FEDERAL COURT OF AUSTRALIA

NAPE v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCAFC 118

Judiciary Act 1903 (Cth) s 39B
Migration Act 1958 (Cth)

Kioa v West (1985) 159 CLR 550
NCAP v Minister for Immigration & Multicultural Affairs [2003] FCA 499
Minister for Immigration & Multicultural Affairs v Eshetu (1999) 197 CLR 611

NAPE and NAPQ v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
N1792 of 2003

RYAN, FRENCH and RD NICHOLSON JJ
10 MAY 2004
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N1792 OF 2003**

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

BETWEEN:	**NAPE** **NAPQ** **APPELLANTS**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGES:	**RYAN, FRENCH and RD NICHOLSON JJ**
DATE OF ORDER:	**6 MAY 2004**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

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

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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JUDGES: **RYAN, FRENCH and RD NICHOLSON JJ**
DATE: **10 MAY 2004**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

1 The appellants appeal from the decision of Hill J given on 21 October 2003 in which he dismissed their application. The application was one brought in reliance on s 39B of the *Judiciary Act 1903* (Cth) seeking judicial review of the decision of the Refugee Review Tribunal ('the Tribunal') which affirmed the decision of the respondent to refuse to grant to the female appellant ('the wife') a protection (class XA) visa which they had sought pursuant to the provisions of the *Migration Act 1958* (Cth) ('the Act').

BACKGROUND CIRCUMSTANCES

2 The appellants are wife and husband. They are both citizens of Fiji and they arrived in Australia on 5 May 2001.

3 The present appeal relating to the application by the wife requires understanding in the context of an earlier application made by the husband. The husband's claims revolved around a seafood business which he managed for his father, which had brought him into dispute with local chiefs and fisheries officers involving corrupt attempts to extort a share of,

or other opportunities, from the business. The husband's father no longer ran the business and the husband had not been involved in it since May 2001. On 5 June 2001 he applied for a visa and his wife was included in the application as a member of the husband's family. However, it was refused by a delegate of the respondent on 18 June 2001. An application for review of that refusal was received outside the prescribed time limit and the Tribunal found it had no jurisdiction to review the delegate's decision which thus stood.

4 On 1 August 2001, following advice by letter dated 18 June 2001 of the delegate's decision, the wife and the husband lodged fresh applications for a visa, he being included in her application as a family member. This occurred inconsistently with the previous application of the husband where she had made no claims to be a person to whom Australia had protection obligations.

5 The wife's application was rejected by a delegate on 21 January 2002 and the appellants applied to the Tribunal for review of the delegate's decision.

6 Her case before the Tribunal was that since the time of the coup d'etat in Fiji she had received many threatening calls from indigenous Fijians. She said she had been physically sworn at and pushed around together with her husband in towns. She claimed the door of her home had been forced on one occasion while she was alone, but that those who had done that had been frightened away by a neighbour. She also claimed her husband had been nearly killed and harassed by the military after the coup. The fear of persecution which she claimed to have had was for racial reasons because she and her husband were Indians. She claimed the police made a mockery of the threatening calls and the appellant's reports to them were not taken seriously because they were Indians. She claimed she feared for her life and that of her husband and son (who had remained in Fiji) if she were returned there. She claimed it was the Fijian authorities who were encouraging or promoting violence and persecution against her.

7 The Tribunal considered the matters and on 8 April 2003 affirmed the delegate's decision. In affirming the delegate's decision, the Tribunal made the following findings:

(a) the wife's claims did not include any direct harm or direct threats of harm to her;

(b) the incidents and threat had been directed at the business managed by the husband

and therefore were not essentially or significantly for a Convention reason;

(c) the difficulties were in any event unlikely to continue since the husband was no longer involved in the business and his father had sold his share in the business;

(d) it was not likely that the husband would now be targeted in Fiji (and, by implication, nor would the wife be threatened);

(e) the 'business dispute' may have been complicated or fanned by the atmosphere in the immediate aftermath of the May 2000 coup, but even then the husband had been able to secure intervention and the support of officials;

(f) further, the situation had been brought under control by the end of 2000, Indo-Fijians did not now face a real risk of violence or harassment, the present government is committed to protecting its citizens regardless of ethnicity and any ongoing incidents of violence or disorder reflect a general difficulty for the community stemming from police ineffectiveness rather than a discriminatory approach to law enforcement.

The Tribunal's ultimate factual finding was therefore that it was not satisfied that the appellants were persons to whom Australia had protection obligations under the Refugees Convention.

8 Before the primary judge, the appellants argued that the Tribunal made at least 12 jurisdictional errors. The primary judge summarised those arguments. His Honour dealt with and rejected each of these grounds of challenge to the Tribunal's decision. His Honour concluded that the appellants had not succeeded in showing any jurisdictional error on the part of the Tribunal. In particular he rejected contentions that the appellant had been denied natural justice or that the Tribunal had failed to consider claims by them based on their race.

GROUND 2: FAILURE TO ADDRESS ONE GROUND RAISED

9 This ground contends that the issue of 'bona fide exercise of power by the Tribunal' had been raised before it as an issue on the review but not dealt with by his Honour.

10 The primary judge gave the appellant leave to amend the application 'to the extent it is necessary' to include within it a ground that there was no bona fide exercise of power. No

further amended application was filed by the appellants pursuant to that leave. The potential need to amend the application arose as a result of submissions included in the appellants' written submissions in reply. The appellants' case that there was no bona fide exercise of power was based on the contention that the Tribunal 'cut him [the husband] off' and was disinclined to obtain further details of the alleged incidents from the husband at the hearing.

11 Whilst in the judgment, the primary judge did not expressly reject the contention that there had been any mala fides or bias, his Honour dealt with and rejected all of the arguments put forward by the appellants in support of this ground under the general heading 'Submission 5 – failure to permit the applicants to explain their case'. His Honour reviewed the transcript of the Tribunal hearing and concluded:

> *'It is clear from the transcript that at no time was either applicant cut off from saying anything. At no time was either applicant denied the opportunity to explain why it was that that applicant believed the harm he or she feared arose because he or she was Indian.'*

12 The primary judge's rejection of the contention that there was a failure to give procedural fairness necessarily carried with it a rejection of any claim of mala fides or bias. His Honour did not err in the way that he dealt with this claim or ground. Even if his Honour was in error in not specifically and expressly rejecting this claim, nevertheless the appeal should in any event be dismissed because nothing in the transcript of the Tribunal hearing or the Tribunal's decision itself could support a finding of mala fides or bias. Such a serious allegation must be clearly alleged and proved and the circumstances in which the Court will find an administrative decision-maker has not acted in good faith are rare and extreme. The circumstances were not present in this case.

13 Other matters raised under this head are addressed under ground 4 and the issue of bias.

GROUND 3: IRRATIONALITY OR ILLOGICALITY

14 Under this ground it is contended that his Honour was in error in holding there was no serious irrationality or illogicality in the way the Tribunal dealt with the issue of whether the appellant wife had been directly threatened.

15 The Tribunal noted in its reasons that the appellants had not claimed that indigenous

Fijians had directly threatened or sought to harm the wife; when the wife had claimed that at one stage the natives had forced to open the door of the home when she was alone but they had been scared away, as a result of which she had not been raped, murdered or suffered injury.

16 It was argued before his Honour that when the Tribunal stated that it had not been claimed that the indigenous Fijians had directly threatened or sought to harm the appellant wife that it was irrational or illogical for it to conclude that she had not been directly threatened or that they had not sought to harm her. His Honour held that that did not in the circumstances of the nature of the claim constitute either irrationality or illogicality.

17 There could be no error of law by his Honour in his conclusion. He had before him a finding of fact by the Tribunal that '[i]t is not claimed that they [some men] directly threatened or sought to harm her [the wife]'. Having regard to the wife's evidence, this statement had a foundation. The primary judge was therefore bound to reject this ground.

GROUND 4: ALLEGED B IAS

18 His Honour addressed three submissions grounded upon an alleged failure on the part of the Tribunal to afford the appellants natural justice by not drawing their attention to material which was adverse to their case and upon which the Tribunal relied in its reasons.

19 However, as the ground is put it is said that his Honour misconceived the submissions for the appellants and that what they complained of was that the Tribunal chose to deliberately pick and choose parts of the country information unfavourable to them and deliberately left out favourable parts in order to deny them refugee status so that it must be concluded that the Tribunal had been biased.

20 There is a preliminary question whether his Honour did misconstrue the submission for the appellants. Nothing in the amended application raised the question of bias. The Tribunal's treatment of the country information did not demonstrate bias. The appellants' case of bias is based on one sentence of the Tribunal's decision where it considers the present and future political situation in Fiji and refers to the US State Department Country Report 2001 in relation to Fiji. The Tribunal states (not directly quoting the report) that the harassment of Indo-Fijians and destruction of their property during 2000 did not continue

during 2001. The applicant's complaint is that the relevant passage in the report also included after a semi colon the words 'however no action was taken against those who looted and vandalised Indo-Fijian stores'. That cannot make out the serious allegation of bias. The Tribunal's findings in relation to the present and future political situation in Fiji were open to it on the materials before it. Nothing in the Tribunal's treatment of this issue demonstrates any unfairness or bias.

21 In any event, a tribunal is not obliged to accept all evidence before it. What is important is that there is evidence which will support the conclusion which it reaches. That necessarily requires it to 'deliberately pick and choose' parts of the evidence including parts of country information. It is under no obligation to accept all country information. In carrying out its task of identifying relevant evidence the Tribunal is fulfilling its proper role and the fact that it has engaged in a process of selection cannot sustain an imputation of bias.

GROUND 5: RATIO OF TRIBUNAL DECISION

22 Here it is contended for the appellants that his Honour erred in holding that the real (or sole) reason the Tribunal rejected their application was because it attributed the harm suffered to the desire of the perpetrators to take over or obtain a share of the fisheries business so that other reasons (including what was described as the police issue) were not real issues.

23 What his Honour said was that the 'the real reason the Tribunal rejected the applicants' claim, so far as it related to what had happened to the husband, was that the harm he suffered was, so the Tribunal found, associated with the fishery business rather than his ethnicity'. He then continued by saying that 'that the matter of police response to complaints was not a critical issue or factor in the Tribunal's decision is made clear by the Tribunal in a paragraph to which he referred, which reads:

> *'In any event, the Tribunal is not persuaded that the difficulties described occurred essentially or significantly for a Convention reasons rather than simply because of the business circumstances and the corruption and greed of others seeking to secure a share of the business or to obtain benefits from the business.'*

24 This was not an incorrect portrayal of the Tribunal's reasons. Nor was it the only answer to the appellants' contentions concerning this particular passage from the country

information. As his Honour noted, the Tribunal did draw the appellants' attention to the essence of the relevant information (that there were mechanisms for lodging complaints against police) during the course of the hearing (see Ground 7 below).

GROUND 6: IDENTIFICATION OF APPELLANT

25 In this ground it is contended that his Honour erred in considering the review from the point of view that the wife was the applicant for refugee status and the husband was not whereas the Tribunal considered both of them as claiming to be refugees. This ground was abandoned by Mr Silva for the appellants in the course of his oral submission on the hearing of the appeal.

GROUND 7: FAILURE TO PUT MATERIAL ADVERSE INFORMATION CONCERNING POLICE COMPLAINTS

26 This ground contends that his Honour erred in holding that the Tribunal had asked the appellants about the lodgement of complaints against the police when in fact this had not been done in any acceptable way. Reference is made to the transcript of the hearing before the Tribunal during the course of which it was stated by the Tribunal member 'that there were mechanisms for example for lodging complaints against police'.

27 That statement was derived from a passage in Country Information Report No. 273/02 as his Honour identified. He said that it was clear it was not the real reason for the Tribunal's conclusion. He regarded the real reason as that previously referred to under the fourth ground discussed above. In any event, as a consequence of the reference by the Tribunal, the appellants were given the opportunity to comment upon it but did not do so.

28 For the appellants it is submitted that there was no opportunity for them to think that the reference made during the hearing signified material adverse information in relation to which it was necessary for them to respond.

29 His Honour held that the information about channels of complaint about misconduct was not significant or critical to the Tribunal's decision. As a result, there was no denial of procedural fairness even if this information had not been specifically drawn to the appellants' attention for comment. His Honour was also correct in holding that this information was in any event drawn to the appellants' attention during the hearing. There was nothing unfair

about the way in which that had been done. It is immaterial that the Tribunal conveyed this information in a statement rather than a question. It is also immaterial that it was conveyed together with related information about the political situation in Fiji from the end of 2000. The appellants were fairly given the opportunity to comment on the relevant political situation in Fiji, including this aspect of that situation.

GROUNDS 8 AND 9 : REFERENCE TO NEWSPAPER ARTICLE

30 This ground seeks to contend that his Honour erred by misrepresenting the intention of the Tribunal when he said that by referring to an article in the Sydney Morning Herald it intended to convey that those high up in Fiji were punished if they disobeyed the law.

31 In its reasons the Tribunal noted, in discussing events in Fiji after the coup of May 2000, that a Fijian government minister had been arrested and charged with involvement in a subsequent army mutiny in November 2000 so that there was no credible issue of impunity. This was extracted from a Sydney Morning Herald article of 15 February 2003. It also noted that Mr Speight had been tried, convicted and imprisoned. His Honour said of the article that it had apparently been cited by the Tribunal to convey the view that even those high up in Fiji were punished if they disobeyed the law. It is said that he misunderstood the context in which the information was used and that the real intention of the Tribunal had been to support the conclusion that the appellants would not suffer discriminatory application of the law as even persons as important as those mentioned had been punished under the law which demonstrated that there was no race-based injustice in Fiji.

32 His Honour's portrayal of the limited relevance of this information to the Tribunal's decision was not erroneous. This information had nothing to do with the critical finding made by the Tribunal that effectively disposed of the appellant's case, namely that the incidents in the past related to the husband's father's business and had not occurred for reasons of race.

GROUND 10: CONFLICT OF INTEREST

33 This ground was the subject of an application for leave to amend.

34 During the course of the hearing his Honour referred to articles in newspapers making

it common knowledge that the situation in Fiji had improved. The ground seeks to contend that his Honour had taken judicial notice of information without the appellants being aware of the specific nature of the information. It is said that he should have given the appellants the opportunity to bring in new materials and media reports.

35 The passage the subject of the complaint in this ground occurred in the course of an exchange between the primary judge and the appellants' solicitor about the extent to which the Tribunal was required to disclose to an applicant obvious and well known facts about a country. The point, as his Honour put it in the reasons, was:

> *'There is also in my mind some question whether it is necessary for the Tribunal to refer the matters of which there would be common knowledge amongst people in Fiji. An example is the question of Mr Speight's punishment.'*

36 Contrary to the appellant's submission, this has nothing to do with judicial notice. In any event, and as his Honour pointed out to the appellants' solicitor in a subsequent exchange after exception had been taken to his Honour's observations, his Honour was not concerned to make findings of fact about the political situation in Fiji. That was a matter for the Tribunal. The apparent suggestion that his Honour's comments might have given rise to apprehended bias cannot be made out. Leave to amend should be granted but the ground has not been sustained.

GROUND 11: FAILURE TO DEAL WITH CRITICAL ISSUE

37 Under this ground it is contended that the Tribunal should have been seen by his Honour to have fallen into jurisdictional error by failing to deal with the critical issue of whether a failure by police to provide protection to the appellant's husband when he complained of a serious physical assault and their racial harassment of him when the complaint was made constituted a Convention based persecution. That is, the issue of state protection should have been considered. Even if the attack on the appellant's husband had not been because of his race, it is said, the issue of the police not providing protection and further harassing the appellant's husband because of his race when he complained to them could support a conclusion that the appellants were at risk of persecution based on race.

38 There was no ground in the amended application to the effect that the Tribunal had erred in failing to deal with claims that the police had failed to provide protection to the

husband. Nor was any clear submission put to this effect. His Honour, accordingly, did not err by not dealing specifically with this matter. His Honour did deal with the more general contention that the Tribunal had failed to consider the claims advance by the appellants.

39 In any event, the Tribunal considered and made factual findings about the police response to the husband's specific complaints. It also considered and made factual findings about the protection given by the police and the government to Indo-Fijians generally after late May 2000. The appellants' complaint has no merit and is no more than a contention that the factual findings made by the Tribunal should have been different.

GROUND 12: NATURAL JUSTICE US STATE DEPARTMENT COUNTRY REPORT

40 Under this head it is contended that his Honour erred in holding that the US State Department country report did not go to the real ground of the Tribunal's decision.

41 The reference by the Tribunal to this material was made in this passage from the Tribunal's reasons:

> *'The country information confirms that the law and order situation in Fiji has improved since 2000. The US Department of State … reports … that the harassment of indo-Fijians and destruction of their property during 2000 did not continue during 2001. The independent country information indicates that the present elected Fijian Government is fully committed to protecting all citizens regardless of ethnicity and that the security forces have warned against violence and are in control of the country and are committed to protecting the population.'*

42 Why his Honour said that the material did not go to the real ground of the Tribunal's decision was because it was not related to the existence of persecution of the husband which had been found to have been inspired not by race but by matters of business and greed.

43 For the appellants it is contended that in order for the Tribunal to decide whether or not the persecution of the appellants had been race-based it had to examine whether race-based persecution was taking place in Fiji so that the report was very relevant.

44 However, the relevance is not the decisive factor. As his Honour observed in his reasons, there is no need for material to be drawn to an applicant's attention where the material is really not relied upon by the Tribunal in reaching its decision: see *Kioa v West*

(1985) 159 CLR 550 at 587 where Mason J stated the rule in terms that there is a need to draw the applicant's attention to material where the material concerns 'the critical issue or factor'. The focus of the primary judge was not on the relevance of the material but on whether it was directed to a critical issue or factor so as to affect the application of the duty to accord procedural fairness.

GROUND 13: JUDICIAL NOTICE

45 Under this ground it was said that his Honour erred in not distinguishing the information of which the Court could take judicial notice from that which was not susceptible of judicial notice. This ground was not pursued in the course of oral argument presented by Mr Silva on the hearing of the appeal.

GROUND 14: IDENTITY OF MATERIAL

46 In the course of his reasons his Honour in dealing with the US State Department country report and the issue of natural justice referred to a letter written to the appellant wife setting out extracts from country information sources and inviting comment. His Honour said those extracts contained information of the same effect as that 'in the American material'. On this ground, the appellants contend that he was in error in so holding and that the fact that such earlier material had been provided did not absolve the Tribunal from its duty to put the latest and most comprehensive information to the appellants.

47 His Honour's point in the passage complained of was that, in very general terms, both the State Department report and the specific material that had been disclosed to the appellants by the delegate, referred to the improvements that had taken place since 2000. There was no error in his Honour so finding. In this context it was unnecessary for his Honour to refer to the specific content of these reports in any detail. His Honour did not suggest, as the appellants appear to contend, that the content of the respective report was identical.

GROUND 15: MISCHARACTERISATION OF BUSINESS ACTIVITY

48 It is alleged that his Honour was in error in holding that if the activities against the appellants arose out of the business activity it was not a Convention ground and the claim must fail. It is said that business and race are not mutually exclusive. It is submitted that it was wrong for his Honour to say that the questioning as to whether the fear of harm arose

because of the husband's activity is but the other side of whether it arose because of race. It is submitted that 'questions can not be asked in the hearing where the appellants are unrepresented with hidden meanings and indirectly implying if this is not this side of the coin then it is the other side.'

49 There is no substance in this ground. Considered in context, there was no error in his Honour's findings or reasons in relation to this aspect of the matter. His Honour did not find, as the appellant contends, that 'business' and 'race' are mutually exclusive. All his Honour was referring to was the fact that the Tribunal had found that the harm arose from the business activity and not the husband's race.

GROUND 16: ILLOGICALITY

50 Here the contentions for the appellants seek to return to the issue of illogicality and to say that his Honour erred in failing to hold there was gross illogicality when the Tribunal had said, first, that the hearing was only intended to be supplementary to the written material and then dismissed the matter saying that the race issue did not emerge during the hearing and did not specifically address the evidence related to race given in the written material.

51 Here the submissions for the respondent seek to rely upon alleged similarities between the current matter and *NCAP v Minister for Immigration & Multicultural Affairs* [2003] FCA 499. There, in an appeal before Hill J from the decision of the Federal Magistrates Court it is said the appellant succeeded on the ground that 'the Tribunal failed or constructively failed to exercise its jurisdiction by not dealing with the case, or a substantial part of the case which the applicant sought to put before it.' That was in circumstances where the Tribunal was unaware of a written case and concentrated exclusively on an oral case. It is not contended that here the Tribunal was not aware of the written submissions. However, it is claimed that the Tribunal affectively did not deal with the substance of the claims addressed in the written submissions. Reliance is placed on the statement by Hill J in *NCAP* at [24] that 'on balance I do not think that an unrepresented appellant should be taken to give up a case which he has explained in a detailed letter to the Tribunal by saying nothing about that case.'

52 At the heart of the complaint in this ground appears to be the contention that the Tribunal did not deal with or consider the claims advanced by the appellants. His Honour rejected this contention. There is no comparison with *NACP v Minister for Multicultural*

Affairs [2003] FCA 499 where the contrary conclusion was reached.

GROUND 19: ERRONEOUS FINDING OF FACT

53 This ground seeks to contend that his Honour erred in holding that 'on its own the fact of the sale did not so do much if anything, to advance the case of the applicants.' That was a reference to the sale of the fishery business by the appellant husband's father and the fact that it was a forced sale. His Honour held that the failure to mention in its reasons that the sale was a forced one was not a jurisdictional error and that in any event the fact that the sale did not do much, if anything, to advance the case of the appellants.

54 For the appellants it is contended that if the sale was involuntary this was relevant to demonstrating overall persecution based on race and to support the contention of continued threat to the appellant husband even after he left Fiji.

55 The passage complained of in this ground must be read in context. As his Honour pointed out, once the Tribunal found that the appellants' problems arose because of their business, the fact that the business had been sold meant that those problems were unlikely to occur again in the future. The forced sale of the business by the husband's father did not advance the appellants' case much because it was open to the Tribunal to conclude, like it had in relation to the husband's problems generally, that this was not a result of race but rather a result of the corruption and greed of persons seeking to secure a share of the business. His Honour was correct in finding that the failure by the Tribunal to mention that the sale was a forced sale was not a jurisdictional error.

GROUND 20: FURTHER ERRONEOUS FINDING OF FACT

56 Under this ground it is sought to contend that his Honour erred in holding 'to say, as the submission says that the Tribunal never directly put the question whether the harm arose because the applicants were Indian does not disclose any error.'

57 For the appellants it is submitted that his Honour looked at the issue in isolation where as it should have been looked at together with the statement by the Tribunal that the race issue did not emerge during the hearing.

58 The passage the subject of this ground must also be read in context. His Honour was

responding to a submission that the Tribunal failed to permit the appellants to explain their case (and therefore failed to given them procedural fairness) because the Tribunal did not directly put to them the question whether the harm arose because they were Indian. His Honour had already observed that the Tribunal had on more than one occasion put to the appellants that the issue was whether the harm the husband feared came about because of a commercial dispute or whether it was persecution for a Convention reason, including race, and had given them the opportunity to say whatever they wanted to say. It is clear that the appellants were given ample opportunity to explain that the harm they feared arose because they were Indian. His Honour's finding that the mere fact that the direct question was not put does not establish error was plainly correct.

GROUND 21: BREACH OF PROCEDURAL REQUIREMENTS

59 Before his Honour it had been contended by the appellants that the Tribunal breached either or both of subs (1) and subs (2) of s 420 of the Act in not giving the appellants a bona fide opportunity to elaborate on their claim that their fear of persecution depended on their ethnicity and thus the Tribunal did not conduct a hearing that was fair or afforded to the appellants substantial justice as required by those paragraphs.

60 In his reasons his Honour said that he had read this transcript to which reference had been made and there was nothing at all which led him to conclude that the review process was not fair or that the Tribunal had failed to afford substantial justice so that there was no substance in the submission.

61 Here it is contended that error exists because there could be no substantial justice found in circumstances when the Tribunal did not ask a question about race but then said that the race issue did not emerge.

62 The only basis for the appellants' contention that this finding was wrong is that the Tribunal did not directly put to the appellants the question whether the harm arose because they were Indian (as to which see Ground 20 above) and an assertion (perhaps based again on the failure to ask the direct question) that the Tribunal did not inquire into their claims. That assertion must be rejected. The Tribunal did inquire into the appellants' claims. The real complaint is with the merits of the decision reached by the Tribunal in relation to their claims. Having found that there was no breach of s 420, there was no need for his Honour to

address the legal significance of any such breach: cf *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

GROUND 22: ORAL EVIDENCE

63 This ground relates to the passage in his Honour's reasons reading as follows where he dealt with an alleged failure to consider the claims advanced:

> *'59 With respect to what is thereafter said on behalf of the applicants in a written submission this does not at all signify that the race issue did not emerge in the hearing. Nor does it signify that the Tribunal failed to give any consideration to the question whether any fear of persecution the applicants might have arose because of race. The problem for the applicants is that the Tribunal formed the view, and on the oral evidence which the husband gave, that the husband's problems were commercial and did not arise on grounds of race. That was a conclusion open to the Tribunal on the evidence. The Tribunal's conclusions are stated in the passage set out in paragraph [32] above.'*

It is said to show his Honour relied only on the oral evidence.

64 This ground misrepresents his Honour's finding. His Honour did not find that the Tribunal formed a view only on the oral evidence. The Tribunal accepted that the incidents referred to in the oral and written evidence occurred. It found, however, that they occurred as a result of the husband's business activities, not his race. This had nothing to do with adverse credibility findings or what was in their written claims as opposed to their oral evidence. There was no error.

GROUND 23: MISAPPLICATION OF A TEST

65 This ground relates to par [62] – [63] of his Honour's reasons which read as follows:

> *'62. In the course of the proceedings the Tribunal said:*
>
> > 'The question is whether that is a conventional motivation in relation to meet yourself. That is to say, they are not saying well there's Mr (*husband's name*) I want to harm him because I don't like Mr (*husband's name*), they are saying this is something I want to get for myself, and if Mr (*husband's name*) gets in the way then we are going to deal with him. It's a question of motivation and I have to go away and think about that and see how that hangs together …'
>
> *63 This passage, which can't be read in isolation, was part of the musings of the Tribunal member as to the issue he had to resolve, namely*

> *whether the harm the husband feared arose for a Convention reason, that is to say, on account of race, or whether it was business motivated. Reading the transcript as a whole there can be no case advanced either that the Tribunal failed to apply the correct test as to who was a refugee, or misinformed the applicants as to what the test he was required to apply was. No jurisdictional error is demonstrated.'*

66 It is said for the appellants that where the claim was based solely on race, the test should be put to the appellants directly so that they could address that issue, whereas the Tribunal put it in a misleading way to the appellants so that his Honour was in error in his conclusions on this issue.

67 The substance of the complaint in this ground has already been considered in the context of other grounds. The mere fact that the Tribunal did not put the direct question as suggested does not establish error. The Tribunal did not put the test to the appellants in 'a misleading way' (the appellants do not suggest how it was misleading). His Honour correctly concluded that the Tribunal applied the correct test.

CONCLUSION

68 For these reasons, the appeal must be dismissed.

I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Ryan, French and RD Nicholson.

Associate:

Dated: 7 May 2004

Counsel for the Appellants: Mr T Silva

Solicitor for the Appellants: Silva Solicitors

Counsel for the Respondent:	Mr M Wigney
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	6 May 2004
Date of Judgment:	6 May 2004
Publication of reasons:	10 May 2004