HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

MINISTER FOR IMMIGRATION AND CITIZENSHIP APPELLANT

AND

SZJSS AND ORS RESPONDENTS

Minister for Immigration and Citizenship v SZJSS [2010] HCA 48
15 December 2010
S147/2010

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 1 and 2(a) and (b) of the order of the Federal Court of Australia made on 24 November 2009 and, in lieu thereof, order that the appeal to that Court be dismissed.*

3. *Appellant to pay the costs of the first and second respondents in this Court.*

On appeal from the Federal Court of Australia

Representation

S J Gageler SC, Solicitor-General of the Commonwealth with G T Johnson for the appellant (instructed by DLA Phillips Fox Lawyers)

B W Walker SC with J R Young for the first and second respondents (instructed by Simon Diab & Associates Solicitors)

Submitting appearance for the third respondent

CATCHWORDS

Minister for Immigration and Citizenship v SZJSS

Immigration – Refugees – Review by Refugee Review Tribunal ("RRT") – RRT gave "no weight" to certain letters tendered in evidence by first respondent – RRT described the giving of certain oral evidence by first respondent as "baseless tactic" – Whether RRT fell into jurisdictional error by failing to give "proper, genuine and realistic consideration" to letters or by describing certain oral evidence of first respondent as "baseless tactic" – Whether RRT's reasons, including use of expression "baseless tactic", gave rise to reasonable apprehension of bias by reason of pre-judgment.

Words and phrases – "jurisdictional error", "proper, genuine and realistic consideration", "reasonable apprehension of bias".

Administrative Decisions (Judicial Review) Act 1977 (Cth), ss 5, 6.
Migration Act 1958 (Cth), s 474.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ. The first and second respondents, husband and wife and citizens of Nepal, arrived in Australia on 22 February 2006. Shortly afterwards, on 5 April 2006, each applied for a protection visa.

2 A criterion for a protection visa under the *Migration Act* 1958 (Cth)[1] is that the applicant is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol[2], or that the spouse or dependant of such an applicant is a non-citizen in Australia and the applicant holds a protection visa[3]. The Refugees Convention includes in its definition of a refugee any person who "owing to well-founded fear of being persecuted for reasons of … membership of a particular social group or political opinion" cannot or will not return to their home country[4].

3 Under Pt 7 of the *Migration Act*, the Refugee Review Tribunal ("the Tribunal") is under a duty to review "an RRT-reviewable decision" of the delegate of the Minister[5] and in doing so the Tribunal is obliged to determine whether or not it is satisfied that the respondents meet the respective criteria referred to above.

4 A delegate of the appellant refused the first respondent's application on 3 July 2006 in accordance with s 65 of the *Migration Act*. On 10 October 2006, the Tribunal affirmed that decision. The first and second respondents sought judicial review of that decision in the Federal Magistrates Court. On 15 August 2007, the Federal Magistrates Court set aside the decision and remitted the matter to the Tribunal to be determined according to law[6].

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1 Reprint No 11 contains the applicable text of the Act.

2 *Migration Act*, s 36(2)(a).

3 *Migration Act*, sub-ss 36(2)(b)(i) and (ii).

4 Article 1A(2) of the Refugees Convention as amended by Article 1(2) of the Refugees Protocol.

5 *Migration Act*, s 414(1).

6 *SZJSS v Minister for Immigration and Citizenship* [2007] FMCA 1495.

5 On 11 December 2007 the Tribunal, differently constituted, affirmed the delegate's decision for a second time. Again, the first and second respondents sought judicial review of that decision in the Federal Magistrates Court and on 8 July 2008, the second Tribunal decision was set aside and consent orders were made remitting the matter back to the Tribunal.

6 On 15 October 2008 the Tribunal, differently constituted again, affirmed the delegate's decision for a third time. The first and second respondents sought judicial review of this third Tribunal decision in the Federal Magistrates Court (Lloyd-Jones FM). The application was dismissed on 11 September 2009[7]. The first and second respondents then appealed to the Federal Court of Australia (Rares J) which allowed the respondents' appeal and quashed the decision of the Tribunal[8].

7 The Federal Court found that the Tribunal had fallen into jurisdictional error in finding that the first and second respondents are not refugees because it failed to give "proper, genuine and realistic consideration" to letters in evidence and because it described the giving of certain evidence by the first respondent as a "baseless tactic"[9]. The reasons of the Tribunal were also said by the Federal Court to give rise to a reasonable apprehension of bias[10], and the matter was remitted for hearing and determination according to law[11]. It is against that decision that the Minister now appeals. The third respondent, the Tribunal, submits to any order this Court may make, save as to costs. Special leave to appeal to this Court was granted on the conditions that the Minister does not seek to disturb the costs orders below and that the Minister will pay the respondents' costs to the appeal, in any event.

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7 *SZJSS v Minister for Immigration and Citizenship* [2009] FMCA 886.

8 *SZJSS v Minister for Immigration and Citizenship* (2009) 113 ALD 270.

9 *SZJSS v Minister for Immigration and Citizenship* (2009) 113 ALD 270 at 281 [46] and 282 [49].

10 *SZJSS v Minister for Immigration and Citizenship* (2009) 113 ALD 270 at 284 [59]-[61].

11 *SZJSS v Minister for Immigration and Citizenship* (2009) 113 ALD 270 at 285.

The facts and procedural history

8 From 1996 until 2006, there was a civil war in Nepal. In November 2006, a Comprehensive Peace Agreement was signed between the Nepalese government and the Communist Party of Nepal – Maoist (the "Maoists"). The Comprehensive Peace Agreement gave the Maoists a role in government. However, in February 2006, when the first and second respondents left Nepal, the Nepalese civil war had not yet ended. Subsequently, in 2008 there were parliamentary elections in Nepal for the Constituent Assembly.

9 In his initial application and before both the first and second Tribunals, the first respondent claimed to fear harm from the Maoists, the Royal Nepalese Army and the police. Before arriving in Australia, he had been a school teacher and, as the owner of a shop, a businessman in the remote Turang village of Gulmi District, Nepal. The first respondent claimed consistently throughout each of the proceedings that the Maoists forced him, and other teachers, to pay compulsory donations out of their wages into Maoist coffers. Originally, the first respondent was forced to pay the equivalent of one day's wages per month, but this gradually increased until he was paying the equivalent of one week's wages each month. The first respondent claimed that he was forced to attend Maoist training camps with other teachers. Also, the first respondent claimed that the Maoists forced him to pay additional taxes in respect of a retail shop which he and his wife were running. The donations were referred to compendiously in the Tribunal's decision as "revolutionary taxes".

10 The first respondent claimed that each of the then government of Nepal and the Maoists suspected he sympathised with the opposite side in the conflict. The donations to the Maoists were, he feared, interpreted by the local government authorities as support for the rebels, whereas the Maoists suspected that he was supplying the government with information and other assistance. He claimed that it would be unsafe and unreasonable for him to relocate to Kathmandu because the Maoists from whom he feared persecution had networks there. The first respondent's claim for protection was based both on his political opinions and his membership of particular social groups, as both a teacher and a businessman.

11 The Tribunal accepted that "school teachers" and "business people" or "shopkeepers" were "particular social groups" in the sense required by the Refugees Convention. The Tribunal accepted that the first respondent had been

forced to participate in Maoist training camps for teachers but noted that in relation to "current-day Nepal" the only evidence the first respondent provided of such practices were examples from remote rural areas and there was no evidence provided of those programs continuing in the bigger cities. Before coming to Australia the first respondent resided in Kathmandu with the second respondent. His brother and his three children currently reside there. The Tribunal rejected the proposition that "if the [first respondent] becomes a school teacher again in Nepal, now or in the reasonably foreseeable future, he would be subjected to [forced participation in Maoist training camps] irrespective of where he might take up a teaching role".

12 This finding was anchored in the fact that, during the period in which the first respondent has been in Australia, the civil war in Nepal has ended and the social and political conditions have changed. The first respondent modified his claims before the Tribunal in the light of these changes. During the course of a hearing on 13 August 2008, at which the first respondent gave evidence and presented arguments, it was put to him that the Maoists now have a parliamentary majority in Nepal and are in a position to draw on State taxes and desist from raising donations as they did formerly. Addressing this and other changes, the first respondent gave evidence to the Tribunal to the effect that a lot of people who used to be in danger are no longer in danger and said a lot of people who used to be in hiding are no longer in hiding. He also said his children who currently remain in Nepal are not in danger but he maintained his claim that he would not be safe in Nepal. Importantly, for present purposes, the Tribunal decided to give "no weight" to certain letters introduced into evidence which appeared to corroborate some of the first respondent's assertions.

Issues

13 The essential issues were whether the Tribunal fell into jurisdictional error by choosing to give no weight to the letters produced by the first respondent ("letters issue") and by describing the giving of certain evidence by him as a "baseless tactic" ("baseless tactic issue"), and whether the Tribunal's reasons demonstrated apprehended bias.

The letters issue

14 There were three letters to be considered, all written after the first and second respondents arrived in Australia on 22 February 2006. The first letter, in

English, dated 20 March 2006, addressed to the first respondent and signed by the Head Master of the secondary school at which he had taught, stated:

> "Having been unsatisfied with the social work and teaching you had been performing in VDC; Turang Majuwa Gulmi. We here by inform you that, the place you have been hiding can be protective.
>
> After your leave acceptance, too, they have been searching through dictators and some times by arm forces. Therefore we would like you not to come out and just stay at where you are."

15 Another letter in English, also dated 20 March 2006, addressed to the first respondent and signed by the Principal of Polaris Secondary Boarding School (which the first and second respondents' daughters had attended) stated:

> "We had been teaching your kids for nine years long period. [Name] (*Class-Seven*), [Name] (*Class-Five*) & [Name], (*Class-Four*) who had been studying at this institution for 9, 7 and 6 years accordingly. We are now unable to be accepted as the boarders students for Maoist, the terrorists, have been challenging us time and again not to admit in this institution. Therefore we here by request you to manage your children where ever you feel comfortable and safe."

16 The third letter dated 18 May 2006, addressed to the first respondent again from the Head Master at the school at which he had taught, was sent from and to the same address. As translated into English from Nepalese, it stated:

> "This is to inform you [first respondent] that your position as a teacher in [name of school] in Gulmi is no longer exist [sic] as you have not join [sic] the School after taking leave for three months until 2061/11/4 (Nepalese date) *16th February, 2006* (*Australian date*) due to your safety reason and various threats given to you. You are not required to come back and continue your job as a teacher in this School".

17 It is convenient to set out the relevant parts of the Tribunal's decision concerning this evidence. Of the two letters from the Head Master dated 20 March and 18 May 2006, the Tribunal said:

> "The [first respondent's] claim to the effect that he would still face harm even in Kathmandu stems partly from his claim that the Maoists have been searching for him since he left Gulmi because they suspect he

> spied on them to the local authorities back there. Although this claim appears supported by the text in the Gulmi headmaster's letters dated 20 March and 18 May 2006, the Tribunal gives no weight to it. It is undermined by the [first respondent's] evidence at the 13 August 2008 hearing about the local Maoist insurgents having treated pro- and imputed anti-Maoist teachers the same, requiring all of them to attend the training camps and incorporate the Maoist curriculum into their own. The claim also appears dependent on the [first respondent's] suggestion that he had been a member of [Amnesty International] long enough for him to become or appear to be an activist, and this claim is already dismissed.
>
> Although the Tribunal accepts that these two letters originated from the relevant school, the Tribunal gives no weight to their content in view of evidence the [first respondent] has presented the Tribunal over time undermining his claims about his purported political and social activism."

18 The Tribunal was of the view that the first respondent "exaggerated and distorted the significance of his having joined [Amnesty International] in September 2005" in the circumstances that he gave evidence that the Maoists began their training camps in 2000. It was also noted that the first respondent joined Amnesty International one month before he and his wife obtained passports; they travelled to Australia in February 2006. The Tribunal also gave the letters from the Head Master no weight because it came to the view that both of the letters and their contents were solicited.

19 Of the Polaris letter, dated 20 March 2006, the Tribunal said:

> "Although the 'Polaris' school letter does not refer to the [first respondent] being a political activist, and is therefore not undermined by the [first respondent's] oral evidence to the Tribunal over time, the Tribunal still gives this no weight. Even allowing for the possibility that the local Maoist insurgents in Gulmi stopped schools from having boarders, no evidence before the Tribunal suggests that such action in itself was, or would be indicative of a real chance of, Convention-related persecution. The letter speaks of an action undertaken in the past in a particular location prior to the recent [change] in the social-political map in Nepal. The Tribunal gives weight to the fact that the [first respondent's] children are all attending private schools in Kathmandu, and facing no pressure from the Maoists. The [first respondent] has not satisfied the Tribunal that

their situation as students and resident of Kathmandu is in any even remote danger of changing."

Revolutionary taxes – the baseless tactic issue

20 It is also convenient to set out the relevant parts of the Tribunal's decision concerning the Tribunal's description of the giving of certain oral evidence by the first respondent as a "baseless tactic":

"The [first respondent] claimed to the Department and to the [Tribunal] that as teachers and business people he and his wife were harassed and punished by the Maoists in the form of obligatory, increasing revolutionary taxes, the donations referred to throughout this decision.

…

The Tribunal is not satisfied on the evidence before it that school teachers are currently being charged revolutionary taxes under threat of violence in Kathmandu, where the [first respondent] was last residing. The Tribunal is not satisfied that if the [first respondent] became a school teacher in Kathmandu or other large cities, he would be obliged to donate to the Maoists *or* face persecutory threats for refusing …

For that matter, the Tribunal is not satisfied on the evidence before it that, irrespective of where he might reside in Nepal, the [first respondent] would face a real chance of the resumption in forced donations to the Maoists upon his becoming a businessman or shopkeeper again. When the Tribunal asked him why he could not come out of hiding in Kathmandu now and live there like his brother, he did not suggest that this was because he is a businessman and because his brother is not, or suggest that businessmen in Kathmandu face a real chance of Convention-related harm. He cited, as the only distinguishing factor, the fact that he is by vocation a school teacher.

The Tribunal is of the view that to a very large part, the [first respondent]'s reference to being a school teacher at this point was a baseless tactic to help him address the potentially adverse impression the Tribunal disclosed to him after he said that people who used to be in hiding from the Maoists are now living out in the open."

Federal Court decision

21 The appeal to the Federal Court followed the Federal Magistrate's determination that the Tribunal decision contained no jurisdictional error. In their Notice of Appeal to the Federal Court, the first and second respondents advanced a claim that the Tribunal had failed to give "proper, genuine and realistic consideration" to the evidence before it.

22 The Federal Court's reasoning included the following[12]:

> "The … [T]ribunal did not find that the two headmasters were prepared to write falsehoods in the letters. I cannot conceive how any rational, reasonable approach to the evaluation of that evidence could give it 'no weight'. I am satisfied rather that the … [T]ribunal was not genuinely considering the [respondents'] claims as corroborated by the letters on the material before it. It used the formula of giving material 'no weight' as a basis on which it might ignore probative, relevant and highly supportive material corroborating the factual basis of the fears which the [first respondent] claimed. It did this simply as a basis for putting the evidence to one side, having said that it had looked at it. …
>
> I am of opinion that when the … member said that he gave no weight to the three letters, he simply recited that he had considered them only to discard them. This was not a proper, genuine or realistic evaluation of this material. …
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> Here, the … [T]ribunal disabled itself from assessing the [first respondent's] case in relation to his fear of persecution in [Kathmandu], by putting to one side as having no weight, letters that corroborated his claim that he continued to be pursued in [Kathmandu] and by characterising as 'a baseless tactic' the continued maintenance of his original claim that as a teacher in [Kathmandu] he feared suffering persecution because the Maoists were still pursuing him. …
>
> Not only was the attribution of a 'baseless tactic' made without evidence, it was contrary to the evidence. …

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12 *SZJSS v Minister for Immigration and Citizenship* (2009) 113 ALD 270 at 280-284 [43]-[61].

> A fair-minded lay observer or properly informed lay person would find the use of the language 'baseless tactic' disturbing in the context of this tribunal's reasoning. Coupled with the … member using the 'no weight' formulation to shut out powerfully corroborative independent evidence, verified at the [T]ribunal's earlier request by the Australian Embassy in Nepal, I am satisfied that a fair-minded lay observer or properly informed lay person would regard this [T]ribunal member as having an apparent bias against the [first respondent's] account".

Was there jurisdictional error?

23 General principles governing the limited role of the courts in reviewing administrative error have long been identified. As Mason J observed in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[13], "mere preference for a different result, when the question is one on which reasonable minds may come to different conclusions" is not a sufficient reason for overturning a judicial decision upon a review. Further, Brennan J said in *Attorney-General (NSW) v Quin*[14]:

> "The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

24 In 1989 with the codification of migration policy the *Migration Act* was amended significantly. At that time, judicial review of migration decisions was conducted under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("ADJR Act").

25 Grounds for review under s 5(1) of the ADJR Act include the ground that "the making of the decision was an improper exercise of the power conferred" by the relevant enactment[15]. Section 5(2) provides that the reference to "an improper exercise of a power" includes a reference to "failing to take a relevant consideration into account"[16], "an exercise of a power that is so unreasonable that

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13 (1986) 162 CLR 24 at 48; [1986] HCA 40.

14 (1990) 170 CLR 1 at 36; [1990] HCA 21.

15 ADJR Act, s 5(1)(e).

16 ADJR Act, s 5(2)(b).

no reasonable person could have so exercised the power"[17], and "any other exercise of a power in a way that constitutes abuse of the power"[18]. Section 5(2)(f) identifies as a ground for review "an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case". Section 6 provides further statutory grounds for review of conduct related to the making of decisions, which include a ground that the making of the proposed decision would be an improper exercise of power conferred by the relevant enactment[19].

26 In *Khan v Minister for Immigration and Ethnic Affairs*[20], Gummow J considered a migration appeal brought in 1987, when such appeals were decided under the ADJR Act. His Honour construed an improper exercise of power as including a reference to an exercise of a discretionary power in accordance with a rule or policy, without regard to the merits of a particular case. His Honour found that in considering all relevant material placed before him, the Minister's delegate was required to "give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy."[21]

27 On 1 September 1994, Pt 8 of the *Migration Act* was introduced[22]. The new Pt 8 scheme for judicial review differed significantly from the provisions of ss 5 and 6 of the ADJR Act; it contained provisions which sought to exclude

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17 ADJR Act, s 5(2)(g).

18 ADJR Act, s 5(2)(j).

19 ADJR Act, s 6(1)(e).

20 (1987) 14 ALD 291.

21 (1987) 14 ALD 291 at 292; see also *Shand v Minister for Immigration and Ethnic Affairs* [1987] FCA 103, and *Broussard v Minister for Immigration and Ethnic Affairs* (1989) 21 FCR 472.

22 As a result of the *Migration Reform Act* 1992 (Cth). Note that Pt 8 was initially numbered Pt 4B but was later renumbered by the *Migration Legislation Amendment Act* 1994 (Cth).

judicial review of migration decisions[23] on numerous grounds, which included the grounds of failing to take relevant considerations into account[24] and a breach of the rules of natural justice[25]. Whilst recognising that statutory limits were then prescribed which bore upon the construction of improper exercise of power[26], in *Minister for Immigration and Multicultural Affairs v Yusuf*[27], McHugh, Gummow and Hayne JJ observed that jurisdictional error may include ignoring relevant material in a way that affects the exercise of a power.

28 It is sufficient for present purposes to note that from October 2001[28], Pt 8 as discussed above was repealed and replaced with the current Pt 8, including the privative clause provisions of s 474, which do not protect decisions involving jurisdictional error or oust the jurisdiction conferred by s 75(v) of the Constitution[29].

29 In *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs*[30], the Minister accepted that a statutory provision requiring a Tribunal to give an applicant an opportunity to appear before it and give evidence[31] implies that such evidence is to be given proper, genuine and realistic consideration. The Minister reiterated that position in this case.

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23 Of the Immigration Review Tribunal (the forerunner of the Migration Review Tribunal) and the Tribunal.

24 *Migration Act*, s 476(3)(e) (as it then stood).

25 *Migration Act*, s 476(2)(a) (as it then stood).

26 *Migration Act*, s 476(3) (as it then stood).

27 (2001) 206 CLR 323 at 351-352 [82]-[84]; [2001] HCA 30.

28 As a result of the *Migration Amendment (Judicial Review) Act* 2001 (Cth).

29 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 508 [83] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; [2003] HCA 2.

30 (2005) 228 CLR 470 at 482-483 [37] per Gummow J and 526 [171] per Callinan and Heydon JJ; [2005] HCA 77.

31 *Migration Act*, s 425(1).

30 In *Swift v SAS Trustee Corporation*[32], Basten JA (with whom Allsop P agreed) noted *Khan's* case and said of the language of "proper, genuine and realistic consideration":

> "That which had to be properly considered was 'the merits of the case'. Taken out of context and without understanding their original provenance, these epithets are apt to encourage a slide into impermissible merit review".

31 The first and second respondents contended that the Tribunal's treatment of the facts, more particularly the letters, was arbitrary, capricious, irrational and unreasonable, and accordingly was inconsistent with the Tribunal's statutory duty to review. It was submitted that the Federal Court's findings of irrationality, unreasonableness[33] (without describing it as such) and a constructive failure to exercise jurisdiction were wholly consistent with the accepted principles governing judicial review.

32 The Minister contended that the weight to be accorded to the letters, and the factual matters to which they gave rise, were entirely matters for the Tribunal as they concerned the merits of the application. It was submitted that the Federal Court employed the language of "proper, genuine and realistic consideration" to register the Court's response to a weighing of the evidence with which the Court disagreed. This, it was said, does not amount to jurisdictional error of the kind discussed by this Court in *Minister for Immigration and Citizenship v SZMDS*[34].

33 The Minister's submissions on the letters issue must be accepted as on a fair reading of the whole of the Tribunal's decision, when the Tribunal said that it gave the letters "no weight" it was referring to the fact that it did not accept the letters as evidencing that the first respondent was in some danger from the Maoists in Kathmandu. This was in large part because of social and political changes which had occurred since the letters were written. The evidence given

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32 [2010] NSWCA 182 at [45].

33 Of the kind identified with *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

34 (2010) 240 CLR 611; [2010] HCA 16.

by the first respondent, including his evidence about the effect of those changes, undermined his claim of political and social activism, thereby contradicting the support which the letters gave to his assertion that Maoists were continuing to pursue him in Kathmandu. The weighing of various pieces of evidence is a matter for the Tribunal[35].

34 It has been recognised that to describe reasoning as irrational or unreasonable may merely be an emphatic way of disagreeing with it[36]. In referring to "any rational, reasonable approach to the evaluation" and the need for "a proper, genuine or realistic evaluation" of the letters, the Federal Court was registering emphatic disagreement with the Tribunal's assessment of the factual matters to which the letters were relevant. It appears the Federal Court would have weighed the letters differently which seems to suggest that, on the basis of the letters, the Federal Court would have been satisfied that Maoists were pursuing the first respondent in Kathmandu. When employing the formula "proper, genuine and realistic evaluation" in respect of the letters, the Federal Court did not appear to consider that one of the matters against which the Tribunal weighed the letters was the first respondent's evidence of the effects of social and political changes in Nepal.

35 Whether the letters were "highly supportive" or "powerfully corroborative" (as they appeared to the Federal Court) of the first respondent's claim that Maoists were pursuing him in Kathmandu was a question upon which reasonable minds might come to different conclusions. The Tribunal's preference for other evidence, including the first respondent's own evidence about numerous matters, including the effect of social and political changes from, and since, 2006, over the evidence of the letters written during the first half of 2006, could not be said to constitute a failure to take into account a relevant consideration as canvassed in *Peko-Wallsend* or *Yusuf's* case. Nor could it be said to be a failure to respond to a substantial argument thereby giving rise to the kind of error

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35 *Abebe v Commonwealth* (1999) 197 CLR 510 at 580 [197] per Gummow and Hayne JJ; [1999] HCA 14.

36 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1167 [5] per Gleeson CJ; 198 ALR 59 at 61; [2003] HCA 30.

identified in *Dranichnikov v Minister for Immigration and Multicultural Affairs*[37].

36 The conclusion that the Tribunal erred in giving "no weight" to the letters, with the implication that it should have given different, presumably determinative, weight to them, depended on the Federal Court reviewing the factual findings of the Tribunal rather than the process by which it arrived at its conclusions.

37 Further, the Federal Court's conclusion that the Tribunal erred in this way did not, in the light of the whole of the evidence, require the further conclusion that the result in the Tribunal was manifestly irrational or unreasonable. Nor did it support a finding of any other failure which might be characterised as jurisdictional error.

38 As to the Tribunal's use of the expression "baseless tactic" set out above, considered in context, the expression was no more than an indication by the Tribunal that it did not accept the first respondent's evidence that he was at risk of being targeted by Maoists in Kathmandu, as a teacher, particularly as his reference to being a teacher was in response to being alerted to the contradictory effect of his own evidence that people who used to be in hiding from Maoists are now living out in the open. It was for that reason that the Tribunal described the giving of this answer as a "tactic". It is clear from the entirety of the Tribunal's reasons that the Tribunal accepted that the first respondent had been a teacher. What the Tribunal considered "baseless" was the first respondent's claim that being a teacher in Kathmandu would attract the attention of the Maoists.

39 No doubt the Tribunal might have used a simpler expression to convey its evaluation of the answer given by the first respondent to the Tribunal's query as to why he could not, like his brother, live safely in Kathmandu. Nevertheless, the evaluation of that answer was a matter for the Tribunal. Irrespective of the use of the expression "baseless tactic", the Tribunal did not accept "that the [first and second respondents] left Gulmi for Kathmandu, and then for Australia, or seeks [sic] to remain here, because the Maoists were and are searching for them". Further, the Tribunal was "satisfied that both the [first and second respondents] can safely and practically join the rest of their family residing in Kathmandu".

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37 (2003) 77 ALJR 1088; 197 ALR 389; [2003] HCA 26.

The Federal Court's disapproval of the Tribunal's use of the expression "baseless tactic" did not reveal that these conclusions had no basis in, or were contrary to, the evidentiary material before the Tribunal.

40 Understood correctly, the Tribunal's use of the expression "baseless tactic" did not give rise to any jurisdictional error.

Was there a reasonable apprehension of bias?

41 The first and second respondents contended that a reasonable apprehension of bias arose because in its reasons the Tribunal categorised the first respondent's critical or central claim that as a teacher he was singled out for harassment as a "baseless tactic", which it was submitted revealed a pre-judgment of a critical issue as to whether the first respondent could live in Kathmandu.

42 The Minister submitted that the Tribunal giving no weight to the letters or using the expression "baseless tactic" neither alone nor in combination gave rise to a reasonable apprehension of bias of the kind recognised in *Re Refugee Review Tribunal; Ex parte H*[38]. In that case, apprehended bias arose as a result of conduct during the course of the hearing; here the allegation of apprehended bias was based on language used in the reasons.

43 It was further contended by the Minister that in conducting an inquisitorial enquiry the Tribunal was not required to accept uncritically the first respondent's claims, a matter which would be understood by the fair-minded and informed lay observer.

44 The use by the Tribunal of the expression "baseless tactic" has already been discussed above. The assessment by the Tribunal of whether the first respondent could, like his brother, live in Kathmandu was based on evidence, including the first respondent's own evidence of the effects of social and political changes in Nepal. It was also based on the absence of evidence that teachers were at risk from Maoists in large cities in Nepal like Kathmandu. The expression "baseless tactic" was used by the Tribunal in its reasons as part of its rejection of the first respondent's claim that he was at risk, in Kathmandu, as a

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38 (2001) 75 ALJR 982; 179 ALR 425; [2001] HCA 28.

teacher. As such, it does not provide any foundation for the contention that a central but contestable issue was pre-judged by the Tribunal.

45 Finally, it should be mentioned that in upholding the appeal before it, the Federal Court referred[39] to the Tribunal's failure to refer to the effects of delay and the requirement for the first respondent to repeat evidence, and in doing so referred to both *NAIS*[40] and *SZIIF v Minister for Immigration and Citizenship*[41].

46 This was part of the reasoning that the conduct of the Tribunal in giving "no weight" to the letters, and its use of the expression "baseless tactic", constituted jurisdictional errors characterised as a constructive failure to exercise jurisdiction[42].

47 The evidence which the first respondent gave before the three different Tribunals was not affected by significant delay which might have been expected to affect the Tribunal's capacity to assess the credibility of the first respondent. Rather it was affected by the fact that relevant and significant social and political changes had occurred in Nepal since 2006 and those changes were addressed by the first respondent in a particular way in the third Tribunal. The relevant date for deciding the existence of a well-founded fear of persecution was in 2008 at the time of the third Tribunal's decision. As already explained, no jurisdictional error was shown by the Tribunal's treatment of the letters produced in evidence or by the Tribunal's use of the expression "baseless tactic" to describe the giving of certain evidence. Nor was jurisdictional error shown otherwise in the Tribunal's handling of the fact that the first respondent gave evidence over time before three differently constituted Tribunals.

48 For these reasons, the appeal should be allowed and the decision of the Federal Court set aside.

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39 *SZJSS v Minister for Immigration and Citizenship* (2009) 113 ALD 270 at 282-283 [54].

40 (2005) 228 CLR 470 at 475 [8] per Gleeson CJ.

41 (2008) 102 ALD 366 at 380 [83] per Weinberg J.

42 *SZJSS v Minister for Immigration and Citizenship* (2009) 113 ALD 270 at 283 [55]-[57] and 285 [64].

Orders

49 It should be ordered that:

1. The appeal be allowed.

2. Paragraphs 1 and 2(a) and (b) of the order made by the Federal Court on 24 November 2009 be set aside and in place thereof order that the appeal to that Court be dismissed.

3. The Minister pay the costs of the first and second respondents in this Court.