Law Society of the Northern Territory

Refugees and judicial review in Australia: a house built on rock or sand?

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(*The views expressed in this paper are the views of Federal Magistrate Lucev. They are not, and do not purport to be, the views of the Federal Magistrates Court or any other Federal Magistrate.)

Introduction

1. For the first half of the twentieth century Australia's migration law and policy was built on the rock of the White Australia Policy. But with the diminution of white Anglo Saxon Protestant and white Irish Catholic nationalism, the White Australia Policy outlived its primary supporters. And, in its place, Australia now has migration laws which, by and large, emphasise the role of administrative decision-making and decision-makers, and their legal overseer, judicial review. No more is that so than in the area of protection visa applications by persons claiming to be refugees.

2. A person claiming to be a refugee must make an application founded on a feared harm on the basis of a well-founded fear of persecution if they return to their country of origin, by reason of one of the Convention reasons: race, religion, nationality, membership of a particular social group, or political opinion.

3. It is only where the decision-maker, in this case the Refugee Review Tribunal,[1] is alleged to have committed jurisdictional error, that an application for judicial review can be made on the basis of that alleged jurisdictional error.[2]

Jurisdictional error

4. A decision of the Tribunal is only liable to be set aside upon review if it involves jurisdictional error.[3] Further, an error by an administrative tribunal, such as the Tribunal, will only constitute jurisdictional error if the Tribunal:

    a) identifies a wrong issue;

    b) asks a wrong question;

    c) ignores relevant material; or

    d) relies on irrelevant material,

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[1] "Tribunal".
[2] *Migration Act 1958* (Cth), s.476 ("*Migration Act*").
[3] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 506 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; [2003] HCA 2 at para.76 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ ("*Plaintiff S157*").

in such a way that the Tribunal's exercise or purported exercise of power is thereby affected resulting in a decision exceeding or failing to exercise the authority or powers given under the relevant statute.[4]

Further introduction

5. What I propose to do tonight is to:

   a) give a very potted history of Australian migration law, and the changes to it, especially in the context of changes to migration law and its impact on judicial review since the late 1980s;

   b) discuss the recent approach of the High Court of Australia in some migration cases involving refugees and judicial review;[5]

   c) discuss, very briefly, the practice and procedure of the Federal Magistrates Court in relation to judicial review applications for refugees.

The Australian colonies

6. Prior to 1901 the Australian colonies had their own migration laws. Those laws had two main pillars. The first was to assist "white" migrants (especially from the United Kingdom) to travel to and be employed in Australia. Many were indentured either before or upon arrival in Australia. The second was to keep the Chinese out. In 1861, the year of the Lamming Flats riots on the New South Wales goldfields, the colony of New South Wales passed the *Chinese Immigration Restriction Act*, and passed a similar Act in 1881. Other colonies did likewise.

The *Immigration Restriction Act 1901*

7. The *Immigration Restriction Act 1901* (Cth)[6] was the legislative vehicle used to uphold the White Australia Policy.

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[4] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 per McHugh, Gummow and Hayne JJ; [2001] HCA 30 at para.82 per McHugh, Gummow and Hayne JJ ("*Yusuf*").
[5] But not including any comment on *Plaintiff M61/2010E v Commonwealth* (2010) 85 ALJR 133; [2010] HCA 41 ("*M61*"), or "offshore entry person" applications generally, as the Court is currently dealing here in Darwin with one of the first batches of such matters.
[6] "*Immigration Restriction Act*".

8. At its heart, the *Immigration Restriction Act* prescribed as a condition of entry a dictation test in any European language.[7]

9. Famously, in the case of Egon Kisch, a Czechoslovak journalist and communist,[8] the dictation test was administered in Scottish Gaelic. Considerable trouble was obviously gone to to find a policemen born in Scotland who was a native Scottish Gaelic speaker to administer the dictation test to Kisch. The High Court held that Scottish Gaelic was not a European language as defined in the *Immigration Act 1901*.[9] That is, it was not a standard form of speech recognised as a received and ordinary means of communication among the inhabitants of a European community for all purposes of the social body. Even in 1934 Scottish Gaelic was not widely spoken![10]

1901-1967

10. In 1901 when the *Immigration Restriction Act* was enacted it consisted of 19 sections. By the time of the judgment in *Kisch* in 1934 the *Immigration Act* was still, despite amendment, only 19 sections.

11. In 1954 Australia became a signatory to the Refugees Convention. This was under the Liberal-Country Party Menzies coalition government, and at a time when significant numbers of east European refugees were migrating to Australia.

12. In 1958 the *Immigration Act* was repealed and replaced by the *Migration Act*. The *Migration Act* contained 67 sections.

13. In 1967, Australia signed the Refugees Protocol.

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[7] This "central and notorious discretion" allowed the language of the test to be determined by the public officer administering the test: S. Gagelar SC, "Impact of migration law on the development of Australian administrative law" (2010) 17 AJ Admin 92 at 93 ("Gagelar, Migration Law"); citing *Chia Gee v Martin* (1906) 3 CLR 649.

[8] Rasmussen, Carolyn, "Kisch, Egon Erwin (1885-1948)", Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anv.edu.au/biograph/kisch-egon-erwin-10755/text19067.

[9] The name of the "*Immigration Restriction Act 1901*" was amended in 1912 to the "*Immigration Act 1901*" ("*Immigration Act*"): Gagelar, Migration Law, fn.11.

[10] *The King v Wilson & Ors, Ex parte Kisch* (1934) 52 CLR 234, especially per Rich J at 240-242 and Dixon J at 243-246 ("*Kisch*").

1958 and onwards: the *Migration Act*

14. In 1958 the *Migration Act* introduced a new scheme with respect to migration and deportation.

15. In relation to migration, entry permits now regulated entry to Australia. Included in entry permits were temporary entry permits which could be cancelled at the absolute discretion of the Minister. If a non-Australian citizen in Australia did not have an entry permit they were a prohibited immigrant. A committee, known as the Determination of Refugee Status Committee was established to deal with the review of entry permit decisions for refugees.

1989 amendments

16. The *Migration Act* was amended in 1989 to provide for entry by permit and visa. The Immigration Review Tribunal was established as part of the internal review process. The Federal Court was given jurisdiction to hear appeals from the Immigration Review Tribunal on questions of law. The Federal Court also had judicial review jurisdiction under s.39B(1) of the *Judiciary Act 1903* (Cth).

1992 amendments

17. In 1992 there were further amendments to the *Migration Act* (which commenced in 1994) and on this occasion the visa was made the sole basis for a person's entry into, and remaining within, the Commonwealth of Australia. The 1992 amendments also established the Tribunal as the body to hear applications for merits review of delegate's decisions concerning the grant of protection visas.

18. The 1992 amendments also introduced a new Part 8 which sought to limit the judicial review of specific classes of decisions, including protection visa application decisions, to the grounds set out in s.476 of the *Migration Act*.

19. The limitations on judicial review were expressly said to be made on the basis that:

    a) they would provide for credible independent merits review; and

    b) they would provide for more predictable outcomes.

20. The new provisions of Part 8 were said to be codified procedures. There is little doubt that they were an attempt to make the courts adhere to what the Parliament prescribed as proper limits for the review of migration (including protection visa) decisions.[11]

The 1998 amendments

21. The 1998 amendments to the *Migration Act* became effective in 1999. They established a code of procedure for the Tribunal similar to that applying to decisions made by the Department.

22. In particular, the 1998 amendments introduced a new s.424A, which required notice to an applicant of information which might be adverse to their protection visa application. The codification of information provisions in s.424A spawned untold litigation. A brief Austlii search indicates that s.424A has been mentioned in more than 5000 cases since 1999.[12]

23. The High Court has made it clear that the information referred to s.424A is evidentiary material or documents, and not doubts or inconsistencies or the absence of evidence. Section 424A does not require the Tribunal to expose its reasoning process to the parties.[13] That is of course broadly consistent with the usual principles of procedural fairness which allow a party an opportunity to comment on material before the decision-maker, but not an ability to interrogate the decision-maker about their provisional reasons.

2001 amendments

24. The 2001 amendments to the *Migration Act*:

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[11] Gagelar, Migration Law, at 98-99; Justice Susan Kenny, "Seeing migration cases through one judge's spectacles" Australian Women Lawyers Conference, June 2008, http://www.fedcourt.gov.au/aboutct/judges papers/speeches kennyj.html, at pp.7 and 11 ("Kenny, Migration Cases").

[12] In the Federal Court 1833 cases, the Full Court of the Federal Court 127 cases, the Federal Magistrates Court 3603 cases, the High Court of Australia 15 cases, High Court of Australia Special Leave Applications 177 cases, and the Tribunal 679 cases. The number for the Tribunal appears very low given that there are 3603 cases for the Federal Magistrates Court which would only be hearing matters on a judicial review application in relation to a decision of the Tribunal.

[13] *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190 at 1195-1197 per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; [2007] HCA 26 (2007) at paras.15-22 per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; *Minister for Immigration and Citizenship v SZGUR & Anor* (2011) 241 CLR 594 at 598 per French CJ and Keifel J; [2011] HCA 1 at para.9 per French CJ and Keifel J.

a) excised from the migration zone certain offshore territories;

b) introduced a new privative clause; and

c) conferred jurisdiction on the Federal Magistrates Court in respect of *Migration Act* applications for the first time.

25. The introduction of a new privative clause in relation to decisions under the *Migration Act* was expressed as being intended to make administrative decisions under the *Migration Act*:

a) final and conclusive;

b) not able to be challenged, appealed or reviewed; and

c) not subject to the constitutional writs or to an injunction or declaration "on any account".

26. The introduction of the new privative clause was a deliberate attempt to excise judicial review by the federal courts.[14] The attempt did not work. In *Plaintiff S157* the High Court held that the new privative clause did not oust jurisdiction with respect to jurisdictional error. This was because a decision affected by jurisdictional error was said not to be a decision made under the *Migration Act*. Therefore, the High Court, exercising jurisdiction under s.75(v) of the Constitution – which allows the High Court to issue Constitutional writs and injunctions against an officer of the Commonwealth, the purpose of which is to ensure that Commonwealth officers obey the law and neither exceed nor neglect the jurisdiction conferred on them under law – still had jurisdiction to grant relief against decisions infected by jurisdictional error.

27. The 2001 amendments conferred jurisdiction on the Federal Magistrates Court for the first time. Legislatively, this was achieved by vesting the High Court's original jurisdiction under s.75(v) of the Constitution with respect to migration matters in the Federal Magistrates Court. Effectively, this meant that the Federal Magistrates Court became, and has become, the first instance court for migration judicial review in Australia.[15] Those matters then go on appeal to the Federal Court, and then on to the High Court, if special leave is

[14] Gagelar, Migration Law, at 101-103; Kenny, Migration Cases, at p.7 and 11.
[15] Gagelar, Migration Law, at 103.

granted. Migration matters do not generally go to the High Court first, but if they do, they are generally remitted to the Federal Magistrates Court. This step was necessary because the numbers of migration judicial review applications threatened to swamp the High Court's original jurisdiction.[16]

2002 amendments

28. There were further procedural fairness amendments to the *Migration Act* in 2002 when s.422B was introduced with respect to decisions of the Tribunal.[17] Section 422B of the *Migration Act* provided that the hearing provisions in the *Migration Act* were to be an "exhaustive statement" of the natural justice hearing rule in relation to matters dealt with.

2005 amendments

29. In 2005 there was a further attempt to limit the volume of migration matters coming to the federal courts for hearing and determination. The Parliament passed s.17A of the *Federal Magistrates Act 1999* (Cth),[18] and s.31A of the *Federal Court of Australia Act 1976* (Cth)[19] in the same terms, which although laws of general application to all cases in those courts, were part of a package of migration legislation amendments. Section 17A of the *FM Act* and s.31A of the *FC Act* provided for summary judgment in cases with no reasonable prospect of success. Although the precise limits are probably yet to be fully tested it is reasonably clear that s.17A of the *FM Act* and s.31A of the *FC Act* lower the threshold test for the granting of summary judgment.[20]

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[16] Chief Justice Robert French, "The Role of the Courts in Migration Law", Migration Review Tribunal and Refugee Review Tribunals Annual Members Conference, 25 March 2011 at pp.20-21 ("French, The Role of Courts").

[17] Similar provisions in respect of the Migration Review Tribunal and Minister's decisions were also introduced: see ss.357B and 57A of the *Migration Act*.

[18] "*FM Act*".

[19] "*FC Act*".

[20] *George v Fletcher* [2010] FCAFC 53 at para.75 per Ryan and Logan JJ; *White Industries Australia Ltd v Commissioner of Taxation* (2007) 160 FCR 298 at 310 per Lindgren J; [2007] FCA 511 at paras.50-54 per Lindgren J; and paras.99-105 per Marshall J, and in particular para.102; *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd* (2008) 167 FCR 372 at 387-388 per Rares J; [2008] FCAFC 60 at para.45 per Rares J; *Lawrenson Light Metal Die Casting Pty Ltd (in liq) v Cosmick Pty Ltd* [2006] FCA 753 at para.15 per Heerey J.

30. The efficacy of making a summary judgment application in respect of applications for judicial review has been called into question. The Chief Justice of the High Court of Australia has recently observed that:

> *An argument that an application for judicial review has no reasonable prospect of success is likely to involve the same questions and take just as long as the actual hearing and determination of the application itself. It has the disadvantage that it can generate collateral litigation. If it is to be used it needs to be used with care and discrimination to ensure that the transaction costs of invoking it do not outweigh the benefit which it delivers.*[21]

2007 amendments

31. In 2007 s.424AA was introduced into the *Migration Act*. It allowed the Tribunal to give orally particulars of information which would be a reason or part of a reason for affirming a decision of a delegate being reviewed by the Tribunal.

Serial amendments

32. The *Migration Act* is a piece of legislation which, because of its social and political importance, and because of the shifts in political and social opinion which mark this area of public policy, has being serially amended since its passage into law in 1958. There have been more than 100 amending Acts to the *Migration Act* in that time. Today, the *Migration Act* ends at s.507, but because of sections which look like car number plates, for example ss.306AGAA and 268CZA, there are close to 750 sections in the *Migration Act*. Those sections are accompanied by a bewildering array of regulations relating to, primarily, the criteria for the grant of various visas.

Shifts in policy and decision-making

33. History thus reveals a radical shift in migration policy since federation. Australia has abandoned the "rock" of the White Australia Policy, underpinned by a very short Act aimed at immigration restriction and the ability to exercise the dictation test, to a very large Act, whereby, at

[21] French, The Role of Courts, at p.22.

least for refugees, the grant of a visa is on the basis of administrative decision-making by reference to criteria in the Refugees Convention.

34. There has also been a fundamental shift in the control of decision-making with respect to entry into Australia, and the emergence of a significant "contest" between Parliament and the courts. Certainly since the late 1980s as the courts have taken a view with respect to particular aspects of the judicial review of the migration decision-making process, Parliament has often reacted, and reacted in an attempt to limit judicial review so as to keep the decision-making process an administrative one, that is, one where the Tribunal is generally the last avenue of resort for a protection visa applicant. Of course one of the difficulties with continued legislative intervention, particularly in procedures with respect to migration judicial review, is that the enactment of more legislation dealing with procedural issues, often expands rather than lessens the scope for jurisdictional error to be established, and therefore for the administrative decision-making process in the Tribunal to be judicially reviewed by the courts.

Recent High Court judgments

Introduction

35. There have been a number of significant migration law decisions of the

High Court in the last three years.[22] Today time permits that only three of those be dealt with, *SZKTI, SZIZO* and *SZIAI*.[23]

SZKTI

36. In *Minister for Immigration and Citizenship v SZKTI*[24] the nature of the exhaustive statement of the requirements of the natural justice hearing rule in s.422B(1) of the *Migration Act* arose. This involved the significance of a code of procedure when interpreting the relevant statutory provisions.

37. At the relevant time, s.424 of the *Migration Act* read as follows:

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

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[22] In addition to the three cases discussed, hereunder can be added:
(a) *Minister for Immigration and Citizenship v SZLFX* (2009) 238 CLR 507; [2009] HCA 31, *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, [2009] HCA 40, and *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23, which, together with *SZKTI, SZIZO* and *SZIAI* are perspicaciously analysed in M Alderton, M Granziera and M Smith, "Judicial Review and jurisdiction errors: The recent migration jurisprudence of the High Court of Australia", (2011) 18 AJ Admin L 138 ("Alderton & Ors, Recent Migration Jurisprudence");
(b) *M61*, although not discussed in this paper, is analysed in:
(i) M Crock and D Ghezellal, "Due process and rule of law as human rights: The High Court and the "offshore" processing of asylum seekers" (2011) 18 AJ Admin L 101; and
(ii) *Darabi v Minister for Immigration* [2011] FMCA 371 at paras.20-37 (in the context of the competence of the application for judicial review).

[23] Under s.91X of the *Migration Act* all refugee applicants are given a pseudonym in order to prevent their identity being disclosed.

[24] (2009) 238 CLR 489; [2009] HCA 30 ("*SZKTI*").

38. Where s.424(2) of the *Migration Act* was applicable, the prescribed acceptable method of service for Tribunal documents was, under s.441 of the *Migration Act*, said to be in writing.

39. In *SZKTI* the question arose as to the use of information provided orally to the Tribunal by third parties, and the reliance by the Tribunal on that information, without giving notice to the applicant of that reliance.

40. The Full Federal Court determined that s.424(2) of the *Migration Act* was an exhaustive statement of the power of the Tribunal to obtain additional information from a person when conducting its review.[25]

41. The High Court, by contrast, had regard to the textual content of s.424, and in particular, characterised s.424(1) of the *Migration Act* as one not confined by procedural limitations, but as a "*broad power*", designed to ensure only that information gathered by this process actually be considered by the Tribunal.[26]

42. The High Court held that the oral inquiries were authorised by the general power contained in s.424(1) of the *Migration Act*. The High Court accepted that the other provisions of s.424 were important in relation to procedural fairness, but nothing further flowed from this, given the breadth of the power contained in s.424(1) of the *Migration Act*. Part of the overall context in which the High Court looked at the breadth of the provision in s.424(1) of the *Migration Act* was by reference to s.420 of the *Migration Act* which required the Tribunal to operate in a manner which was "*economical, informal and quick*". The High Court held that restricting the Tribunal to request additional information might be inimical to the matter in which the Tribunal was intended to operate.[27]

43. The High Court took an essentially pragmatic approach to the provision of additional information upon request by the Tribunal, emphasising the broad power inherent in s.424(1) rather than the

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[25] *SZKTI v Minister for Immigration and Citizenship* (2008) 168 FCR 256 at 267 per Tamberlin, Goldberg and Rares JJ; [2008] FCAFC 83 at paras.42-43 per Tamberlin, Goldberg and Rares JJ.
[26] *SZKTI* (2009) CLR at 501-502 per French CJ, Heydon, Crennan, Kiefel and Bell JJ; HCA at para.37 per French CJ, Heydon, Crennan, Kiefel and Bell JJ.
[27] *SZKTI* CLR at 504 per French CJ, Heydon, Crennan, Kiefel and Bell JJ; HCA at para.47 per French CJ, Heydon, Crennan, Kiefel and Bell JJ.

specific power in s.424(2) of the *Migration Act*.[28] This is an approach which gives the Tribunal more scope to operate in the manner intended by s.420 of the *Migration Act*.

SZIZO

44. In *Minister for Immigration and Citizenship v SZIZO*[29] the High Court was dealing with circumstances where the Tribunal had adopted procedures which did not strictly comply with the requirements of the *Migration Act*. The High Court had to determine whether or not, in those circumstances, the Tribunal decision was valid.

45. Section 441G of the *Migration Act* provides that the Tribunal must give an authorised recipient (that is a person authorised by the visa applicant, and nominated by the visa applicant), any document that it would otherwise have given to the visa applicant. There was no dispute in *SZIZO* that the Tribunal had failed to give the authorised recipient documents that would ordinarily have been given to the visa applicant.

46. In *SZIZO* the eldest daughter of a family was the nominated authorised representative to whom all of the Tribunal correspondence ought to have been addressed. Her father was the visa applicant. The invitation to attend a hearing at the Tribunal was sent to the father, and not the daughter. Additionally, the letter advised that the father should inform his wife, and four children, about the letter. The entire family resided at the same address. Significantly, all of the applicants appeared before the Tribunal, and all of them gave evidence.

47. The Full Federal Court found that the failure to send correspondence to the daughter as the authorised representative, in accordance with s.441G of the *Migration Act*, meant that the Tribunal had, as a matter of fact, not complied with the requirements of the *Migration Act*.[30]

48. The Full Federal Court found that the Tribunal had not complied with an imperative statutory obligation, and that exceptional circumstances were required in order to refuse to issue constitutional writs in such

[28] Alderton & Ors, Recent Migration Jurisprudence, at 138-139.
[29] (2009) 238 CLR 627; [2001] HCA 37 ("*SZIZO*").
[30] *SZIZO v Minister for Immigration* (2008) 172 FCR 152 at 165-166 per Lander J; [2008] FCAFC 122 at para.82 per Lander J (with whom Moore and Marshall JJ agreed) ("*SZIZO Full Federal Court*").

circumstances. Consequently, the appeal was allowed by the Full Court of the Federal Court.[31]

49. The High Court however saw no jurisdictional error such as to invalidate the decision of the Tribunal. Unanimously, the High Court determined that s.441G of the *Migration Act* was concerned with the provision of effective notice of the Tribunal hearing. Section 441G was designed, the High Court said, to ensure timely and effective notice of the hearing was given to an applicant so as to enable the Tribunal to properly conduct a procedurally fair hearing.[32] The High Court observed that compliance with s.441G of the *Migration Act* would discharge the Tribunal's obligations to give timely and effective notice of the hearing in accordance with the Parliamentary intention. However, it did not follow from that that Parliament intended that any departure from a procedural step would mean that the Tribunal Decision was invalid. It was necessary to consider the extent and consequences of any departure from the statutory procedural regime. That was especially the case where there had been no injustice in the way in which the Tribunal had ultimately conducted the review. In this case, where the invitation to the hearing had been brought to the attention of all concerned, and all concerned had attended and given evidence, there was no denial of natural justice, and therefore no jurisdictional error such as to invalidate the decision of the Tribunal.[33]

SZIAI

50. *Minister for Immigration and Citizenship v SZIAI*[34] dealt with whether or not jurisdictional error occurred where an administrative decision-maker failed to undertake its own inquiries to ascertain relevant facts.

51. In *SZIAI* the visa applicant had submitted documents received from Bangladesh concerning his membership of an Ahmadiyya Muslim organisation for consideration by the Tribunal. The Tribunal contacted a local branch of the Ahmadiyya Muslim Association in Australia. That

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[31] *SZIZO Full Federal Court* FCR at 168-169 per Lander J; FCAFC at para.97 per Lander J (with whom Moore and Marshall JJ agreed).
[32] *SZIZO* CLR at 639-640 per French CJ, Gummow, Hayne, Crennan and Bell JJ; HCA at paras.33-34 per French CJ, Gummow, Hayne, Crennan and Bell JJ.
[33] *SZIZO* CLR at 640 per French CJ, Gummow, Hayne, Crennan and Bell JJ; HCA at para.35 per French CJ, Gummow, Hayne, Crennan and Bell JJ.
[34] (2009) 83 ALJR 1123; [2009] HCA 39 ("*SZIAI*").

association said that the certificates obtained in Bangladesh were forgeries and annexed a letter from the National Ameer of the Bangladeshi Ahmadiyya Muslim Organisation indicating that there was no record of the visa applicant's membership. The Tribunal used this information to draw conclusions about the visa applicant's credibility: in short it found that he was not a witness of truth and that his evidence was not to be accepted. The visa applicant's application for review was dismissed.

52. In the Federal Court, before a single Judge on appeal, the Tribunal decision was quashed because it was said that the facts gave rise to a duty for the Tribunal to make further inquiries of the authors of the Bangladeshi documents. In relation to those documents the Tribunal had been provided with telephone numbers for the authors.[35]

53. The High Court recognised that failure to make obvious inquiries about a critical fact, the existence of which is easily ascertained, might affect a decision in some way such as to constitute jurisdictional error.[36] In this case however, the High Court held that no duty arose. This was because further inquiries concerning the authenticity of the certificates would not have yielded any useful result. If the authors of the certificates were contacted, and said that the documents were forged, there were stronger grounds for the Tribunal's Decision. If not, then nothing was added to the statements effectively conveyed by the certificates themselves.[37] Also, it was noted that neither the applicant nor his solicitors were able to add anything beyond the bare denial of the allegation in the National Ameer's letter that the certificates were forgeries. For those reasons, there was no factual basis for the conclusion that the failure to inquire constituted a failure to undertake the statutory duty of review, or that it was otherwise so unreasonable as to support a finding that the Tribunal's decision was infected by jurisdictional error.[38]

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[35] *SZIAI v Minister for Immigration and Citizenship* [2008] FCA 1372.
[36] *SZIAI* ALJR at 1129 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; HCA at para.25 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[37] *SZIAI* ALJR at 1129 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; HCA at para.26 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[38] *SZIAI* ALJR at 1129 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; HCA at para.26 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

54. The High Court decision in *SZIAI* has been criticised. It has been said that:

> *Given that the Tribunal in* SZIAI *used the purported falsity of the certificates in its determination that the applicant was not a witness of truth, the provenance of the certificates was centrally relevant both to this question as well as to his membership of the Ahmadi group.*[39]

55. The obvious answer to this criticism is one borne of frequent practice in the area: that is, because falsity of certificates is such a common feature of cases, the duty to inquire would arise as often as not in relation to Tribunal decisions. Clearly, the duty to inquire was not one intended to be used as a general rule, but rather for the exceptional case.

56. An example in practice which predates *SZIAI*, and may therefore be called into question, is *WZANF v Minister for Immigration and Citizenship*.[40] In *WZANF* a Turkish national of Armenian descent alleged persecution on the basis of political opinion. In part, his case depended upon circumstances which saw him arrested in relation to an attempt to organise a protest in a Turkish regional town. Submitted for consideration by the Tribunal was a photocopy of a page from the local regional newspaper showing persons being arrested by the police, and the accompanying text, which identified the applicant. Issues of credibility arose, and the Tribunal refused to make further inquiries as to the authenticity of the newspaper account. In relation to the newspaper article the Federal Magistrates Court found as follows:

> *The Newspaper Article*
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> *102. The applicant contends that the Tribunal could have requested the Secretary [of the Department of Foreign Affairs and Trade] to find out:*
>
> *a) if the Newspaper existed;*
>
> *b) if the Newspaper keeps its archives; and*
>
> *c) if the Newspaper Article was printed as alleged by the applicant.*

[39] Alderton & Ors, Recent Migration Jurisprudence at 150.
[40] [2010] FMCA 110 ("*WZANF*").

103. Given the centrality of the Newspaper Article to the activities of the applicant and the Organisation, and the fact that the Tribunal's finding that the Newspaper Article was not authentic meant that the Tribunal precluded itself, wrongly, for reasons set out above, from considering corroborative evidence contained in the Newspaper Article, particularly:

a) the naming of the Organisation, indicating that it did exist; and

b) the naming of the five founding members of the Organisation referred to in clause 6 of the Organisation's Constitution, again indicating that the Organisation did exist; and

c) the similarities between the Newspaper Article account of events and the events described by the applicant in evidence before the Tribunal,

the authenticity or otherwise of the Newspaper Article was critical. The Newspaper Article was arguably the most critical corroborative document in the review given the adverse consequences which the applicant says followed from the reported events.

104. The applicant was asked by the Tribunal to produce "the original" of the article. The applicant said that he was unable to do so because his brother was unable to obtain the original because it was in the newspaper archives and he was not able to get a copy even if he paid money for it.[41]

105. The Tribunal made no apparent attempt to exercise its powers under s.427(1)(d) of the Migration Act to inquire as to:

a) the existence of the newspaper;[42]

b) the publication of the article; and

c) the availability of the article.

[41] Applicant's Statutory Declaration, 26 May 2008, para.4: CB 144. It needs to be borne in mind that this request for an "original" was made to, and conveyed through, Turkish speakers. If the request for an "original" was put to the Newspaper, it is hardly surprising that no "original" was forthcoming, especially three and a half years after the printing of the paper in question (original footnote from *WZANF*).

[42] By way of comparison, the Tribunal, of its own volition, accessed a website (using Google) to bring in to its decision-making process material which contradicted the applicant's evidence as to the ethnicity of the Dead Person: CB 226 (original footnote from *WZANF*).

> *106. Although the applicant's brother was not able to obtain a copy of the article from the Newspaper's archives, the Court considers that this type of information is the type of information that might be the subject of a request by the Tribunal to the Secretary of the Department to see if it could be obtained (or, perhaps more pertinently, confirmed) by a Turkish government official, or even a DFAT official in Turkey. This is particularly so where the evidence discloses that the Newspaper has archives, and it is possible (and even probable on the evidence) that there is a copy of the Newspaper Article in the archives.*
>
> *107. Because the Newspaper Article was a critical document, and because it would have been corroborative of a number of the integers of the applicant's claim, the Tribunal committed a jurisdictional error by failing to require the Secretary of the Department to arrange for the making of inquiries as to:*
>
> *a) the existence of the Newspaper;*
>
> *b) the publication of the Newspaper Article; and*
>
> *c) if the Newspaper Article was published in the Newspaper, the possibility of obtaining a copy, and not necessarily the original, of the Newspaper Article.*[43]

The High Court's recent approach

57. The High Court's recent approach to judicial review of Tribunal decisions set out in the above three cases is essentially characterised by a pragmatic approach to the law. The High Court appears to be allowing the Tribunal to get on with its job of doing a merits review quickly, cheaply and informally. Moreover, the High Court's judgments in the above cases appear to limit the scope for judicial review in relation to Tribunal decisions in relation to refugee applications. In that regard at least, the High Court's position appears to be closer to that of the executive and the Parliament than might previously have been the case. Significantly, in each of the above three decisions the High Court overturned the Federal Court which had found for the applicant.

58. The High Court has, arguably, given more certainty to the role of the Tribunal. It has provided it with a more solid foundation from which to perform its essential role. It has limited the scope for judicial review

[43] *WZANF* at paras.102-107 per Lucev FM.

and narrowed the range of the shifting sands of judicial review which have sometimes trapped Tribunal decisions.

Practice and procedure – the Federal Magistrates Court

59. Finally, I want to outline, very briefly, some elements of practice and procedure in the Federal Magistrates Court in relation to the judicial review of Tribunal decisions.

60. The application is commenced by filing a specified form, and an affidavit, attaching the Tribunal Decision.

61. Usually, before the first directions hearing or first court date, the respondents, the Minister and the Refugee Review Tribunal, will submit appearances (the Tribunal usually submitting save as to costs) and at the first court date orders will usually be made (at least in the Perth and Darwin registries) as follows:

a) allowing the filing of amended application and any further affidavit by the applicant;

b) providing the Minister with the opportunity to file a court book and any relevant material;

c) for both parties to file submissions, usually 14 days and 7 days (applicant and respondent respectively), before the hearing date; and

d) providing for a hearing date, usually within three months.

62. At hearing, the applicant goes first, followed by the respondent, and the applicant in reply. Most of the relevant information is contained in the court book and submissions, and it is unusual for any further evidence or information to emerge in the course of any hearing. Judgment is usually, but not always reserved, and written reasons for judgment are published. Where reserved, judgment is usually, but again not always, delivered within three months of hearing.