FEDERAL COURT OF AUSTRALIA

SZCOQ v Minister for Immigration and Multicultural Affairs [2007] FCAFC 9

MIGRATION – protection visa – appeal from decision of Federal Magistrate dismissing application for judicial review of Refugee Review Tribunal's decision – where appellant alleged politically motivated false charges made against him and provided charge sheet to Tribunal – where Tribunal found no evidence that charge was politically motivated – where Tribunal did not accept appellant had a prominent role in community or politics – whether Tribunal failed to have regard to contents of charge sheet

Migration Act 1958 (Cth) s 424, s 430(1)

Addo v Minister for Immigration and Multicultural Affairs [1999] FCA 940 cited
Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280 cited
Iyer v Minister for Immigration and Multicultural Affairs [2000] FCA 1788 cited
Kalala v Minister for Immigration and Multicultural Affairs (2001) 114 FCR 212 considered
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 cited
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 cited/applied
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 cited
Minister for Immigration and Multicultural Affairs, Re; Ex parte Applicant S20/2002 (2003) 77 ALJR 1165 cited
NAJT v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51 considered
SZDMC v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 763 cited

SZCOQ v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS AND REFUGEE REVIEW TRIBUNAL
NSD 523 OF 2006

MOORE, BESANKO AND BUCHANAN JJ
9 FEBRUARY 2007
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 523 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZCOQ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**MOORE, BESANKO AND BUCHANAN JJ**
DATE OF ORDER:	**9 FEBRUARY 2007**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the first respondent's costs.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 523 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZCOQ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**MOORE, BESANKO AND BUCHANAN JJ**
DATE:	**9 FEBRUARY 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

MOORE J

1 This is an appeal against a judgment of a Federal Magistrate of 23 February 2006 dismissing an application for judicial review of a decision of the Refugee Review Tribunal made on 2 December 2003 and handed down on 2 January 2004. The Tribunal had affirmed a decision of a delegate of the Minister for Immigration and Multicultural Affairs to refuse to grant the appellant a protection visa.

2 The appellant is a citizen of Bangladesh who arrived in Australia on 19 June 2002 on a business visitor's visa to attend a Buddhist conference in Melbourne. Before the Tribunal the appellant claimed to have a well-founded fear of persecution by the Bangladesh Nationalist Party (BNP) on the basis of his religious beliefs as a Buddhist and his actual or imputed political opinion. He claimed that his activities for community development had brought him to the hostile attention of an influential BNP leader and other authorities in Bangladesh who regarded him as an influential figure in the Buddhist community and non-supporter of the BNP. The appellant claimed to have experienced many incidents of

persecution including physical violence, trauma, threats, and discrimination against his family. The appellant also claimed that he had been the subject of politically motivated false charges.

3 The appellant provided the Tribunal with various documents in support of his application including a charge sheet dated March 2002 concerning alleged offences by the appellant and others. The Tribunal accepted that the appellant was a Buddhist and was active in the community but did not accept that he was a religious leader or that he had a prominent role in the community or politics. It therefore did not accept that he was a target of political violence and concluded that he did not have a well founded fear of persecution.

4 The charge sheet was several pages in length. On its face, it indicated that the appellant and two others had been charged with an offence carried out on 10 January 2002. The appellant was described as the general secretary of the Awami League in a specified area. The informant was described by name and identified as a member of the government and a prominent parliamentarian and political adviser to the Prime Minister. The charge was that the appellant and others had thrown hand bombs causing injury to the informant and others at a BNP meeting. It was alleged in the charge sheet that the incident occurred "due to political rivalry and political grudge". The charge sheet recited that the three accused "were involved in many anti-Government activities cases and they were wanted in many cases of various Police stations".

5 The Tribunal dealt with this document in its reasons in the following way (at [56] of its reasons for decision):

> "[the appellant] *provided.... documents relating to a charge against* [him] *which he describes as false and that is politically motivated… The Tribunal accepts as plausible the applicant's claim that a charge was laid against him in early 2002 but* ***has no information to support the applicant's claim that this charge was politically motivated and does not accept that this was the case****. The Tribunal finds that nothing in this material adds support to the applicant's claim to hold a well-founded fear of persecution on return to Bangladesh arising from political opinion"*. (emphasis added)

6 The Tribunal indicated there was no further material to support the claim the appellant had been or would be targeted for political reasons and did not accept as plausible that the

appellant had been subjected to violence because of his political opinion.

7 The Tribunal found the appellant's claims could not establish that he faced a real chance of serious harm or mistreatment for a Convention reason. Having considered the appellant's evidence and independent country information, it found that the appellant did not have a well-founded fear of persecution for a Convention reason.

8 On 27 January 2004, the appellant filed an application in the Federal Magistrates Court seeking judicial review of the Tribunal's decision. Various amended applications were filed, with the appellant ultimately relying on a second further amended application filed 9 February 2006. Three grounds were raised. Firstly, the appellant claimed the Tribunal either ignored the contents of the charge sheet or that the Tribunal's reasoning was illogical in relation to the charge sheet, the Tribunal having found that there was no support for the appellant's claim that the charge was politically motivated. Counsel for the appellant in oral argument submitted that the absence of reasoning by the Tribunal on the contents of the charge sheet in the reasons for the decision supported an inference that the Tribunal overlooked relevant material in the document.

9 In relation to the second and third grounds, the appellant contended there had been a denial of procedural fairness contrary to s 422B of the *Migration Act 1958* (Cth) ("the Act") in that the Tribunal failed to give the appellant an opportunity to respond to independent country information and the Tribunal's concerns in relation to the charge sheet.

10 The Federal Magistrate rejected the grounds relating to procedural fairness, observing he was bound by the decision in *SZBDF v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1493. In that decision, the Court found that there was no scope for a wider obligation to provide particulars of information to be implied into the Tribunal's review process, beyond what was provided by s 424A of the Act. Furthermore, the Federal Magistrate found, in accordance with *SZBDF*, that the Tribunal's reasoning processes need not be disclosed.

11 The Federal Magistrate indicated that the real issues were raised by the first ground. His Honour found that the Tribunal had considered the charge sheet and had given full

weight to it, referring to [56] of the Tribunal's decision. The relevant issue, in his Honour's opinion, was whether the Tribunal failed to have regard to the contents of the charge sheet. His Honour noted at [19]:

> *"Paragraph 56 of the RRT's reasons is not clear on its face in that it is unclear what the presiding member meant by saying that he had no information to support the applicant's claim that the charge was politically motivated. Neither is it clear why the presiding member found that nothing in the material before the RRT added support to the applicant's claim to hold a well-founded fear of persecution on return to Bangladesh arising from political opinion. In the absence of clarity on the face of the RRT's reasons, the Court is entitled to draw inferences."*

12 His Honour said that three possible inferences could be drawn. One was that the Tribunal overlooked the political content of the charge sheet and failed to pay any meaningful regard to its contents. Another was that the Tribunal was aware of the political content but did not consider that it gave rise to any necessary implication concerning the motivation for the laying of the charge. The third was that the Tribunal might have regarded the charge as genuine but incompetently drawn. His Honour found there was no basis for preferring one inference over another and dismissed the application on the basis that the appellant was unable to discharge the onus of proving that the Tribunal failed to pay due regard to the contents of the charge sheet.

13 On 13 March 2006, the appellant filed a notice of appeal in this Court that raised various grounds, including grounds not raised before the Federal Magistrate. At the hearing of the appeal only one ground was pursued. It was that the Tribunal had failed to have regard to the contents of the charge sheet and this failure constituted jurisdictional error. Although not put in these terms, the appellant challenged the Federal Magistrate's decision on the footing that his Honour had erred in not identifying this error. Reference was made to the joint judgment of North and Madgwick JJ in *Kalala v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 212 at [23], and the decision in *NAJT v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 147 FCR 51 at [212] (per Madgwick J). The appellant submitted that the first of the three inferences identified by the Federal Magistrate should be drawn. That is, it should be inferred that the Tribunal member overlooked the obvious political content in the charge and thus had failed to pay any

meaningful regard to the content of the charge sheet.

14 A convenient starting point in dealing with this submission is to consider what the Tribunal meant in [56] of its reasons for decision and, in particular, what was meant by its observation that it had no information to support the appellant's claim that the charge was politically motivated. It is often necessary, in cases such as the present, to ascertain what matters the Tribunal did or did not take into account in reaching its decision. Usually, it is the Tribunal's reasons which signal the answer. In this context, it is common to speak of inferences to be drawn from the reasons for decision: see the discussion of McHugh, Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [69]. The drawing of inferences is an aspect of fact-finding. However in the context of the judicial review of decisions of administrative tribunals such as the Refugee Review Tribunal, it is necessary to bear in mind the often repeated cautionary observations of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272 that the administrative decision maker's reasons are not to be construed minutely and finely with an eye keenly attuned to the perception of error. The reasons are to be construed beneficially: see also the observations of Sackville J in *Hu v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 63 at [89].

15 In the present case, what the Tribunal may have meant in its discussion about the charge sheet, when read beneficially, was that while it acknowledged the existence of the charge sheet and what it contained, there was no material (putting aside the charge sheet) which indicated that what had motivated the informant or complainant who had laid the charge against the appellant was the appellant's actual or imputed political opinions. This analysis of the Tribunal's approach is consistent with what, in substance, was its finding of fact that the laying of the charge was not politically motivated. On this approach, it would have been open to the Tribunal to put to one side the contents of the charge sheet because while the charge was political in content (in the sense that it was a charge laid by a politician against the appellant alleging criminal conduct in the context of political activity) it does not follow that the laying of the charge was itself an act which was politically motivated.

16 It is possible to view the Tribunal's reasons less beneficially. It may not have read the

charge sheet nor have been aware of its contents. This explanation can be more readily reconciled with the Tribunal's finding that the appellant had no real political profile. A tension might otherwise be perceived between the Tribunal's finding that the appellant had no political profile and the evidence before it of a charge laid against the appellant by a politician, alleging significant political activity involving criminal acts. That tension would be lessened, although not eliminated, if one infers reasoning on the part of the Tribunal that the charge was probably false (and that the allegations about criminal conduct in the contest of political activity were baseless) and had been laid for an ulterior purpose which could be political. However, an analysis which assumes that the Tribunal did not have regard to the charge sheet and its contents is not the only available construction of the Tribunal's reasons. The analysis in the preceding paragraph is another and should be preferred, consistent with the approach demanded by the High Court in *Wu Shan Liang*.

17 In the result, the Tribunal has not fallen into the error identified by the appellant. It is unnecessary to consider whether such an error would have amounted to jurisdictional error. The appeal should be dismissed with costs.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Moore.

Associate:

Dated: 9 February 2007

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 523 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZCOQ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**MOORE, BESANKO AND BUCHANAN JJ**
DATE:	**9 FEBRUARY 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BESANKO J

18 I have had the advantage of reading in draft the reasons for judgment of Moore J. I agree that the appeal should be dismissed and I am in substantial agreement with his Honour's reasons. However, I wish to make some observations of my own.

19 The appeal was argued on the basis that the Magistrate erred because he should have found that the Tribunal failed to have regard to the charge sheet and its contents. The relevant features of the charge sheet are set out in the reasons for judgment of Moore J at [4]. Although it was suggested by the appellant that the reasoning of the Tribunal in relation to the significance of the charge sheet was illogical that was put forward as a reason to conclude that the Tribunal had failed to have regard to the contents of the charge sheet, rather than as an independent ground of challenge. This case does not call for a consideration of irrationality and illogicality as an independent ground of judicial review and the extent to which it differs from other grounds of judicial review including Wednesbury

unreasonableness (*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165; Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) pages 263-268; G Airo-Farulla, *Rationality and Judicial Review of Administrative Action* (2000) 24 MULR 543).

20 It is perhaps trite to say that in order to establish jurisdictional error on the ground that a decision-maker has failed to take into account a relevant consideration or matter it is necessary to establish that the consideration was one the decision-maker was bound to take into account, that the decision-maker failed to take the consideration into account and that the consideration was not so insignificant that the failure to take it into account could not have materially affected the decision (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-42 per Mason J (as he then was).

21 In this case, the first requirement was conceded by the first respondent before the Magistrate. Before this Court counsel for the first respondent said that he had no instructions to withdraw the concession. The concession is not self-evidently correct. The charge sheet and its contents was an item of evidence which was relevant, on the appellant's case, to whether he had a well-founded fear of persecution because of his religious or political opinions. That was the ultimate issue and it was clearly addressed by the Tribunal. The Magistrate rejected a contention by the appellant that an obligation to have regard to the charge sheet and its contents arose by reason of s 424 of the *Migration Act 1958* (Cth) which is in the following terms:

> *'(1) In conducting the review, the Tribunal may get any information that it considers relevant. However, if the Tribunal gets such information, the Tribunal must have regard to that information in making the decision on the review.*
>
> *(2) Without limiting subsection (1), the Tribunal may invite a person to give additional information.*
>
> *(3) The invitation must be given to the person:*
>
> *(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or*
>
> *(b) if the person is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.'*

22 The Magistrate rejected this contention because the charge sheet was not 'proactively obtained' by the Tribunal but rather 'volunteered' by the appellant and he referred to *SZDMC v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 763. On appeal the appellant did not challenge that conclusion although that was in a context in which he had a concession by the first respondent in his favour.

23 The Magistrate recorded the fact that the concession made by the first respondent was made on the basis that a like obligation, being an obligation similar to that imposed by s 424, could be implied from s 420 and the general law. The Magistrate said ss 414 and 425 may also be relevant.

24 It is not entirely clear what is meant by the reference to the general law in this context bearing in mind that the identification of the considerations or matters a decision-maker is bound to take into account must be firmly grounded in the provisions of the Act under which the decision is made.

25 There was only limited debate before this Court as to the source of the obligation to have regard to the charge sheet and its contents and I would not wish to be taken to be saying that the concession is incorrect; simply that it is not self-evidently correct (Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) pages 260-261. I am prepared to proceed on the basis of the concession because ultimately I have concluded that the Tribunal did have regard to the charge sheet and its contents.

26 In terms of the content of the obligation to have regard to the charge sheet and its contents, the Magistrate referred to it as an obligation to have 'meaningful regard' to these matters. Different expressions have been used in the cases and the precise expression used does not appear to be decisive. In *Kalala v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 212 at 220 [23] North and Madgwick JJ referred to whether the Magistrate had really examined a particular matter and in *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51 at 93 [212] Madgwick J referred to the need to give a matter real and genuine consideration. I would put the matter in the following way. In a case where a matter is mentioned by the decision-maker, the Court's assessment of the nature and quality of the decision-maker's reasons and of the importance of

the particular consideration or matter in the context of the case may nevertheless lead the Court to conclude that the decision-maker has not given the matter genuine consideration and therefore has failed to have regard to it. At the same time it is clear that the Court should not interfere with a decision on an application for judicial review simply because it disagrees, even strongly disagrees, with the weight the decision-maker places on a particular consideration or matter.

27 As the cases to which Moore J has referred make clear, the Court should not approach the Tribunal's reasons by construing them minutely and with an eye keenly attuned to the perception of error: *Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280; Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259. Furthermore, a relevant contextual matter in a case such as the present is the Tribunal's obligation to provide reasons for its decision. In this case, that obligation is contained in s 430(1) of the Act which provides:

> *'(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:*
>
> *(a) sets out the decision of the Tribunal on the review; and*
>
> *(b) sets out the reasons for the decision; and*
>
> *(c) sets out the findings on any material questions of fact; and*
>
> *(d) refers to the evidence or any other material on which the findings of fact were based.'*

28 It was not suggested by the appellant that there had been a breach of s 430(1) in this case (*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323). Counsel for the first respondent referred to a well-established line of authority to the effect that the Tribunal does not have to give reasons for rejecting evidence inconsistent with the findings it has made: *Addo v Minister for Immigration and Multicultural Affairs* [1999] FCA 940 at [24]; *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 at [11].

29 The Tribunal refers to the charges or the charge sheet in four paragraphs in its reasons. When summarising the claims and evidence, the Tribunal refers to the appellant's assertion that if he returned to Bangladesh he would be arrested and detained in relation to

false charges. In the next paragraph of its reasons, the Tribunal states (relevantly):

> *'On 31 July 2003 the Tribunal received from the applicant a Charge Sheet dated March 2002 which concerned alleged offences by the applicant. The applicant also provided a letter from a medical advisor in Chittagong dated August 1992 stating that the applicant had been under treatment "due to torture by the police and other law enforcing authorities as well as Bangladesh Nationalist Party men". The applicant also submitted a document from the secretary-general of the Bangladesh Bouddha Bhikkhu Mahasabha certifying that the applicant was a member of that movement from 1993 to 2000. The applicant also provided a document dated October 2002 from the secretary-general of an orphans' home in Chittagong (the same person was the signatory of the previous document) certifying that the applicant had served as a religious teacher in the home for four years from December 1994 to November 1998.'*

30 Later, under the heading of Findings and Reasons, the Tribunal refers to the appellant's claim that he is subject to an outstanding false charge motivated by political enmity.

31 There then follows four paragraphs in the Tribunal's reasons, the most important of which is paragraph 56. However, the others are also important because they provide the context in which the discussion in paragraph 56 occurs. The four paragraphs are as follows (paragraph references omitted):

> *'55. The Tribunal does not consider on the basis of the applicant's protection visa application, written submissions and oral testimony that he was of any prominence in Bangladeshi politics. He has demonstrated very limited knowledge of political life in Bangladesh and makes no claim to have held political positions or indeed to have been directly involved in politics at all. The Tribunal therefore finds it implausible that the applicant was seriously expected by BNP party workers to promote their candidate through his claimed role as an influential figure in the Buddhist community. He has provided no material to support his claim that such an expectation existed.*
>
> *56. In addition to the documents discussed above referring to his role in the Buddhist community, he has provided documents from a medical practitioner referring to injuries which the practitioner described as the result of torture by police and BNP members and documents relating to a charge against the applicant which he describes as false and as politically motivated. The Tribunal accepts as plausible that the applicant was injured in some way in an incident in 1992 (when he*

was 14) but does not accept the medical practitioner's unsupported and unexplained assertion in the medical certificate he provided that the injuries resulted from torture by the police and BNP members. The Tribunal accepts as plausible the applicant's claim that a charge was laid against him in early 2002 but has no information to support the applicant's claim that this charge was politically motivated and does not accept that this was the case. The Tribunal finds that nothing in this material adds support to the applicant's claim to hold a well-founded fear of persecution on return to Bangladesh arising from political opinion.

57. There is no further material before the Tribunal to support the claim that the applicant was a target of political violence or that there is any reason why he would be so targeted. His responses to discussion of this issue at his hearing lacked detail and credibility. The Tribunal does not accept as plausible, or as supported by the material before it, that the applicant came to the attention of the BNP government when they came to power in 1992, when the applicant was aged 14, that he was "physically and mentally tortured" by fundamentalist Muslim activists and forced to leave his village and that his home was set on fire, that he was attacked, with others, during a religious festival in March 1997 and severely injured or that his family home was attacked after the 2001 election. The Tribunal finds his claim that he would be attacked and killed on his return to Bangladesh by BNP activists still seeking retribution for his not having supported their candidate in the 2001 election to be without credibility given the considerations set out above in relation to the applicant's lack of political involvement and the time that has now passed since that election, in which the BNP achieved a landslide win.

58. The Tribunal does not accept as plausible the applicant's claim to have been subjected to violence motivated by his political opinion. Accordingly, the Tribunal considers that the applicant's fears of politically-motivated violence targeted at him on return to Bangladesh are not well founded in the circumstances applying in Bangladesh now and in the reasonably foreseeable future.'

32 There are some features of the Tribunal's reasoning in paragraph 56 which are puzzling. The Tribunal member uses the word 'plausible' which may mean no more than apparently correct and he refers to 'a' charge rather than 'the' charge. It is possible that the Tribunal member was accepting no more than that a charge was laid against the appellant and not necessarily a charge with all the features contained in the charge sheet. As I have said, those features are outlined in the reasons for judgment of Moore J at [4]. If it is the case that the Tribunal member accepted the charge sheet as an authentic document, nevertheless, he made no finding as to whether the allegations were true or false. Despite these matters I am

satisfied the Tribunal member did have regard to the charge sheet and its contents. He carefully analysed the documents from the medical practitioner and indicated what he accepted and what he did not. He referred to the charge sheet and found that it was not politically motivated. The contents of the charge sheet do not as a matter of logic dictate a conclusion that the charge was politically motivated. It was open to the Tribunal member to conclude that he could not be satisfied that the charge was politically motivated on the other evidence in the case. His reasoning was not irrational or illogical such that it should be inferred that he did not have regard to the contents of the charge sheet. Finally, the Tribunal member concludes paragraph 56 by referring to 'this material' and that is clearly a reference to the documents from the medical practitioner and the charge sheet.

33 The Tribunal member might have set out details of the contents of the charge sheet and he might have placed greater weight on the contents of the charge sheet. However, I am satisfied that he did have regard to the charge sheet and its contents.

34 In those circumstances the appeal must be dismissed with costs.

I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate:

Dated: 9 February 2007

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 523 OF 2006**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**SZCOQ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**MOORE, BESANKO AND BUCHANAN JJ**
DATE:	**9 FEBRUARY 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BUCHANAN J

35 The appellant arrived in Australia on 19 June 2002 on a business visitor visa. He obtained this visa ostensibly for the purpose of attending a Buddhist conference in Melbourne on 22 and 23 June 2002, although it appears he did not in fact attend. In his application for this business visa he certified that he had not ever been charged with any offence that was awaiting legal action.

36 On 12 July 2002 he lodged an application for a Protection (Class XA) visa. The foundation for the application was the suggestion that, as a leader of a Buddhist community, he would be persecuted if he returned to Bangladesh, a Muslim dominated country. He made a particular complaint about persons associated with a named local political figure who was an adviser to the Prime Minister and a leader of the BNP.

37 A delegate of the Minister for Immigration and Multicultural Affairs refused to grant a protection visa on 16 October 2002. On 17 November 2002 the appellant applied to the

Refugee Review Tribunal ('the RRT') for review of the delegate's decision.

38 By letter dated 1 July 2003 the appellant was notified that the RRT would hold a hearing on 5 September 2003 to which the appellant was invited. He was also asked to 'send us any new documents … you want the Tribunal to consider'. The first hearing did not proceed and a new hearing was arranged for 24 September 2003. Prior to the hearing the RRT received from the appellant a number of documents including a 'Charge Sheet' and accompanying documents ('the charge sheet material') dated 20 March 2002 which, on its face, charged the appellant and two other persons with the commission of very serious criminal offences in Bangladesh including throwing bombs into a public meeting causing 'grievous injuries' to police and members of the public and attacking persons present at the meeting with deadly weapons resulting in at least 20 persons sustaining 'grievous hurt'

39 The hearing before the RRT was sound recorded. It took place between 11.36am and 1.45pm on 24 September 2003. An interpreter was necessary. The transcript record of the hearing does not contain any discussion about the charge sheet material. No questions were asked about it and the appellant did not refer to it in his answers.

40 The appellant was asked, amongst other things, about the circumstances of his arrival in Australia and the stated purpose of his visit. His responses to these issues caused the RRT to doubt his credibility. Having regard to its reservations about whether he was 'a Buddhist of any particular prominence or any significant degree of commitment' and in the light of independent country information to the effect that 'Buddhists are not in general subject to persecution in Bangladesh', the RRT did not accept that he would suffer 'Convention related persecution on return to Bangladesh arising from his religion'.

41 The appellant was also asked about the suggestion that he would be the subject of persecution on political grounds. He responded on a number of occasions that he would be killed if he returned to Bangladesh. He insisted attempts to kill him had occurred many times.

42 The RRT doubted the appellant's credibility on these issues also. It said in its decision:

> *'33. Asked for further information on attempts to kill him, the [appellant] said these had taken place many times. Asked how many times, he said two to four times. Asked if he could give more details of when these attacks had occurred, he said he could not remember. The [appellant] gave no additional information about these attacks. The Tribunal commented that this aspect of his claims was important and asked him if he could provide further information. The [appellant] did not do so.'*

43 The RRT concluded that he was not 'of any prominence in Bangladeshi politics' and, after referring to the charge sheet material as discussed below, said:

> *'There is no further material before the Tribunal to support the claim that the [appellant] was a target of political violence or that there is any reason why he would be so targeted. His responses to discussion of this issue at his hearing (see para 33 above) lacked detail and credibility.'*

44 In the hearing in this Court there was no direct challenge to the findings I have referred to. The focus of attention was placed entirely upon what was alleged to be the failure of the RRT to have regard to the contents of the charge sheet material and the failure of the Federal Magistrate to discern a jurisdictional error in the RRT decision on this point.

45 The charge sheet material is referred to by the RRT in its decision in a number of places, but only briefly. At paragraph 27 the RRT said (in part):

> *'In his application for review of [the delegate's] decision, the [appellant] stated that …… If he had to return to Bangladesh, he would be arrested and detained in relation to false charges.'*

At para 28 it said:

> *'On 31 July 2003 the Tribunal received from the [appellant] a Charge Sheet dated March 2002 which concerned alleged offences by the [appellant].'*

Paragraph 54 said:

> *'He also claims to be subject to an outstanding false charge motivated by political enmity (see para 28 above).'*

46 The RRT's findings about the charge sheet material are included in paragraph 56 as follows:

> *'In addition to the documents discussed above referring to his role in the Buddhist community, he has provided documents from a medical practitioner referring to injuries which the practitioner described as the result of torture by police and BNP members and documents relating to a charge against the [appellant] which he describes as false and as politically motivated. The Tribunal accepts a* [sic] *plausible that the applicant was injured in some way in an incident in 1992 (when he was 14) but does not accept the medical practitioner's unsupported and unexplained assertion in the medical certificate he provided that the injuries resulted from torture by the police and BNP members. The Tribunal accepts as plausible the [appellant's] claim that a charge was laid against him in early 2002 but has no information to support the [appellant's] claim that this charge was politically motivated and does not accept that this was the case. The Tribunal finds that nothing in this material adds support to the [appellant's] claim to hold a well-founded fear of persecution on return to Bangladesh arising from political opinion.'* (Emphasis added)

47 It may be seen that in this paragraph the RRT deals with two issues. Each arose from the additional documents supplied by the appellant which were received by the RRT on 31 July 2003. The first issue, concerning allegations of torture, arose from a document which bears the date 10 August 1992. It has no relevance to the present challenge but it should be noted that the RRT rejects part of the contents of this "medical certificate". This suggests that the RRT thought either the medical certificate was false or the contents untrue.

48 The balance of the paragraph deals with the material which is relevant to the appellant's present ground of challenge. Although accepting that it was plausible that charges reflected in the charge sheet material had been laid against the appellant, the RRT dismissed the idea that they might be 'politically' motivated. Although it does not say so, the implication is that it rejects the appellants claim that any such charges were false. However, the RRT did not appear to have any information available to it to suggest that the charge sheet material did have a basis in fact. This was certainly not the basis on which the material was provided.

49 The applicant provided this material as evidence that false charges had been brought against him. It was obviously intended to bolster his claim of political persecution. The informant was the high-profile political figure the appellant had identified as responsible for attacks on him and others and attempts to kill him. The RRT's other conclusions, particularly

its rejection of the claim that the appellant was politically active, in fact provide some reason to doubt the factual basis of the allegations in the charge sheet material, should it be valid.

50 If the better view of the material is that it was unlikely to be factually correct further questions inevitably arise. The appellant's position was that the charges really did exist but they were false. In other words, they were trumped up by the influential political figure accused by the appellant of being at the centre of activities which he pointed to as evidencing the real likelihood of persecution against him if he returned to Bangladesh. If this was a real possibility, in my view the RRT was obliged to deal with it (see *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 per Sackville J at [62] (with whom North J agrees at [129]). If it was not, the RRT needed to explain why that was so. The absence of any explanation suggests that no real consideration was given to the material, rather it was simply dismissed as irrelevant.

51 One possibility was that the charge sheet material was a fabrication. The RRT was not obliged to accept it at face value. It had already expressed serious reservations about the appellant's credibility. It rejected, as unreliable, other written material sent to it at the same time as the charge sheet material. However, the RRT did not treat the charge sheet material in this fashion. It accepted it as plausible.

52 By accepting that it was plausible that charges had been laid against the appellant in early 2002 the RRT, in my view, came under an obligation to make an attempt to resolve the questions which arose from the charge sheet material. Some discussion of the accusations and their significance, if any, for the RRT's conclusions was to be expected. It was not enough, in the circumstances, to simply say that the material did not add anything to the appellant's claims for a protection visa.

53 In *Repatriation Commissioner v O'Brien* (1985) 155 CLR 422 ('*O'Brien*') Brennan J said (at 446):

> *'If a failure to give adequate reasons for making an administrative decision warrants an inference that the tribunal has failed in some respect to exercise its powers according to law (as, for example, by taking account of irrelevant considerations or by failing to consider material issues or facts), the court*

> *may act upon the inference and set the decision aside. In such a case, the exercise of the statutory power to make a decision is held invalid not because of a failure to state the reasons for making the decision, but because of a failure to make the decision according to law: see* Denver Chemical Manufacturing Co. v Commissioner of Taxation (N.S.W.); Sullivan v Department of Transport.*'* (References omitted)

54 This passage was approved in the joint judgment of McHugh, Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (*'Yusuf'*) where, at [75] their Honours say:

> *'If the Tribunal, confronted by claims of past persecution, does not make findings about those claims, a statement of its reasons and findings on material questions of fact may well reveal error. The error in such a case will most likely be either an error of law (being an erroneous understanding of what constitutes a well-founded fear of persecution) or a failure to take account of relevant considerations (whether acts of persecution have occurred in the past).'* (There follows a footnote reference to the passage in *O'Brien*.)

55 Applying the test in *O'Brien* to the present case I have come to the view that the proper inference to be drawn is that the RRT dismissed the charge sheet material without any real consideration of it, whereas if it was 'plausible' as the RRT accepted, it raised issues that should have been dealt with.

56 Reference was made, by counsel for the first respondent, during argument on this appeal to observations made by Allsop J in *Rezaei v Minister for Immigration and Multicultural Affairs* [2001] FCA 1294 at [57] which have been referred to in subsequent cases – see *Thirukkumar v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 268 at [29] and *MZWBW v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 94 at [26].

57 Allsop J, in the passage relied upon, referred to *Yusuf*. He said:

> *'*Yusuf *does not stand for the proposition that a relevant consideration has not been taken into account and the decision-maker thereby has failed to embark on or complete his or her jurisdictional task merely because some piece of evidence which the Court thinks is relevant in the evidential or probative sense can be seen not to have been weighed or discussed. "Relevant" for this purpose means that the decision-maker is bound by the statute or by law to take this into account.'*

58 He quoted the following observations from the joint judgment of McHugh, Gummow and Hayne JJ at [74]:

> *'What is important, however, is that the grounds of judicial review that fasten upon the use made of relevant and irrelevant considerations are concerned essentially with whether the decision-maker has properly applied the law. They are not grounds that are centrally concerned with the process of making the particular findings of fact upon which the decision-maker acts.'*

59 These remarks draw attention to the need to test issues of relevance in the proper statutory context and against the material elements under consideration rather than allowing the investigation to be unduly distracted by the factual issues which a party may wish to emphasise in support of its own case. McHugh, Gummow and Hayne JJ in the paragraph immediately before the passage cited by Allsop J said at [73]:

> *'The considerations that are, or are not, relevant to the Tribunal's task are to be identified primarily, perhaps even entirely, by reference to the Act rather than the particular facts of the case that the Tribunal is called on to consider.'*

60 However, in a clear reference to the remarks in [75], which I set out earlier in paragraph 20, their Honours go on to say [at 78]:

> *'That is not to say that the Federal Court has no jurisdiction to deal with cases in which it is alleged that the Tribunal failed to make some relevant finding of fact. For the reasons stated earlier, a complaint of that kind will often amount to a complaint of error of law or of failure to take account of relevant considerations.'*

61 It is, of course, necessary to make a distinction between considerations which go merely to the findings of fact to be made in a case and those considerations which bear upon the material elements which must be satisfied, or rejected, when dealing with an applicant's claims. When read in the full context of his judgment, and the paragraph in which the passage relied upon appears, I do not understand the observations of Allsop J to be inconsistent with the approach which I have taken.

62 I have come to the view that the RRT simply dismissed the charge sheet material as irrelevant and did not take it into account or have any real regard to it. On the assumption

made by the RRT, that it was plausible that charges were laid against the appellant in early 2002 as reflected in the charge sheet material, it cannot be said that consideration of this material, and the proper inferences to be drawn from it, were without any relevance to its deliberations. Accordingly, jurisdictional error is established (see *Craig v South Australia* (1995) 184 CLR 163 at 179 (*'Craig'*)).

63 That does not lead inevitably to a finding that the decision is invalid, at least under the general law. Attention is required to the way in which the jurisdictional error affects the exercise of decision-making power.

64 In *Craig* the High Court said (at 179):

> *'At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law.'*
>
> And:
>
> *'If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.'*
> (emphasis added)

65 The passage emphasised is important. It draws attention to the necessity to show that the exercise of power itself has miscarried (see also *Yusuf* at [82]).

66 Conventionally, one way of testing whether the exercise of power is 'thereby affected' is to ask whether taking the correct approach could possibly have made a difference to the outcome (see, for example, *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145; *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 per Gleeson CJ at [4], per Gaudron and Gummow JJ at [58], per McHugh J at [104], per Kirby J at [131] and per Callinan J at [211]).

67 Having regard to its reservations about the appellant's credibility and its rejection of the major bases for his claim to a protection visa it may be doubted that the RRT would, after further consideration of the charge sheet material, come to a different view on the review application. There are certainly strong reasons arising from the character and content of the material itself for that view.

68 If the charge sheet material is a fabrication it obviously could not assist the appellant, except by deception. If the charges are real and based in fact there is no reason to conclude that their existence suggests any obligation to the appellant from Australia under the Convention. If the charges are real but false, as he claims, there may be no reason to believe, having regard to their graphic nature, that they will not be dealt with properly and in a way which accords the appellant a proper hearing under the laws of Bangladesh. Accordingly, the prospect of 'political persecution', which he alleges, may be readily dismissed by the RRT.

69 However, an assessment of that kind is not a matter for this Court. Irksome though the Court's intervention may appear in a case where it may rightly be said there appears little prospect for the appellant upon any reconsideration of his claim for a protection visa, I do not think the possibility can be simply excluded in the absence of any real discussion of the material.

70 Moreover, the general law principles stated in *Craig* must be applied in the context of the statutory scheme established by the Act. The High Court has emphasised that a reviewable decision of the kind made by the RRT, if jurisdictionally erroneous, is of no legal effect: see *Minister for Immigration and Multicultural and Indigenous Affairs v Bhardwaj* (2002) 209 CLR 597 (per Gaudron and Gummow JJ at [51], per McHugh J at [63] per Hayne J at [152] – [153]); *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476 (per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [76]); and *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004)* 207 ALR 12 (per Gummow and Hayne JJ at [29]). This suggests that the task committed to the RRT by s 414 of the Act has not been completed.

71 Accordingly, I would uphold the appeal, set aside the decision of the RRT and remit the matter to the RRT. The applicant should have his costs of this appeal and the proceedings

in the Federal Magistrates Court.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 9 February 2007

Counsel for the Appellant:	Mr B Zipser
Counsel for the First Respondent:	Mr S Lloyd
Solicitor for the First Respondent:	Sparke Helmore
Date of Hearing:	20 November 2006
Date of Judgment:	9 February 2007