FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v Jayshree Enterprises Pty Ltd [2017] FCA 264

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| Appeal from: | *Jayshree Enterprises Pty Ltd v Minister for Immigration & Anor and Gohil v Minister for Immigration & Anor* [2016] FCCA 2825  |
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| File numbers: | QUD 860 of 2016QUD 859 of 2016 |
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| Judge: | **LOGAN J** |
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| Date of judgment: | 28 February 2017 |
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| Catchwords: | **MIGRATION** – appeal from decision of Federal Circuit Court of Australia – whether primary judge erred in concluding that the Tribunal did fall into jurisdictional error – content of no evidence ground at common law – evidence before Tribunal admitted logically of absence of satisfaction with respect to relevant visa criterion – appeal allowed  |
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| Legislation: | *Constitution* s 75(v)*Administrative Appeals Tribunal Act 1975* (Cth) s 33*Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5*Migration Act 1958* (Cth) ss 65, 476*Migration Regulations 1994* (Cth) reg 5.19  |
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| Cases cited: | *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611*Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014  |
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| Date of hearing: | 28 February 2017 |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 32 |
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| **QUD 860 of 2016**: |  |
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| Counsel for the Appellant: | Ms AS Stoker  |
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| Counsel for the First Respondent: | The first respondent appeared in person with the assistance of an interpreter |
|  |  |
| Counsel for the Second Respondent: | The second respondent filed a submitting notice, save as to costs |
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| **QUD 859 of 2016**: |  |
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| Counsel for the Appellant: | Ms AS Stoker  |
|  |  |
| Counsel for the First Respondent: | The first respondent appeared in person  |
|  |  |
| Counsel for the Second Respondent: | The second respondent filed a submitting notice, save as to costs |
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ORDERS

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|  | QUD 860 of 2016 |
|   |
| BETWEEN: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION Appellant |
| AND: | JAYSHREE ENTERPRISES PTY LTDFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | LOGAN J |
| DATE OF ORDER: | 28 FEBRUARY 2017 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Circuit Court of Australia made on 21 October 2016 be set aside. In lieu thereof:
	1. The application for judicial review be dismissed.
	2. The applicant pay the First Respondent’s costs of and incidental to the application, to be taxed, if not agreed.
3. The First Respondent pay the Appellant’s costs of and incidental to the appeal, to be taxed, if not agreed.

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

ORDERS

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|  | QUD 859 of 2016 |
|   |
| BETWEEN: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION Appellant |
| AND: | SAURABH VIKRAMISNH GOHILFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGE: | LOGAN J |
| DATE OF ORDER: | 28 FEBRUARY 2017 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Circuit Court of Australia made on 21 October 2016 be set aside. In lieu thereof:
	1. The application for judicial review be dismissed.
	2. The Applicant pay the First Respondent’s costs of and incidental to the application, to be taxed, if not agreed.
3. The First Respondent pay the Appellant’s costs of and incidental to the appeal, to be taxed, if not agreed.

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

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

LOGAN J:

1. On 21 October 2016, in respect of two judicial review proceedings before it, the Federal Circuit Court of Australia (Federal Circuit Court) directed as to one, BRG258/2016, being a proceeding brought by Jayshree Enterprises Pty Ltd (Jayshree Enterprises), that a writ of certiorari, issue directed to the Administrative Appeals Tribunal (Tribunal) quashing its decision dated 23 February 2016, and that a writ of mandamus issue directed to the Tribunal requiring it to determine the application made to it for the review of a decision of a delegate of the Minister for Immigration and Border Protection (Minister) dated 19 February 2016 according to law, together with a costs order.
2. In the other judicial review proceeding, BRG256/2016 brought by Mr Saurabh Vikramsinh Gohil, the Tribunal made similar orders, differing only in detail as to the date of the Tribunal’s decision and that specified as the date of the decision of the Minister’s delegate. In that proceeding also, there was an adverse costs order against the Minister. The Minister has appealed to this Court against each of the orders made by the Federal Circuit Court. I add that, as might be expected and as the Tribunal did before the Federal Circuit Court, the Tribunal adopted a submitting role in respect of responding to the appeals.
3. As it was before the Federal Circuit Court, in relation to the judicial review applications, it is convenient to hear the two appeals together. They are intimately related. It is the case that, were the appeal to which Jayshree Enterprises is the active party respondent to succeed, it would necessarily follow that the Minister’s appeal, to which Mr Gohil is a party, must also succeed.
4. There are three grounds of appeal which are as follows:

1. The Federal Circuit Court erred in holding that it was not open to the Second Respondent on the evidence before it to conclude that the First Respondent did not appear to have the financial resources to provide full-time employment to the nominated employee in the nominated position for at least two years if the nomination were approved.

*Particulars*

The Second Respondent received evidence regarding the financial resources of the First Respondent which supported the Tribunal’s conclusion. This was therefore not a case where there was no evidence upon which the Tribunal’s finding could be made: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *VAS v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 350.

2. The Federal Circuit Court erred in holding that the Tribunal had made an error of fact amounting to a jurisdictional error.

*Particulars*

The Federal Circuit Court held that the Second Respondent made a jurisdictional error in concluding that the First Respondent did not appear to have the financial resources to provide full-time employment to the nominated employee in the nominated position for at least two years if the nomination were approved. Insofar as the Second Respondent made the error identified by the primary Judge, that error was an error of fact which did not constitute a jurisdictional error: *Attorney-General of New South Wales v Quinn* (1990) 170 CLR 1, 35-36.

3. The Federal Circuit erred in that the learned Judge engaged in impermissible merits review.

*Particulars*

In disturbing a non-jurisdictional finding of fact made by the Tribunal, in the manner particularised in respect of Grounds 1 and 2 above, the primary Judge engaged in impermissible merits review: *MIEA v Wu Shan Liang* (1996) 185 CLR 259.

1. It is necessary, for the determination of the appeal, to descend into the history in the course of public administration of a particular application which was made to the Minister under the *Migration Act 1958* (Cth) (Migration Act) by Jayshree Enterprises, together with the related visa application by Mr Gohil. The administrative history is set out in the reasons of the Tribunal.
2. On 4 March 2015, Jayshree Enterprises made application to the Minister for the approval of the nomination of a position in Australia under reg 5.19 of the *Migration Regulations 1994* (Cth) (Regulations). Though the Tribunal’s reasons as to the relevance of that particular application in respect of the granting of a visa under the Act are compressed, there is a subclass 187 visa in respect of which, as part of the criteria, it becomes material that an application carries with it approval for nomination of a position under reg 5.19.
3. More particularly, in this case the nomination was one known as a direct entry nomination, to which reg 5.19(4) was applicable. In the absence of the criteria in reg 5.19(4) being met, and in the circumstances of this particular case, the application for nomination of a position would fail and, in turn, one of the necessary elements for the grant of a visa would not exist. Section 65(1)(a)(ii) provides, materially, that after considering a valid application for a visa, the Minister, if satisfied that the other criteria for it prescribed by this Act or the Regulations have been satisfied, is to grant the visa.
4. The precise interrelationship between the satisfaction-based obligation to grant a visa found in s 65 and the task in considering an application for nomination was not explored before the Tribunal, the Federal Circuit Court or, for that matter, on the appeal. That is a subject to which I shall return later in these reasons for judgment.
5. First, it is necessary to set out the text of reg 5.19(4) of the Regulations:

Direct Entry nomination

(4) The Minister must, in writing, approve a nomination if:

(a) the application for approval:

(i) is made in accordance with subregulation (2); and

(ii) identifies a need for the nominator to employ a paid employee to work in the position under the nominator’s direct control; and

(b) the nominator:

(i) is actively and lawfully operating a business in Australia; and

(ii) directly operates the business; and

(c) for a nominator whose business activities include activities relating to the hiring of labour to other unrelated business—the position is within the business activities of the nominator and not for hire to other unrelated businesses; and

(d) both of the following apply:

(i) the employee will be employed on a full-time basis in the position for at least 2 years;

(ii) the terms and conditions of the employee’s employment will not include an express exclusion of the possibility of extending the period of employment; and

(e) the terms and conditions of employment applicable to the position will be no less favourable than the terms and conditions that:

(i) are provided; or

(ii) would be provided;

to an Australian citizen or an Australian permanent resident for performing equivalent work in the same workplace at the same location; and

(f) either:

(i) there is no adverse information known to Immigration about the nominator or a person associated with the nominator; or

(ii) it is reasonable to disregard any adverse information known to Immigration about the nominator or a person associated with the nominator; and

(g) the nominator has a satisfactory record of compliance with the laws of the Commonwealth, and of each State or Territory in which the applicant operates a business and employs employees in the business, relating to workplace relations; and

(h) either:

(i) both of the following apply:

(A) the tasks to be performed in the position will be performed in Australia and correspond to the tasks of an occupation specified by the Minister in an instrument in writing for this sub-subparagraph;

(B) either:

(I) the nominator’s business has operated for at least 12 months, and the nominator meets the requirements for the training of Australian citizens and Australian permanent residents that are specified by the Minister in an instrument in writing for this sub-sub-sub-paragraph; or

(II) the nominator’s business has operated for less than 12 months, and the nominator has an auditable plan for meeting the requirements specified in the instrument mentioned in sub-sub-paragraph (I); or

(ii) all of the following apply:

(A) the position is located in regional Australia;

(B) there is a genuine need for the nominator to employ a paid employee to work in the position under the nominator’s direct control;

(C) the position cannot be filled by an Australian citizen or an Australian permanent resident who is living in the same local area as that place;

(D) the tasks to be performed in the position correspond to the tasks of an occupation specified by the Minister in an instrument in writing for this sub-sub-paragraph;

(E) the business operated by the nominator is located at that place;

(F) a body that is:

(I) specified by the Minister in an instrument in writing for this sub-subparagraph; and

(II) located in the same State or Territory as the location of the position;

has advised the Minister about the matters mentioned in paragraph (e) and sub-subparagraphs (B) and (C).

1. It emerges from the Tribunal’s reasons that the nomination application was made in the context of the prospective employment of Mr Gohil in a retail business conducted by Jayshree Enterprises in its capacity as trustee for the Jayshree Family Trust, from sites in the Sunshine Coast area to the north of Brisbane. Of particular moment before the Tribunal was the question as to whether or not both of the criteria in reg 5.19(4)(d) were met; and even more particularly, whether that specified in reg 5.19(4)(d)(i) was met, or rather whether the Tribunal was reasonably satisfied that this particular criterion was met. As to that, the Tribunal’s conclusion at [27] of the Tribunal’s reasons was that the requirement was not met.
2. To understand the Tribunal’s reasons for that conclusion, it is necessary to set out, having regard to the reasons for judgment of the primary judge and the grounds of appeal against his Honour’s judgment, [19] through to, and including [26] of the Tribunal’s reasons:

19. The Tribunal explained to Mr Parmar that the Regulations required that a nominee for a subclass 187 visa would be employed on a full-time basis in the nominated position for at least two years. He said that he was aware of this requirement. The Tribunal asked whether he believed that the current nominee would be employed for two years, given that none of his previous nominees had remained with him for two years. He stated that he believed that the current nominee would stay in the position for two years because he had promised Mr Parmar that he would. The Tribunal asked whether the previous nominees had given him the same promise, and he said that they had.

20. The Tribunal asked Mr Parmar to describe the applicant’s current workforce. He said that the applicant currently had five full time employees, including the current nominee, the three nominees approved in 2015 and one other permanent resident. The applicant also has 12 part-time employees currently.

21. The Tribunal asked the applicant what the applicant’s wages bill would be for the next year if all of these employees continued to work for the business, and he agreed with the Tribunal’s estimate that the five full time employees would cost about $250,000. He said that the wages cost for the part-time employees would depend on the hours that they worked, but agreed that it would be at least $100,000, making a total wages bill of at least $350,000 for the current financial year.

22. The Tribunal pointed out that the total wages bill for the last financial year had been $143,705.78, and asked how the applicant would afford this bill given that in his evidence he had said that the net profit for the year of $86,237.91 was drawn from the business as salary for he and his wife. He said that it was his hope that the business would expand to generate enough profit to cover the additional wages bill as well as allowing for drawings for he and his wife.

23. The Tribunal asked Mr Parmar whether he expected that all the currently approved nominees would work for the applicant for two years, and he said that he hoped that they would. He said that at least one of them would not be eligible for citizenship until the two-year period had expired.

**Term of employment of the visa holder: r.5.19(4)(d)**

24. Regulation 5.19(4)(d) requires the nominees to be employed in the nominated position for at least 2 years full time, and the terms and conditions of that employment do not expressly exclude the possibility of an extension.

25. The evidence before the Tribunal is that if this nomination is approved the applicant would face a wages bill in excess of $350,000 for the current financial year, an increase of about 250% on the wages figure shown in the accounts for the 2015 financial year. While Mr Parmar’s evidence was that he hoped that the business would be able to fund this level of wage growth through increased turnover; no evidence has been supplied of such an increase in turnover.

26. In the circumstances, the Tribunal is not satisfied that the nominated employee would be employed on a full-time basis in the position for at least 2 years if this nomination were approved, as the business does not appear to have the financial resources to provide such employment.

1. The total wages figure and profit figure specified in [22] of the Tribunal’s reasons was taken from a financial statement for the year ended 30 June 2015, which along with statement for the year ended 30 June 2014, were before the Tribunal. The transcript of the evidence of Mr Parmar referred to in the passage from the reasons quoted, is not in the court book. Rather, the account as to what he said is confined to that set out in the Tribunal’s reasons.
2. Also before the Tribunal, in respect of the financial affairs of Jayshree Enterprises, were a series of extracts from the business activity statements and other records maintained by the Australian Taxation Office, accessible by a tax agent in respect of business activity statement lodgement. These took the detail, such as it was, about financial affairs of Jayshree Enterprises beyond the end of the 2015 financial year and extended it to October 2015. In relation to business activity statements, and having regard to the operation of taxation legislation, and consequential lodgement periods, it is apparent that Jayshree Enterprises, in developing its case before the Tribunal placed the latest business activity statement position which it could, having regard to the date of hearing in February 2016, before the Tribunal.
3. The judicial review application grounds underwent, to say the least, considerable amendment by the time the Federal Circuit Court came to hear the case. As amended, the grounds of review were these:

1. The Tribunal engaged in conduct which amounted to jurisdictional error in that it failed to consider, on balance, all relevant factors in assessing whether the Applicant satisfied Regulation 5.19(4) of the *Migration Regulations 1994* (Regulations) and had sufficient financial recourses to employee the nominee.

Particulars

At the time of the Application, the Applicant was and had already been employing the nominee in the Applicant’s business.

2. The Tribunal engaged in conduct which amounted to jurisdictional error in that it considered, on balance, irrelevant factors in assessing whether the Applicant satisfied Regulation 5.19(4) of the Regulations, in particular that the Applicant’s wages bill would be in excess of $350,000.

1. As a general observation, a reference to “on balance” in each of these review grounds is unattractive, in terms of known bases of jurisdictional error, and suggestive, instead, of a solicitation and an impermissible one at that, for the Federal Circuit Court to conduct a form of merits review.
2. As it happened, it appears that from his Honour’s reasons for judgment, that his Honour did not approach the disposition of the case by reference to these particular amended grounds. I say that because the critical paragraph in his Honour’s reasons for judgment is [29], in which his Honour states:

As I said at the beginning, it is for this Court to decide whether or not a particular finding was open on the evidence. That is, whether any decision maker could come to that conclusion on the evidence if they were acting according to their duty.

1. His Honour concluded, at [30], that it was:

… not open to the Tribunal to conclude that they were not satisfied that the nominated employee would be employed on a full time basis in the position for at least two years if there nomination were approved.

1. The reasoning process that led to that conclusion commences, in my view at [18] and concludes at [27]:

18. There are errors in the reasoning of the Tribunal. Whether they end up being jurisdictional errors may be another matter, but the first error is in paragraph 25:

* *“That the evidence before the Tribunal is that if this nomination is approved, the applicant would face a wages bill in excess of $350,000 for the current financial year ...”*

19. That was not the evidence that was before the Tribunal at all. The evidence that the tribunal was referring to, came from a sort of agreement between the two; that if all of those five full-time employees and twelve part-time employees continued to be employed, that would mean that the five would have an average of $50,000.00 a year, which would mean $250,000.00 and the twelve part-time employees, however that is made up, would be $100,000.00 a year. That was a very rough “guestimate” of what the wages bill would be like.

20. If the Tribunal were wanting to look at what the wages bill would have been, then the evidence before the Tribunal was that all the employees had been paid up until, it would seem, close to February 2016.

21. The Tribunal could have looked at everything that every employee had been paid up to that time and extrapolate if need be. The Tribunal could easily have looked at what the wages bill for the 17 employees had been in the last month and then extrapolate.

22. But in any event, whether the figure of $350,000.00 was correct, the Tribunal went to the extraordinary statement of saying that the $350,000 would only be faced by the Applicant if the nomination were approved.

23. It is an extraordinary sentence in many ways, because the evidence before the Tribunal was, even if it was not for this particular applicant, who was being paid, it would seem, about $70,000.00, that the wages bill would still be more than double what the wages bill was for the previous financial year.

24. Therefore to say that the evidence before the Tribunal is that if this nomination is approved, the Applicant will face a wages bill in excess of $350,000 for the current financial year is not a proper summary of the evidence before the Tribunal.

25. Instead, what it does, in using such a figure that seems to be a “guestimate” after a discussion, is that that estimate has taken on, for the Tribunal, an aura of fact. Using that as fact, it is has then made a number of other assumptions.

26. Of course, it has not recognised that, whatever the wages bill actually is, already two-thirds of the financial year had occurred at the time of the hearing and the evidence was that the Applicant had been meeting its wages bill, had paid all of its employees and was not suffering any financial stress or hardship.

27. Therefore, to come to the conclusion that the business does not appear to have the financial resources to provide such employment, flies in the face of the evidence that was before the Tribunal.

1. The “core function” of the Tribunal is the reviewing on the merits of an administrative decision: *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123.
2. Though the Tribunal may permissibly and in certain particular circumstances be obliged to make inquiries, that is not its core function. This Tribunal member, as the reasons make apparent, was disposed to ask questions of Mr Parmar in the course of the hearing. The Tribunal member is not to be criticised for so doing. That the Tribunal member did this does not mean that it was for the Tribunal member to make out the case for approval of the nomination. There was no formal onus of proof in the proceedings before the Tribunal. To use such terminology would be to borrow language from a completely different field of discourse, namely, that in respect of the exercise of judicial power. At most, it was for a particular party seeking a particular outcome to put such material as it was advised before the Tribunal supporting that outcome, but that does not mean that there was any formal onus of proof.
3. Further, the rules of evidence, by express provision, s 33 of the *Administrative Appeals Tribunal Act 1975* (Cth), did not apply to a proceeding before the Tribunal. The Tribunal was entitled to act on material that was not and would not be admissible in a judicial proceeding or which was not presented in accordance with formalities that would attend its admission in a judicial proceeding. Critically for present purposes, the Tribunal had before it a trading history as revealed in accounts. The Tribunal’s reasons give no indication that the Tribunal member did other than accept the veracity and reliability of those trading accounts. Apart from that, the Tribunal member had particular statements from Mr Parmar upon which the Tribunal member was entitled to act and accept as to a prospective position in respect of the partially completed 2016 financial year. It also had before it, as mentioned, business activity statement material.
4. Quite what to make of all of that material was for the Tribunal. If it transpired that there was a particular gap which hindsight demonstrated to be critical, then that was a gap which it was not for the Tribunal to fill. It is certainly possible, having regard to the trading figures that were placed before the Tribunal for completed financial years, to form a view not just that Jayshree Enterprises’ business was expanding, but that it was so doing in a way that left a profit. Equally though, there was, having regard to the statements made to the Tribunal member by Mr Parmar, quite reasonably an interrogative note left as to whether the business would support the particular wages bill that was specified to the Tribunal member in response to the questions asked. In turn, it is not illogical, even having regard to the growth evident from the trading accounts, to be left with an interrogative note as to whether over the two-year period in question the business would support the continuous full-time employment of a person in the nominated position.
5. It appears to me that the learned Federal Circuit Court judge has regarded the jurisdictional error concerned as no evidence to support the conclusion reached. The *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 (*Rajamanikkam*) is a case which concerned a statutory no-evidence ground of review, once found in s 476(1)(g), as elaborated upon in s 476(4)(b) of the Migration Act. Those provisions were similar to those of s 5(1)(h) and s 5(3)(b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (Judicial Review Act).
6. The jurisdiction being exercised by the Federal Circuit Court was, by s 476, as it stood later, materially the same as that conferred upon the High Court by s 75(v) of the *Constitution*. In turn, that means that it is the common law no-evidence ground rather than the no-evidence ground as specified in the Migration Act provisions mentioned and as specified presently in the Judicial Review Act provisions mentioned which is relevant. *Rajamanikkam* is, nonetheless, of present relevance for a passage which appears by way of introduction to a consideration of the statutory ground in the judgment of Gleeson CJ. His Honour stated at [26] that:

As that case showed, identification of the “decision” may constitute an important step in deciding whether there has been an error of law in the form of a breach of a duty to act in accordance with the requirements of procedural fairness. The requirement is to “base [a] decision on evidence”; a requirement as to the way the decision maker is to go about the task of decision-making. The distinction between judicial review of administrative decision-making upon the ground that there has been an error of law, including a failure to comply with the requirements of procedural fairness, and comprehensive review of the merits of an administrative decision, would be obliterated if every step in a process of reasoning towards a decision were subject to judicial correction. The duty to base a decision on evidence, which is part of a legal requirement of procedural fairness, does not mean that any administrative decision may be quashed on judicial review if the reviewing court can be persuaded to a different view of the facts.

[footnote references omitted]

1. The distinction between judicial review of administrative decision-making upon the ground that there has been an error of law, including a failure to comply with the requirements of procedural fairness, and comprehensive review of the merits of an administrative decision, would be obliterated if every step in a process of reasoning towards a decision were subject to judicial correction. The duty to base a decision on evidence which is part of a legal requirement of procedural fairness, does not mean that any administrative decision may be quashed on judicial review if the reviewing court can be persuaded to a different view of the facts.
2. In *Rajamanikkam,* at [27], Gleeson J cites with approval a passage from Lord Wilberforce’s speech in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1047 (*Tameside Metropolitan Borough Council*). That is part of a passage from that same speech which is later cited with approval by Gummow ACJ and Kiefel J (as her Honour then was), in their joint judgment in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [21] (*SZMDS*). It is as well to commence reference to that fuller passage with the statement made by Gummow ACJ and Kiefel J at the conclusion of [20] of their joint judgment in *SZMDS*, with reference to s 65 of the Migration Act:

The criterion for attraction of the jurisdiction of the decision maker in deciding an application under the Act for a protection visa is not expressed in terms of “fact” as simply understood. Rather, as explained earlier in these reasons, the Act fixes upon a criterion of “satisfaction” as to the existence of a certain state of affairs respecting the status of the applicant.

1. They then also adopt, with approval, an extract from Lord Wilberforce’s speech in *Tameside Metropolitan Borough Council*, observing, at [21]:

… a statement of principle by Lord Wilberforce made in 1976, before the tectonic shifts in English public law which occurred in later decades, is of first importance. In *Secretary of State for Education* *and* *Science v Tameside Metropolitan Borough Council*, his Lordship said of a provision conditioning the power of the Secretary of State to act upon satisfaction as to a certain state of affairs:

“The section is framed in a ‘subjective’ form – if the Secretary of State ‘is satisfied’. This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, *before it can be made*, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and they have been taken into account, *whether the judgment has been made upon a proper self-direction as to those facts*, [and] whether the judgment has not been made upon other facts which ought not to have been taken into account.”

[Emphasis in original, footnote references omitted]

1. The difficulty in relation to the conclusion reached by the Federal Circuit Court judge is that there was material before the Tribunal which reasonably admitted of not being satisfied in respect of the critical criterion; “A person will be employed on a full-time basis in the position for at least two years”. That criterion required an element of value judgment as to a prospective position. It is certainly possible, having regard to the trading performance over the course of three years, and also the statement of a man whom the Tribunal did not regard as dishonest, Mr Parmar, about “hope” to reach a view that there was an upward trend in this business and that it was likely to support a particular position for two years. But that was not the only view to which one might come.
2. There was an interest on the part of Jayshree Enterprises to be served here by adducing such evidence as it could to support that particular prospective position. I suspect strongly that much lay behind the statement given to the Tribunal by Mr Parmar as to “hope”, but it was for Jayshree Enterprises to give further colour and substance, if so disposed, to that “hope”. It was not for the Tribunal to ask further questions. The result before the Tribunal, was a case where reasonable people might reasonably differ as to whether the Tribunal should have been satisfied as to the condition in reg 5.19(4)(d)(i) being met. That being so, it was not a no‑evidence case for the purposes of jurisdictional error.
3. Further, the Tribunal’s reasoning as to an absence of satisfaction, leading to its conclusion as to noncompliance with that provision, was not illogical. The particular wages bill in prospect was evidence for the purposes of the Tribunal’s administrative review. It was not illogical, on the material which the Tribunal had, for the Tribunal not to be satisfied that the position could be supported on business performance for a further two years. Of course, it may have been possible, by virtue of further evidence from Mr Parmar, perhaps corroborated by a forensic accounting report and a related business plan, to see how the position could be supported for that length of time. But it was not for the Tribunal to make out Jayshree Enterprises’ case.
4. In the course of submissions, reference was made to other favourable outcomes before the Minister’s department in respect of nominations, based on much the same information base. This was not a case, promoted before the Federal Circuit Court as one where there was inconsistency of administrative decision making. If that be the case then it may well be that there is a need, on the part of the Minister, to delve further into the quality overall of the way in which his delegates have dealt with Jayshree Enterprises’ various applications. It is not, though, a task for the Federal Circuit Court, much less for this Court on appeal.
5. The Federal Circuit Court has, with respect, misapprehended the content of the no‑evidence ground in respect of the exercise of a jurisdiction assimilated with that conferred on the High Court by s 75(v) of the *Constitution*. That being so, the appeal must, on this basis, be allowed. It necessarily follows from the foregoing, that in respect of the appeal relating to which Mr Gohil is respondent, that the result is the same.

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| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 22 March 2017