FEDERAL COURT OF AUSTRALIA

SZGUW v Minister for Immigration and Citizenship [2009] FCA 321

MIGRATION – Refugee Review Tribunal – review of a delegate's decision to refuse a protection visa - earlier decision of the Refugee Review Tribunal quashed by a judge of the Federal Court because it had committed a jurisdictional error by failing to consider all of the appellant's claims in their proper context - whether the Refugee Review Tribunal had discharged its obligation to reconsider the matter according to law by failing to identify or assess the jurisdictional error which caused the original decision to be quashed – whether it should be inferred that the Refugee Review Tribunal had properly reconsidered the matter according to law where the jurisdictional error affecting the previous Refugee Review Tribunal's decision is not identified or assessed in the subsequent Refugee Review Tribunal's reasons for decision – whether it is futile to quash the subsequent Refugee Review Tribunal's decision because of the effect of its adverse credibility findings– discretionary considerations in granting relief – consideration of the interests of the administration of justice.

Migration Act 1958 (Cth)

SZGUW v Minister for Immigration & Citizenship [2008] FCA 91
Attorney-General (New South Wales) v Quin (1990) 170 CLR 1
Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476
The King v the War Pensions Entitlement Appeal Tribunal; Ex parte Bott (1933) 50 CLR 228
R v Anderson; Ex parte Ipec-Air Pty Ltd (1965) 113 CLR 177
Murphyores Inc Pty Ltd v The Commonwealth (1976) 136 CLR 1
Leisure and Entertainment Pty Ltd v Willis (1996) 64 FCR 205
Kovalev v Minister for Immigration and Multicultural Affairs (1999) FCA 557
Yulianti v Minister for Immigration and Multicultural Affairs [2001] FCA 142
Allan v Repatriation Commission [2003] AATA 994
Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60
Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389
SZBYR v Minister for Immigration and Multicultural Affairs (2007) 81 ALJR 1190
R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Limited (1949) 78 CLR 389
Wade v Burns (1966) 115 CLR 537
NAIS v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 470

Lewis C, *Judicial Remedies in Public Law*, 4th Ed, Sweet and Maxwell

SZGUW v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
NSD 1946 of 2008

REEVES J
7 APRIL 2009
DARWIN

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1946 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZGUW**
Appellant

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

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **REEVES J**
DATE OF ORDER: **7 APRIL 2009**
WHERE MADE: **DARWIN**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Magistrates Court made on 11 December 2008 be set aside.
3. There be an order in the nature of certiorari to quash the decision of the second respondent signed on 27 May 2008.
4. There be an order in the nature of mandamus requiring the second respondent to review the decision of the delegate of the first respondent made on 23 February 2005, according to law.
5. That the first respondent pay the appellant's costs of this appeal and the application for judicial review before the Federal Magistrates Court.

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

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1946 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZGUW**
Appellant

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

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **REEVES J**
DATE: **7 APRIL 2009**
PLACE: **DARWIN**

REASONS FOR JUDGMENT

INTRODUCTION

1 This matter has an unusual history. The Refugee Review Tribunal ('the Tribunal') has now conducted a merits review of the decision of the delegate of the Minister for Immigration and Citizenship, to reject his application for a protection visa, on three separate occasions. The Tribunal has, therefore, to date, produced three separate decisions. The first decision was quashed, by consent, by order of the Federal Magistrates Court. The second decision was quashed by an order of the Federal Court, following a contested appeal hearing. The third Tribunal decision is now before me following an unsuccessful application for judicial review before the Federal Magistrates Court.

2 For the reasons set out below, I have concluded that this third Tribunal decision must also be quashed and the matter referred back to the Tribunal, yet again. Before setting out my reasons for this conclusion, I will set out a more detailed summary of the factual and procedural background to this matter.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The appellant's claims

3 The appellant is a citizen of China who arrived in Australia in December 2004. On 20 January 2005, he lodged an application for a protection (class XA) visa with the Department of Immigration and Citizenship. In the statement attached to that application, he claimed that he had suffered persecution in China at the hands of the Fuqing City Government as a member of a group of farmers who, in 1992, had their land acquired without their consent by the Fuqing City Government for the development of the Fuqing Rongqiao Economic and Technological Development Zone. As a consequence, he claimed that the group of farmers had sued the government for eight years, without any success. In 2000, he claimed that his house was demolished and all his belongings were confiscated because he was "fighting with government for protecting farmer's right on land".

4 On 20 June 2003, he claimed 300 farmers who had lost their land gathered together outside the Fuqing City Government Offices after an "unsatisfactory" inquiry and adverse publicity to seek an explanation. He claimed they were ignored and the police were sent to disperse them. Then, on 24 June 2003, he and others led 400 farmers to the Fuqing City Government Offices to seek a solution and shortly after the farmer's arrival many armed police arrived. The appellant claimed that he and 20 other representatives were arrested and that he was detained for 10 days during which time he was hit and tortured. The appellant claimed that a month after his detention they received a decision from the provincial government refusing to review their appeal. He claimed that two other people "backbone members of the group" had been officially arrested, but that he and another person had escaped from China. He claimed he had been informed by relatives that the government was trying to arrest him and he feared detention, torture and arrest if he returned.

The first and second Tribunal decisions

5 A delegate of the first respondent refused the appellant's application for a protection visa on 23 February 2005 ('the delegate's decision'). On 22 March 2005, the appellant applied to the Tribunal for a review of the delegate's decision. The Tribunal affirmed the delegate's decision in a decision signed on 7 June 2005 ('the first Tribunal decision'). On 27 July 2006, Federal Magistrate Emmett ordered, by consent, that the first Tribunal decision be

quashed and remitted to the Tribunal to be determined according to law. The Tribunal, differently constituted ('the second Tribunal'), affirmed the delegate's decision in a decision signed on 17 November 2006 ('the second Tribunal decision').

The decision of Jacobson J

6 On 4 July 2007, the Federal Magistrates Court dismissed an application for judicial review of the second Tribunal decision. That decision was appealed to this Court. On 21 February 2008, Jacobson J ordered that the appeal be allowed, and that the matter be again remitted to the Tribunal to be determined according to law.

7 In his decision ([2008] FCA 91), Jacobson J concluded that the second Tribunal had failed to consider the appellant's claims in their totality. His Honour ruled that this amounted to a constructive failure to exercise the Tribunal's jurisdiction and, therefore, a jurisdictional error: see at [55]-[75]. In particular, Jacobson J concluded (at [65]-[69]) as follows:

> [65] I do not see how the Tribunal could have proceeded to deal with the question of whether the appellant had a well-founded fear without first considering the full impact of the harm alleged by the appellant, taken in its full context.
>
> [66] Here, the context was not confined to the appellant's detention and mistreatment following the demonstration in 2003. The appellant's claim, taken as a whole, was that he was unable to obtain state protection for his right to protest against the illegal confiscation of his land because the state, or its authorities, were involved in the confiscation and the appointment of the beneficiaries of the illegal act to determine the amount of the compensation. I do not consider that this approach wrongly conflates the concepts of "serious harm" and "well-founded fear" (emphasis added)
>
> [67] It is true that "overall, based on the evidence" the Tribunal was satisfied that the appellant's fear was not well-founded. But the difficulty with this statement is that it appears after the Tribunal had considered each step in the claims in isolation and without considering the impact of state involvement in the conduct: *MZWPD* at [72]-[73]. (emphasis added)
>
> [68] It follows in my view that the Tribunal failed to consider a substantial aspect or integer of the appellant's case that was sufficiently plain on the facts that were established: *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 389 at [24]; *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [55]-[57].
>
> [69] This amounted to a constructive failure to exercise the Tribunal's jurisdiction: *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; *NABE* at [48]-[49]; *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at [44].

Earlier (at [63]), Jacobson J identified the Convention nexus as:

> … imputed political opinion or membership of a particular social group, namely dispossessed farmers from the Fuqing Economic Zone.

8 Accordingly, Jacobson J ordered that:

> 1. The appeal be allowed.
>
> 2. The orders of the Federal Magistrates Court made on 4 July 2007 be set aside, and in their place order that:
>
> (a) there be an order in the nature of certiorari to quash the decision of the Second Respondent handed down on 7 December 2006.
>
> (b) There be an order in the nature of mandamus requiring the Second Respondent to review according to law the decision made by a delegate of the First Respondent on 23 February 2005 to refuse a protection visa.
>
> 3. That the First Respondent pay the Appellant's costs of the appeal.

The third Tribunal decision

9 The Tribunal, again differently constituted ('the third Tribunal'), conducted a hearing on 23 May 2008, which the appellant attended. In its decision signed on 27 May 2008, the third Tribunal again affirmed the delegate's decision ('the third Tribunal decision'). The third Tribunal accepted that the appellant was a Chinese National and that he was a farmer. However, the third Tribunal found that the appellant gave inconsistent evidence and was not able to provide details of significant events in which he claimed to be involved. It therefore concluded that the appellant was not a credible witness and the appellant's claims were not true. Accordingly, the Tribunal concluded (at [76]), as follows:

> I have considered the applicant's claims in their totality but for the reasons given about I do not regard the applicant as a credible witness and I do not accept his claims. Having regard to my findings above, I do not consider that the applicant has a well-founded fear of being persecuted for a Convention reason if he returns to China now or in the reasonably foreseeable future. I am not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in paragraph 36(2)(a) of the Act for a protection visa.

10 The appellant made an application to the Federal Magistrates Court for judicial review of the third Tribunal decision and on 11 December 2008, that application was dismissed. The appellant then appealed that decision to this Court.

THE PRESENT APPEAL

11 The appellant's notice of appeal filed in this Court raises two ground as follows:

> 1. The decision of RRT was an improper exercise of the power conferred by law.
>
> 2. The Tribunal failed to have regard to some evidence and claims which were before the Tribunal.

12 At the hearing before me on 26 February 2009, the appellant appeared in person, unrepresented, but assisted by an interpreter. Mr Cleary appeared for the first respondent. During that hearing, I raised with Mr Cleary my concern that the third Tribunal decision did not appear to have paid any regard to the rulings made by Jacobson J, particularly his ruling that the second Tribunal had failed to properly consider all the appellant's claims. Mr Cleary responded that while there was no express discussion of the decision of Jacobson J in the third Tribunal decision, there was a mention of the decision in paragraph 1 and, more importantly, the Tribunal had considered all the claims raised by the appellant. In this regard, Mr Cleary pointed to paragraph 32 of the third Tribunal decision which, he said, set out a summary of the claims the appellant had made. Paragraph 32 is as follows:

> In a submission to the Tribunal as presently constituted dated 22 April 2008 the [appellant's] representative said that the applicant claimed that he feared persecution in China on the Convention grounds of membership of a particular social group, which she defined as 'dispossessed farmer', and political opinion, based on his involvement in farmers' protests against the resumption of their land. She produced copies of what purport to be a 'Notice of Detention' issued by the Fuqing City Public Security Bureau (PSB) on 24 June 2003 stating that the applicant had been detained 'at the 11th hour on 24 June 2003 for disturbing official affairs through public gathering' and a 'Certificate of Release from Detention' issued by the Fuqing City Public Security Detention Centre on 3 July 2003 stating that the applicant had been detained from 24 June 2003 to 3 July 2003.

CONSIDERATION

13 The respective roles of the judiciary and administrative decision makers was discussed at length in the often quoted decision of Brennan J in *Attorney-General (New South Wales) v Quin ('Quin')* (1990) 170 CLR 1. The following observations of Brennan J in *Quin* are particularly relevant for present purposes (at 35-36):

> The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government.
> …
> The merits of administrative action, to the extent that they can be distinguished from

> legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

14 Applied to the *Migration Act 1958* (Cth) ('the Act'), these observations of Brennan J reinforce the well established principle that, under the Act, the Tribunal, and it alone, is responsible for the conduct of merits reviews of the decisions of ministerial delegates. However, these observations also reinforce the equally well established principle that questions of law that arise for determination in the course of the Tribunal's merits reviews, specifically relating to whether the Tribunal has exceeded or neglected its jurisdiction, are the responsibility of the judiciary, and it alone: see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [104] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

15 In *Quin*, Brennan J went on to emphasise the care the courts should take to avoid interfering with the legitimate exercise of administrative power. He said (at 37-38):

> The courts - above all other institutions of government - have a duty to uphold and apply the law which recognizes the autonomy of the three branches of government within their respective spheres of competence and which recognizes the legal effectiveness of the due exercise of power by the Executive Government and other repositories of administrative power. The law of judicial review cannot conflict with recognition of the legal effectiveness of the due exercise of power by the other branches of government.
> If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk.

16 To underscore all this, various decisions have made it clear that even where a court decides, on judicial review, that the decision of an administrative tribunal should be quashed because it is wrong in law, the court does not have the power to substitute its own decision for that of the administrative tribunal, or order it to decide the matter one way or the other: see *The King v the War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242 per Rich, Dixon and McTiernan JJ and at 245 per Starke J; *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 189 per Kitto J; *Murphyores Inc Pty Ltd v The Commonwealth* (1976) 136 CLR 1 at 17 per Mason J; and *Leisure and Entertainment Pty Ltd v Willis* (1996) 64 FCR 205 at 220 per Spender J and, see also, Lewis C, *Judicial Remedies in Public Law* ('Lewis'), 4th Ed, Sweet and Maxwell at 6-016 and the English authorities cited.

17 Consistent with the principles outlined above, the court's role is limited to stating what the law is and to ordering the administrative tribunal to consider the matter afresh according to law as stated. However, the necessary concomitant of the court's care and

restraint in its review of administrative decisions is that when a court does decide to set aside an administrative decision because it involves an error of law, it goes without saying, that the decision maker will take heed of what the court has said the law is, and apply it in its reconsideration of the matter. After all, this is what the expression "to consider the matter according to law" plainly means. This flows from everything Brennan J said in *Quin* and, indeed, the enforcement of the rule of law dictates nothing less: see *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70 per Brennan J.

18 It is for these reasons that the courts take care when they are setting aside an administrative decision because of an error of law, to ensure that the error of law is clearly identified. This can present difficulties where a decision is to be set aside by consent of the parties, as French J observed in *Kovalev v Minister for Immigration and Multicultural Affairs* [1999] FCA 557 (at [9] and [15]), as follows:

> [9] There is a fundamental difficulty where a court makes an order remitting a matter to a decision-maker or tribunal to be decided "according to law" and the court itself is not informed of the nature of the error conceded. The court is then making an order without being apprised of its basis and proposed operation. To do so in my opinion is a purported, but not an actual exercise of judicial power. Moreover, in a practical sense the decision-maker or tribunal lacks the benefit of any binding direction from the court as to precisely what it is that the decision-maker or tribunal is required to do.
>
> …
>
> [15] In the ordinary course after a contested hearing on a judicial review application such an order may be made and its content derived from the reasons for judgment that accompany it where an error or errors in law are identified. Absent such reasons, and without further explanation in the order itself, the decision-maker would lack any binding direction from the Court as to precisely what it was that the decision-maker was required to do. (emphasis added)

See also, *Yulianti v Minister for Immigration and Multicultural Affairs* [2001] FCA 142 at [12] per Stone J and *Allan v Repatriation Commission* [2003] AATA 994 at [13] per Downes P.

19 True it is, that in a reconsideration of a matter under the Act, the Tribunal considers the matter de novo, which means that the Tribunal is therefore entitled to consider the matter afresh on the evidence before it and it is not bound by the first Tribunal's decision: see *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 68 per Bowen CJ and Deane J and, see also, Lewis at 6-017 and the English authorities cited. However, reconsidering the matter afresh without being bound by the first Tribunal's decision on the

facts, does not mean ignoring the rulings of law made by the Court on the first Tribunal's decision.

20 In this matter, Jacobson J did not state his rulings of law in the orders he made, but he did identify them very clearly in his reasons for judgment. It follows that the content of the orders his Honour made, can be easily derived from his reasons for judgment: see [7] above. In summary, that content is that the second Tribunal failed to consider the whole of the appellant's claims in their full context, in particular, his claims that he was unable to obtain state protection because of collusion between the state authorities to defeat his protests and his appeals for compensation for the illegal confiscation of his land. The question then is whether the third Tribunal has taken heed of these failures and then taken them into account in its reconsideration of the matter according to law. To answer that question, it is necessary to consider the terms of the third Tribunal decision.

21 Before turning to consider the third Tribunal decision, it is appropriate to recall what the Full Court said about the process of drawing inferences from a Tribunal's reasons. In *WAEE v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 184 (at [47]), the Full Court said:

> The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.

When these observations are applied to the peculiar circumstances of this matter, viz the third Tribunal was reconsidering the matter following the orders made by Jacobson J, I consider that it was incumbent upon the third Tribunal to make it clear on the face of its reasons, how it has discharged its obligation to reconsider this matter according to law specifically, the rulings of law made by Jacobson J. Conversely, if such is not clear on the face of the third Tribunal decision, I consider that failure gives rise to a strong inference that the third Tribunal did not properly discharge its obligations in this regard.

22 I turn now to consider the third Tribunal's decision. First, it is notable that there is only a passing reference to the orders of Jacobson J in the third Tribunal decision, as follows (at paragraph 1):

> On 4 July 2007 the Federal Magistrates Court dismissed an application for review but on 21 February 2008 the Federal Court ordered that an appeal be allowed, that the orders of the Federal Magistrates Court made on 4 July 2007 be set aside and that in their place it be ordered that there be an order in the nature of certiorari to quash the decision of the second Tribunal and that there be an order in the nature of mandamus requiring the Tribunal to review according to law the decision made by a delegate of the minister on 23 February 2005 to refuse a protection visa. The matter is now before the Tribunal pursuant to the orders of the Federal Court. (emphasis added)

23 More importantly, the third Tribunal has not recorded the error of law identified by Jacobson J, anywhere in its decision. It follows that it has not separately and distinctly assessed that error of law and considered how it should take it into account in its review of the delegate's decision. It could, for example, have set out the crucial elements of the appellant's claims as identified by Jacobson J, that were not considered by the second Tribunal (see as summarised in [20] above), and then rejected those claims because it did not consider they were credible. There is no indication on the face of the third Tribunal's decision that it did these things.

24 While, Mr Cleary is correct in his submissions that the third Tribunal has identified at least some of the claims made by the appellant, or his representative, at paragraph 32 of the third Tribunal decision: see [12] above, the problem I see with this submission is that the claims identified in paragraph 32 do not encapsulate the crucial elements of the unconsidered claims as identified by Jacobson J, specifically his failure to obtain state protection and the related collusion between the state authorities. Nonetheless, at paragraph 34 of the third Tribunal decision, it has recorded the appellant's representative as saying:

> She submitted that it had been the Chinese authorities who had confiscated the applicant's ancestral home and farmland, that the same authorities had assessed whether he would be compensated or not, and that the same authorities sent the police to disperse farmers when they protested against the authorities robbing them of their land, place to live and livelihood.

These claims do at least appear to identify the element of collusion between the state authorities identified by Jacobson J.

25 However, in the Findings and Reasons section of the third Tribunal decision, after a number of general statements to the effect that the third Tribunal did not accept the statements made by the appellant as true, it says (at paragraph 73):

> Having regard to the view I have formed of the applicant's credibility I do not accept that the applicant was in fact arrested on 24 June 2003 and detained for ten days as he claims. I do not accept that the applicant had come to the adverse attention of the Chinese Government before he was issued with a passport in October 2004 and I do not accept that, as he claims, the police are still looking for him now. I do not accept that the applicant was ever involved in farmers' protests in relation to land issues or in any other anti-government protests or appeals in China nor that there is a real chance that he will be involved in any such activities if he returns to China now. I do not accept that the applicant's relatives have been involved in such protest or appeals, as the applicant claims, nor that there is a real chance that the applicant will be imputed with an anti-government political opinion as a result of the involvement of his relatives in such activities. I do not accept that there is a real chance that the applicant will be arrested, detained, tortured or otherwise persecuted for reasons of his real or imputed political opinion if he returns to China now or in the reasonably foreseeable future.

26 In my view, there are two problems with the approach the third Tribunal has taken. First, as with the second Tribunal, it seems to have focused on the demonstration in 2003, rather than the full context of the appellant's claims taken as a whole, as described in paragraphs [65] and [66] of the decision of Jacobson J set out in [7] above. Secondly, to the extent (if at all) the third Tribunal has considered the appellant's claims of collusion between the state authorities to defeat his protests and appeals, in relation to the illegal confiscation of his land, the third Tribunal seems to have treated the appellant as being in the same position as all farmers (and others), in China, who have had their land confiscated. It did so in the following terms:

> [74] As referred to above, in the statement accompanying his original application the applicant said that he had been persecuted in China by the Fuqing City Government for reasons of his membership of a particular social group which he defined as 'farmers of deprived land fighting for Living Right'. In her submission dated 22 April 2008 the applicant's representative said that the applicant claimed that he feared persecution in China on the Convention ground of membership of a particular social group which she defined as 'dispossessed farmers'. … For the reasons given above I do not accept that the applicant was involved in fighting for the living rights of farmers, nor that there is a real chance that he will be involved in such activities if he returns to China now.
>
> [75] As I put to the applicant, I do not accept on the evidence before me that 'farmers' as a particular social group are persecuted for reasons of their membership of that group in China. In her submission dated 22 April 2008 the applicant's representative submitted that the legal system in China denied farmers basic rights which were available to others in China, but, as I put to

> the applicant in the course of the hearing before me, I do not accept on the basis of the material which the applicant's representative herself submitted that this is true. I consider that the material which the applicant's representative submitted suggests that farmers are treated in the same way as everybody else in China and that urban residents are equally affected by the problems cause by the requisition of land for road, factories, housing and office developments in China. (emphasis added)

In treating the appellant's claims in this way, I consider the third Tribunal has also failed to consider the appellant's claims taken as a whole in their proper context.

27 It is, of course, possible to construe that the third Tribunal decision as having made credibility findings against the appellant that are so fundamental and so all embracing that they leave no room for the appellant to succeed on his unconsidered claims. However, it is significant, in my view, that the third Tribunal has not expressly stated that conclusion in its decision. Moreover, it is worth recalling that the second Tribunal also rejected all, or most, of the appellant's claims on credibility grounds, but that did not prevent Jacobson J from setting aside its decision because it had failed to consider the unconsidered claims in their context: see [67] of the decision of Jacobson J set out in [7] above. On the same basis, I cannot be confident that if the third Tribunal had considered the unconsidered claims, it would have rejected them as well on credibility grounds. I am fortified in this view by the decision of the High Court in *Wade v Burns* (1966) 115 CLR 537. In that matter, the High Court reviewed a decision of a magistrate who had wrongly held that he did not have a 'general discretion' to hear an application. Significantly, for present purposes, the High Court set aside the magistrate's decision, notwithstanding his comment that if he did have the general discretion to deal with the application, he would have refused it in any event. The High Court considered that this comment should not be considered as decisive of the application if it were to be properly reconsidered according to law: see at 555 per Barwick CJ, 562-563 per Menzies J and 568-569 per Owen J. Furthermore, Kirby J reached a similar conclusion in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs ('NAIS')* (2005) 228 CLR 470 at [123] where he rejected an argument that re-determination was futile observing that "Where jurisdictional error is shown, this Court does not second guess the decision of the [tribunal]."

28 Having considered the third Tribunal decision carefully, I do not consider that the third Tribunal has clearly dealt with the unconsidered claims identified by Jacobson J in their

full context. I therefore consider there is a strong inference that they have not been considered by the third Tribunal. It follows that I consider that the third Tribunal has not discharged its obligations to reconsider this matter according to law, specifically the law as ruled on by Jacobson J.

29 Finally, before granting any relief in this matter, I must take into account that granting relief of this kind is a matter of discretion: see *SZBYR v Minister for Immigration and Multicultural Affairs* (*'SZBYR'*) (2007) 81 ALJR 1190 at [28]. The factors relevant to the exercise of such a discretion were identified in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Limited* (1949) 78 CLR 389 at 400, in the following terms:

> … the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made.

30 Here, the only one of these factors that may exist is "if no useful result could ensue". In *SZBYR*, the court relied upon this factor to refuse the appellants relief because they could not overcome the Tribunal's findings that their claims lacked the requisite Convention nexus: see *SZBYR* at [29]. Here, I consider this factor would only apply if the circumstances outlined in [27] above applied: ie overwhelming credibility findings. For the reasons given in [27] and [28] above, I do not consider they do. Moreover, I consider that it is in the interests of the administration of justice, or "the public law and the standards of administrative justice in this country" as Kirby J described in *NAIS* (at [119]), that relief be granted here. In a different context, but one with some parallels, the High Court has set an undemanding test for the application of the apprehension of bias principle in the interests of the administration of justice that all courts are impartial and are clearly seen to be impartial: see *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63 at [6]-[7]. In this situation, to refuse relief on discretionary grounds, might encourage the view that the Tribunal could circumvent this Court's orders by making findings on other aspects that could be considered to be decisive on the appellant's application, without directly addressing the questions of law raised by the Court's orders. Put another way, I consider the public confidence in the administration of justice requires the Tribunal, in a situation where it is reconsidering a matter following an order made by this Court, such as occurred here, to demonstrate clearly

that it has followed the Court's order by stating clearly and specifically what it thought the error of law was and how it has dealt with that error of law in its reconsideration of the application. I should add that I do not suggest there was any deliberate circumvention here.

CONCLUSION

31 For these reasons, I consider the Federal Magistrate erred in failing to detect that the third Tribunal had failed to conduct its further review of the delegate's decision according to law, by failing to consider and take into account the jurisdictional error identified by Jacobson J in his reasons for judgment. It follows that the decision of the Federal Magistrate must be set aside and, so too, must be the decision of the third Tribunal. Further, the Tribunal must be again directed to consider the appellant's application for a review of the delegate's decision according to law, specifically the law as outlined in these reasons for judgment and the reasons for judgment of Jacobson J.

32 In many respects this is a most regrettable and unfortunate outcome. A great deal of public resources have, undoubtedly, been expended in this matter to date and more are likely to be expended in the future. As well, this outcome has the potential to cause unfairness to the appellant if he is asked by yet another Tribunal to recall events that date back as far as 1992 – some 17 years ago – in circumstances where he has now been in Australia for more than four years. Inconsistencies are sure to arise in such circumstances and the Tribunal will need to take care to ensure that its default does not create any unfairness: see *NAIS* at [9]-[10] per Gleeson CJ and [106] per Kirby J.

I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves.

Associate:

Dated: 7 April 2009

Appellant:	In person
Counsel for the First Respondent:	Mr M Cleary
Solicitor for the First Respondent:	Clayton Utz
Date of Hearing:	26 February 2009
Date of Judgment:	7 April 2009