

FEDERAL COURT OF AUSTRALIA

MZXRS v Minister for Immigration and Citizenship [2009] FCA 2

**MZXRS v MINISTER FOR IMMIGRATION AND CITIZENSHIP
VID 750 OF 2008**

**JESSUP J
9 JANUARY 2009
MELBOURNE**

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY**

VID 750 OF 2008

**BETWEEN: MZXRS
 Appellant**

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

JUDGE: JESSUP J

DATE OF ORDER: 9 JANUARY 2009

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent's costs.

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

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JUDGE: JESSUP J

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PLACE: MELBOURNE

REASONS FOR JUDGMENT

1 This is an appeal from a judgment of the Federal Magistrates Court given on 29 August 2008 dismissing an application by the appellant for judicial review of a decision of the Refugee Review Tribunal (“the Tribunal”), signed on 31 May 2007 and handed down on 3 July 2007. In that decision, the Tribunal affirmed an earlier decision of a delegate of the respondent Minister not to grant a Protection (Class XA) Visa to the appellant pursuant to the *Migration Act 1958* (Cth) (“the Act”).

2 The appellant is a citizen of India, who arrived in Australia on 27 February 2005. Before the Tribunal, the appellant’s case for a protection visa was based upon what he claimed to be a fear of persecution should he be obliged to return to India because of his, and his father’s, political involvement with the Congress Party and the Rashtriya Janatha Dal (RJD). The appellant claimed that his father had to leave politics because his life was in danger from political opponents. He also claimed that while in Bihar state he was attacked by anti-Muslim activists in 2001, and was beaten and threatened to be killed if he continued his involvement with the RJD. He asserted that in 2004 while he was in Delhi arranging a visa to come to Australia he was again attacked, but he did not report it. The appellant claimed that he was an enemy to the Bharatiya Jahata Party, Janatha Dal United, and the Naxalite movement, and would not be provided with government protection if he returned to India.

3 The appellant attended a hearing before the Tribunal on 5 April 2007. Arising from that hearing, and from the Tribunal's consideration of the matter generally, on 13 April 2007 the Tribunal wrote to the appellant pursuant to its obligation under s 424A of the Act. In that letter, the Tribunal invited the appellant to comment upon information which was available to it, under certain headings. Under the heading "Information Concerning Your Residence and Activities Before You Came to Australia", the Tribunal referred to information that led it "to doubt that you were involved in any significant political activity with the...RJD after it was formed in Bihar State in 1997." It referred to information that led it "to doubt that you were attacked in November 2001 as claimed..." It said that that information led it "to doubt that you suffered difficulties in any of these places because of any political activities...[and]...to doubt that you were attacked in Delhi in 2004..."

4 Under the heading "Information in Relation to Father's Political Involvement", the Tribunal referred to information which led it "to doubt that you suffered persecution or harm such as to influence your father to withdraw from politics in any way".

5 Under the heading "Information Concerning State Legislative Assembly Elections", the Tribunal referred to information which was "relevant to the credibility of the evidence concerning your political involvement...[and which suggested]...that you could not have been involved in campaigning...as claimed."

6 Under the heading "Information Relevant to Political Situation in Bihar", the Tribunal referred to information which appeared to be "at odds with your suggestion at the Tribunal hearing that you were unable to obtain the assistance of your local MP or MLA in relation to the claimed attack in November 2001 or subsequent to this." It referred to information which led it "to doubt the credibility of your explanation for not seeking the assistance of the authorities if you were suffering difficulties as a result of involvement with the RJD."

7 Under the heading "Delay in Coming to Australia", the Tribunal referred to information that led it "to doubt that you had been attacked in November 2001 or suffered any other serious difficulties as a result of political involvement." It referred also to information that led it "to doubt that you suffered attacks and other difficulties as a result of political involvement in the way you have claimed."

8 Under the heading “Information concerning Hernia Operation”, the Tribunal referred to information that led it “to doubt that you left India because of fears resulting in particular from past political involvement in Bihar State.”

9 Under the heading “Delay in Lodging Protection Visa Application”, the Tribunal referred to information which led it “to doubt that you left India for Australia because you feared for your safety as a result of difficulties suffered due to political involvement in India...[and which led it]...to doubt that you were beaten or otherwise seriously harmed in India as a result of political involvement.”

10 Under the heading “Information in Protection Visa Application”, the Tribunal referred to information which led it “to doubt that you were ever involved in political activity in India that caused you to be targeted or harmed by political opponents in the past or to fear harm from political opponents in the future....[and which led it]...to doubt that you were beaten or otherwise harmed by political opponents in the past as claimed, that you were forced to move from place to place as a result of difficulties suffered due to political involvement, or that you came to Australia as a result of being targeted or harmed for political involvement.”

11 Under the heading “Information in Psychiatric Report”, the Tribunal referred to a report from a consultant psychiatrist dated 18 April 2006, and said that the information therein “does not appear consistent with your claim that you fled India as a result of being targeted and harmed for your political involvement...[and which led the Tribunal]...to doubt the credibility of your claims in this regard.”

12 Under the heading “Information in Relation to the Circumstances of Your Family”, the Tribunal referred to information which suggested “that you and other family members have not suffered any significant discrimination as Muslims or as a result of any political involvement.”

13 In a letter to the Tribunal dated 27 April 2007, the appellant’s agent responded to each of the Tribunal’s concerns as set out above. The letter contained 25 enclosures, the content or significance of which was not otherwise explained. A number of the enclosures consisted of copy affidavits, statements and letters by third parties in support of the appellant’s claims. It

was not then suggested that the Tribunal should contact the makers of those documents, but it was proposed that the Tribunal should, in its discretion, hold a further oral hearing.

14 Relevantly to the present appeal, the documents enclosed with the appellant's agent's letter of 27 April 2007 included the following:

- a. an affidavit sworn in February 2007 by the caretaker of an apartment in which the appellant had stayed. He said that he had known the appellant since August 2002. He said that the appellant had been in very bad health and was undergoing medical treatment. He last saw the appellant in February/March 2004. Beneath his signed name was a mobile telephone number.

- b. an affidavit (not clearly dated) from the appellant's aunt. She said that she came to know through her sister (the appellant's mother) that the appellant was attacked on 25 November. The appellant lived with her and her husband for a time. He was hiding in a small village. He was very depressed, scared and afraid for his life and uncertain of his future. She said that, if the appellant returned to India, "it will again make lot of trouble for him". Beneath her signed name was a mobile telephone number.

- c. an affidavit (of which the date does not appear) by the appellant's uncle. He said that, due to the appellant's political background, he had to face a lot of problems, including, sometimes, "risk of life". In November 2001, the appellant was attacked by "some political foes", but managed to escape. Since then, "they were in look out for him to kill him". The appellant had to live elsewhere and to seek refuge in various places. The appellant looked very frightened and much depressed. The appellant went to Delhi, at which time "he was also heard to be attacked by some unknown persons". Beneath the uncle's signed name was a mobile telephone number.

- d. a statement, perhaps made in April 2007, by another aunt of the appellant's. In November 2001, she came to know about an attack on the appellant. He came to live with her in January 2002, as his life was in danger, and lived there for nearly a year. He was very depressed, scared and on medication. However, it was difficult for the appellant to live with his aunt, as the area where they lived was a strong Naxalite

area. She felt that the appellant was “under threat of life here also”. At the foot of her statement, she provided a land-line telephone number.

- e. an affidavit, apparently sworn in March 2007, by the appellant’s brother. He said that the appellant was “good in politics”, but that there was trouble on several occasions, which became worse when the appellant was attacked on 25 November 2001. The appellant was running from place to place “for his life”. The appellant was “depressed, feared and unhealthy”. The appellant was attacked on 16 July 2004 in Delhi. The brother said that, in this situation, the appellant’s return to India “will surely take his life as all other people from his group are missing and many had been dead after that”. The brother provided his land-line telephone number.
- f. an affidavit, apparently sworn in March 2007, from the appellant’s mother. She said that the appellant commenced his political career in class 11 at college. He used to work with his father, and to take part in party activities. Due to those things, on 25 November 2001 the appellant became a victim of a barbaric attack, after which his mother had not seen “any sign of relief on his face.” He was scared, and was losing his mental ability. He was under medication. His parents sent him to live elsewhere to save his life. His father decided to send him to Australia, thinking that living where he did could be dangerous for him. On 16 July 2004, the appellant was attacked by four men in Delhi. The appellant’s mother said that returning to India would create a lot of problems for him, and that it would be dangerous if he were to come back. She provided her land-line telephone number.
- g. an affidavit sworn in March 2007 by the appellant’s father. He said that he commenced his political career in 1987. The appellant also took a great interest in politics, and used to join his father in political activities. At some point, the appellant “had some time a hot talk with the opposition party activist”, after which things became worse and worse in their constituency (due also to the loss of the seat of their political leader). The appellant was attacked on 25 November 2001 “by some opposition anti minority party.” The appellant’s father did not report this matter to the police, because the exposure of the incident would only cause trouble for him and the appellant. He sent the appellant to live with his aunt and uncle, and he himself (the

father) “got lot of threat calls and felt insecure for my son.” Things were becoming worse for the appellant, as he was also suffering from “brain infection disease”. Where his parents had sent him was a “strong Naxalite area”, as a result of which his father moved him to a different place. According to his father: “I decided him to send Australia at any possibility as once in Feb.2002 we were failed due to attack on him and his mental depressive symptoms.” He said that he was “fed up for my son for running from one place to another to save his life.” The appellant’s father was “shattered” when the appellant was again attacked on 24 July 2005 in Delhi. He said that the appellant’s return to India would give birth to old political rivalry, and would create a lot of trouble which could also lead to death. He provided a telephone number.

- h. a statement, possibly dated 7 April 2007, from another of the appellant’s uncles. The appellant had lived with him in early 2002 because of attacks on him where he had previously been. According to the uncle, “he had got several threat of life” in that place due to his involvement in RJD. The appellant was unhealthy, depressed, scared and suffering from a brain infection. The problem was worse when they received “some anonymous phone calls of threat.” The appellant realised that he was being chased whenever he went out for some time. Because of these things, and because his life was in danger, he left the area where his uncle lived. The uncle expressed the view that, if the appellant returned to India, “he has a great threat of life which will also create problems for his family members.” A land-line telephone number was provided at the foot of the statement.
- i. an affidavit sworn in March 2007 by a lawyer who knew the appellant from the days they worked together in the RJD. The appellant was a good and active member. Due to some political fight, the appellant was attacked on 25 November 2001. After that, things went wrong for the appellant, and the lawyer had no further contact with him. He provided a mobile telephone number.
- j. an affidavit sworn in April 2007 by a computer engineer in Delhi with whom the appellant had lived briefly in July 2004, when he was trying to obtain an Australian visa. He said that it was tough for the appellant to live there “due to his

political connection with some party”. He said that the appellant’s return “will be great trouble for him which may be paid by his life.” He provided a telephone number.

- k. an affidavit, of which the date of affirmation does not appear, by a hardware engineer. He knew the appellant during year 11 at college. They were in the same class and were also members of “Youth Congress”. The appellant was very active and always took a great interest in political news. The appellant’s mind was always inclined towards politics. A mobile telephone number was given.
- l. a letter dated 10 April 2007 from someone who described himself as “ex M.P.”. He had known the appellant since his early days in RJD. The appellant was a great supporter of the writer of the letter, and worked under his party banner during an election in 1998. He spoke generally of the appellant’s political activities. He knew the appellant personally because of the relation which he (the writer) shared with the appellant’s father. He said that “due to some political rivalry he was attacked by some person on 25th of November 2001”. After that, both the appellant and his father “had to face lot of problems”. The appellant’s return to India would only make life worse for him. The writer thought that the appellant would not be safe in India. He said that the appellant may become “the victim of corrupt and criminalise politics”. The letter was written on the letterhead of a member of parliament, with various telephone numbers set out.
- m. a letter dated 10 April 2007 from a freelance journalist, who studied with the appellant at university. The appellant lived with him in Delhi when he (the appellant) was trying to leave India. Unfortunately, according to the journalist, the appellant was “attacked by some people” on 16 July 2004. This attack was said to be due to “some involvement in politics”. The appellant’s return to India “will arise the same question for him and for his family members”. It would be difficult for the appellant to survive. A mobile telephone number was set out as part of the letterhead.
- n. a letter dated 5 April 2007 from a press reporter upon a letterhead which contained a telephone number. He said that he had known the appellant “during the days [of] office politics” in RJD. He met the appellant “very occasionally” with the

appellant's father. He came to know that the appellant was attacked on 25 November 2001. "During the upheavals of system and politics", the appellant's father received several threats to his life "also afterwards". The appellant and his father "lived in lot of terror". The appellant's return to India "will lead him to death as lot of other people had been killed since his incident."

- o. a letter dated 5 April 2007 from another journalist, written on letterhead paper which set out a telephone number. The writer said that he knew the appellant since the days he joined the Congress Party. He came to know him closely when he was in RJD. He knew some of the incidents in which the appellant was "given threat of life by opposition party member". The appellant was attacked on 25 November 2001 "with the motive of great assault." The appellant's return "in this atmosphere will at fire in his problem." The writer said that it was better for the appellant to live "away from here."
- p. a letter dated 6 April 2007 from the President of the District Students Union of RJD. He was a doctor in homeopathic medicine. He knew the appellant as a member of the RJD. He was a recognised face due to his father's "image" in the RJD. He used to take part in all types of rallies against the opposition party, and participate in all election campaigns. He came "in the eye" of opposition party members. He got attacked on 25 November 2001. After that, the writer has not met the appellant "but the situation is still tense for him and presence maybe again open the chapter of his life danger". Beneath the signature on the letter was a mobile telephone number.
- q. an undated letter from someone who had been the appellant's family doctor. It referred to some medical treatment which had been given to the appellant. No telephone number was set out.
- r. a letter dated 18 April 2007 from a social worker, who had been seeing the appellant as counsellor since June 2006. She said that the appellant told her about the problems which he had encountered in Delhi when studying in "a largely Muslim university". In 1997, police came to the university and attacked students, and some students were jailed. After that, the appellant stayed off campus with a friend for some months. No telephone number was provided.

- s. a statement dated 5 April 2007 from the vice president of a political constituency in the area from which the appellant hailed. He had known the appellant since the days of Youth Congress. He spoke of the appellant's influence and leadership with him and others in a like situation. He spoke of the appellant's political activities. He provided his office telephone number.
- t. a statement dated 7 April 2004 from the president of the "Distric Congress Commity" in the area from which the appellant hailed. He had known the appellant from when he joined the Congress party as a youth member. The appellant became President of the Youth Congress "Minority Cell" in that area. The appellant was "an outstanding leader with incredible mind". He spoke generally of the appellant's political work, adding that the appellant left Congress in 1997, after which "my relation with him due to different party has been very limited and we very rarely meet each other." He provided his office telephone number.

15 The Tribunal wrote again to the appellant on 8 May 2007, inviting him to comment on certain information. It referred to independent information which was available to it which indicated that it was very easy to obtain false documents in India. It noted that the appellant had indicated that his application for a student visa contained incorrect information and false documentation. It observed that that circumstance suggested that the appellant was able to obtain false documentation.

16 In its letter of 8 May 2007, the Tribunal referred to the "numerous documents" which the appellant had provided in support of his claims. It continued:

The information on the availability of false documents and your apparent ability to obtain false documentation may be of relevance when the Tribunal comes to assess the reliability of the documentary evidence you have provided.

The Tribunal also notes that you have provided the Tribunal with the documents in support of your claims almost 12 months after lodging your application for a protection visa on 9 May 2006 and over two years after your arrival in Australia on 27 February 2005. The fact that many of these documents come from family members who have displayed a willingness to assist you leads the Tribunal to question why you would have been unable to obtain supporting documentation sooner if you fled India in fear for your life because of the matters described in the documents.

The Tribunal noted that many of the documents provided by the appellant contained spelling errors, including instances in which the same error was made in documents originating from different people. It said:

The Tribunal has some doubts as to whether each of these people would have made the same error in referring to this political party. This may lead the Tribunal to doubt that these are genuine documents prepared by the individuals named in the documents and to question the reliability of the documentation you have provided.

The Tribunal said that it had considered the appellant's request for a further hearing, but had decided not to proceed in that way.

17 The appellant's agents replied to the Tribunal by letter dated 21 May 2007. The agent conveyed her instructions that all of the documents provided were genuine, and gave an explanation as to how the same spelling error might have been made by different people. The letter continued:

We note that up to date contact details have been provided for each of the deponents of the affidavits previously submitted to the Hon. Tribunal. You may contact these deponents directly and verify the authenticity of their testimony.

The next correspondence from the Tribunal to the appellant was dated 1 June 2007, and contained an invitation to attend the handing down of the Tribunal's decision on 12 June 2007.

18 In the "Findings and Reasons" section of its written decision, the Tribunal considered the affidavits and statements which had been forwarded to it on behalf of the appellant. It said:

In making its findings as to the extent of the applicant's political involvement, the Tribunal has also had regard to statements such as those from his father, his mother, his brother, Md. Jahangir, Samar Faizi, Vijay Kumar Vijay, Nisar Ahmad Aasi and Dr Hemant Kumar as to his interest and involvement in politics. The Tribunal accepts that, as indicated in the letter from Mr Vijay, the applicant was involved in the RJD. The statements provide little evidence as to the precise detail of any activities in which the applicant was involved. Having carefully considered all of the available evidence, the Tribunal, as indicated above, accepts that the applicant was politically active but finds that this was limited by his periods of absence from Munger and that he did not have a profile of particular significance as a leader or organiser.

Later, the Tribunal said:

The Tribunal also notes that a number of the statements provided by the applicant in support of his claims refer to problems experienced by the applicant in places such as

Kichua Cha, Gaya and West Bengal. However, having carefully considered the written statements in the light of all the evidence, the Tribunal nevertheless considers that the applicant's claim as to such sustained interest in him lacks credibility.

Towards the end of its reasons, the Tribunal dealt with the significance of the affidavits and statements rather extensively, as follows:

In making its findings, the Tribunal has also had regard to the numerous letters and statements from various parties. The applicant provided statements from a number of relatives who referred to harm suffered by the applicant in various places and to the risk to the applicant if he were to return. The applicant also provided statements from people who indicated that they were friends or colleagues or had met him or his father in the course of political or related activities. The statements also attest to harm suffered by the applicant (and, in some instances also his father) in the past (including the claimed attacks in November 2001 and July 2004), to fear experienced by the applicant and his father, to steps taken by the applicant to avoid harm and to the risk to the applicant if he were to return to India. The Tribunal notes that, as put to the applicant, false documents are readily available in India. The applicant has conceded that false documentation was provided in support of his student visa application. This does not in itself entitle the Tribunal to dismiss the documentary evidence provided by the applicant as being unreliable. However, as set out above, there are numerous difficulties with the applicant's claims as to harm suffered by him in the past.

It has been put to the Tribunal that these are genuine documents. The Tribunal has carefully considered the content of the statements on the basis that they have been provided by the various individuals named in the statements, individuals with whom the applicant or his family have some relationship or association. In circumstances where the applicant [sic] has had the opportunity to consider a large number of written statements and to weigh these with a significant quantity of other evidence, the Tribunal has not found it necessary to contact each deponent directly. The Tribunal considers a number of other factors to be inconsistent with the information as to the harm experienced by the applicant in the past and the threat to the applicant and his father. In particular, the applicant himself, in spite of problems and difficulties referred to in the various letters and statements, returned to Patna in Bihar State for an operation shortly before his departure for Australia. The Tribunal considers that the applicant has not provided a satisfactory explanation as to why, if he and his father, had problems of the type described in the statements, they did not seek the assistance of the Bihar authorities. Nor does the Tribunal accept on all the evidence that the applicant was a person of such political prominence that he would have been pursued in various places over such a sustained period in the way suggested by the information in many of the statements. Having carefully considered the material in the statements in the light of all the available evidence, the Tribunal does not consider that this material outweighs the significant difficulties with the applicant's evidence as set out above. The Tribunal does not accept that the applicant has been harmed by political opponents in the past, that he and his father have been harassed, threatened or otherwise targeted by political opponents in the past, or that the applicant was forced to move around India or, indeed, to leave India because of a threat of harm at the hands of political opponents.

19 It is clear from the materials in the Appeal Book, and from the 45-page decision of the Tribunal itself, that this was a weighty case for its consideration. The material before the Tribunal was extensive. The Tribunal appears to have accepted the formal authenticity of the affidavits and statements, or at least approached the decision-making task on the basis that those affidavits and statements had in fact been provided by the persons referred to. It considered the contents thereof alongside the substantial body of other material which was before it. In the result, it did not accept critical elements of the appellant's factual case.

20 Before the Federal Magistrate, it was argued on behalf of the appellant that the Tribunal had constructively failed to exercise its jurisdiction, or had otherwise erred in point of jurisdiction, by failing to make inquiries of those persons who had provided the affidavits and statements upon which he relied. It was said that the failure to make such inquiries was so unreasonable that it could not have been done by any reasonable tribunal properly instructing itself, in accordance with the authorities to which Kenny J referred in *Minister for Immigration and Citizenship v Le* (2007) 164 FCR 151, 173-176.

21 In rejecting that submission, the Federal Magistrate said:

In considering whether there is a reasonably straightforward enquiry that was open to the Tribunal, that was readily available and that was likely to be of significance assistance to the Tribunal one must consider what could be expected to be achieved by telephoning each of the deponents. Whilst the telephone call could have confirmed that the documents emanated from the deponents (fact already accepted by the Tribunal), it would not have, in a practical sense, been effectively dispositive of the question of whether or not the versions given by the various deponents were reliable and ought to be accepted.

The Tribunal would still have been in the position of having to weight the evidence of the deponents of the statements against that given by the applicant and the circumstances of the particular application. The deponents were not readily available to give evidence before the Tribunal, but could only be heard by way of telephone. It is not apparent on the face of the material that telephoning the witnesses or deponents would have been likely to provide significantly better evidence than the Tribunal had before it. Indeed, it was not unlikely that despite telephone conferences with a large number of persons the Tribunal would not have been significantly advanced in its fact finding. It is not the case that every witness must be heard orally by the Tribunal. It is a matter for the decision maker to determine as one of the many aspects of the Tribunal hearing.

The way in which the Tribunal has conducted the hearing in this case does not appear to me to demonstrate the jurisdictional error. It is certainly not so unreasonable that no reasonable decision maker would have embarked upon a similar course.

22 In his Notice of Appeal in this court, the appellant relied upon the following ground:

[The] Tribunal was under a duty to make further inquiries having been put on notice that the named individuals, who made the statements and were contactable by telephone, could confirm the contents of their statements or letters. To proceed to a decision without making any attempt to obtain that information was so unreasonable as to vitiate the exercise of the decision-making power or it constituted a breach of the rules of natural justice or was an improper exercise of the Tribunal[']s power.

23 The line of jurisprudence upon which the appellant relies had its genesis in the tentative view expressed by Wilcox J, by way of *obiter*, in *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, 169-170:

A power is exercised in an improper manner if, upon material before the decision-maker, it is a decision to which no reasonable person could come. Equally, it is exercised in an improper manner if the decision-maker makes his decision – which perhaps in itself, reasonably reflects the material before him – in a manner so devoid of any plausible justification that no reasonable person could have taken this course, for example by unreasonably failing to ascertain relevant facts which he knew to be readily available to him. The circumstances under which a decision will be invalid for failure to inquire are, I think, strictly limited. It is no part of the duty of the decision-maker to make the applicant's case for him. It is not enough that the court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it.

The proposition to which Wilcox J was tentatively attracted was endorsed by the Full Court, and not merely by way of *obiter*, in *Luu v Renevier* (1989) 91 ALR 39, 49-50. Their Honours said (at 50):

One may say that the making of a particular decision was unreasonable – and, therefore, an improper exercise of power – because it lacked a legally defensible foundation in the factual material or in logic. But, equally, one may be able to say that a decision is unreasonably made where, to the knowledge of the decision-maker, there is readily available to him or other factual material, likely to be of critical importance in relation to a central issue for determination, and which has not been obtained.

24 *Prasad* and *Luu* were decided under the *Administrative Decisions (Judicial Review) Act 1977*. However, the same principle was accepted for the purposes of a proceeding under s 39B of the *Judiciary Act 1903* by the Full Court in *Yang v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 132 FCR 571, 579. Having reviewed these and other authorities, in *Le Kenny J* articulated the principle in the following terms (164 FCR at 173 [63]):

The concept of vitiating unreasonableness has been extended to the manner in which a decision was made. Thus, a failure by a decision-maker to obtain important

information on a critical issue, which the decision-maker knows or ought reasonably to know is readily available, may be characterised as so unreasonable that no reasonable decision-maker would [have] proceeded to make the decision without making the inquiry.

25 For the principle referred to above to operate in particular circumstances, it appears to be necessary that there be, readily available to the decision-maker, important information on a critical issue of which the decision-maker knew or ought reasonably to have known. If so, and if the decision-maker takes no step to obtain that information, it is open to the court to conclude that no reasonable decision-maker would proceed to decision in such circumstances. I say “open to the court” since the resolution of a question of that kind will inevitably depend upon the facts of the particular case and the assessment of the court before which they come. How “important” the information, how “critical” the issue and how “readily available” the information need to be before the principle operates, are matters which, it seems to me, can be determined only against the circumstances of a particular case.

26 The kind of situation with which the principle is concerned is revealed by an examination of the facts of the cases in which it has been invoked. In *Prasad*, the question was whether a relationship between two married people was a genuine one. The people were interviewed separately, and gave inconsistent answers to questions which related to the common circumstances of their life together. The investigating officers regarded those inconsistencies as important, but took no step to make further inquiries with a view to resolving them. Simple factual matters such as whether a room had a window were not followed up. In *Luu*, the decision-maker rejected an application for permanent residence by reference to the risk of the then applicant’s recidivism into criminal behaviour without obtaining additional medical reports which were readily available and which would have thrown a completely different light upon the facts of the case. In *Yang*, an application for a student visa had been rejected upon the ground that the undertaking of studies at the year 10 level in Australia would have involved a “regression” with respect to the school level which the applicant had achieved in China, which was said to be “year 12”. However, the decision-maker had taken no step to ascertain what was involved in schooling at that year level in China. In another case in the same line, *SZJBA v Minister for Immigration and Citizenship* [2007] FCA 1592 the decision-maker received the cover sheet of a facsimile communication, which indicated that the communication consisted of five pages. The remaining pages were

not received. The decision-maker took no step to contact the sender with a view to enquiring about the missing pages.

27 It is apparent from the authorities to which I have referred that the principle of vitiating unreasonableness, in the context of a decision-maker's failure to make an inquiry, is concerned with information as such. Generally speaking, it is unlikely that mere opinions, assessments, or evaluations by third parties will constitute information in the relevant sense. On the other hand, the authenticity of a document purporting to contain an expression of opinion, assessment or evaluation may constitute information within the meaning of these authorities.

28 It was submitted on behalf of the appellant that the Tribunal should have telephoned each of the persons who made an affidavit, or provided a statement, in support of his application for review. As appears from the extracts from its decision set out above, the Tribunal approached its task on the basis that the formal authenticity of these affidavits and statements was a given. That is to say, for example, the Tribunal accepted that the affidavit purporting to have been made by the appellant's mother was in fact so made, and so on. There was, therefore, no need to contact any of the makers for the purpose simply of confirming that such a person existed and that he or she had made the affidavit or statement in question.

29 Counsel for the appellant submitted, however, that the Tribunal should not have dealt with the affidavits and statements in the way that it did without first having contacted the maker of each of them. He submitted that "at least a selected group of the deponents" should have been contacted by telephone "to determine whether the written evidence could be verified"; and that an inquiry by the Tribunal "would not simply be to determine the genuineness of the documents but rather the contents and whether the assertions in the documents could support and/or corroborate the appellant's claims." It seems to be suggested that the purpose of such contacts would have been to place the Tribunal in a better position to form a view as to the accuracy and reliability of the contents of the affidavits and statements which were before it.

30 What was proposed on behalf of the appellant goes beyond an inquiry of the kind contemplated by the authorities to which I have referred. Here there was no information, not

presently available, which could readily have been obtained by the making of a simple inquiry. To the contrary, the substance of the matters upon which the appellant relied were already before the Tribunal in the affidavits and statements referred to. It was not suggested that there was any omission which should have been apparent to the Tribunal. The purpose of any such contact as was proposed, therefore, could not have been to obtain information. In my view, the position for which the appellant contends derives no support from the authorities to which I have referred earlier in these reasons. In this respect I agree with the views expressed by Jacobson J in *Burton v Minister for Immigration and Citizenship* [2008] FCA 1464, [27] – [33].

31 Counsel for the appellant relied upon the judgment of Flick J in *SZIAI v Minister for Immigration and Citizenship* (2008) 104 ALD 22. In that matter, the applicant for a protection visa had provided two “certifications”, from persons residing overseas, in support of his claim that he had changed his religious faith. Each such document provided an address and mobile telephone number. The Tribunal asked the applicant whether he consented to it contacting the Australian association which was relevant to his claimed new faith. The applicant did consent, and the Tribunal did make that contact. The Australian association responded to the effect that the certifications were “fake and forged”. The Tribunal accepted that proposition, without taking any step to contact the makers of the certifications. Flick J held that this approach by the Tribunal involved vitiating unreasonableness, noting the absence of any submission on behalf of the Minister “that there was not a line of inquiry which was readily available to the Tribunal and centrally relevant to the task being undertaken” (104 ALD at 25 [18]). By contrast, in the present case, such a submission was made on behalf of the Minister. It was submitted that the appellant’s case did not merely relate to the authenticity of documents, but involved the proposition that the Tribunal should, in effect, have a conversation with each of the makers of the affidavits and statements relied on by the appellant with a view, perhaps, to removing, or at least qualifying, any reservations which it might otherwise have about the truth of the matters asserted therein. I accept that as a broadly accurate characterisation of the appellant’s case. It is a situation quite different from that with which Flick J was concerned in *SZIAI*.

32 The Federal Magistrate came to the conclusion that the approach which the Tribunal took to the appellant’s request to contact the makers of the affidavits and statements was

“certainly not so unreasonable that no reasonable decision-maker would have embarked upon a similar course.” For reasons which I have attempted to explain above, I am in broad agreement with that conclusion. The appellant has not established that there was any error on the part of His Honour. The appeal must, therefore, be dismissed.

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

Associate:

Dated: 9 January 2009

Counsel for the Appellant: Mr M McInnis

Solicitor for the Appellant: Victoria Legal Aid

Counsel for the Respondent: Ms E Latif

Solicitor for the Respondent: DLA Phillips Fox

Date of Hearing: 26 November 2008

Date of Judgment: 9 January 2009