FEDERAL COURT OF AUSTRALIA

VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 82

MIGRATION – application for protection visa – Tribunal did not invite applicant to comment on certain general country information relied upon by Tribunal – whether such information required to be provided by s 424A of the *Migration Act*

MIGRATION – application for protection visa – procedural fairness – Tribunal failed to disclose to applicant all general country information relied upon by Tribunal – applicant does not establish how the information would have been dealt with – whether failure to disclose disputed information constituted breach of natural justice – whether any breach of natural justice constituted reviewable error in the circumstances of the case

Migration Act 1958, s 424A

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 applied
NANM and NANN of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 99 followed
NARV v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 203 ALR 494 doubted
Re Minister for Immigration and Multicultural Affairs; Ex Parte "A" (2001) 185 ALR 489 applied
Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 195 ALR 502 applied
Re Refugee Tribunal; Ex parte Aala (2000) 204 CLR 82 referred to
Rezaei v Minister for Immigration and Multicultural Affairs [2001] FCA 1294 applied
SBBS v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 361 referred to
Stead v State Government Insurance Commission (1986) 161 CLR 141 referred to
Thirukkumar v Minister for Immigration and Multicultural Affairs [2002] FCAFC 268 applied
VHAJ v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 186 75 ALD 609 followed
VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 448 affirmed

VHAP OF 2002 v THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
V 443 OF 2003

GYLES, CONTI AND ALLSOP JJ
31 MARCH 2004
SYDNEY (HEARD IN MELBOURNE)

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **V 443 OF 2003**

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

BETWEEN:	**VHAP OF 2002** **APPELLANT**
AND:	**THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**GYLES, CONTI AND ALLSOP JJ**
DATE OF ORDER:	**31 MARCH 2004**
WHERE MADE:	**SYDNEY (HEARD IN MELBOURNE)**

THE COURT ORDERS THAT:

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

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
VICTORIA DISTRICT REGISTRY **V 443 OF 2003**

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

BETWEEN:	**VHAP OF 2002** **APPELLANT**
AND:	**THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**GYLES, CONTI AND ALLSOP JJ**
DATE:	**31 MARCH 2004**
PLACE:	**SYDNEY (HEARD IN MELBOURNE)**

REASONS FOR JUDGMENT

GYLES AND CONTI JJ:

1 The appellant was born in 1957 in Shandong Province in the People's Republic of China. She is a citizen of that country and lived and worked there until her departure on 1 June 2001. She arrived in Australia on 2 June 2001 pursuant to a Visitor's Visa issued on 25 May 2001 with her own Passport which had been issued in China on 13 April 2001. She lodged an application for a Protection Visa on 4 July 2001.

2 The basis for that application was twofold – fear of persecution:

(1) on the ground of religion as a Catholic Christian

(2) on the ground of political opinion – as a political dissenter.

That application was rejected by a delegate of the Minister on 29 August 2001. She applied to the Refugee Review Tribunal (the Tribunal) for review of that decision. By a decision of 13 August 2002, notified to the appellant on or about 30 August 2002, the Tribunal affirmed the delegate's decision.

3 On 26 September 2002 the appellant filed an application to the Court for review of the Tribunal's decision. The grounds were:

> *'1 The Tribunal did not observe procedures that were required by the Act or the regulations to be observed in connection with the making of the decision.*
>
> *2 The Tribunal did not have jurisdiction to make the decision.*
>
> *3 The decision was not authorised by the Act or the regulations.*
>
> *4 The decision was an improper exercise of the power conferred by the Act or the regulations.*
>
> *5 The decision involved an error of law being an error involving an incorrect interpretation of the applicable law.*
>
> *6 The decision involved an error of law being an error involving an incorrect application of the law to the facts as found by the Tribunal.*
>
> *7 There was no evidence or other material to justify the making of the decision.'*

4 On 16 May 2003 that application was dismissed with costs by Finkelstein J (*VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 448). This appeal is from that dismissal.

5 The appellant's original grounds of appeal were in the following terms:

> *'**Grounds***
>
> *2. The learned trial judge erred in law, with regard to the construction of the relevant requirements of s424A of the* Migration Act 1958 *("the Act") in relation to the provision of information made pursuant to the act.*
>
> *Particulars*
>
> *In circumstances where the Refugee Review Tribunal ("the Tribunal") relied upon information concerning the situation in China and the behaviour of the authorities in relation to exit procedures from China, Christianity, 1989 Pro-democracy movement and Falun Gong which the Tribunal considered part of the reason for rejecting the application. It was incumbent on the tribunal to invite the appellant to comment or respond to the information.*
>
> *3. Further or in the alternative, the learned trial judge erred in law in holding that notwithstanding the Refugee Review Tribunal denied the*

appellant natural justice, the breach of the rules of natural justice did not give rise to a remedy.

Particulars

The applicant repeats the particulars referred to in paragraph 2 above.

4. *Further or in the alternative whether s476(2)(b) of the* Migration Act 1958 *(Cth) applies to impose on the Tribunal an obligation to act reasonably. Although this point was not pressed before his Honour it is now pressed that the decision of the Tribunal was so unreasonable that no reasonable decision-maker so exercised the power*

Particulars

The Tribunal in dealing with the questions whether the applicant had suffered persecution and whether she had a well-founded fear of persecution in the future, proceeded in defiance of logic to the applicant's claim to have suffered persecution directed at her as if she were a practitioner of Falun Gong.

His Honour therefore erred in not uphold ing this ground of review.'

6 At the hearing of the appeal the grounds were amended to include the following:

*'1 The learned trial judge erred in law in not finding that the Refugee Review Tribunal erred in law in making the decision on 13 August 2002 relating to the applicant that "*The Tribunal affirms the decision not to grant a protection visa" *("**the decision**") and thereby acted without jurisdiction in failing to consider or determine relevant matters or substantive issues arising on the evidence and material before the Tribunal.*

Particulars

The Tribunal failed properly or at all to consider the applicant's claims in her statement received by the Tribunal on 9 August 2002 prior to the hearing of the applicant's case by the Tribunal that:

(a) "Other people who had participated in these activities had become political prisoners in our country, who were taken away, tortured, imprisoned, and brainwashed." (AB 67.4);

(b) "I have some research from the internet to back up my claims about Christians persecuted in China." (AB 67.7);

(c) "My life is far from safe in China … also due to the fact that I escaped from China." (AB 67.7)

7 Towards the end of the hearing of the appeal application was made to further amend the grounds of appeal to include the following ground:

> *'5. The Tribunal erred in law and thereby acted without jurisdiction in failing to consider or determine relevant matters or substantive issues arising on the evidence and material before the Tribunal.*
>
> *PARTICULARS*
>
> *(a) The Tribunal failed to take account of or to determine the appellant's claims to have suffered and to have well founded fear of persecution because she had a different political opinion from the Chinese authorities on matters including any or all of the 1989 "Tian Men square" events, the situation of the Dalai Lama and Tibet, "Fa Lun Gong", religion, contact with foreigners, the operation of the Public Security Bureau, corruption in the government, human rights and the system of law or justice in China. (Cf. AB 27, 28, 38–39, 40, 50, 114–124).*
>
> *(b) The Tribunal failed to take account of or to determine whether the appellant had well founded fear of persecution because, having independent, critical or different political opinion from the Chinese authorities on any or all of the matters set out in paragraph (a) of the particulars to this Ground, she would be perceived as a dissident or a person of general political opposition to the government.*

That application was opposed. Argument was heard upon it which included all arguments related to it and it was indicated that a ruling would be given with this judgment.

8 During the hearing of the appeal it was indicated that it was not necessary to hear from the respondent on ground 1, (except as to particular (c)) or as to ground 4. Ground 1 is bound up with the proposed ground 5.

Ground 1 and Proposed Ground 5

9 Particulars (a) and (b) of ground 1 can be quickly dispatched. We are quite satisfied that Finkelstein J was entitled to reject the arguments. These were simply alleged pieces of evidence in support of substantive claims which the Tribunal was not obliged to address specifically. (See the analysis of *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 by Allsop J in *Rezaei v Minister for Immigration and Multicultural Affairs* [2001] FCA 1294 approved by Cooper and Finkelstein JJ in *Thirukkumar v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 268 at [29].)

10 The particular that the applicant may be persecuted on account of the fact that she 'escaped' from China is on a somewhat different footing, as that could be regarded as a substantive and severable basis for a claim of persecution, albeit raised with the Tribunal at the heel of the hunt. It was not addressed in terms in the reasons of the Tribunal. Upon consideration, we agree with the opinion of the trial Judge that, as the Tribunal did not accept that the appellant 'escaped' from China, the point cannot succeed.

11 The proposed ground 5 is based upon the view that the Tribunal concentrated on individual complaints or examples of political opinion or dissent rather than meeting the gist of the claim that the appellant was a political dissenter in general. It was not a point taken at the hearing below, and on reading the reasons of the Tribunal, we have concluded that it has no chance of success. The Tribunal expressly held that it did not accept that the appellant had a real chance of being persecuted on the basis of her political opinion or activity and gave reasons for that conclusion. In those circumstances leave to make the proposed amendment is refused.

Ground 2

12 The information which would fall within s 424A(1) in this case does not expressly refer to, and is not expressly about, the appellant (or any other relevant person). In other words it is not specifically about the appellant unless it is regarded as being about every person who may fall into a class which is the subject of the information. Section 424A(3) provides, so far as is relevant:

> *'(3) This section does not apply to information:*
>
> *(a) 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 …'*

13 It is argued for the appellant that this prescribes two criteria that must be met, namely, that the information:

(1) is not specifically about the applicant; and

(2) is just about a class of persons

It is submitted that the information in question was general in nature, covering more than one class of persons, and so did not satisfy the second criterion.

14 In our opinion that argument must be rejected. The reference to the class of persons in subs 424A(3)(a) is not another criterion to be met. It is designed to underline the specificity required by precluding any argument that reference to a class would be taken as a reference to all individuals falling within it. This construction of the subsection is consistent with the decisions in *NANM and NANN of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 99 at [17] and *VHAJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 186 75 ALD 609 at [50] per Kenny J and [71] per Downes J with which we agree. The opinion of Ryan and Finkelstein JJ on this point in *NARV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 203 ALR 494 at [30]–[31] seems to be contrary to those authorities (whilst seeking to distinguish them) but, in any event, would not affect the conclusion of Finkelstein J in this case even if correct.

Ground 3

15 Finkelstein J found that the Tribunal had not afforded the appellant natural justice because it had not disclosed to the appellant all of the 'country information' in its possession which was relevant to the decision. However, having correctly directed himself by reference to both *Stead v State Government Insurance Commission* (1986) 161 CLR 141 and *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, Finkelstein J said:

> *'18 In this case I am satisfied that even if the applicant had been provided with all the documents upon which the tribunal relied, she would not have conducted her case before the tribunal any differently. Nor would it have affected the outcome of her application. Most of the information contained in the documents relied on was uncontroversial, in many respects in the public domain, and much of it was likely to be known to the applicant. Secondly, even if I am wrong on the first point, it is difficult to see how the applicant could ever be in the position where she could controvert the information, if any of it was controversial. I draw particular attention to the fact that the applicant did not assert that she would have run her case differently if she had been given the country information. Nor did she indicate how she might have been deprived of the opportunity of making submissions which might have persuaded the tribunal to act differently. Her failure to explain how she has been adversely effected is relevant to the present inquiry:* Re Minister for Immigration and Multicultural Affairs; Ex Parte "A" *(2001) 185 ALR 489, 500–501. I am mindful of the fact that a court should only reluctantly conclude that a denial of natural justice would have no bearing on the case, but that is the position I find myself in.'*

16 The reasons of the Tribunal identify the country information it relied upon and the use

made of it. It is correctly described as general information about the country. The reasons were conveyed to the appellant on or shortly after 30 August 2002. There was ample opportunity for her to have presented evidence at the trial which took place on 6 May 2003 as to what would have been done by or on behalf of the appellant if the potential use of the information by the Tribunal had been known in advance. We agree with Finkelstein J that the reasoning of Kirby J in *Ex parte 'A'* is directly in point. See also *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 361 at [36]–[37] and *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 at [36]–[37], [106], [112] and [149]–[151]. In *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966; 190 ALR 601, there was a relevant agreed fact in the stated case (see [16]). Even if, as suggested by Ryan and Finkelstein JJ in *NARV* at [17], there is no general rule to be applied, we do not disagree with the conclusion of Finkelstein J in the present case, the effect of which would place this case in the class to which reference was made at [18] in *NARV*. Ground 3 is rejected.

17 We agree with Allsop J that the contention on behalf of the Minister that the trial Judge was in error in finding that there was any operative breach of the rules of natural justice as the country information related to issues which were clearly on the table to be addressed should be upheld for the reasons given by his Honour. It is not necessary to explore separately how a failure by the Tribunal to provide general country information can be regarded as a breach of the implied duty of natural justice in the face of the express provisions of s 424A of the Act. (cf *NAAX v Minister for Immigration and Multicultural Affairs* (2002) 119 FCR 312 at [47]–[82]. The disagreement on appeal was as to the conclusion at [83] – see *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298 per Wilcox J at [320], per French J at [555] and von Doussa J at [648]. The decision of the High Court in *Muin* would now need to be taken into account.)

Ground 4

18 This ground was based upon a finding of the Tribunal that it was not satisfied that the appellant would be persecuted because she had commented critically on the ban on Falun Gong and so would be regarded as a practitioner of it. That ground was not pressed below in view of the perceived state of authority. The appellant now places reliance upon the decision of the High Court *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant*

S20/2002 (2003) 198 ALR 59 particularly per McHugh and Gummow JJ at [34] and [52]. In our opinion, the Tribunal was quite entitled to reject the claim that the appellant was or would be accused of or regarded as being a Falun Gong practitioner when she was not and did not claim to be such a practitioner. It is not necessary to explore the so called ground of unreasonableness for the purposes of this case.

Conclusion

19 The appeal is dismissed. The appellant is to pay the costs of the respondent.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gyles and the Honourable Justice Conti.

Associate:

Dated: 31 March 2004

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AND:	**THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**GYLES, CONTI AND ALLSOP JJ**
DATE:	**31 MARCH 2004**
PLACE:	**SYDNEY (HEARD IN MELBOURNE)**

REASONS FOR JUDGMENT

ALLSOP J

20 I have had the benefit of considering the joint reasons of Gyles J and Conti J. I agree with the orders proposed by their Honours. I also agree with their Honours reasons, though I wish to add some comments on two matters. The first concerns the issue of s 424A; the second concerns the issue of natural justice.

21 As to s 424A, and in particular s 424A(3)(a), I am of the view that the construction favoured by Gyles J and Conti J is clearly correct.

22 As to the question of natural justice, I am not persuaded that there was any failure to afford natural justice. I would therefore uphold the respondent's notice of contention in this regard.

23 The Tribunal had recourse to so-called country information about China, in the respects identified by the primary judge at [12] of his reasons.

> *…To resolve the applicant's claim the tribunal was required to have regard to the situation in China. The applicant's claim was premised on a number of bases: that religious freedom is not tolerated in China; that democratic movements are suppressed; and that members of the Falun Gong are arbitrarily arrested, imprisoned and beaten. The nature of her allegations also required the tribunal to investigate the ease with which a Chinese citizen could obtain a passport to leave the country. The tribunal obtained "country information" about these topics and based its conclusions in part on that information. The sources to which the tribunal had regard included: (1) In relation to procedures for leaving China, the laws relating to the control of exit and entry of citizens, commentary by the Department of Foreign Affairs and Trade (DFAT) on whether a dissident could obtain a passport and a statement by a senior lecturer in Chinese politics at the University of New South Wales; (2) In relation to the treatment of Christians in China the tribunal had available to it the 2001 United States International Religious Freedom Report (China) and a report from DFAT; (3) A research paper and academic papers dealing with the treatment of dissidents in China; and (4) In relation to the Falun Gong the tribunal relied on information obtained on the Internet, a US State Department report on International Religious Freedom and a report from Amnesty International, among other sources.*

24 Matters raised by that country information were raised with the appellant. This was made clear by [13] and [14] of his Honour's reasons:

> [13] *As previously mentioned, before the delegate's decision the applicant had been advised that the department had available to it information which suggested that it was improbable that dissidents or individuals of interest to the Chinese government could obtain a passport. She was also advised that country information suggested there had been a loosening of government control over, and a resurgence of, religious activity with millions of citizens adhering to Christianity. The applicant was invited to respond to this information. She provided a response.*
>
> [14] *However, none of the other country information in the possession of the tribunal was provided to the applicant either before or during the hearing. The applicant says, and this is not denied, that the undisclosed information formed, at least in part, the basis upon which the tribunal reached its decision. For that reason, she says the tribunal breached the rules of natural justice, thus rendering its decision ineffective.*

25 The primary judge's reasoning leading to the conclusion of a failure to afford natural justice was set out in [15], [16] and [17] of his reasons:

> [15] *It goes without saying that one of the basic requirements of a fair hearing is that the decision-maker must disclose to the person affected*

by his decision any information in his possession which is relevant to the decision. The requirement is obvious in relation to adversarial proceedings. In Re D (Minors) (Adoption Reports: Confidentiality) *[1996] AC 593, 603-604 Lord Mustill said: "My Lords, it is the first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if a party does not know the substance of what is said against him (or her), for what he does not know he cannot answer." The same principle applies to proceedings which are not adversarial such as proceedings before the tribunal, (see:* R v Secretary of State for the Home Department; Ex parte Sittampalam Thirukumar *[1989] Imm AR 402, 414;* R v Secretary of State for the Home Department; Ex parte Akdogan *[1995] Imm AR 176, 179-181), although perhaps not with the same degree of rigour (as to which see* National Companies and Securities Commission v News Corporation Ltd *(1984) 156 CLR 296, 315 per Gibbs CJ and 322-323 per Mason, Wilson and Dawson JJ). Nevertheless, in proceedings before the tribunal an applicant has a right to make representations and that right would be meaningless if the applicant is not informed of adverse material which the tribunal may take into account in arriving at its decision. If the material is contained in documents then, speaking generally, the documents should be made available to him. As Sedley J said in* R v London Borough of Camden; Ex Parte Paddock *[1995] COD 130 (quoted in M Fordham,* Judicial Review Handbook, *3rd edn, Oxford, Portland Oregon, 2001 at 850): "It is neither technical nor unduly onerous for decision-makers in every branch of public life to understand and work by this princip le, and to appreciate that it means in turn that they should not receive relevant material from outside sources without the knowledge of those affected."*

[16] *It was contended by the Minister that, in discharging its duties as decision-maker, it was enough that the tribunal put to the applicant questions based on the information in its possession. In* Freedman v Petty and Greyhound Racing Control Board *[1981] VR 1001, it was alleged that there had been a breach of the rules of natural justice by the failure of the Board to disclose documents. The Board contended that there was no such failure because all allegations known to the board had been put to the plaintiff in the form of questions. Marks J rejected this submission. He said (at 1021):*

> "*[The submission]* overlooks essential matters. The plaintiff was not told that he was being given an opportunity to answer allegations in statements in the possession of the Board. He was merely asked questions. Accordingly, he did not know that the Board's mind might be affected by *[them]* …. Putting questions is not necessarily the same as putting allegations … ."

[17] *In my view, there has been a breach of the rules of natural justice in this case. But to make that finding does not end the matter. …*

26 His Honour then applied *Stead v State Government Insurance Commission* (1986) 161 CLR 141.

27 Natural justice and the analysis of whether, in any case, it was afforded is not a process of syllogistic reasoning. One does not approach it thus: the person is entitled to adverse material, this material was relied on in reaching an adverse result, that makes it adverse material, it was not provided in terms, therefore there has been a failure to afford natural justice.

28 Natural justice is ultimately a question of fairness. The appellant here came to the Tribunal armed with her material about her country of origin in order to persuade the Tribunal to reach a state of satisfaction about her, China, and her future: that she had a well-founded fear of persecution for a Convention reason should she be required to return to China. In order to perform the task required of it by ss 36 and 65 of the *Migration Act 1958*, the Tribunal was required to inform and educate itself about China generally, and about aspects of Chinese life and affairs pertinent to the appellant's claims. In so analysing that material the Tribunal might form a view about the appellant or her version of events, which fairness dictated, must be raised. That was done here. The Tribunal will often have a store of experience and knowledge about the country in question without the need for specific reference to material. Sometimes, as here, it will reach for specific material for assistance. In doing so it was only informing itself of matters against which to assess the claims of the appellant. If, as here, subjects of concern are raised, I do not see how fairness requires provision of the specific text of country information seen to be of relevance.

29 The material to which we were taken was not such as to be required to be provided to the appellant. The appellant had an opportunity to persuade the Tribunal of her claims. The Tribunal raised with her issues of concern, which in the end were important. Fairness was afforded.

30 The kinds of consideration which led the primary judge confidently to apply *Stead*, and which were an accurate assessment of the material, seem to me to reinforce the conclusion that there was no breach of the rules of natural justice. At [18] his Honour said:

> *…Most of the information contained in the documents relied on was uncontroversial, in many respects in the public domain, and much of it was*

> *likely to be known to the applicant. Secondly, even if I am wrong on the first point, it is difficult to see how the applicant could ever be in the position where she could controvert the information, if any of it was controversial. …*

I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop.

Associate:

Dated: 31 March 2004

Counsel for the Appellant:	Mr A Krohn
Solicitor for the Appellant:	Victorian Legal Aid
Counsel for the Respondent:	Ms H Riley
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	12–13 November 2003
Date of Judgment:	31 March 2004