FEDERAL COURT OF AUSTRALIA

MZXQS v Minister for Immigration and Citizenship [2009] FCA 97

MIGRATION – visa – protection visa – whether Refugee Review Tribunal failed to consider all claims of appellants – whether claim based on persecution for imputed political opinion due to sister's political affiliations distinct from claim to membership of particular social group (family), or from claim based on imputed political opinion as Tamil – whether Tribunal failed to consider claim based on membership of particular social group, being failed asylum seekers returning to Sri Lanka

Held: Tribunal failed to consider both claims – jurisdictional error

Migration Act 1958 (Cth), ss 5(1), 36, 91R(3), 91S, 91X

Convention relating to the Status of Refugees done at Geneva on 28 July 1951
Protocol relating to the Status of Refugees done at New York on 31 January 1967

MZXQS v MIAC & Anor and MZXQT v MIAC & Anor [2008] FMCA 372 reversed
SCAT v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 80 (2003) 76 ALD 625 applied
Htun v Minister for Immigration & Multicultural Affairs [2001] FCA 1802 (2001) 194 ALR 244 applied

MZXQS v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
VID 226 of 2008

MZXQT v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
VID 227 of 2008

GRAY J
17 FEBRUARY 2009
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 226 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MZXQS** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**GRAY J**
DATE OF ORDER:	**17 FEBRUARY 2009**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the Federal Magistrates Court on 10 April 2008 be set aside.

3. There be substituted for those orders orders that:

    (1) A writ of certiorari issue, directed to the Refugee Review Tribunal, removing into this Court the decision of the Refugee Review Tribunal, signed on 30 April 2007 and sent to the appellant on 10 May 2007, affirming a decision of a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs to refuse to grant to the appellant a protection visa, for the purpose of quashing that decision.

    (2) The decision of the Refugee Review Tribunal, signed on 30 April 2007 and sent to the appellant on 10 May 2007, affirming a decision of a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs to refuse to grant to the appellant a protection visa, be quashed.

(3) A writ of mandamus issue, directed to the Refugee Review Tribunal, requiring it to hear and determine according to law the application of the appellant for review of the decision of a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs to refuse to grant to the appellant a protection visa.

(4) The first respondent pay the appellant's costs of the proceeding in the Federal Magistrates Court.

4. The first respondent pay the appellant's costs of the appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 227 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MZXQT** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**GRAY J**
DATE OF ORDER:	**17 FEBRUARY 2009**
WHERE MADE:	**MELBOURNE**

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IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 226 of 2008**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MZXQS** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

VID 227 of 2008

BETWEEN:	**MZXQT** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**GRAY J**
DATE:	**17 FEBRUARY 2009**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

The nature and history of the proceedings

1 These two cases, heard together by the consent of the parties, raise the question whether the Refugee Review Tribunal considered all of the grounds on which each of the appellants claims to be entitled to a protection visa. Each appeal is from a judgment of the Federal Magistrates Court of Australia. The two cases were heard together in that court. The reasons for judgment of the learned federal magistrate in both cases are published as *MZXQS v MIAC & Anor* and *MZXQT v MIAC & Anor* [2008] FMCA 372. In each case, the federal magistrate dismissed the appellant's application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal"). In each case, the Tribunal affirmed a decision of

a delegate of the then Minister for Immigration and Multicultural and Indigenous Affairs (now the Minister for Immigration and Citizenship) (in both cases, "the Minister"), refusing to grant to the relevant appellant a protection visa.

2 The appellants are citizens of Sri Lanka, of Tamil ethnic origin. They are sisters. Because s 91X of the *Migration Act 1958* (Cth) ("the Migration Act") requires that their names not be published, the older sister is identified in her proceeding as MZXQS and the younger as MZXQT. For the purposes of these reasons for judgment, when it is necessary to distinguish between the two appellants, I refer to them as "Appellant S" and "Appellant T" respectively. They arrived in Australia together, on 9 October 2006. Their applications for protection visas were both made on 20 November 2006. The initial decisions, rejecting their applications, were made on 9 January 2007. Their applications to the Tribunal for review of those decisions were both made on 25 January 2007. Both were represented by the same migration agents, one of whom is counsel who appeared for both appellants on the hearing of their appeals. On 22 February 2007, each appellant attended a Tribunal hearing. The member constituting the Tribunal was the same in both cases. That member signed each of the two decisions of the Tribunal on 30 April 2007, and they were sent to the respective appellants on 10 May 2007.

3 By s 36 of the Migration Act, there is a class of visas to be known as protection visas. A criterion for a protection visa is that the person applying for it be a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. The terms "Refugees Convention" and "Refugees Protocol" are defined in s 5(1) of the Migration Act to mean respectively the *Convention relating to the Status of Refugees done at Geneva on 28 July 1951* and the *Protocol relating to the Status of Refugees done at New York on 31 January 1967*. It is convenient to refer to these two documents, taken together, as the "Convention". For present purposes, it is sufficient to note that, pursuant to the Convention, Australia has protection obligations to a person who:

> *owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country*

The appellants' claims

4 Each of the appellants claimed to have a well-founded fear of persecution, if she should return to Sri Lanka, for reasons of race, political opinion and membership of a particular social group. The ground of race was invoked by each appellant on the basis that persons of the Tamil race were likely to be persecuted by the majority Sinhalese in Sri Lanka, and also on the basis that persons of the Tamil race were likely to be suspected of involvement with or sympathy for the Liberation Tigers of Tamil Eelam ("the LTTE"), a political and military organisation of Tamils, agitating for Tamil self-rule in Sri Lanka. The ground of political opinion was invoked not by reason of any actual political opinion, but by reason of imputed support for the LTTE or the Tamil cause. The ground of membership of a particular social group was invoked on two bases. One was the appellants' family. It was contended that the appellants had a well-founded fear of persecution because another sister is a member of the Sri Lankan Parliament, representing a constituency in the LTTE-controlled north of the country, and a member of the Tamil National Alliance ("the TNA"), to whom is imputed the political opinion of support or sympathy for the LTTE. The other particular social group contended for was Tamils returning from overseas who had spent a considerable period in a western country. The contention was that the appellants would be targeted by security forces and by militant Tamil groups for extortion.

The Tribunal's reasons

5 In its reasons for decision in each appellant's case, the Tribunal dealt with the claims under four headings. Under the heading "*Tamil ethnicity*", the Tribunal dealt with what it described as a claim by each appellant "that as a Tamil she is suspected of involvement or sympathies with the LTTE solely on the basis of her race". The Tribunal referred to the lack of difficulty that the appellants had had in passing security checks in the past, to the fact that both appellants had been able to relocate from Jaffna to Colombo, obtain employment there, and travel overseas at will. The Tribunal was not satisfied that either appellant was of any adverse interest to the Sri Lankan authorities or that either had suffered discrimination or serious harm on the basis that she was a Tamil.

6 Under the heading "*Political beliefs*", the Tribunal characterised each appellant's claims in the following terms:

> *The applicant makes no claims to being directly involved in the politics of Sri Lanka. She claims that that [*sic*] as a Tamil she is suspected of involvement or sympathies with the LTTE solely on the basis of her race...and if she returned to Colombo "she would face a real chance of becoming subject to cordon and search operations of the security forces directed at Tamils".*

7 After referring again to the appellants' ability to pass security checks and to pass through immigration and customs on return to Sri Lanka from elsewhere without incident, the Tribunal said:

> *On the evidence discussed, the Tribunal is not satisfied that the applicant has suffered discrimination or serious harm on the basis of her being a member of any political organisation or on the basis of an imputed political opinion based upon her being of Tamil ethnicity.*

8 Under the heading "*Member of a particular Social group – Parliamentarian's sister*", the Tribunal said:

> *The applicant contends that she has a profile which makes her of interest to the authorities because she has a sister who is a Parliamentarian on the Opposition side.*

9 The Tribunal then went on to discuss the meaning of "particular social group". It expressed the view that a family is capable of constituting a particular social group within the meaning of the Convention, but said that "this is subject to s.91S" of the Migration Act and set out an extract from that section. Section 91S provides:

> *For the purposes of the application of this Act and the regulations to a particular person (the* first person*), in determining whether the first person has a well-founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person's family:*
>
> *(a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; and*
>
> *(b) disregard any fear of persecution, or any persecution, that:*
>
> *(i) the first person has ever experienced; or*
>
> *(ii) any other member or former member (whether alive or dead) of the family has ever experienced;*
>
> *where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.*

10 The Tribunal then said:

> *Therefore, a person who is pursued because he or she is a relative of a person targeted for a non-Convention reason does not fall within the grounds for persecution covered in the Convention definition.*

11 After discussing some of the evidence, the Tribunal concluded that it was not satisfied that the appellant's sister had a fear of persecution for a Convention reason. The Tribunal then said:

> *This claim of the applicant leads the Tribunal to believe that the applicant exaggerates the possibilities of a threat to herself as a result of her sister's position. The Tribunal is not satisfied in this case that the applicant is a member of a social group...In any case, the Tribunal is satisfied that the applicant does not have a well founded fear of persecution as a result of being a member of a family group of a Parliamentarian.*

12 Again, the Tribunal referred to the question of security checks and residence in Colombo, before concluding:

> *The Tribunal finds that the applicant has not suffered discrimination in employment on the basis of her ethnicity or as a member of the family of a Parliamentarian and does not accept that she will face a real chance of this in the reasonably near future.*

13 Under the heading "*Member of a particular Social Group - Returnees*", the Tribunal said in each case:

> *The applicant's agent claimed that the applicant "as a Tamil who has spent a considerable period in a Western country she will be of interest to the security forces and militant Tamil groups as a target of extortion". There is no substance for this claim in the history of the applicant's previous overseas travel. After travelling abroad in 2004 and 2005 she was not subject to extortion or theft attempts. The Tribunal does not accept the claim.*
>
> *The applicant's agent claimed that the applicant would be at risk of detention at the airport if she returns to Sri Lanka because of her time spent in a western country. The Tribunal notes that the applicant has travelled overseas before and not experienced any difficulty in travel movements and therefore puts no weight on this claim.*

14 Under the heading "*Other considerations*", the Tribunal discussed other issues not relevant to this proceeding. In the case of Appellant S, the Tribunal said:

> *The Tribunal has considered the claims of the applicant separately for the purpose of clarity. The Tribunal has also considered the applicant's claims cumulatively against the three convention grounds of race, imputed political opinion and member [*sic*] of a particular social group(s). The Tribunal is not satisfied that the circumstances that the review applicant has put forward, taken either individually or cumulatively, evidence that the applicant has a well-founded fear of persecution within the meaning of the Convention.*

15 In the Tribunal's reasons for decision relating to Appellant T, only the second sentence of this paragraph appears.

The grounds of application to the Federal Magistrates Court

16 In their separate applications to the Federal Magistrates Court, each of the appellants relied on seven grounds to justify the relief sought. For present purposes, it is necessary only to deal with two of those grounds. The first was that the Tribunal "failed to deal either expressly or at all with the specific claim of imputed political opinion of being pro-LTTE through the [appellant's] sister being an MP from a political party considered to be pro-Tamil/LTTE". The second ground was that the Tribunal "failed to deal with the specific claim of fear of harm as a returned asylum seeker".

The federal magistrate's reasons for judgment

17 The federal magistrate dealt with the first of these two grounds at [8]-[16] of his reasons for judgment. At [10], his Honour relied on the Tribunal's finding of fact that there is no well-founded fear of persecution as a consequence of either appellant being a member of the family of a parliamentarian. His Honour expressed the view that the Tribunal dealt with the claim of particular social group, and also dealt with the claim that the appellants had profiles because their sister was a parliamentarian. At [17]-[29], his Honour considered and rejected the second ground relevant to this proceeding. His Honour accepted a submission by counsel for the Minister to the effect that, on a fair reading of the Tribunal's reasons, the manner in which the Tribunal dealt with the appellants' claim that they would be at risk as Tamils returning to Sri Lanka after spending time in a western country indicated that it had also considered whether either appellant had a well-founded fear of persecution as a result of applying unsuccessfully for refugee status.

The grounds of appeal

18 Although expressed in four paragraphs, rather than two, the grounds of appeal are the same in substance as the two grounds in the applications to the court below, to which I have referred in [16].

Imputed political opinion by reason of sister's position

19 In her application to the Tribunal, each of the appellants commented upon the reasons and conclusions of the Minister's delegate. In commenting on a statement of the delegate as to the need for a Convention connection between the persecution of an applicant or the clan to which he or she belongs and the risk of harm, each appellant said:

> *I would submit that the primary connection is the fact that my sister is a member of parliament who represents the TNA. The TNA has its power base in Jaffna and is the northen [*sic*] Tamil's political party. She was living and working in the north of Sri Lanka when she was elected to represent the north. It is generally agreed that any member from the north of Sri Lanka, must have had some link or connection to the LTTE and it is fact that all those members are viewed with suspicion and distrust from the general Sri Lankan Sinhalese population. The very fact that she was able to stand for election in the north of Sri Lanka (Jaffna) means that she would have needed the support or endorsement of the LTTE. The LTTE will vet and control who and who does not stand for election. If the person is viewed as having anti LTTE views that person will not be a candidate for the north.*

20 A further statement by each appellant was:

> *In response to the Delegate stating that I do not have a profile which results in me being of interest, adverse or otherwise to the authorities, I again highlight the fact that because of the fact that my sister is the Tamil MP, representing the TNA from Vaddukodd, which is in the north of Sri Lanka, my profile is directly affected. My sister the MP is a very well known MP, she visits my house on a regular basis and all of my neighbours were well aware of this fact. Before she was elected MP she resided with me.*

21 In her final written submission to the Tribunal, Appellant S said, in relation to imputed political opinion:

> *Political opinion includes people who have links to political parties or groups, people who have publicly expressed their political views and people who are assumed correctly or incorrectly to hold certain political views.*
>
> *Right throughout my submission and evidence I have stressed the fact that because the* [sic] *my sister is an MP representing the TNA from Jaffna, I have been and will be held to hold the same political views as her. That is, she supports a party who has*

> *the backing of the LTTE. My claim can also be seen as a member [*sic*] of particular social group, in this case the family, which includes my politician sister.*

22 In her final written submission, Appellant T expressed herself in the same terms, except that she used the phrase "our submission" instead of the phrase "my submission" and the phrase "The applicant's claim" instead of the phrase "My claim".

23 It was clear from these submissions that each of the appellants was making a claim of imputed political opinion on the basis of her relationship to the appellants' sister. Each was saying that, because their sister was a member of Parliament, representing a constituency in the LTTE-dominated north of the country, and a member of the TNA, the sister would be understood or believed to be sympathetic to the cause of Tamils in general and to the LTTE in particular. This political opinion would be imputed to members of her family, whether they actually held it or not. The imputation was said to be more likely because the sister had stayed with the appellants in their home in Colombo. This was a claim of imputed political opinion distinct from that based purely on the appellants being of the Tamil race. It was also a claim of a well-founded fear of persecution for the Convention reason of political opinion, entirely distinct from any claim with reference to the Convention reason of particular social group.

24 The Tribunal did not deal expressly with that claim. The Tribunal member appeared to be unaware of it as a separate claim. The Tribunal dealt only with imputed political opinion on the basis of race. It dealt only with the relationship of the appellants with their sister on the basis that it was a claim based on membership of a particular social group. In dealing with the latter, when it discussed s 91S of the Migration Act, the Tribunal appears to have overlooked the claim that the appellants' sister would have imputed to her a political opinion by reason of the location of her constituency and her membership of the TNA. The appellants were not relying on membership of a particular social group for this purpose, so s 91S was inapplicable. The sister might not have feared persecution herself, because she might have assumed that her prominence as a member of Parliament would protect her. This would not prevent her political opinion being imputed to either of the appellants, causing them to fear persecution. The Tribunal's statement that each appellant had exaggerated the possibilities of a threat to herself as a result of her sister's position was not made in the context of consideration of imputed political opinion by this means. It was made in the

context of the particular social group ground and the Tribunal's discussion of the application of s 91S to that ground. Similarly, the Tribunal's finding that each appellant had not suffered discrimination in employment as a member of the family of a parliamentarian, and would not face a real chance of this in the reasonably near future, was in the context of the particular social group ground. The Tribunal simply did not deal with the separate, and separately articulated, claim of imputed political opinion by reason of the appellants' sister's position.

The returned asylum seeker claim

25 In her statement accompanying her application to the Tribunal, each appellant addressed the question of what would occur on return to Sri Lanka. Each statement contained the following:

> *In the past, Amnesty International advised that -*
>
> *" Returning asylum seekers to Colombo and the south are often held for questioning for a period of 48 hours upon their arrival at Katunayake: after their release the majority of them go underground as there is no official protection or help offered by the authorities. In most cases there is no information about their subsequent fate or whereabouts."*
>
> *Currently, Amnesty International January 2007, Hotham Mission findings : re Sri Lankan Asylum seekers in Australia have advised:*
>
> *Asylum seekers returning to Sri Lanka faced significant risks and concerns. There are reports of returned asylum seekers and refugees going into hiding after receiving death threats, being arrested on arrival and reported deaths both in police custody and by the army.*
>
> *There are serious protection concerns for particular individuals with a history of arrests or perceived past affiliations with the LTTE or certain political groups or individuals.*
>
> *It is therefore likely that the applicant's circumstances will lead to a situation whereby:*
>
> *a. she will be at risk of detention at the airport. When the security officers realise that she has been in Australia for some time, they may well ask by what authority she stayed in Australia and she would have to say that she applied for Refugee Status. The next obvious question is as to why she had to apply for Refugee Status, and as a Tamil she may then be under suspicion because of this application.*

26 Each appellant then went on to assert that, on return to Sri Lanka, she would be suspected of involvement with or sympathy for the LTTE solely on the basis of her race. Each appellant then went on to assert that, as a Tamil who had spent a considerable period in

a western country, she would be of interest to the security forces and militant Tamil groups, as a target of extortion.

27 In this way, the claim of a well-founded fear of persecution as a member of a group consisting of returned asylum seekers, or returned Tamil asylum seekers, was put as a separate and distinct claim from any other claim based on a group of returnees to Sri Lanka defined in any other way. The Tribunal was bound to consider each of these separate and distinct claims. The Tribunal does not appear to have been aware of the claim of either appellant to have a well-founded fear of persecution on the basis of membership of a particular social group, being failed asylum seekers returning to Sri Lanka, or Tamils who were failed asylum seekers returning to Sri Lanka. The claim obviously had dimensions greater than the other claim or claims in relation to returnees. It would be necessary for the Tribunal to consider whether a confession of an unsuccessful claim for refugee status in another country would lead officials to question the basis on which such a claim had been made, and to suspect that there was some substance to that basis, even though the claim had been rejected. If it had considered that claim, it would then have been necessary for the Tribunal to consider whether s 91R(3) required it to disregard the application for a protection visa. That subsection requires the decision-maker to disregard any conduct engaged in by a protection visa applicant in Australia unless that applicant satisfies the decision-maker that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee within the meaning of the Convention. The fact that the Tribunal did not discuss the possible impact of s 91R(3) is a further indication that it had not considered this claim as a separate claim in relation to either appellant.

Conclusion

28 Each of the appellants made two separate and distinct claims that were not considered by the Tribunal. They were claims based on imputed political opinion as a result of the appellants' sister's position, and claims based on the proposition that they would be members of a particular social group, being citizens returning to Sri Lanka after making unsuccessful claims to be refugees in other countries. It is well-established that the Tribunal is obliged to deal with each and every claim made by an applicant for review of a decision refusing to grant a protection visa. Failure to do so amounts to jurisdictional error. As Allsop J (with

whom Spender J concurred) said in *Htun v Minister for Immigration & Multicultural Affairs* [2001] FCA 1802 (2001) 194 ALR 244 at [42]:

> *The requirement to review the decision under s 414 of the [*Migration*] Act requires the tribunal to consider the claims of the applicant. To make a decision without having considered all the claims is to fail to complete the exercise of the jurisdiction embarked on.*

See also Merkel J at [8] and *SCAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 80 (2003) 76 ALD 625 at [26] and [30] per Madgwick and Conti JJ.

29 The federal magistrate was therefore in error in failing to find in favour of the appellants on each of the two grounds to which I have referred. His Honour should have found that there was jurisdictional error on the part of the Tribunal in relation to the decision in each of the appellant's cases. His Honour should have made the orders sought in the applications to the Federal Magistrates Court, or similar orders, having the effect of quashing the Tribunal's decision in each case and remitting each matter to the Tribunal to be heard and determined according to law. His Honour should also have ordered that the Minister pay the costs of the proceeding in the Federal Magistrates Court.

30 The appeals must therefore be allowed. The orders made by the federal magistrate on 10 April 2008, dismissing the two applications, must be set aside. In substitution for those orders, there should be made orders for writs of certiorari quashing the decisions of the Tribunal, and orders for writs of mandamus, having the effect of requiring the Tribunal to hear and determine each appellant's application for review of the decision of the delegate of the Minister according to law. The Minister should be ordered to pay the costs of each appellant of the proceedings in the Federal Magistrates Court. The Minister should also be ordered to pay the appellants' costs of their appeals to this Court.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 16 February 2009

Counsel for the Appellants:	Mr J Gibson
Solicitor for the Appellants:	Wimal & Associates
Counsel for the Respondents:	Mr W Mosley
Solicitor for the Respondents:	Australian Government Solicitor
Date of Hearing:	29 August 2008
Date of Judgment:	17 February 2009