FEDERAL MAGISTRATES COURT OF AUSTRALIA

AZABR v MINISTER FOR IMMIGRATION & ANOR *[2011] FMCA 825*

MIGRATION – Protection visa – review of decision of Refugee Review Tribunal to affirm decision of Minister not to grant the visa – Pakistani national – Tribunal find applicant genuinely fearful for Convention reason but that risk only pertains to area of Pakistan where applicant and his family reside – relocation to other area of Pakistan "such as Karachi" found to be reasonable – content of relocation test – also argued that apprehended bias evidenced by same member delivering reasons contemporaneously in two other matters – very similar facts – no jurisdictional error.

Migration Act 1958 (Cth), ss.36, 420 & 476

Craig v The State of South Australia [1995] HCA 58
Plaintiff S157/2002 v The Commonwealth of Australia (2003) 211 CLR 476
SZATV v The Minister for Immigration and Citizenship [2007] HCA 40
Randhawa v MILGEA (1994) 52 FCR 437
Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473
British American Tobacco Australia Services Limited v Laurie [2011] HCA 2
Ebner v Official Trustee in Bankruptcy [2000] HCA 63
NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 214 ALR 264
Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70

Applicant:	AZABR
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	ADG 94 of 2011
Judgment of:	Lindsay FM
Hearing date:	22 August 2011
Date of Last Submission:	22 August 2011

Delivered at:	Adelaide
Delivered on:	31 October 2011

REPRESENTATION

Counsel for the Applicant:	Mr Charman
Solicitors for the Applicant:	Hamdan Lawyers
Counsel for the Respondents:	Ms Johnson
Solicitors for the Respondents:	Sparke Helmore

ORDERS

(1) The Application for Judicial Review filed on 29 April 2011 is refused.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT ADELAIDE

ADG 94 of 2011

AZABR
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application pursuant to s.476 of the *Migration Act 1958* ("the Act") in which the applicant seeks judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") of 31 March 2011. In its decision the Tribunal affirmed the decision of the delegate of the Minister not to grant the applicant a protection visa.

2. The applicant is a citizen of Pakistan. He is from the Haripur District in the North West Frontier Province of Pakistan an area apparently now known as Khyber-Pakhtunkhwa. He and his family are from the city of Haripur in that district. Haripur is close to the border of North West Frontier Province and the Province of the Punjab.

3. The applicant arrived in Australia on a student visa in August 2007. He left Australia in September 2009 and returned in October 2009. He was granted another student visa for the period April to July 2010. He applied for a protection visa on 21 June 2010.

4. He is a Sunni Muslim.

5. His family in Pakistan consists of his parents and a brother.

6. When he returned to Pakistan in 2009 he was robbed and when he reported the robbery to the police he was told by the police that he should come home to Pakistan as he was a non-Muslim on account of his living in a western country. His family started to receive threats about six weeks after he returned to Australia from that visit. His family had received threatening letters. The letters accused him of being non-Muslim and claimed that he would bring western culture back to Pakistan with him. The authors of the letter say that it is their responsibility to bring him back to Pakistan to join the Taliban.

7. One night in 2010 three people came to the home of his parents and pointed a gun at them and told his mother that she had to stop teaching girls or they would kill her. She has subsequently given up her job as a teacher.

8. He says that the Taliban occupy and control a city about 35 kilometres from Haripur and that the Taliban are everywhere in this region.

9. In addition to taking evidence of the applicant at the oral hearing the Tribunal also took oral evidence from a community outreach worker with whom the applicant had been doing voluntary work and received a letter from a social worker for whom the applicant has also worked.

10. The reasons for decision of the Tribunal contained an exhaustive examination of country information in relation to Pakistan from the perspective of the threat posed to persons in Pakistan by the Taliban and other violent Sunni jihadi groups.

11. The Tribunal accepted the applicant's claims that his family had received threats. They had some doubts about the seriousness of the threats. It accepted that if he returned to live in Haripur he would be seen as a person who had lived in the western country and would be regarded as a "non-Muslim" and a threat to the way of life of the various terrorist organisations that inhabit that area. The Tribunal was satisfied that his fears were for a Convention reason and specifically that he fears harm by reason of his religion or an imputed political opinion by reason of his being imputed as westernised and "anti-Muslim". The Tribunal was satisfied that there was a real chance that

he would face serious harm based on his religion and the imputed political opinion should he return to Haripur in the foreseeable future.

12. The Tribunal's finding differed from the finding of the delegate of the Minister in that whilst the delegate found that the applicant had a genuine fear of harm he was not satisfied that there was a real chance of persecution occurring. It is fair to say that the delegate had more serious concerns about the credibility of certain aspects of the applicant's claims.

13. The Tribunal went on to find however that it was reasonable for the applicant to relocate to another area of Pakistan such as Karachi and for that reason it was not satisfied that the applicant was a person to whom Australia had protection obligations under the Refugees Convention. That meant that he did not satisfy the criterion set out in s.36(2)(a) of the Act and therefore that application for a protection visa should be refused and the decision of the delegate confirmed.

14. The Tribunal found that the threat to the applicant was confined to the area around Haripur. It did not accept that he had a profile such that the extremist groups whom he feared would pursue him wherever in Pakistan he lived.

15. The Tribunal placed some emphasis upon the fact that the applicant was well educated and had been capable of living away from his home and in Australia for some years and that he spoke Urdu and English, the two main languages of Pakistan and was a member of the branch of the Muslim faith in Pakistan which constituted the majority of the population (Sunni). All of these matters taken together combined satisfied the Tribunal that the applicant could live and work in another major city in Pakistan such as Karachi.

16. The applicant had contended before the Tribunal that nowhere in Pakistan was safe but the Tribunal, whilst acknowledging that random acts of generalised violence outside of the North West Frontier Province were still possible in a city such as Karachi that the chance of the applicant experiencing such violence was remote. The Tribunal was not satisfied he would be targeted by the relevant terrorist organisations away from the Haripur area.

17. In order to succeed on the review the applicant must demonstrate that the decision of the Tribunal was vitiated by jurisdictional error as that concept has been explicated by the High Court in a number of cases such as *Craig v The State of South Australia* [1995] HCA 58 and as it has been specifically explicated in cases involving the work of Tribunals under the Act in *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476.

18. The applicant contended before me that the Tribunal had fallen into jurisdictional error in two ways.

19. The first point was that the Tribunal had failed to exercise its jurisdiction in that it applied the wrong legal test in relation to the issue of relocation within Pakistan.

20. The Tribunal's understanding of the law in relation to this issue is set out at [68] of its decision. I set out that paragraph in full:

> *The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: Randhawa v MILGEA (1994) 52 FCR 437 per Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of "practicable", to expect him or her to seek refuge in another part of the same country. What is "reasonable" in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense: SZATV v MIAC [2007] HCA 40 and SZFDV v MIAC [2007] HCA 41, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.*

21. The Tribunal had this to say at [70] of its determination:

> *The relevant question for the Tribunal is whether there is a real chance the applicant would face persecution for a Convention reason if he moved to another area of Pakistan, and whether in his particular circumstances it is reasonable for him to do so.*

22. As I indicated to counsel during the course of argument in relation to this matter the first two lines of the passage set out in paragraph [70] save for the conjunction "and" are plainly wrong. In order to determine whether a relocation to another part of the applicant's country is reasonable and if therefore the applicant fails to satisfy on that account the criteria for entitlement to a protection visa, the Tribunal did not have to be satisfied that there was a real chance that the applicant would face persecution for a Convention reason if he moved to that other area. That is far too stringent a test. Once the reasonable apprehension of persecution for a Convention reason within a particular locality of a country has been satisfied, the Tribunal's attention should be focused upon whether in all of the circumstances of the applicant a move to another region or area of the country is a reasonable one for him to make. Whether living in the new locality would give rise to a reasonable fear of persecution for a Convention reason is beside the point. It may do. But if it does not that is not determinative. The question is still whether the move to the alternative area of the country of origin is reasonable in the circumstances of the applicant. But I think that point is taken up in the latter part of the sentence. If the first two lines of paragraph [70] were all that the Tribunal had to say on the topic then clearly it would have fallen into an error and probably a jurisdictional error but that is not all it had to say on the topic. It is not even all it had to say on the topic addressed in that paragraph of its Reasons. A fair reading of the Tribunal's Reasons indicates that it understood properly that the test was a much broader one.

23. The Tribunal's specific finding was that the threat to the applicant from the terrorist organisation Tehrik-e-Taliban Pakistan (TTP) was localised. The Tribunal was not prepared to accept that an "ordinary Pakistani" [71], who does not have a political profile but who had simply been living and studying in a western country such as Australia would raise interest of a kind with the TTP such as could lead to a real chance of persecution away from the locality in which he was known.

24. Taking into account the evidence it accepted as to the threats made to the applicant's family (but also taking into account the fact that they have been threatened and not harmed and that he was able to safely return to Pakistan in 2009) the Tribunal came to the view that he was not a person of such interest to the TTP as to put him at risk of being pursued wherever he lived in Pakistan.

25. I have already noted that the Tribunal's findings as to the level of education the applicant enjoyed, his ability to live independently and away from home in Australia, his membership of the largest branch of the Muslim faith in the country and his speaking of both major languages in the country meant that it was reasonable to assume that he could cope with living and working in another major city in Pakistan such as Karachi or in other words that it would be reasonable for him to do so.

26. The Tribunal considered and accepted his genuine fear of recent events in Pakistan. It discussed in the context of the country information the violence that was plaguing the country including in Karachi, but, critically the Tribunal was not satisfied that if the applicant lived in a city such as Karachi that he would be targeted and harmed in the types of random generalised violence from which the populations of cities such as Karachi were suffering.

27. Mr Charman, for the applicant, said that there was an inconsistency between the Tribunal's finding that he would be persecuted on account of his perceived anti-Muslim and westernised identity once he returned from Australia and the finding but that such risk of persecution only arose within the region of Haripur. It was said that he would logically be at the same risk of persecution in a city such as Karachi. That submission ignores the specific finding of the Tribunal that his risk of persecution in Haripur related to the knowledge of himself and his family that elements of the TTP had in that area. Once that element of local knowledge was removed the applicant is no different from many other Sunni Muslim students who have been spending time for educational purposes in a western country. I do not think the Tribunal distinguishing risks arising from his presence in an area where he and his family are known, and risks arising in another major urban centre

altogether is irrational or illogical or indicative of a failure to exercise the jurisdiction it has.

28. In order to read fairly the Tribunal's Reasons it must be borne in mind that the Tribunal was instancing Karachi as a place within Pakistan to which the applicant could relocate. I also do not think that a fair reading of the Tribunal's Reasons indicates that it failed to take into account the applicant's specific individual circumstances in assessing whether a relocation to another part of the country was reasonable.

29. The exercise involved in the "relocation test" in the context of candidates for protection visas was examined by the High Court of Australia in *SZATV v The Minister for Immigration and Citizenship* [2007] HCA 40. In that case the Tribunal's finding (upheld on review to this Court and on appeal to the Full Court of the Federal Court) was that the applicant, a citizen of the Ukraine and a journalist who was at risk of persecution if he returned to his place of residence in the Ukraine, was not a person to whom Australia owed obligations under the Refugees Convention because he was able to obtain work in another industry (the construction industry) as he had done in Australia and in that context his chance of being persecuted by the Ukrainian security services upon his return to the Ukraine was deemed to be remote. The majority judgment said this of the application of the test in that case at [32]:

> *The effect of the Tribunal's stance was that the appellant was expected to move elsewhere in Ukraine, and live "discreetly" so as not to attract the adverse interest of the authorities in his new location, lest he be further persecuted by reason of his political opinions. By this reasoning the Tribunal sidestepped consideration of what might reasonably be expected of the appellant with respect to his "relocation" in Ukraine. It presents an error of law, going to an essential task of the Tribunal. This was determination of whether the appellant's fear of persecution was "well-founded" in the Convention sense and thus for the purposes of s.36(2) of the Act.*

30. The High Court considered itself to be simply applying the law as propounded in the decision of *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

31. The crux of the assessment of the reasonableness of the relocation of this case was movement to another area of Pakistan. The Tribunal did not seek to describe how the appellant should conduct himself whether following a relocation or otherwise. It posited the possibility of him relocating to another area of Pakistan given his specific circumstances and it determined that it was reasonable that he do so and I do not think in doing so the Tribunal fell into jurisdictional error.

32. Nothing said by the High Court in *SZATV* (supra) is inconsistent with the propounding of the relocation test in *Randhawa v MILGEA* (1994) 52 FCR 347 which was the explication of the test the Tribunal relied upon in its reasons.

33. The second ground advanced in relation to jurisdictional error arose from the circumstance that the Tribunal delivered a decision in respect of two other applications on the same day (they are matters that are also the subject of applications to this Court under s.476 of the Act, namely AZABP (ADG 92 of 2011) and AZABQ (ADG 93 of 2011)). Mr Charman appeared on behalf of the applicants in each of those two cases as well. He asked that the submissions he made on behalf of applicant AZABR be accepted as the submissions on behalf of applicant AZABP and applicant AZABQ.

34. No separate or discrete submissions were made in respect of applicant AZABP or applicant AZABQ.

35. AZABP was also a citizen of Pakistan from Haripur who had been studying and living in Australia. The Tribunal accepted that his family had received threats from the TTP and his fear of persecution by them if he returned to Haripur was genuine. There was an additional element of fear of persecution on the basis of imputed political opinion (the involvement of his wife's family in a political party known as Muhajir Quami Movement ("MQM") that was argued. Fear of persecution on that ground was not accepted by the Tribunal and that finding was not the subject of any application to this Court.

36. The Tribunal went on to find that the applicant could reasonably relocate in Pakistan to an area where he would not face persecution and it did so on the basis of a finding that his fear of persecution by the

TTP was localised. The personal circumstances of this applicant were very similar to those of applicant AZABR.

37. Applicant AZABQ was also from Haripur, was also a student who had been studying in Australia and was also a person whom the Tribunal accepted genuinely feared persecution at the hands of the TTP if he returned to Haripur. The Tribunal rejected a separate claim of fear of persecution for a Convention reason relating to his Indian heritage or because of his inability to speak the language spoken by the denizens of Pakhtunkhwa. Once again the Tribunal was satisfied that he could relocate to another area of Pakistan where he would not face a real chance of persecution for a Convention reason and once again his personal circumstances were very similar to AZABR.

38. The Tribunal's reasoning in each of the cases is very similar as is its consideration of the country information and its key findings are expressed in language that is also very similar.

39. It is said that the fact that the same Tribunal member determined all three cases and that a decision in all three cases was made on the same day and in language that was very similar and in some passages almost identical would give rise to a reasonable apprehension that the Tribunal had not brought an impartial mind to bear on the decision making process.

40. The content of the test of whether a judicial officer has said or done things that give rise to a reasonable apprehension that he has not or that he will not bring an impartial mind to bear on his adjudication has been explicated in many decisions of the High Court of Australia, most recently in *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2. That case was one involving an apprehension said to be grounded on a previous adjudication in a related cause but the legal test discussed is pertinent to all of the other varieties of factual circumstance in which the issue can arise.

41. As French CJ points out at [38] *"There is a variety of ways in which the impartiality of a court may be or may appear to be compromised"*.

42. The test is whether the relevant circumstances are such that a fair-minded and well-informed person might reasonably apprehend that the

judicial officer might not bring or might not have brought as the case may be an impartial mind to bear on the adjudication (*Ebner v Official Trustee in Bankruptcy* [2000] HCA 63).

43. As French CJ goes on to say at [39] of *British American Tobacco Australia Services Limited* (supra):

> *Particular applications of the general principle enunciated in Ebner will be required for the different classes of case in which an apprehension of bias is said to arise and different sets of circumstances within those classes.*

44. The application of the test must take into account the fact that the Refugee Review Tribunal does not administer public justice in open Court. As Allsop J put that matter in *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 214 ALR 264 at [19]:

> *The tribunal does not administer public justice. The elements which affect the public confidence in the adjudication of disputes by an independent and impartial arm of government (in the broad sense) and which may be seen to inform what might be said to be freestanding norms of conduct and behaviour by judges conducting public hearings are not necessarily as easily transposable as strict obligations of administrative decision-makers acting private. The tribunal here must investigate the facts for itself unaided by counsel presenting the parties' cases, to the degree and extent it thinks appropriate. The tribunal which has to reach a state of satisfaction may want to test and probe a recounted history. It may have particular matters troubling it for resolution, which require questioning and expressions of doubt which are entirely appropriate, but which if undertaken or said by a judge in open court in adversary litigation might give rise to an apprehension of a lack of impartiality.*

45. Deane J in *Laws v Australian Broadcasting* Tribunal (1990) 170 CLR 70 at [90] said:

> *It has long been settled that the content of the requirements of procedural fairness may vary according to the particular circumstances of a case, including the nature and general functions of the entity required to observe them and the relationship between that entity and the person to whom procedural fairness must be accorded. Plainly, such variations may occur in the content of the requirement that a tribunal*

> *required to observe procedural fairness be not tainted by either the actuality or the appearance of disqualifying bias. Thus, acquaintanceship with or preconceived views about a party of a kind which would create the appearance of disqualifying bias in a judge exercising the judicial power of a court of law may be permissible and unobjectionable in a statutory body which, while required to accord procedural fairness in the discharge of a particular function, is entrusted with other functions which necessitate a continuing relationship with those engaged in a particular industry.*

46. Here, the apprehended bias is said to arise from the combination of the following matters:

a) The same member constituted the Tribunal in each case;

b) The decisions and reasons for decision were all delivered on the same day;

c) The language and form of expression used in relation to the "Findings and Reasons" part of each decision are near identical.

47. Section 420 of the Act provides, in sub-section (1):

> *The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.*

48. The contemporaniety of the delivery of the decisions is unexceptional itself.

49. There is no doubting the very close similarity of expression in the key areas of the decision, those relating to relocation and the reasonableness of it especially. But the key aspects of the claims themselves were remarkably similar. All three applicants came from Haripur; all succeeded on their claims as they were grounded on fear of persecution on account of imputed Westernism or anti-Muslimism; all had family members who had been threatened by the TTP; all had been studying in Australia.

50. Given these remarkably similar aspects of their claims, it is unsurprising that there was a consistency in outcome and that in

explaining how it reached that particular outcome, similar language and thought processes were evident.

51. Moreover, in this case, the applicant's specific circumstances were addressed by the Tribunal in some detail in determining the outcome.

52. The ground of apprehended bias is not made out.

53. For the foregoing Reasons, the application for judicial review is refused.

I certify that the preceding fifty-three (53) paragraphs are a true copy of the reasons for judgment of Lindsay FM

Date: 31 October 2011