s425 the applicant refers to three cases. Neither of those cases have any relevance to the present case. They are each distinguishable from the present case.*

*In SZBEL v MIMIA (2006) 228 CLR 152 the High Court held there was jurisdictional error in that case because of what had occurred at the oral hearing. The High Court held that the Tribunal breached s425 (and committed jurisdictional error) because it decided the matter on issues that were not considered*

*dispositive by the delegate and had not invited the applicant to comment on those issues prior to its decision.*

*In the present case there was no issue decided adversely to the applicant by the Tribunal that was not considered dispositive by the delegate. In the present case the issues before the delegate were the same as those before the Tribunal. This included the independent country information on the human rights situation in India<sup>11</sup>.*

*In any event, it is clear from the transcript of the oral hearing before the Tribunal that the Tribunal Member gave the applicant and his agent ample opportunity at the oral hearing to comment on the independent country information used by the Tribunal<sup>12</sup>.*

*The decision of SZBEL is not relevant to the present case.*

*In SZFDE v MIMIA (2007) 237 ALR 64, the High Court held that a fraud committed by the migration agent lead to a stultification of the entire review process. This included the hearing under s425, which the applicant in SZFDE did not attend on the advice of the agent.*

*No fraud is alleged in the present case. SZFDE is not relevant.*

*Finally, in SZGYM v MIAC (2007) FCA 1923, Graham J held there was jurisdictional error because of the failure of the Tribunal to provide an interpreter who spoke the applicant's own language dialect at the oral hearing.*

*The applicant does not allege there was any problem with the interpreter he was provided with at the hearing. SZGYM is not relevant.*

*None of the authorities cited by the applicant support any assertion that there is an obligation under s425 to provide or allow the applicant an opportunity to comment on independent country information that may be used by the Tribunal in its decision after the hearing (or at all, for that matter).*

*Nothing in s425 requires the Tribunal to provide the applicant with a further hearing or opportunity to make submissions to the Tribunal in the circumstances.*

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<sup>11</sup> See delegate's decision at CB 40 to 41 and Tribunal's decision at GB 158-159.

<sup>12</sup> See affidavit of E Warner Knight sworn 10 March 2008 at transcript page 11 and onwards.

*Furthermore, at no stage did the applicant even request a further opportunity to comment on that information. He simply complained on two occasions (on 24 September and 3 October 2007) about the audibility of the hearing CD.*

*On the contrary, as the Tribunal itself points out in its reasons for decision, the Tribunal is **expressly** not obliged to provide the applicant with an opportunity to comment on independent country information it may rely upon in its decision. This is because such information is excluded from any such obligation under s424A(1) in subsection 424A(3)(b) of the Act.*

*The Tribunal complied with s425.*

*There was no breach of s424A for the reasons given ... above.*

*The First Ground should be rejected.*

*Ground 2*

*In this ground the applicant is asserting the Tribunal failed to make some finding of fact as to whether a political leader of the political party to which the applicant was alleged to be a member was the subject of persecution in India.*

*This should be rejected for the following reason.*

*The High Court in MIMIA v Yusuf (2001) 206 CLR 232 held that the s430(1) of the Act only obliged the Tribunal to set out its findings on those questions of fact which **it** considered material to its decision. Yusuf is also authority for the proposition that in any event a failure to make a finding on a material question of fact is not a failure to observe a procedure required by the Act.*

*The Tribunal is not under any duty under the Act to make **all** material findings of fact. To assert that it is under such a duty is not a basis for asserting jurisdictional error: see Yusuf at [75].*

*The only obligation the Tribunal has under s430(1)(c) is to set out such findings **as it has made**, and nothing more. Section 430 does not expressly impose any obligation on the Tribunal to make factual findings beyond this or on every matter of fact alleged by the applicant: see Yusuf at [10] per Gleeson CJ, [34] per Gaudron J, [67]-[68] per McHugh, Gummow and Hayne JJ.*

*In the present case the Tribunal set out the findings of fact it made. It complied with its statutory obligation under s430(1)(c). There was no statutory requirement under the Act for the Tribunal*

*to make a factual finding regarding whether a political leader of the political party to which the applicant was alleged to be a member was the subject of persecution in India by the police.*

*The applicant appears by this ground to seek merits review of the Tribunal's decision, which is impermissible in the Federal Magistrates Court. The review by the court system of the approach of the Tribunal is not to re-hear all factual matters. The review by the court system is to ensure that the Tribunal, which was charged with the responsibility of factually investigating the appellant's claims, acted according to law: see SZHZT v MIAC [2007] FCA 1661 at [7].*

*Ground 2 should be rejected. (emphasis retained)*

*Ground 3*

*In his third ground the applicant claims the Tribunal misunderstood his claims: see Htun v MIMIA (2001) 194 ALR 244 for a discussion of this kind of jurisdictional error.*

*This should be rejected for the following reasons.*

*Contrary to the written submissions of the applicant the Tribunal did not determine the applicant's claim simply on the basis that he was a member of the Sikh religion. The Tribunal quite clearly considered both the claims that the applicant was persecuted as a Sikh and that he was persecuted for his political activities and opinion, namely his membership and support of a political party in India – the Shiromani Akali Dal party led by Simranjit Singh Mann<sup>13</sup>. A political party that had as one its objectives the establishment of a separate Sikh state in the Punjab region of India.*

*In relation to the political claim a fair reading of the Tribunal's decision as a whole shows that the Tribunal Member accurately understood the claim being a claim for persecution on the basis of his "membership" and "support for the Shiromani Akali Dal party led by Simranjit Singh Mann..."<sup>14</sup>.*

*This included the claims he was involved in political efforts to establish a "separate Sikh state in the Punjab region"<sup>15</sup>, and that he was "a key political figure"<sup>16</sup> in India. This summation is*

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<sup>13</sup> CB 162.3.

<sup>14</sup> CB 161.6.

<sup>15</sup> CB 156.6.

<sup>16</sup> CB 157.7.

*consistent with the oral evidence given by the applicant at the hearing as well<sup>17</sup>.*

*Moreover the Tribunal accepted that the applicant “is a Sikh” and that he was involved in “political efforts, including through membership of the Shiromani Akali Dal party to establish a separate Sikh state in the Punjab region of India”<sup>18</sup>.*

*Ultimately however, the Tribunal preferred the independent country information to the evidence of the applicant. Such a conclusion was plainly open to the Tribunal on the material before it.*

*The assertion that the Tribunal misunderstood the applicant’s claims is unmeritorious. The Tribunal’s decision clearly referred to and dealt with the claims identified in the evidence before it. The Tribunal committed no error of the type identified by Allsop J in Htun.*

*The Tribunal carried out its statutory review function according to the Act.*

*The Tribunal did not commit any jurisdictional error.*

*Ground 3 should be rejected.*

## **Reasoning**

### **Ground 1**

23. The applicant’s first complaint is that the Tribunal did not allow him the opportunity to give evidence and present arguments in accordance with s.425 of the *Migration Act 1958* (Cth) (“the Migration Act”). That section provides:

(1) *The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.*

(2) *Subsection (1) does not apply if:*

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<sup>17</sup> Affidavit of E Warner Knight at transcript page 14.

<sup>18</sup> CB 160.9.



- (a) *the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or*
- (b) *the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or*
- (c) *subsection 424C(1) or (2) applies to the applicant.*
- (3) *If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.*
24. Although the common law fair hearing rule is excluded by s.422B of the Migration Act, it has been held that s.425 itself incorporates obligations of procedural fairness in relation to the Tribunal hearing. The hearing opportunity provided must be a real one and the applicant is entitled to know the essential issues on which the outcome of the review will turn. The applicant's complaint in this case is that the opportunity afforded him was ineffective because he was not provided with an audible sound recording of the hearing conducted on 20 September 2007.
25. It appears that the applicant's migration agent was given a copy of the sound recording of the hearing at the end of the hearing in a CD format<sup>19</sup>. The applicant's agent found the sound recording to be inaudible and orally requested a fresh copy on 24 September 2007<sup>20</sup>. Two days later the applicant was invited to the handing down of the Tribunal decision<sup>21</sup>. A fresh CD containing a recording of the Tribunal hearing was sent under cover of a letter from the Tribunal dated 28 September 2007<sup>22</sup>.
26. On 3 October 2007 the applicant's agent wrote to the Tribunal to complain that he was still waiting for a fresh copy of the sound recording and that the copy he was originally given was inaudible. In particular, the agent complained that he was unable to listen to the portion of the sound recording where country information was put to his client. The agent could not recall what had been said. The agent

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<sup>19</sup> CB 90

<sup>20</sup> CB 94

<sup>21</sup> CB 134-135

<sup>22</sup> CB 138

stated that Simiranjit Singh Mann (an ex member of Parliament and President of the Akali Dal at Amritsar) was willing to give evidence in support of the applicant. The agent included with the letter a statutory declaration by another person in support of the applicant. In response, the Tribunal by letter dated 3 October 2007 deferred the handing down of the decision until 25 October 2007 and advised that a new copy of the hearing CD had been sent to the agent.

27. On 24 October 2007 the applicant's agent sent a facsimile to the Tribunal relevantly stating<sup>23</sup>:

*Please find attached a ruff [sic] letter responding to what little could be heard from the CD. Also kindly excuse the lateness of this as I have been trying to hear what was said on the CD. **Supportive evidence has not been supplied as I am not sure what the reasons for possible refusal are.*** (emphasis added)

28. On the same day the agent wrote again to the Tribunal to complain about the quality of the fresh CD that had been supplied. In particular, the agent stated<sup>24</sup>:

*I have received a new CD of the hearing, however, this one although it has no errors, is still very bad and in fact it is so bad that I have been unable to hear the "Independent Information" put to the above-named. As I do have some hearing problems, I requested others to listen to the CD and tell me what the Independent Information was. However, they have just reported back and informed me that they were also unable to hear what information was put to the above-named client during the hearing.*

29. The following day the Tribunal confirmed by letter that the Tribunal's decision would be handed down on 25 October 2007<sup>25</sup>.

30. In its reasons for decision the Tribunal dealt with the circumstances in the following terms<sup>26</sup>:

*The Tribunal has considered the concerns raised by the representative (as well as the additional comments and information provided in his faxed letter dated 24 October 2007)*

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<sup>23</sup> CB 147

<sup>24</sup> CB 148

<sup>25</sup> CB 149

<sup>26</sup> CB 160

*and has decided to proceed with the handing down of the decision on 25 October 2007. The principal factors in the Tribunal's decision to proceed with the handing down are as follows:*

- The representative was present with the applicant at the hearing.*
- The Tribunal has listened to the second CD recording of the hearing and considers that the comments by the Presiding Member and other participants at the hearing are audible.*
- The quality of the sound in the second CD recording is the best that the Tribunal's technical staff can produce.*
- In the interests of procedural fairness the Tribunal chose to put to the applicant at the hearing independent country information not specifically about the applicant on which the Tribunal subsequently relied in making its decision. The Tribunal notes, however, that under s.424A(3)(a) of the Act, the Tribunal is not obliged to put such information in writing to the applicant.*

31. For the purposes of the proceeding in this Court the applicant attempted to have a transcript of the Tribunal hearing prepared by Spark & Cannon. The quality of the sound recording was so poor that Spark & Cannon was unable to prepare a transcript. The Minister arranged for the purported transcript now in evidence to be prepared by Auscript but Auscript also noted that the sound quality of the audio recording was very bad. The purported transcript is more noteworthy for what it does not contain than for what it contains. It consists substantially of gaps. I counted 108 gaps where Auscript was unable to reproduce anything from the sound recording. I read the transcript in 10 minutes. At the commencement of the sound recording the Tribunal officer stated that the hearing had commenced at 2.33pm. At the end of the sound recording the Tribunal officer stated that the hearing had concluded at 3.36pm. The hearing therefore ran for just over an hour. Even allowing for slow speech and pregnant pauses it is obvious that a substantial amount of what occurred at the hearing has not been reproduced in the transcript. What is reproduced in the transcript must be treated with caution, given the very poor audio quality of the sound recording. I am bound to conclude that the presiding member was wrong in stating that the comments by him and the other participants at the hearing were audible on the sound recording. Only some of them

were. The presiding member's opinion was used to support the Tribunal's decision to hand down its decision on 25 October 2007, notwithstanding the protests from the applicant's agent. The question is not, however, whether the Tribunal decision should have been handed down on that day. The question is whether the Tribunal breached s.425 of the Migration Act.

32. The mere fact that the Tribunal was unable to supply a sound recording of the Tribunal hearing which was audible in its entirety does not constitute a breach of s.425. That is because, ordinarily, the hearing opportunity afforded pursuant to s.425 concludes at the end of the hearing. The Tribunal is bound to take into account further submissions or information furnished by an applicant up to the date of handing down of a decision but that does not necessarily depend upon an ability to listen to the sound recording of a hearing. In order to succeed on this ground, the applicant must establish that:
- a) there was something unresolved at the end of the hearing on 20 September 2007;
  - b) the applicant needed to refer to the sound recording of the Tribunal hearing in order to deal with that issue;
  - c) the applicant was unable to deal with that issue because of the poor quality of that sound recording; and
  - d) the Tribunal did not furnish an alternative means of dealing with that issue and no alternative means were available to the applicant.
33. Relevant guidance to these issues is provided by the High Court decision in *NAFF v Minister for Immigration* [2004] HCA 62<sup>27</sup>. In that case the Court did not have the benefit of either a sound recording or transcript<sup>28</sup>. Nevertheless, the Court was prepared to draw inferences from the available information that the presiding member was dissatisfied with the hearing opportunity that had been afforded to the applicant in that case and that it was appropriate to hear more from him

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<sup>27</sup> (2004) 221 CLR 1

<sup>28</sup> *NAFF* at [28]

on certain issues. In their joint judgment at [31]-[33] McHugh, Gummow, Callinan and Hayden JJ stated:

*The case, then, is an unusual one. In her closing remarks on 5 February 2002, the Tribunal member was herself acknowledging that the purposes of the review had not been completely fulfilled by the documents supplied before 5 February 2002 or by the events of 5 February 2002. She was indicating that she had not yet finished receiving the presentation of arguments by the appellant which he had been invited to make, pursuant to s 425(1) of the Act, by the letter of 13 December 2001. She was saying that procedural fairness required some further steps to be taken, so that the matters indicated could be ironed out one way or the other. It is clear that the Tribunal member was in the best position to judge whether the review process was incomplete. Her conduct is only consistent with the formation of a firm impression that it was.*

*It is possible that the reason why the Tribunal member failed to send the promised questions was that, on reflection, she thought that everything she required had in fact already been put before her, or that a resolution of the perceived inconsistencies in the appellant's statements was not crucial in deciding the review against him. If either of these explanations, or any other explanation, existed, it is to be expected that the Tribunal member would have advanced it, either by a letter to the appellant or in her detailed reasons for decision. She did not do so. It is probable, when the workload under which the Tribunal labours is borne in mind, that the Tribunal member did not send the promised questions because she had forgotten or overlooked the fact that she had made the promise to send them. Her failure to give any indication otherwise suggested that her original impression that the review process was incomplete had not altered on reflection, and was soundly based. It would not be complete until the steps which she had thought could remedy its defects had been carried out. The failure to complete the review process was a failure to comply with the duty imposed by s 414(1) to conduct the review and the duty under s 425(1) to hear from the appellant.*

*Whatever the source of power to do what was done, its existence, in the context of the other powers listed in Pt 7 Divs 2-7A of the Act, suggests that its exercise was a serious matter. Thus the course contemplated by its exercise in the manner in which it was exercised in the present case, once embarked on, was not lightly to be departed from. There was no provision permitting the*

*making of a decision affirming the delegate's decision, and the handing down of reasons for that decision, before the course contemplated was complete. Hence whether the Tribunal member was relying on s 427(1)(b) or s 415(1) read with s 56, that part of the process of review which involved participation by the appellant, as provided for in s 425(1), had not been concluded.*

34. The first question is whether anything was left unresolved at the conclusion of the oral hearing on 20 September 2007. There was nothing in the Tribunal's reasons for decision that suggests anything was left unresolved. On the other hand, correspondence from the applicant's agent points to a belief by the agent that the applicant wished to deal with country information put to him at the hearing by the presiding member and that the applicant was inhibited from doing so by reason of the inaudible sound recording. The presiding member, in his reasons, states that relevant country information was put to the applicant at the hearing<sup>29</sup>. The presiding member said:

*The Tribunal put to the applicant independent country information that Sikhs are able to practice their religion without restriction by Indian authorities. The applicant responded that members of his political party had been tortured by the authorities.*

*The Tribunal put to the applicant independent country information that conflict between Sikhs and Hindus, particularly since Manmohan Singh had become India's Prime Minister, had substantially eased. The applicant commented that while conflict "at a high level" may have eased, at a lower level Sikhs were still persecuted; for example, he was still being threatened by the authorities.*

*The Tribunal put to the applicant independent country information that Sikhs are provided with access to various constitutional guarantees for the protection of the rights of religious minorities as well as to the protection of the legal system. The Tribunal noted that the applicant himself had been acquitted of charges by the court in 1993. The applicant responded that while he had been eventually acquitted, he had already been detained for a long time.*

*The Tribunal noted that Amnesty International said in a report in January 2003 that while torture was still a serious problem in*

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<sup>29</sup> CB 157

*Punjab, the police generally no longer tortured Sikhs on account of their political view or suspected militant links. In response, the applicant cited his own persecution by the authorities.*

*The Tribunal put to the applicant advice from Australia's Department of Foreign Affairs and Trade (DFAT) that there are provisions under Indian law for redress of human rights abuses and if supporters of registered political parties are subject to political persecution they have recourse through the Indian legal system. The applicant commented that Indian police are corrupt and a law unto themselves. The applicant also cited the persecution of Samranjit Singh Mann, who is a political leader and a member of parliament, as demonstrating that no one is immune from prosecution.*

35. The transcript records that the following discussion occurred at the hearing between the presiding member and the applicant (and his agent) about the country information<sup>30</sup>:

*MR DELOFSKI: Now, I think I now have an understanding of the sequence of your arrests and claim of persecution. I have here some independent country information about India and situation for Sikhs that I would like to put to you just for your comment. According to this independent information at the current time we were talking about at the moment, in recent years, not so much at the time in the '80s when there was the attack on the Golden Temple. Because what I'm looking at in assessing whether you meet the definition of a refugee is whether you have a well founded fear of persecution if you return to India in the future. So even if I accept that you have been persecuted in the past that does not necessarily mean that you meet the definition of a refugee if I feel that the situation has improved. .... I have tissues and everything as well.*

*Okay. Now, this independent information that we have here suggests that at the moment Sikhs are able to practice their religion without restriction. Do you say that's correct?*

*THE INTERPRETER: No.*

*MR DELOFSKI: That's not correct?*

*THE INTERPRETER: All people from my party .... are actually being punished at present and some of them are .... and the .... party actually tells the police inspector the police to ....*

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<sup>30</sup> transcript, pages 11-15

*MR DELOFSKI: Now, the other – another piece of company information that we have is that certainly since Manmohan Singh has become Prime Minister, a good cause for the Sikh. Conflict between Sikhs and Hindu has ceased.*

*THE INTERPRETER: This is actually ..... very high level. High political level but in ..... of ..... who are actually at a lower level, they are still actually tortured ..... They actually provide information to UN over the government to say that everything is safe when it isn't. One of the Sikh ..... he was actually taken away by the police and they interrogated ..... and now there is a case in the court against the ..... inspector who was interrogated.*

*MR DELOFSKI: Well, the information we have is that if you are not in a senior leadership level then you are not likely to be of interest to the police because of your political beliefs. There may be isolated instances where police harass the individual people but it may be for reasons other than because they are a Sikh and I think because they have family problems .....*

*THE INTERPRETER: Because he was – he belong to that party. That party from ..... That's why he was ..... The police they actually gave back to us they said you are to leave Khalistan otherwise you will be killed in ..... the hit list. They were torturing them.*

*MR DELOFSKI: Now, we have other country information that suggests that the Indian Constitution and the Indian courts do provide protection to the rights of Sikhs.*

*THE INTERPRETER: But it is not the case.*

*MR DELOFSKI: You, of course, were charged in the courts and were acquitted which suggests that at least in certain places you are provided a protection.*

*THE INTERPRETER: Yes, but I was detained all that time.*

*MR DELOFSKI: It does seem like a long time between the time you were arrested. Now, other information that the tribunal has received includes a statement by Amnesty International in 2003 that police generally no longer torture Sikhs on account of their political views and suspected militant links.*

*THE INTERPRETER: But you can see what happened to me. That and the ..... 11 who are being tortured. .... They come to our house, they arrest us, detain us and then they torture us but it*



*doesn't open up – people don't know actually what is – what happened at that level.*

*MR DELOFSKI: Now, Australia's Department of Foreign Affairs and Trade have provided advice that there are provisions under Indian law for redress of human rights abuses. Do you have a comment on that?*

*THE INTERPRETER: So police can have us many time and the inspector of police ..... get that opportunity ..... torture us and ..... they wish to. .... gangs who actually torture us and they are called ..... there are many newspaper articles on these gangs ..... who have been harassing other people.*

*MR DELOFSKI: I've got some of the – I've obviously got the newspaper advice and other information you have provided and I will look at that before I make any decision. I just wanted to mention one other piece of country information. Advice from our Department of Foreign Affairs and Trade. They have also advised that if supporters of registered political parties in India are subject to political persecution, they have recourse through the Indian legal system.*

*THE INTERPRETER: ..... was actually ..... see what happened to him and he was actually tortured ..... parliament member. They told ..... member of parliament .....*

*MR DELOFSKI: Thank you for that. I haven't had a chance to look at the material – the additional material.*

*MR ADVISOR: Some of those works in there are actually ..... very recent. ....*

*MR DELOFSKI: Well, I mean, I will take into account any information including the information you have already provided up until the time that the decision is made.*

*MR SINGH: ..... tortured to death ..... this one - - -*

*MR DELOFSKI: We have the ..... certificate. We have the medical certificate.*

*THE INTERPRETER: I got fed up because I was tortured ..... tied up like that.*

*MR DELOFSKI: I think the medical certificate ..... the torture. I will certainly take that into account. Is there anything else that you wanted to cover? Do you think we've covered the main .....*

*issues of persecution? We're nearing the end of the – what happens now is that I will go away and think about what you've told me at the hearing. I will read the material and then make a decision as to whether I feel that you do meet the definitions I have described at the start of the hearing. That takes probably – quite a few weeks. A few weeks. I'll try not to delay it too long ..... fresh in my mind.*

*THE INTERPRETER: One inspector he did give me hard time and he was almost certain that I will be killed if I go back home ..... As I told you before, this particular inspector warned me.*

*MR DELOFSKI: Why do you feel he's concerned with you as an individual?*

*THE INTERPRETER: He said because I am one of the political figure and I have political contacts with other. So I am not treated as a political member ..... torture .....*

*MR DELOFSKI: Why do they see you as the key political figure when you say you were just a member?*

*THE INTERPRETER: Because I have been in politics for a long time. Many contacts. Since 1984. .... contact too many ..... I am unable to stay at home because I was under surveillance all the time by the police and that is the reason my father was ..... and he passed away.*

*MR DELOFSKI: Are you in favour of the establishment of independent fixed date in the Punjab region by military means or do you hope to do it by peacefulness?*

*THE INTERPRETER: By peacefulness. They are – this is ..... actually after ..... but I was .....*

*MR DELOFSKI: I'll have a look at that material. As I said, I will try to make the decision fairly soon after we have the hearing so things are still fresh in my mind. But it does – I mean, there is a process involved so it will probably be a few weeks.*

*MR ADVISOR: ..... in jail .....*

*MR DELOFSKI: I mean as I said any information in any statement that you have provided before the decision is made I will take into account.*

*.....*

*MR DELOFSKI: When did he obtain his protection visa?*

*THE INTERPRETER: .....*

*MR DELOFSKI: When? Do you know when?*

*THE INTERPRETER: Three years ago.*

*MR DELOFSKI: Three years ago. Well, if you want, if you can say in a written statement .....* (emphasis added)

36. I draw the following conclusions from the transcript. First, the applicant and his agent contested with the presiding member the country information that the presiding member had referred to. Secondly, the presiding member offered to take into account further information submitted up to the date of the handing down of the Tribunal decision. Thirdly, the applicant and his agent were particularly concerned for the presiding member to understand that the applicant was asserting that he was a high profile member of the Akali Dal with links to its leader Samranjit Singh Mann. It appears to have been asserted at the hearing that someone known to the applicant (possibly Mr Mann) had recently been subjected to persecution by the Indian authorities. Finally, at the end of the hearing, the presiding member extended some form of invitation to the applicant and his agent to submit something further in documentary form. The precise terms of the offer are not known because of the state of the purported transcript. The Tribunal's reasons are silent as to the terms of the offer. It is possible that the presiding member may have forgotten about it. Presiding members of the Tribunal write their reasons either relying on their memory of what occurred at an oral hearing, or their own notes, or the sound recording. If the presiding member had listened to this portion of the sound recording it is entirely possible that he would have overlooked the offer that he had made.
37. I conclude that there was an unresolved issue at the end of the oral hearing on 20 September 2007 and that the hearing had not been completed. The Tribunal had invited the applicant to submit some further information in writing bearing upon the country information that had been referred to by the Tribunal. The applicant and his agent reasonably required the sound recording in order to review what the presiding member had said about that country information. As matters

turned out, the country information formed the basis of the Tribunal decision. The applicant and his agent were unable to identify what the country information was that the presiding member had referred to because of the poor quality of the sound recording. The Tribunal could have overcome that problem by identifying in writing the country information in issue or by providing copies of it. There is no evidence that either course was followed by the Tribunal. I conclude that it was not. The applicant and his agent needed the assistance of the Tribunal in order to take advantage of the opportunity offered by it because they could not recall specifically from the hearing what the information was that the Tribunal was relying upon.

38. Having extended the offer to the applicant and his agent to receive further written information from him bearing upon vital country information the Tribunal needed to provide the means for them to act on the invitation. An audible sound recording would probably have been sufficient. The sound recording was not sufficiently audible. The clear identification of the relevant country information or the provision of copies of it would certainly have been sufficient but that was not done. The applicant was thereby prevented from taking advantage of the offer extended by the Tribunal and the hearing opportunity afforded to him was unfair. As was the case in *NAFF* the failure by the Tribunal to complete the review process fairly in accordance with the offer that had been extended constitutes a breach of s.425 and a jurisdictional error. On that basis, the applicant is entitled to relief in the form of the constitutional writs of certiorari and mandamus.
39. It is not strictly necessary to deal with the remaining grounds of review. However, in my view, if one reads grounds 2 and 3 as a single ground it is apparent that the Tribunal also erred by failing to deal with relevant material, namely the applicant's apparent assertion at the hearing that he was a high profile member of the Akali Dal who faced a real risk of persecution in India because of his association with other persecuted leaders including Mr Mann. The Tribunal dealt with the applicant's claims in the following way<sup>31</sup>:

*The applicant claims that he fears persecution by the Indian authorities because he is a Sikh (whether this claim is regarded as*

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<sup>31</sup> CB 160-162

*being based on the Convention grounds of race, religion, nationality or membership of a particular social group) and has been involved in political efforts, including through his membership of the Shiromani Akali Dal party, to establish a separate Sikh state in the Punjab region of India.*

*The Tribunal has considered the evidence and accepts that the applicant is a Sikh and has been involved in political efforts, including through membership of the Shiromani Akali Dal party, to establish a separate Sikh state in the Punjab region of India. The Tribunal also accepts that on occasions prior to 2002 he has been detained by police in his region, sometimes without charge, and been persecuted by the police.*

*The Tribunal has considered the evidence provided by the applicant and his representative as well as the independent evidence (summarised above) and is not satisfied that the applicant's fear of persecution for any Convention reason if he returns to India is well-founded. The Tribunal has based this finding on independent evidence that the situation in India for Sikhs has ameliorated significantly in recent years, including politically active Sikhs supporting the Khalistan movement (whose aim is to obtain an independent state for Sikhs) and/or Sikhs who are members of the Shiromani Akali Dal party and/or Akali Dal (Mann) supporters.*

*As noted above, experts told the US Citizenship and Immigration Services in 2003 that it was unlikely that members or supporters of the Shiromani Akali Dal (Mann) party in Punjab were being targeted in any systematic way. The US Embassy in New Delhi said as long ago as 1997 that membership of the Akali Dal (Mann) was 'not a ground for anticipating prosecution or mistreatment in India'. Paul Wallace, a political scientist at the University of Missouri, told US asylum officers in February 2003 that any police abuse of Akali Dal (Mann) supporters would likely get press attention because Punjab, like the rest of India, had a relatively open press (Resource Information Center, US Citizenship and Immigration Services, 'India: Information on Treatment of Members of the Akali Dal (Mann) Party in Punjab', 16 May 2003, IND03004.ZSF).*

*The Tribunal accepts the advice of the Australian Department of Foreign Affairs and Trade to the effect that if supporters of registered parties in India are subject to political persecution from rival political parties or other agents they have recourse through the Indian legal system (DFAT Country Information Report No. 368/98, dated 7 October 1998, CX32164). The*

*Tribunal notes that the applicant himself was acquitted in an Indian court of charges laid by the police.*

*Having regard to the independent evidence, the Tribunal does not accept that there is a real chance that the applicant will be persecuted for reasons of his support for the Shiromani Akali Dal party led by Simranjit Singh Mann if he returns to India now or in the reasonably foreseeable future. Having regard to the independent evidence, and the change in the situation in Punjab referred to above, the Tribunal does not accept that, if the applicant returns to India now or in the reasonably foreseeable future, there is a real chance that, as he has claimed, he will be killed or otherwise persecuted by the police or other authorities for his political and/or religious beliefs or activities or specifically for reasons of his real or imputed pro-Khalistani political opinion.*

*The independent evidence available to the Tribunal indicates that the divide between Sikhs and Hindus has been bridged and that the antagonism between Sikhs and the Congress party in Punjab is now a distant memory. Manmohan Singh from the Congress party became India's first Sikh Prime Minister in 2004 and the Congress party has been in power in Punjab since 2002 (Soutik Biswas, 'The fading of Sikh militancy', BBC News, 16 March 2005, downloaded from [http://news.bbc.co.uk/2/hi/south\\_asia/3733271.stm](http://news.bbc.co.uk/2/hi/south_asia/3733271.stm), accessed 30 December 2006). Sources told the Canadian Immigration and Refugee Board in late 2005 that Sikhs were able to practise their religion without restriction in every state in India. The central Indian government recognises Sikhs as one of five religious minority groups and, as such, Sikhs are provided with access to various constitutional guarantees for the protection of the rights of religious minorities (Research Directorate, Immigration and Refugee Board of Canada, 'India: Ability of Sikhs to relocate within India; issues to be considered when relocating; safety concerns; treatment by authorities (March 2005 - December 2005)', 18 January 2006, IND100771.EX).*

*Sikhs figure in prominent positions in India: as referred to above, the Prime Minister, Manmohan Singh, is a Sikh. The United Nations High Commissioner for Refugees told the Board in November 2005 that 'the general situation for Sikhs in India has stabilized, and for those in Punjab improved significantly from the violence ridden decade of the mid 1980s to mid 1990s' (Research Directorate, Immigration and Refugee Board of Canada, 'India: Ability of Sikhs to relocate within India; issues to be considered when relocating; safety concerns; treatment by*

*authorities (March 2005 - December 2005)', 18 January 2006, IND100771.EX).*

*Having regard to the independent evidence the Tribunal does not accept that there is a real chance that the applicant will be persecuted as a Sikh (whether this claim is regarded as being based on the Convention grounds of race, religion, nationality or membership of a particular social group) or for his political opinion if he returns to India now or in the reasonably foreseeable future.*

*Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant has a well-founded fear of being persecuted for a Convention reason if he returns to India. It follows that he is not a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.*

40. The Tribunal records earlier in its reasons that, following the identification of relevant country information, the applicant described the physical effects of his claim of torture by the police and said that a particular police inspector in his region will kill him if he returns. Asked by the Tribunal why this policeman would single him out for persecution, the applicant said that he was a key political figure, that he had been involved in politics for a long time and had a wide range of contacts. The applicant affirmed that he wished to achieve his political aims by peaceful means<sup>32</sup>. However, the presiding member does not record in his reasons the discussion that followed, very possibly because the sound recording from that point was largely inaudible. I infer that it was at that point that the applicant or his agent referred to the alleged persecution of Mr Mann and possibly others and the applicant's links to them. This was plainly important information that the Tribunal needed to grapple with because if the applicant could establish that he was a high profile figure with links to the persecuted leader of the party, he might establish a well-founded fear of persecution notwithstanding the available country information. The Tribunal in its summary of the available country information<sup>33</sup>, although not in its findings and reasons, referred to the following country information:

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<sup>32</sup> CB 157

<sup>33</sup> CB 159

*Ravi Nair, the Executive Director of the South Asia Human Rights Documentation Centre, based in new Delhi, told the Canadian Immigration and Refugee Board that judicial protection against arbitrary arrest had improved in the Punjab and habeas corpus writs were now being honoured. The four specialists agreed that people who were not high profile suspects were not at risk in the Punjab. Ravi Nair defined a high profile individual as someone suspected of anti-state activities by the Indian authorities. He said that simply holding a pro-Khalistani political opinion would not make an individual high profile: one would have to engage in violent and anti-state acts. According to Nair, those without a high profile had much less to fear from the Punjab police and now had better access to judicial recourse if treated improperly (Documentation, Information and Research Branch, Immigration and Refugee Board of Canada, 'India: Information from four specialists on the Punjab', 17 February 1997, IND26376.EX.)*

41. The Tribunal, in its decision, although it referred to the persecution of Mr Mann, failed to deal with the issue of the risk to the applicant because of his claimed association with Mr Mann, or anyone else. Indeed, in its reasons for decision, the Tribunal relied upon certain country information without dealing in any meaningful way with the attempts by the applicant to challenge or distinguish that information or fit himself within the class of high profile figures who still faced a risk of persecution according to the recent information before the Tribunal and quoted above. The Tribunal thus overlooked relevant material. That also constitutes a jurisdictional error<sup>34</sup>.
42. As to costs, I will order that the Minister pay the applicant's costs in accordance with the Court scale.

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**I certify that the preceding forty-two (42) paragraphs are a true copy of the reasons for judgment of Driver FM**

Associate:

Date: 16 May 2008

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<sup>34</sup> *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 180 ALR 1 at [83]