FEDERAL COURT OF AUSTRALIA

SZUNN v Minister for Immigration and Border Protection [2015] FCA 955

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| Citation: | SZUNN v Minister for Immigration and Border Protection [2015] FCA 955 |
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| Appeal from: | SZUNN v Minister for Immigration [2015] FCCA 1298 |
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| Parties: | **SZUNN v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and REFUGEE REVIEW TRIBUNAL** |
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| File number: | NSD 588 of 2015 |
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| Judge: | **KATZMANN J** |
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| Date of judgment: | 31 August 2015 |
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| Legislation: | *Migration Act 1958* (Cth) ss 36(2), 65, 91R, 496  |
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| Cases cited: | *Attorney-General for the State of NSW v Quin* (1990) 170 CLR 1 *Johnson v Johnson* (2000) 201 CLR 488 *Livesey v NSW Bar Association* (1983) 151 CLR 288 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332*Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 *Minister for Immigration and Multicultural Affairs v Jia* *Legeng* (2001) 205 CLR 507*Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476*Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28; 179 ALR 425*SLMB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 129 |
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| Date of hearing: | 14 August 2015 |
|  |  |
| Place: | Sydney |
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| Division: | GENERAL DIVISION |
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| Category: | No Catchwords |
|  |  |
| Number of paragraphs: | 43 |
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| Counsel for the Appellant: | The appellant appeared in person. |
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| Solicitor for the First Respondent: | Ms A Wong of DLA Piper Australia |
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| Solicitor for the Second Respondent: | The Second Respondent filed a submitting notice |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 588 of 2015 |

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| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

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| BETWEEN: | SZUNNAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentREFUGEE REVIEW TRIBUNALSecond Respondent |

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| JUDGE: | KATZMANN J |
| DATE OF ORDER: | 31 AUGUST 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

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

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| JUDGE: | KATZMANN J |
| DATE: | 31 AUGUST 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. The appellant is a Bangladeshi national who claims to fear persecution because of his affiliations with the Bangladesh Nationalist Party (“BNP”), the main opposition party in Bangladesh. He arrived in Australia on a business entrant - short stay (subclass 456) visa ostensibly to undergo business training. Shortly before the visa was due to expire, he applied to the Minister for a protection (class XA) visa, claiming to fear for his life in Bangladesh because of his active support for the BNP.
2. The application was considered by a delegate of the Minister. The delegate was not satisfied that the appellant was a person to whom Australia owed protection obligations and so refused to grant the application. The appellant appealed to the Refugee Review Tribunal to review his application on its merits but the Tribunal affirmed the delegate’s decision. An application for judicial review to the Federal Circuit Court was unsuccessful. In this appeal the appellant alleges that the primary judge fell into error in two respects. For the following reasons those allegations are not made out and the appeal must be dismissed.

##  Eligibility for a protection visa

1. Under the terms of the *Migration Act 1958* (Cth) the Minister is bound to grant an applicant a visa for which he or she applies if the Minister is satisfied of certain criteria set out in the Act or the Regulations. If not, he is bound to refuse it. See s 65. Those powers may be delegated: Migration Act, s 496.
2. The principal criteria for eligibility for a protection visa are contained in s 36(2) of the Act. At the time of the Tribunal’s decision, they include that the applicant for the visa is:

(a) a non-citizen in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.

1. Paragraph (a) is generally known as the refugee criterion and (aa) as the complementary protection criterion.
2. Protection obligations under the Refugees Convention (the Convention relating to the Status of Refugees done at Geneva on 28 July 1951) as amended by the Refugees Protocol (the Protocol relating to the Status of Refugees done at New York on 31 January 1967) (together “the Refugees Convention”) are owed to refugees. Article 1A(2) of the Refugees Convention relevantly defines a refugee as a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country …

1. The Migration Act also required that the alleged reason[s] be “the essential and significant reason[s]”, that the harm be “serious”, and that the conduct be “systematic and discriminatory”: see the former s 91R.
2. “Significant harm” for the purposes of para (aa) of s 36(2) is defined in s 36(2A) and qualified by s 36(2B). Section 36(2A) states that a non-citizen will suffer significant harm in circumstances where he or she will be arbitrarily deprived of his or her life, subjected to torture, or cruel or inhuman, or degrading treatment or punishment, or where the death penalty will be carried out.

## The appellant’s claims

1. In a statement submitted with his application for a protection visa, the appellant claimed that he had been active in the student wing of the BNP since senior school. He said that when an army-backed caretaker government came to power in 2007 he was arrested and tortured. He claimed that in 2009, following an election in which the Awami League and its ally won a majority of seats and formed government, he was elected vice-president of the “thana committee Chatradal” and became a target of the Chatra League, the student wing of the Awami League. He claimed that on 19 February 2010 he was attacked by a group of Chatra League cadres and beaten “mercilessly” into a state of unconsciousness. He asserted that the Awami League Government has become aggressive towards BNP leaders and activists, false charges were levelled against a number of the leaders, and many BNP leaders have left the country “to secure their lives”. He claimed that “ceaseless torture” of BNP student leaders had apparently led to the closure of Chatra Dal but on 25 February 2011 a procession he was leading was disrupted by police and Awami cadres and he was seriously injured by police batons. He also claimed that on 29 June 2012 his house was attacked and looted by “Awami goons” and, once again, he was seriously injured. He stated that his brother tried to file a case against them with the police but the police did not accept his petition and informed his brother that there was a case pending against the appellant. After this incident the appellant considered his life was in danger, determined to leave the country, and made arrangements to obtain a visa. He fears he will be persecuted if he is required to return to Bangladesh.
2. In his interview with the delegate the appellant also claimed that he was pressured into joining the Chatra League. He told the delegate that he had fled to India for two days, only returning because he was short of money and had been told that his problems had been resolved.
3. In response to an invitation to attend the Tribunal hearing, the appellant submitted several documents in support of his claims. At the hearing he told the Tribunal that he had two trumped-up charges outstanding against him in Bangladesh and submitted a document purportedly from a court to corroborate what he said.
4. The Tribunal accepted that the appellant was a citizen of Bangladesh but, for several reasons, did not find his claims to be credible. *First*, the Tribunal said that the appellant was unable to satisfactorily explain why he was attracted to the BNP. It found his explanation “superficial [and lacking in] detail or understanding of the party’s goals, policies and objectives…”. *Secondly*, the Tribunal considered the appellant’s evidence of the positions he held during the decade from 2001 to be “confused, internally inconsistent, and chronologically inaccurate and implausible”.  *Thirdly*, the Tribunal said that the appellant’s account of the circumstances of his last alleged attack was confusing. *Fourthly,* the Tribunal did not accept that the appellant could have had outstanding charges against him but still be able to leave Bangladesh legally on his own passport. *Fifthly,* the Tribunal had regard to the fact that the appellant returned to Bangladesh after a visit to India and considered his alleged financial reason to be inconsistent with his capacity to come and go. *Sixthly,* the Tribunal referred to the delay in the appellant leaving Bangladesh for Australia after he obtained his visa (a period of 10 days). *Finally,* the Tribunal observed that the documents were “rife” with spelling and factual errors and their contents were inconsistent with the appellant’s claims in his protection visa application and his oral testimony.
5. Consequently, the Tribunal did not accept the appellant’s claimed affiliations with, and role and profile in, the BNP. Nor did the Tribunal accept or that he faced serious harm from the Awami League or the Bangladeshi police. It also rejected the appellant’s claim about the outstanding charges and considered the document proffered in support not to be genuine or reliable and gave it no weight.
6. The Tribunal went on to find that the appellant’s credibility was “so seriously undermined that there is no credible or trustworthy evidence before it upon which to make a finding that the [appellant] is a Convention refugee or that he is a person in respect of whom Australia owes protection obligations.”.
7. Based on these findings the Tribunal said it was also unable to accept that the appellant was a person in respect of whom Australia has protection obligations under para 36(2)(aa) of the Act. Accordingly, it held that the appellant did not satisfy the complementary protection criterion.

## The application in the Federal Circuit Court

1. To succeed in his application for judicial review the appellant had to show that the Tribunal had fallen into jurisdictional error: Migration Act, s 476, *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476. The basis of the appellant’s case was set out in the grounds of his application. They read (without alteration):

[1] In making decision , the Refugee Review Tribunal acted without jurisdiction or in excess of jurisdiction when it failed to take into account relevant considerations.

…

[2] The Applicant claims that the Tribunal made a jurisdictional error when intentionally asked several irrelevant questions to undermine his poliitcal activities and his role in the Chhatra Dal and the BNP

…

[3] The applicant claims that the RRT made a jurisdictional error when it made decision on assumption and probability. The Tribunal’s finding of reasons is Confused and the test for persecution was not applied according to the Rules of the Migration Act

…

[4] The Tribunal failed to apply the correct test in relation to the complementary Protection Provision contained in section 36(2)(aa) of the Migration Act 1958 The Tribunal made a jurisdictional error when it did not follow Rules of Real Risk Test of persecution and harm .

 …

1. The primary judge held that none of the grounds was made out.

## The appeal

1. The appeal is in the nature of a rehearing. A rehearing is not a new hearing of the application for judicial review. Neither is it a review of the merits of the Tribunal’s decision. To succeed it is necessary for the appellant to establish error on the part of the primary judge: *SLMB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 129.
2. The grounds of appeal read as follows (without alteration):

1. Hon. Judge Manousaridis of the Federal Circuit Court failed to hold that Refugee Review Tribunal committed a jurisdictional error when it failed to apply the correct test in relation to the Complementary Protection Provision contained in section 36 (2) (aa) of the Migration Act .The RRT did not follow Rules of Real Risk Test of Persecution and harm . RRT decision is unreasonable with regards to Complementary Protection Provision .

2. The Tribunal's assessment of the credit of the fact about the Applicant's leadership role in the Chhatra Dal ( Youth Wing of BNP) is , misconceived and misinformed . Being a truthful witness the appellant disclosed all about his activities in the youth Wing of BNP to show that he is tagated becase of his active role in organising Youth Wing of BNP . Because of his active participation , the Awami League Party workers and leaders targated to kill him .The Appellant claims that Hon .Judge made a jurisdictional error when he agreed with the respondents on all of the contents of the Appellants oral and written evidence . The appellant claims that he was denied natural justice and procedural fairness when the Tribunal in making decision ignored the basic principles of hearing when same irrelevant questions were asked for only purpose to confuse and discredit the oral evidence . .

1. Ground 1 picks up the substance of ground 4 of the application in the court below, ground 2 raises essentially the same complaint that was made in ground 2 below.

## The appellant’s submissions

1. The appellant was not legally represented either in this Court or in the Federal Circuit Court. He did not file any submissions but at the hearing before me he sought to impress upon the Court that he had given truthful evidence to the Tribunal and that, unless the BNP came to power, he would be killed if he returned to Bangladesh. He professed not to understand how the Tribunal was unable to accept what he said and the evidence he had provided. He submitted that he could have provided more evidence if necessary.

## Ground 1

### Did the Tribunal fail to apply the correct test in relation to complementary protection?

1. On this question the appellant submitted that the Tribunal must have failed to apply the correct test because it did not believe him. He asserted he would definitely be tortured if he were to return to Bangladesh. He was unable to articulate the correct test or to explain what was wrong with the Tribunal’s approach to complementary protection.
2. The primary judge held that the Tribunal applied the correct test in relation to the complementary protection criterion contained in s 36(2)(aa). His Honour said that the Tribunal considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the appellant being removed from Australia to Bangladesh, there is a real risk the appellant will suffer significant harm as defined in s 36(2A) of the Act. The primary judge also observed that the Tribunal found there were no substantial grounds for so believing because the Tribunal did not find credible the appellant’s claims regarding his claimed BNP affiliation or his claims that there are criminal charges outstanding against him.
3. The primary judge did not err in this respect. That is evident from what the Tribunal said at [66], where it dealt with the complementary protection ground:

The Tribunal has also considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Bangladesh, there is a real risk that he will suffer significant harm as defined in subsection 36(2A) of the Act. The Tribunal has had regard to the evidence and claims put forward by the applicant. Given that the applicant is not credible in relation to his claims regarding his claimed BNP affiliation, directly or indirectly, nor the claims relating to harm faced by him for this reason, and as his claims of outstanding charges against him are not credible, it finds that there are not substantial grounds for believing that there is a real risk he would face significant harm in the Bangladesh (*sic*) under Australia’s protection obligations under s.36(2)(aa). The Tribunal does not accept that there are substantial grounds for believing that there is a real risk the applicant or the applicant (*sic*) will be arbitrarily deprived of his life, or the death penalty will be carried out on him, or that he will be subjected to torture or to cruel or inhuman treatment or to degrading treatment or punishment in Bangladesh. On the evidence before it the Tribunal does not accept that there is a real risk the applicant will suffer significant harm in Bangladesh. The Tribunal does not accept that the applicant is a person in respect of whom Australia has protection obligations under paragraph 36(2)(aa) of the Act.

1. The test for determining whether the complementary protection ground is made out arises from s 36(2)(aa). The question the Tribunal was required to ask itself was whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his removal from Australia to Bangladesh, there is a real risk the appellant will suffer significant harm within the meaning of s 36(2A). The Tribunal asked (and answered) that very question.

### Was the Tribunal decision unreasonable on the question of complementary protection?

1. This is the other issue raised by the first ground of appeal.
2. For the appellant to succeed on this basis he would need to persuade the Court that the Tribunal decision was unreasonable in a legal sense. An administrative decision may be legally unreasonable for any one of a number of reasons; the legal standard of reasonableness is not limited to irrational or bizarre decision-making: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (“*Li*”) at [68] (Hayne, Kiefel and Bell JJ). The plurality in *Li* considered that legal unreasonableness extends to “the more specific errors, going to jurisdiction, which the law recognises and to which Lord Greene MR referred in [*Associated Provincial Picture Houses Ltd v Wednesbury* [1948] 1 KB 223 at 228]”. These include failing to obey rules concerning the proper application of the law, failing to take into account matters the relevant legislation mandates for consideration, taking into account irrelevant considerations, and reaching a conclusion that no reasonable decision-maker could ever have reached. See also French CJ at [24]–[30]. In some circumstances, even where a particular error in reasoning cannot be identified, the Court may infer that the decision was unreasonable: *Li* at [68] (Hayne, Kiefel and Bell JJ). The plurality in *Li,* picking up on a remark of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41, said at 72:

Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.

1. *Li* involved the exercise of a statutory discretionary power (to grant an adjournment). This case does not. The question here is whether the Tribunal’s state of satisfaction was reached unreasonably. In such a case, the answer probably depends on whether the decision was not based on findings or inferences of fact supported by logical grounds: *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 (“*SZMDS*”) at [40] (Gummow A-CJ and Kiefel J). In *SZMDS,* wherethe majority found that the Tribunal’s decision that an applicant for a protection visa did not fear persecution on the claimed ground was not legally unreasonable, Crennan and Bell JJ observed at [135]:

Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn.

1. In every case, however, it remains important to respect the limits of judicial review of administrative action. As Brennan J put it in *Attorney-General for the State of NSW v Quin* (1990) 170 CLR 1 at 35–36:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. 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.

1. Describing a decision as unreasonable is often no more than “an emphatic way of disagreeing with it”: *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [34]; see also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [40] (Gleeson CJ and McHugh). As French CJ observed in *Li* at [30], the legal requirement that a decision be reasonable “is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees...”.
2. So the question here is whether the impugned decision is legally unreasonable or merely one with which the appellant emphatically disagrees.
3. When I invited the appellant to explain why the decision was unreasonable, his reply was: “[the Tribunal] did not believe me”. He protested: “I will suffer and they will kill me …Maybe if the BNP comes to power, I will not suffer.”.
4. The particulars given of the comparable ground in the application in the Federal Circuit Court were to similar effect.
5. Regardless of which test is used to determine the question, I am satisfied that the decision was not legally unreasonable. Right or wrong, the inferences and conclusions the Tribunal drew were open on the evidence. The appellant’s description of the decision as unreasonable is no more than an expression of his emphatic disagreement with it. As the Minister submitted in argument, the appellant is merely seeking impermissible merits review.
6. Ground 1 must be dismissed.

## Ground 2

1. The appellant elected to say nothing in support of ground 2 and I am unable to discern any basis for the allegation that the appellant was denied natural justice or procedural fairness (the expressions are synonymous). The transcript of the Tribunal hearing was not before the Court so I am reliant on the Tribunal’s account of what occurred. I see nothing in the decision record to suggest that the Tribunal asked irrelevant questions or had an ulterior purpose of confusing and discrediting the appellant. The Tribunal was not bound to accept the appellant’s account. It was entitled, if not obliged, to test it in order to carry out its statutory function, namely, to review the Minister’s decision (Migration Act, s 414). The questions it appears to have posed were all relevant to the criteria for the grant of a protection visa.
2. In substance the primary judge came to the same conclusion. There is nothing in his Honour’s reasons on this issue which bespeaks error.
3. In the court below, though not in this Court, an allegation of bias was squarely made in the particulars to the first ground of the application. Here, it was only inferred.
4. Bias may be actual or perceived. Either way, absent any question of waiver, it will amount to a denial of procedural fairness. But actual bias in the form of prejudgment, which is the insinuation here, occurs where the decision maker is so committed to a conclusion already formed as to be incapable of alteration, regardless of what arguments are advanced or evidence is presented: *Minister for Immigration and Multicultural Affairs v Jia* *Legeng* (2001) 205 CLR 507 (“*Jia*”)at [72] (Gleeson CJ and Gummow J). It must be “distinctly made and clearly proved”: *Jia* at [69] (Gleeson CJ and Gummow J). There is no basis for concluding that the Tribunal was actually biased against the appellant. A case of perceived or apprehended bias will be made out if a fair-minded lay observer might reasonably apprehend that the decision maker might not bring an impartial mind to the resolution of the questions in dispute: *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 293-294. But, as Gleeson CJ and Gummow J went on to observe in *Jia* at [72], “[n]atural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.”.
5. Nor will bias, whether actual or apprehended, be established merely by pointing to the posing of probing questions by an adjudicator, especially a tribunal such as this conducting an inquisitorial proceeding. As the High Court observed in *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28; 179 ALR 425 at [30]:

Where … credibility is in issue, the person conducting inquisitorial proceedings will necessarily have to test the evidence presented — often vigorously. Moreover, the need to ensure that the person who will be affected by the decision is accorded procedural fairness will often require that he or she be plainly confronted with matters which bear adversely on his or her credit or which bring his or her account into question.

See, too, *Johnson v Johnson* (2000) 201 CLR 488 at [46] (Kirby J).

1. The Court was not asked to examine any particular aspect of the Tribunal’s conduct of the proceeding. As I have already indicated, no transcript of the hearing was provided and no submissions were made which would justify the Court calling for the electronic record.
2. Ground 2 must also be dismissed.

## Conclusion

1. There is no reason to doubt the correctness of the primary judge’s conclusions. If, contrary to the Tribunal’s findings, the appellant is, indeed, genuine in his claims, his grievance is understandable. In the absence of jurisdictional error, however, neither the Federal Circuit Court nor this Court can intervene. On the material before it, the Tribunal was entitled to come to the conclusions it did and there is nothing to suggest a procedural irregularity of the kind that would vitiate the proceeding. The appeal must therefore be dismissed. Costs should follow the event. There will be orders accordingly.

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| I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann. |

Associate:

Dated: 31 August 2015