FEDERAL COURT OF AUSTRALIA

SGDB v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCAFC 59

MIGRATION – Protection Visa – fair hearing – failure to consider case put by applicant – failure of the Tribunal to consider whether there was a well founded fear of persecution on journey back to place of resettlement

Migration Act 1958 (Cth) s 36(2)(a), s 424A, s 474
Judiciary Act, 1903 (Cth) s 39B

Plaintiff S157/2002 v Commonwealth of Australia (2003) 195 ALR 24
Muin v Refugee Review Tribunal (2002) 190 ALR 601
Re Minister for Immigration and Multicultural Affairs; Ex parte A (2002) 185 ALR 489
VAAC vMinister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 74
Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 197 ALR 389
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323

SGDB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

S 590 OF 2003

FINN, SELWAY and LANDER JJ
15 MARCH 2004
ADELAIDE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY **S 590 OF 2003**

ON APPEAL FROM A FEDERAL MAGISTRATE

BETWEEN: **SGDB**
APPELLANT

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS**
RESPONDENT

JUDGES: **FINN, SELWAY and LANDER JJ**

DATE OF ORDER: **15 MARCH 2004**

WHERE MADE: **ADELAIDE**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The 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.

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SOUTH AUSTRALIA DISTRICT REGISTRY **S 590 OF 2003**

ON APPEAL FROM A FEDERAL MAGISTRATE

BETWEEN:	**SGDB** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**FINN, SELWAY and LANDER JJ**
DATE:	**15 MARCH 2004**
PLACE:	**ADELAIDE**

REASONS FOR JUDGMENT

THE COURT

1 This is an appeal from a decision of the Federal Magistrates Court which dismissed an application for judicial review by the appellant in relation to a decision of the Refugee Review Tribunal ("the Tribunal") refusing him a protection visa. For the reasons given below we allow the appeal, set aside the decision of the Tribunal and remit the matter to the Tribunal for further hearing.

2 The appellant is an Afghani citizen from Oruzgan province. He is a Hazara and a Shi'a Muslim. The appellant arrived in Australia on 15 January 2001. On 15 February 2001 he applied for a protection visa under the *Migration Act 1958* (Cth) ("the Act"). His wife and family also applied. (In these reasons reference to "the appellant" should be understood as including the claims also made for his family). In order to obtain such a visa it was necessary that the respondent ("the Minister") be satisfied that 'Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol': s 36(2)(a) of the Act. In general terms such an obligation would arise if the appellant was a "refugee" as defined in Article 1A(2) of the Refugees Convention. Such a person must be unable or unwilling to return to his or her country of former habitual residence owing to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social

group or political opinion". The basis of the application by the appellant was that he had a well-founded fear of persecution on the basis of his Hazara ethnicity and his Shi'a religion if he was returned. Of course, at that time the Taliban were in control of Afghanistan, including Oruzgan Province.

3 A delegate of the respondent refused the application for a protection visa on 20 April 2001. The delegate's decision was affirmed by the Tribunal on 23 July 2001. Both the delegate and the Tribunal did not accept the applicant's claim that he was an Afghani citizen. The appellant sought judicial review of the Tribunal's decision under the Act. On 8 February 2002, by consent, the decision of the Tribunal of 23 July 2001 was set aside and the application for review by the Tribunal was remitted to the Tribunal for re-hearing. On 28 June 2002, following a re-hearing of the application, the Tribunal again affirmed the decision of the delegate of the respondent not to grant to the appellant a protection visa under the Act. As discussed below, the Tribunal accepted that the appellant was an Afghani citizen. However, by the time that it gave its decision the situation in Afghanistan had changed greatly from what it had been when the appellant had first applied for a refugee visa. The Taliban had been overthrown. The Tribunal's decision was based upon the effect of these changes and whether the appellant still had a "well founded fear of persecution" if he returned. It is the decision of the Tribunal given on 28 June 2002 which directly concerns this appeal.

4 The appellant applied under s 39B of the *Judiciary Act, 1903* (Cth) seeking to have the decision of the Tribunal reviewed. That application was heard by the Federal Magistrates Court which dismissed it (see [2002] FMCA 217), primarily on the basis that the jurisdiction of the Court was limited by the provisions of s 474 of the Act. The decision of the Federal Magistrates Court was appealed to this Court. That appeal was heard by Mansfield J who allowed it (see [2003] FCA 74), primarily on the basis that s 474 of the Act did not have application to "jurisdictional errors": see *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24. His Honour remitted the application back to the Federal Magistrates Court. That Court again considered the matter and again dismissed it (see [2003] FMCA 127). This appeal is brought from that decision.

5 As already noted, the critical issue in the delegate's decision and in the first Tribunal decision was whether or not the appellant could satisfy the decision maker that he was an

Afghani. When the matter returned to the Tribunal for a re-hearing this was still the issue that was of primary concern. The hearing commenced on 15 April 2002 and continued on 18 April 2002. The appellant called a number of witnesses to confirm his claim to being an Afghani citizen. The appellant gave evidence on 18 April 2002. The transcript of his evidence was put before us. He was initially questioned about whether or not he was an Afghani. About halfway through what would appear to be some 3 hours of giving evidence, the Tribunal member announced that she was "satisfied that you are an Afghan national". As the Tribunal member then put it, "I now have to talk to you about why you fear going back to Afghanistan". As the Tribunal member accepted, if the Taliban had still been in power, she would have had no difficulty in finding that he had a well founded fear of persecution. The issue was whether that was still the case following the "Taliban's demise".

6 In that regard the Tribunal had before it a letter dated 8 April 2002 from the applicant's Migration Agent which contained considerable information dealing generally with the lack of security in Afghanistan. That letter did not identify any particular problems facing the Hazara people in Oruzgan Province, but pointed generally to the problems in Afghanistan following the fall of the Taliban and to the possibility of ethnic violence.

7 The Tribunal also had before it "country information" from various sources, including the Department of Foreign Affairs and Trade. The Tribunal member put to the appellant that the effect of this information was that

> *'… It would be safe for you to go back to Orashkhan (sic) because you'd be going back to an Hazara dominated Orashkhan and there are commentators who are saying that those sorts of areas are safe and that it will also be safe for you to travel back through Pashtun dominated areas or Tazik dominated areas to reach your home area.'*

8 The appellant responded that it would not be safe for him to return to "Hazara dominated areas" because he would have to travel through Pashtun areas to do so:

> *'First off I want to tell you that yes this is true that we always use the particular passages that are surrounded by Pashtun people according to our religion we would be persecuted. this is a continuous thing that had happened before and also we are a minority group in Afghanistan. It is difficult for us to go inside of Afghanistan because our borders are surrounded by Pashtun people.'*

The appellant proceeded to point out that in order to return to Oruzgan Province from Kabul he would need to pass through Kandihar and the district of Choura, both of which are Pashtun districts. In response to this the Tribunal member commented that she "only had to be concerned about safe passage in a country when relocation is an issue".

9 In its decision the Tribunal set out the factual background and some of the country information that was before it. The Tribunal accepted that the appellant genuinely fears being persecuted by Pashtans if he returns to his home district. However, it held, on the basis of the "country information" that the relevant fear was not a "well founded" fear:

> *'I accept the applicant's evidence at the hearing that he genuinely fears being persecuted by Pashtuns if he returns to his home district. He explained that he held this fear because many Pashtuns lived in his area; because Pashtuns were effectively interchangeable with the Taliban; and because his adherence to the Shi'a Muslim religion sets him apart from the predominantly Sunni Muslim Pashtuns, and their religious differences will continue to be a problem. I also refer to the DFAT report (CX63508) dated 2 April 2002 which states that the security situation in Oruzgan continues to be uncertain, and that there are reports of remnants of the Taliban or Al Qaeda in the northern part of Oruzgan. Such reports provide some objective basis for the applicant's fear of being harmed if he returns there.*
>
> *…*
>
> *In addition, I refer to reports that I accept as authoritative by DFAT (CX63521 and CX63508). These reports indicate that, as an Hazara, the applicant would not face persecution upon returning to an area where Hazaras form the majority of the population; that there is a sizeable minority of Hazaras in Oruzgan; and that "there have been no reports of violence or harassment against" Hazaras in Oruzgan. I also refer to the. Applicant's evidence that, although Pashtuns lived nearby, he comes from an Hazara area of Afghanistan. That is consistent with the internet report on Hazarajat set out above that includes the applicant's district of Shahrestan in the Hazarajat region of Afghanistan.*
>
> *Consequently I am not satisfied that there is a real chance that the applicant will be persecuted by the Taliban or Pashtuns in the Shahrestan district of Oruzgan Province for reasons of his Hazara ethnicity or Shi'a Muslim religion. I am therefore not satisfied that he has a well-founded fear of being persecuted in Afghanistan by the Taliban or Pashtuns. On the same basis I am not satisfied that the second-named applicant has a well-founded fear of being persecuted in Afghanistan by the Taliban or Pashtuns.'*

10 Nowhere in its reasons does the Tribunal deal with the issue squarely raised by the appellant in his evidence – the claim that the journey back to his home area was not safe. It is

plain from his evidence that that is the primary reason he gave as to why he had a well founded fear of persecution.

11 The Federal Magistrates Court drew attention to this issue in its first decision ([2002] FMCA 217). As it pointed out (at [10]), "While the applicant and his family may be safe in their home village, they have to get there."

12 When the matter was remitted to the Federal Magistrates Court the appellant argued that there were two jurisdictional errors in the process and reasoning of the Tribunal. The first was that the appellant had not been afforded procedural fairness at the hearing. The second was that the appellant argued that the appellant and his advisor were not afforded sufficient time to address the issue of whether the appellant had a well founded fear of persecution after the Tribunal had announced that it accepted that the appellant was an Afghani citizen. The Federal Magistrates Court in its second decision rejected this argument:

> *'It is also arguable that the RRT in this case committed an error of jurisdiction in that the RRT proceeding was procedurally unfair. First, the bulk of the second hearing before the RRT was taken up with a consideration of the nationality of the applicant. It was only towards the end of that hearing that the presiding member announced that she accepted that the applicant was a credible witness and that he and his family were Afghans who were genuine refugees when they came to Australia. The applicant and his migration agent were given an opportunity at a late stage in that hearing to make oral submissions on the question of whether the applicant's fear of persecution was well founded in the light of changed political circumstances in Afghanistan. The presiding member did refer to the two DFAT reports at that hearing. However, the time available to make oral submissions was quite limited and the applicant was taken somewhat by surprise, given that the hearing had been largely taken up with an examination of his nationality and the credibility of his claims of persecution at the hands of the Taliban. In addition, the presiding member stated that she would deliver a decision within one week of the hearing, which would have dissuaded the applicant and his migration agent from seeking to make extensive further written submissions.*
> *In my view, the short time available to address what turned out to be the real issue at the oral hearing before the RRT on 18 April 2002 does not itself establish procedural unfairness. The issue was clearly raised by the presiding member and the presiding member referred to the two critical DFAT documents. While the time was brief, the conduct of the hearing was fair. What is more important is what happened after the hearing.'*

13 However, another argument based upon procedural fairness was accepted, at least in part, by the Federal Magistrates Court. That Court did accept that the Tribunal had referred

to material which had not been put to the appellant. It held that the failure to do so was a breach of the common law obligations of procedural fairness. However, it held that such a breach was not a jurisdictional error by reason of s 424A(3) of the Act:

> *'As noted above, the migration agent had previously put in a written submission directed to the issue of changed circumstances in Afghanistan and would reasonably have expected that the presiding member would have referred to it. She did not. Rather, the RRT relied upon country information which, in large part, was not disclosed to the applicant (appeal book, pages 130-131). It is apparent from that document that many of the materials cited in the decision were either not in existence or not accessed until after the RRT hearing. Although the two DFAT reports were critical to the ultimate conclusion reached by the presiding member, in my view, all of the country information referred to by her in the reasons for decision was material in leading to her conclusion that the very substantial political changes in Afghanistan meant that the applicant's fear of persecution should he return there was not well founded. In my view, under the general law, the RRT was under an obligation to disclose to the applicant all of the country information which it proposed to rely on which had a bearing upon this critical issue:* NAEE & Anor v Minister for Immigration *[2003] FMCA 105. However, as I found in that case, s.424A of the Migration Act excludes the common law rules of procedural fairness in relation to country information. But for the operation of s.424A(3) I would find that the decision of the RRT is vitiated by jurisdictional error by reason of procedural unfairness under the general law. The operation of s.424A(3) prevents that finding.'*

14 Section 424A of the Act imposes a statutory obligation upon the Tribunal to provide certain information to the applicant. Under subsection (3) that obligation does not apply to information "that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member."

15 The second jurisdictional error alleged by the appellant before the Federal Magistrates Court was that the Tribunal failed to consider a relevant consideration, namely the danger faced by Hazaras in the area in which the appellant lived. The Federal Magistrates Court held that the Tribunal had considered that matter:

> *'As I have already noted, there is no express reference to the submission by the applicant's migration agent about the absence of State protection and the continuing ethnic rivalries between Hazaras and Pashtuns in Afghanistan. In my view, however, the RRT did not fail to deal with that element of the applicant's claim. The presiding member said at page 127 of the appeal book:*
>
> "I accept the applicant´s evidence at the hearing that he genuinely fears being persecuted by Pashtuns if he returns to his home district. He explained that he

> held this fear because many Pashtuns lived in his area; because Pashtuns were effectively interchangeable with the Taliban; and because his adherence to the Shi´a Muslim religion sets him apart from the predominantly Sunni Muslim Pashtuns and their religious differences will continue to be a problem."
>
> *As I have already noted, the presiding member found some objective basis for the applicant's fear of being harmed if he returned to his home district. Nevertheless, the presiding member concluded, in the light of the available country information, that:*
>
> "I am not satisfied that there is a real chance that the applicant will be persecuted by the Taliban or Pashtuns in the Sharashtan district of Oruztan [sic] province for reasons of his Hazara ethnicity or Shi´a Muslim religion."
>
> *Given that the presiding member concluded that there was no real chance of persecution for a Convention reason it was unnecessary for her to consider specifically the existence or non existence of effective State protection. The presiding member may have made factual errors in coming to that conclusion but that goes to the merits of the RRT decision, not its legality.*

16 It is noted that these two allegations of jurisdictional error did not specifically include to the Tribunal's failure to deal with the claim by the appellant relating to the dangers of travelling through Pashtun areas in order for him to return to his home area. The learned Federal Magistrate did not specifically address that question in his reasons, although he did note that he now considered that some of the concerns he had referred to in his reasons in [2002] FMCA 217, which may have included this issue, "go to the merits of the decision, rather than the legality of it".

17 The appellant appeals to this Court from the decision of the Federal Magistrates Court. Two grounds are given. The first is that the Magistrate erred in finding that there had not been a breach of natural justice. On this ground the appellant repeats the two arguments put to the Federal Magistrate. The first is that the appellant should have been afforded an opportunity to put further submissions on the question of whether he had a well-founded fear of persecution once it appeared that the Tribunal was satisfied that he was an Afghani citizen. The short answer to this argument is the same as that made by the learned Federal Magistrate. The applicant well knew that the question whether he had a well-founded fear of persecution was an issue about which the Tribunal would need to be satisfied. He well knew that this was an important issue given the change of government in Kabul. The written submissions made to the Tribunal on the appellant's behalf expressly addressed that issue. Neither the applicant nor his adviser requested any further time to address the issue, presumably because they were

well aware (or, at least, hopeful) that the issue would arise and they were prepared to deal with it. There was no procedural unfairness in the Tribunal not allowing further time.

18 The second argument was based upon the acknowledged failure of the Tribunal to refer in its reasons to the written submissions of the appellant together with the reference by the Tribunal to some material that it did not put to the appellant. The appellant expressly denied that he was putting an argument based upon the Tribunal relying on material which was not put to the appellant (contrast *Re Minister of Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57) or upon the appellant having been misled (contrast *Muin v Refugee Review Tribunal* (2002) 190 ALR 601). The appellant also denied that he was putting an argument based upon any failure of the Tribunal to read or consider the submissions that the appellant had put to it. Rather, the argument seemed to be that in the circumstances as applied in this case there was some duty upon the Tribunal to afford the appellant a further opportunity to submit further information to it so as to reinforce the material in the written submission. The argument so put relied upon some inherent unfairness in the process that was adopted. It is a sufficient answer to this argument that there was no evidence before us which identified the alleged unfairness or the manner in which it operated (see *Re Minister for Immigration and Multicultural Affairs; Ex parte A* (2002) 185 ALR 489, at 501 [54]), save for a submission that the appellant would have made further submissions if he could. There was no evidence that the applicant desired to put any other material before the Tribunal or that there was anything that prevented the applicant from doing so. In this case the factual basis for the argument that there had been some breach of procedural fairness has not been established, even assuming that evidence of unfairness of the sort alleged by the appellant would give rise to an obligation to afford procedural fairness.

19 It should be noted that our reason for rejecting this argument is different from that given by the learned Federal Magistrate. He relied upon s 424A(3) of the Act as excluding jurisdictional error for failure to provide information that would fall within that subsection. The respondent properly accepted that that subsection does not have that effect: see *VAAC v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 74. However, for the reasons given above, we are of the view that there was no failure to afford procedural fairness to the appellant.

20 The second ground of appeal is that there was a jurisdictional error by the Tribunal in its consideration of whether there was a well-founded fear of persecution. It is clear enough that for there to be a well-founded fear of persecution there must be a "real chance" of it. The Tribunal identified that that was the test and purported to apply it. The problem with its analysis in this regard was identified by Mansfield J in his judgment ([2003] FCA 74) at [16]:

> *'The Tribunal had earlier in its reasons, as noted, referred to DFAT report CX63508 as providing "some objective basis for the applicant´s fear of being harmed if he returns there". It was one of the DFAT reports it accepted as authoritative. The Tribunal also described that source as reporting that the applicant* would not face *persecution upon returning to an area where Hazaras form the majority of the population. The expression "would not face persecution" must be read together with the Tribunal´s earlier comment that those reports provide "some objective basis" for the applicant´s fear of being harmed if he returns there. I do not therefore read the Tribunal as saying, by use of the words "would not face", that the evidence showed the appellant would certainly not face persecution upon returning to an area where Hazaras form the majority of the population. That would mean the Tribunal had simply contradicted itself in two findings in its reasons for decision. It may be read as reflecting a view that the appellant would probably not face persecution upon returning to an area where Hazaras formed the majority of the population.'*

21 Clearly enough, if the Tribunal had applied a test of whether the appellant "would probably not face persecution" rather than a test of whether or not there was not a "real chance of persecution" then the Tribunal would have made a jurisdictional error. It was unnecessary for Mansfield J to express any concluded view of the question and he did not do so. The learned Federal Magistrate did consider the question. He concluded:

> *'While on first reading there appears to be inconsistency between the presiding member's initial finding that the first DFAT report provides some objective basis for the applicant's fear and her conclusion that his fear was not well founded, this is explicable on the basis that she must have concluded that there was less than a ten percent chance that the applicant would be persecuted should he return to Afghanistan. The presiding member clearly set out the correct test at page 127 of the appeal book. At paragraph 17 of his reasons for decision, Mansfield J stated that it is arguable that unless there was other material which enabled the RRT to take the step of saying that, in practical terms, there is no real chance that the applicant would be persecuted if he returns to his home province (that being the focus of the RRT´s attention), the RRT may have erred in law by reaching its decision based upon a finding that something probably would not happen, rather than that that* [sic] *there is no real chance of it happening, even though ultimately it expressed itself in those terms. In my view, a fair reading of the presiding member´s reasons for decision indicates that she applied the correct test and*

> *that, although she was satisfied that there was some objective basis for the applicant´s fear, in the light of the available country information, that objective basis was so small that it could be discounted.'*

22 We agree with the analysis by the learned Federal Magistrate. We would go further. The conclusion reached by the Tribunal seems, in terms, to be limited to the specific area from which the appellant comes. This is discussed further below. However, given the specificity of the ultimate conclusion reached by the Tribunal it is not obvious that the relevant findings are inconsistent in the manner suggested by the appellant.

23 This leaves the final issue. This is the argument that the Tribunal made a jurisdictional error in failing to consider whether there was a real risk of persecution to the appellant and his family during their journey from Kabul back to their home. This was not an argument that was addressed by the learned Federal Magistrate. It may not have been raised before him. No objection was made to the issue being pursued before us.

24 It was submitted to us that this jurisdictional error involved the application of the wrong test of whether there was a well-founded fear of persecution. In the alternative, it may be considered that the failure to address the actual claim made by the appellant involves a failure to afford natural justice to the appellant: see *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 389 at 394 [24]. However put, the respondent properly conceded that if the issue of whether there was a real risk of persecution to the appellant and his family during their journey from Kabul to their home was fairly raised before the Tribunal and if the Tribunal had not dealt with it, then there was a jurisdictional error.

25 The Minister made two answers to the alleged error. First, the Minister said that there was no evidence before the Tribunal which fairly raised the question. As to that it is sufficient to refer to the evidence given by the appellant before the Tribunal. The appellant was in a position to speak of the persecution of Hazara persons by Pashtuns. He was in a position to speak of the ethnic groups that would be encountered in the journey from Kabul to his former home. In general terms his evidence was accepted. It is clear from the quotations from the transcript of the hearing that the appellant relied squarely upon the risk to him and his family from travelling through Pashtun areas. In our view the issue had been squarely raised before the Tribunal. The Tribunal had a duty to deal with it.

26 The Minister also submitted that the Tribunal had dealt with that issue. True it is that the Tribunal in its reasons sets out part of a DFAT report which provides:

> *'AFGHANS FROM THE VARIOUS ETHNIC GROUPS CAN GENERALLY TRAVERSE AREAS WHERE OTHER GROUPS ARE IN THE MAJORITY. MANY PARTS OF AFGHANISTAN ARE INSECURE - BUT THE LEVEL OF LAWLESSNESS APPLIES GENERALLY RATHER THAN TO ANY ETHNIC MINORITY TRAVERSING THE TERRITORY'*

It may be accepted that that report was capable of supporting a finding by the Tribunal that the appellant and his family were not at real risk of persecution on their journey to their homes, but it would seem clear that the Tribunal did not make that finding. In its reasons the Tribunal refers on one occasion to "specific problems in returning to areas of Afghanistan" and in another to "persecution upon returning to an area", but it would seem from the context that both of these references relate to the situation once the person arrived at the place of resettlement, rather than the journey to that place. This seems to be confirmed by the DFAT report already referred to which appears to distinguish between the problems that might be faced by persons at the place where they are resettled (referred to in the report as "specific problems in resettling") and the problems that might be faced when "traversing other ethnic tribal areas in order to reach their own". Given this distinction it would seem clear that the Tribunal was addressing only the "real chance" of persecution at the place where the appellant would resettle. The failure of the Tribunal to address the issue of whether there would be a real risk of persecution of the appellant during the journey entitles us to infer that that issue was not considered by it: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, at 346.

27 However, in this case it is unnecessary to rely upon mere inference. It would seem to be clear from the ultimate conclusion in the Tribunal's reasons that the Tribunal did not consider the separate question of whether there was a risk to the appellant during the journey:

> *'Consequently I am not satisfied that there is a real chance that the applicant will be persecuted by the Taliban or Pashtuns in the Shahrestan district of Oruzgan Province for reasons of his Hazara ethnicity or Shi'a Muslim religion. I am therefore not satisfied that he has a well-founded fear of being persecuted in Afghanistan by the Taliban or Pashtuns.'*

The finding in the first sentence that there is not a "real chance" that the appellant might be persecuted in the district to which he would return, is treated by the Tribunal as necessarily

concluding the question of whether he has a well founded fear of persecution. This would only be true if whatever risks he might face on the journey were not relevant to the Tribunal's consideration. They were not only relevant, but the Tribunal was required to consider them. Its failure to do so involved a jurisdictional error.

28 Given the time already taken in the resolution of the appellant's claims for refugee status and the fact that he and his family remain in detention it is particularly disappointing that the matter must be returned back to the Tribunal. Nevertheless, there is no other option. The appeal is allowed. The order of the Federal Magistrates Court made on 28 May 2003 will be set aside and in lieu thereof certiorari will be granted to bring the proceedings before this Court and to quash the decision of the Tribunal given on 28 June 2002. The matter will be remitted to the Tribunal for further hearing in accordance with law. The Court acknowledges the assistance given by Mr Barrett QC who appeared pro bono for the appellant.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Finn, Selway and Lander.

Associate:

Dated: 12 March 2004

Counsel for the Applicant: G Barrett QC

Solicitor for the Applicant: Refugee Advocacy Service of South Australia

Counsel for the Respondent: M Roder

Solicitor for the Respondent: Sparke Helmore

Date of Hearing: 2 March 2004

Date of Judgment: 15 March 2004