FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v MZYTS [2013] FCAFC 114

Citation:	Minister for Immigration and Border Protection v MZYTS [2013] FCAFC 114
Appeal from:	MZYTS v Minister for Immigration & Citizenship [2012] FMCA 1109
Parties:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION v MZYTS and REFUGEE REVIEW TRIBUNAL**
File number:	VID 1113 of 2012
Judges:	**KENNY, GRIFFITHS AND MORTIMER JJ**
Date of judgment:	16 October 2013
Catchwords:	**MIGRATION** — Appeal from judgment of Federal Magistrates Court setting aside decision of Refugee Review Tribunal to refuse a protection visa — Whether Refugee Review Tribunal failed to perform statutory task by not considering most recent country information — Tribunal reasons disclosed neither consciousness nor consideration of central aspect of visa applicant's claim — Tribunal decision affected by jurisdictional error — Decision of Federal Magistrate upheld.
Legislation:	*Convention relating to the Status of Refugees* (done at Geneva on 28 July 1951) 189 UNTS 137 *Protocol relating to the Status of Refugees* (done at New York on 31 January 1967) 6060 UNTS 267 *Migration Act 1958* (Cth) ss 36(2)(a), 65, 414, 430 *Administrative Decisions (Judicial Review) Act 1977* (Cth)
Cases cited:	*Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 *Abebe v Commonwealth* (1999) 197 CLR 510 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 *Minister for Immigration and Multicultural Affairs v Yusuf*

(2001) 206 CLR 323
Minister for Immigration and Citizenship v SZGUR (2011) 241 CLR 594
SZDXZ v Minister for Immigration and Citizenship [2008] FCAFC 109 at [25]
Minister for Immigration and Citizenship v SZJSS (2010) 243 CLR 164
Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham (2000) 58 ALD 609
Rezaei v Minister for Immigration and Multicultural Affairs [2001] FCA 1294
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Craig v South Australia (1995) 184 CLR 163
Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147
Tickner v Chapman (1995) 57 FCR 451
SZJTQ v Minister for Immigration and Citizenship (2008) 172 FCR 563

Date of hearing:	15 August 2013
Date of last submissions:	1 July 2013
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	78
Counsel for the Appellant:	G Johnson SC with C J Horan
Solicitor for the Appellant:	Sparke Helmore
Counsel for the Respondents:	R J C Watters
Solicitor for First the Respondent:	Victoria Legal Aid
The Second Respondent submitted to any order the Court might make, save as to costs.	

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 1113 of 2012**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **Appellant**
AND:	**MZYTS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**KENNY, GRIFFITHS AND MORTIMER JJ**
DATE OF ORDER:	**16 OCTOBER 2013**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. Leave be granted for the title of the appellant in the Notice of Appeal dated 20 December 2012 to be amended from Minister for Immigration and Citizenship to Minister for Immigration and Border Protection.

2. The appeal is dismissed.

3. The appellant pay the first respondent's costs of and incidental to the appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 1113 of 2012**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **Appellant**
AND:	**MZYTS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**KENNY, GRIFFITHS AND MORTIMER JJ**
DATE:	**16 OCTOBER 2013**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

THE COURT:

NATURE OF THE APPEAL

1 This is an appeal from the judgment of a Federal Magistrate (as his Honour then was) given on 29 November 2012.

2 The appellant (the **Minister**) raises two grounds of appeal:

1. The Federal Magistrate erred in finding that the Refugee Review Tribunal (the **Tribunal**):
   a. failed to have regard to the most recent material available; or
   b. failed to consider the First Respondent's claims as at the time of the Tribunal's decision.
2. The Federal Magistrate should have found that the Tribunal had considered the written submission by the First Respondent's migration agent dated 21 February 2011, including the country information referred to in that submission.

3 For the reasons that follow, we consider that the learned Federal Magistrate was correct to find the Tribunal had not dealt with the first respondent's claim as it had been

advanced before the Tribunal. The first respondent had identified cyclical and, in 2011, increasing risks to actual or perceived members and supporters (as he claimed to be) of the Movement for Democratic Change (**MDC**), the leading opposition political party in Zimbabwe. Those risks were said to have increased because of speculation about, and preparations for, possible elections in 2011 and the conduct of constitutional reform meetings, as well as an accompanying generalised increase in political violence, said to be a feature of election cycles in Zimbabwe. The Tribunal's reasons disclose neither consciousness nor consideration of these central aspects of the first respondent's claim.

4 We consider the Tribunal's error was jurisdictional. Accordingly, the appeal will be dismissed.

BACKGROUND TO THE APPEAL

5 The first respondent, whom we shall describe in the remainder of these reasons as the visa applicant, was accepted by the Tribunal to be a national of Zimbabwe. He first entered Australia lawfully in February 2007. He later travelled back to Zimbabwe, before returning to Australia in 2009.

6 On 27 May 2010 he lodged an application for a protection visa. In his application, the visa applicant claimed to fear persecution for reasons of:

1. His political opinion in support of the MDC and opposition to the government of Zimbabwe and the Zimbabwe African National Union — Patriotic Front (**ZANU-PF**); and
2. His membership of a particular social group based on his family membership or as a returnee who had lived in a Western country for a significant period of time.

7 On 19 October 2010 a delegate of the Minister refused to grant a protection visa to him.

8 The visa applicant applied to the Tribunal for review of the delegate's decision. A hearing was held by the Tribunal on 31 January 2011. Prior to the hearing, on 7 January 2011, the visa applicant's migration agent made a written submission to the Tribunal, outlining the way in which the visa applicant submitted he was a refugee within the meaning

of Art 1A of the *Convention relating to the Status of Refugees* (done at Geneva on 28 July 1951) 189 UNTS 137, as amended by the *Protocol relating to the Status of Refugees* (done at New York on 31 January 1967) 6060 UNTS 267 (the **Refugees Convention**). A number of the Convention reasons given by the visa applicant for his fear of persecution in Zimbabwe, and dealt with in the 7 January 2011 submission, are not presently material to the issues in this appeal.

9 What is material are those parts of the submission dealing with the visa applicant's claimed political opinion, said to be manifested by his status as a supporter and member of the MDC. The visa applicant also claimed a political opinion would in any event be imputed to him because he would be perceived, for reasons he gave, by the ZANU-PF officials and supporters, and by government authorities loyal to ZANU-PF, as an MDC supporter and/or member.

10 Relevant parts of the 7 January 2011 submission from the migration agent included the following:

> Country information indicates that the applicant's fears of persecution for the above reasons are well-founded. In particular, targeting of those who do not support the ZANU-PF movement and who do support or are perceived to support the MDC, continues to occur, despite the formation of the Unity Government in February 2009. President Mugabe and the ZANU-PF remain in control of the army and police, the two main institutions targeting MDC members. At this time, there is no indication that there has been a substantial or material change in the political situation in Zimbabwe.
> …
>
> In our submission, while the epidemic violence of the 2008 elections has not yet re-surfaced, the country information set out below clearly indicates that the situation in Zimbabwe remains volatile and dangerous for people who are MDC supporters and who oppose Zanu-PF and that the situation looks set to worsen with the ongoing Constitutional process and the call for elections in 2011. Available country information also indicates that despite the formation of a Unity Government in 2009, MDC members and supporters continue to face a *real chance* of persecution at the hands of the Zimbabwean authorities and ZANU-PF supporters.
> …
>
> Mr Mugabe has stated his intention to hold the elections by mid-2011 with the aim to '*get into a situation where Zanu-PF can rule the country*'. A May 2010 report by Crisis in Zimbabwe Coalition (CZC) said mere speculation about a 2011 election has already seen an increase in political violence in certain provinces and over the last few months MDC has expressed concern that Zanu-PF have been establishing bases in rural areas to intimidate people. CZC has also raised concerns about the re-introduction of 2008 intimidation tactics, noting

that:

> *Reports received from Mr. Chengetai Chimunhu, the Movement for Democratic Change (MDC-T) District Chairman for Marambapfungwe are that ZANU PF has re-launched 'Operation Surrender' originally launched during the run-up to the June 2008 election as a strategy to arm-twist MDC supporters into supporting ZANU PF. The operation, re-launched soon after Mugabe and Tsvangirai announced the possible holding of elections in 2011, allegedly involves training of youths at designated bases and unleashing of violence on villagers.*
>
> …
>
> In our submission it appears clear that, although Robert Mugabe and former opposition leader Morgan Tsvangirai formed a 'Unity Government', there has been no noticeable improvement in the country situation, or the situation for those perceived to be supporters of the MDC. Country information reports continue to detail incidences of violence and discrimination against those who are perceived to be MDC members and supporters, despite the formation of the Unity Government. It is submitted that, given the disastrous human rights situation that has persisted in Zimbabwe over at least the past ten years, it is highly unlikely that a dramatic and durable change for the better will be seen in the near future. At best the situation in Zimbabwe may improve, but any such improvement would take many years. Certainly at this stage and in the reasonably foreseeable future the situation remains one of great instability, where human rights abuses persist and where people with profiles like the applicant continue to be targeted for abuse.
>
> (emphases in original)

11 Accompanying the 7 January 2011 submission was a statutory declaration made by the visa applicant. That statutory declaration picked up and relied on the evidence given by the visa applicant in his first statutory declaration in support of his protection visa application, which had been made on 25 May 2010.

12 Relevantly, that May 2010 statutory declaration stated (without reproducing any identifying information about the visa applicant):

> 13. When I was in Zimbabwe between [certain dates], I did not directly observe any violence. As I have mentioned, violence by the ZANU-PF and their supporters against the MDC always escalates around the time of elections. Two elections (the second boycotted by the MDC) had been held in Zimbabwe earlier in 2008, with a power-sharing deal finally being achieved in September 2008, which saw Morgan Tsvangirai sworn in as Prime Minister on 11 February 2009. So things were comparatively calm at the time of my visit.
>
> 14. However, the situation remains volatile and dangerous, and I fear that it will only get worse again, particularly as Zimbabwe moves towards further elections. … Through my contacts with home – and through the international media – I keep informed about the security situation, particularly as would affect someone with my particular social and political profile. I need to know if I can safely return to … Zimbabwe, and for the foreseeable future, I know that I cannot. If forced to return to Zimbabwe, I would continue to be politically

> active in support of the MDC. I believe it is our responsibility to work for positive change and to support a President that represents the majority of the people.
>
> …
>
> 17. I am unable to obtain the protection of the Zimbabwean Government, nor of individuals loyal to me who work within the Zimbabwean administration – … because the authorities remain predominantly loyal to the ZANU-PF. While Morgan Tsvangirai and the MDC now have (ostensible) control of certain government ministries, such as agriculture and finance, the key defence and state security ministries remain under the control of the ZANU-PF. Also, despite the Home Ministry – which controls the ZRP – being 'shared' between the MDC and ZANU-PF, the Chief Commissioner remains loyal to the ZANU-PF. If [the individuals who are loyal to me within the Zimbabwean administration] were to exercise their power in order to help me, they would be placing their own lives in severe jeopardy. Unless Mugabe and the ZANU-PF voluntarily relinquish the power they continue to exert over the security forces, there is unlikely to be any improvement in security for active MDC members and supporters like me.
>
> …
>
> 19. I fear I will suffer serious harm, including beatings, detention and possible death there on account of my actual and imputed political opinion in support of the MDC and in opposition to the ZANU-PF, and on account of my membership of particular social groups, including my family group.

13 The second statutory declaration made on 7 January 2011 was responsive to the contents of the delegate's decision, which of course was the decision the Tribunal was required to review. It relevantly stated (again without reproducing any identifying information about the visa applicant):

> 3. I refer to the delegate's findings that it is only people with a high political profile, or prominent activists, or people close to such people, that are at risk. I believe that the Zimbabwe African National Union – Patriotic Front ("ZANU-PF") will use violence to convince any people they think are not aligned to them, including people they suspect are Movement for Democratic Change ("MDC") supporters. Prominent MDC people would clearly be at risk but in some ways they are also more protected than the average supporter on the street. They have guards and more capacity to protect themselves. Members of the public who are targeted have no protection and cannot seek protection from the authorities.
>
> 4. The delegate says that widespread election-related violence has not resurfaced. This does not take account of the fact that violence remains and is flaring and that many people fear that human rights abuses around the upcoming election will be just as bad as before, when many people were physically harmed and killed. The situation in Zimbabwe has not changed in any way to suggest that the violence of the ZANU-PF will not be repeated.
>
> 5. The problems with the recent constitutional meetings gives a clear indication that the ZANU-PF remains willing to use violence against MDC support[er]s and people they view as opposed to them and is continuing to do so.
>
> …

7. Contrary to the delegate's view, I believe that country information continues to indicate that people in Harare are at risk of politically motivated violence. Just one example I have recently read is that in September 2010, 13 constitutional outreach community meetings in Harare had to be suspended because of violence from ZANU-PF supporters. One of the violent meetings was in Mbare, which is close to Mabvuku. It has also been reported that the ZANU-PF are continuing to demand that people identify themselves as ZANU-PF supporters, and are viciously targeting those that cannot.

8. In December of last year, I also heard ….. that [a] man from our street, who was a member of the MDC, [had] disappeared and [was] found dead a few days later. Witnesses said he had been arguing with ZANU-PF supporters at a bar before this happened, and that they grabbed him and put him in a van on his way home. My family said the matter was reported to the police, but they did nothing about it…..

…

11. My return trip to Zimbabwe … was for compassionate reasons and fell at a time when the situation there was relatively calm. The Unity Government was being formed at that time: everyone was hopeful the situation would continue to improve and things were more stable.

12. Unfortunately, this was not the situation when I lodged my application or now. Hopes about the Unity Government quickly faded when it became clear that it was not a genuine and fair power-sharing arrangement and the ZANU-PF and their thugs continued their violent actions against MDC members and supporters. The situation looks increasing precarious and dangerous and I fear that MDC members and supporters will continue to be victimised by the ZANU-PF and that there is also a big risk that wide-spread violence will erupt again.

14 The Tribunal's reasons disclose that at the hearing on 31 January 2011, amongst matters not relevant to the issues in the appeal, the Tribunal raised the following matters with the visa applicant:

48. The Tribunal observed the applicant returned to Zimbabwe in [a certain period] and he agreed this was the case, saying he thought it was safe by that time to return because the ZANU-PF were negotiating a government of national unity, and the level of violence was low. The Tribunal put to him country information from the United Kingdom Border Agency "*Country of Origin*" Report which suggested in the October to December 2008 period there was actually an increase in the level of political violence in Zimbabwe, and noted this seemed inconsistent with his assertion that he thought things had settled down.

…

56. The Tribunal observed that many people travelled back to Zimbabwe (including from "Western" countries), without being at risk. It raised with the applicant country information contained in several reports about returnees and failed asylum seekers. It noted DFAT advices between 2002 and 2007 suggested returnees to Zimbabwe were not at risk simply because they had lived in or studied in Australia. It raised particularly an October 2007 advice from DFAT to that effect, as well as country information from the United Kingdom's Country of Origin Information Report of 2009, and a report from the Institute for War and Peace Reporting, which had reported on attempts by both President Mugabe

> and Prime Minister Tsvangirai to encourage Zimbabweans who had left the country to return to Zimbabwe to help rebuild it. Finally it referred to the October 2010 report of a fact finding mission to Zimbabwe which reported returnees and failed asylum seekers interviewed by the mission had not reported any significant problems on return.
>
> 57. The applicant responded that the June 2009 report of the MDC leader Mr Tsvangirai seeking to encourage people to return was around the time the National Unity Government was being discussed, and there was a prospect of change. He didn't think that government had been successful, and was no longer effective, and that promises made had not occurred.
>
> 58. The Tribunal also raised with the applicant country information from the Fact Finding Mission report of October 2010 in relation to political violence, noting that report indicated more recent levels of violence were down on that experienced during 2008, that all organisations reported politically motivated violence was "*rare in most urban centres in Zimbabwe*" and that Bulawayo and Harare were noted as relatively safe, and whilst some organisations noted influential MDC supporters could be at risk, ordinary opposition and MDC supporters were not thought to be at any particular risk.
>
> 59. The applicant disagreed with this, saying he had seen an article about violence directed towards MDC members attending a meeting concerning constitutional amendment, and there was other evidence of violence continuing. He also asserted political instability was increasing, and even the US Ambassador had said violence was being experienced because of the failure of the Government of National Unity and the forthcoming elections in June 2011.
>
> …
>
> 63. Following a short break requested by the applicant the Tribunal reconvened. The Tribunal invited the applicant to indicate to it any further issues he wished to raise. He said he feared return because he had witnessed a lot of violence in Zimbabwe before he first came to Australia, and feared the same tactics would be used. He disagreed with country information that might suggest members of the MDC were not under threat, because people could be asked to prove their ZANU-PF loyalty by producing cards or reciting the slogans and as such everyone was at risk.
>
> (emphases in original)

15 It is clear from the matters raised by the Tribunal, and the visa applicant's responses during the hearing that, with the prospect of new elections in the foreseeable future, the question of how volatile and dangerous the situation was "on the ground" in Zimbabwe for people who were actual or perceived supporters of the MDC — but not leaders or persons with a high profile — was a key question in assessing whether the visa applicant was owed protection obligations by Australia for the purposes of Art 1 of the Refugees Convention and s 36(2)(a) of the *Migration Act 1958* (Cth) (**Migration Act**).

16 The Tribunal's reasons record a submission at the hearing by the visa applicant's migration agent and a request for the opportunity to file a post-hearing submission.

> 65. In terms of more current information [the migration agent] said there was a real risk that if the Government of National Unity was not extended or collapsed, that violence would increase, and if the election in 2011 occurred, that violence could well rise to the previous levels. She also asserted ZANU-PF were recruiting youth to be used as a form of violence against opposition members, and that there were instances of violence directed towards ordinary people in urban areas such as Harare in more recent times.
>
> 66. [The migration agent] indicated she would like the opportunity to obtain further information and to address aspects of matters raised by the Tribunal, and asked for three weeks in which to do so. The Tribunal indicated it would adjourn the matter, and not make a decision for at least three weeks to enable her to provide those extra submissions. It also invited her to consider expanding on her claim that the applicant fell into a particular social group comprising young men in Zimbabwe, which it considered a somewhat broad particular social group.

17 The Tribunal's reasons then describe the receipt of the post-hearing submission in the following terms:

> 67. On 21 February 2011 the Tribunal received a further submission from the applicant's adviser. In that submission it was asserted the applicant faced risk on return to Zimbabwe because of his membership of particular social groups, being "a young Zimbabwean man", "Zimbabwean youth" or "returnee from a Western country". That submission also provided additional country information, which was said to support the claim the applicant was at risk if he returned to Zimbabwe.

18 Other submissions not relevant to the present appeal were noted in two short following paragraphs. The Tribunal's reasons do not otherwise set out or describe the contents of the post-hearing submission relevant to this appeal or the country information to which it referred.

19 The Tribunal affirmed the delegate's decision to refuse a protection visa. The Tribunal proceeded on the basis that the visa applicant was a MDC member and had attended a "small number of rallies in Zimbabwe as claimed" before coming to Australia. The Tribunal found him to be an "ordinary member or supporter" of the MDC. It accepted that he may have witnessed violent incidents prior to his departure and been subjected to tear gas and police violence at rallies, although it did not accept this conduct was in any way targeted at the visa applicant. It appeared to accept the visa applicant had experienced police or government supporters banging on his house gate and trying to break in, and witnessed them go next door and beat his neighbour up, but the Tribunal found this was "an act of random violence" not directed at the visa applicant or his family.

20 The Tribunal rejected the visa applicant's claims to have a well-founded fear of persecution by reason of his membership of two identified social groups, his status as a "returnee" and someone who had sought asylum in Australia, and his association while in Australia with a group of Zimbabwean students called "ZimVic".

21 As to his fear of persecution by reason of being a member or supporter of the MDC, or by reason of those characteristics being imputed to him by ZANU-PF and government authorities, the Minister accepted on the appeal that the critical finding of the Tribunal is at [87] of its reasons:

> 87. Whilst the Tribunal accepts the applicant is an MDC member it does not accept that simply being a member creates a real chance of persecution. In reaching this conclusion the Tribunal relies on and accepts country information (above) from the UK "*Fact Finding Mission*" which indicates whilst some organisations had noted that influential MDC supporters could be at risk, "*ordinary opposition and MDC supporters were not thought to be at any particular risk*". The Tribunal considers the applicant falls into that category of supporter.
>
> (emphasis in original)

22 The Tribunal repeats this finding in slightly different language at [99] of its reasons, where it states:

> The Tribunal therefore does not consider there is anything more than a remote chance the applicant would face serious harm because of his own identified MDC membership and association….

THE DECISION OF THE FEDERAL MAGISTRATES COURT

23 The relevant ground of review, as expressed in the application before the Federal Magistrates Court, was that the Tribunal's decision was affected by jurisdictional error because it had failed to have regard to the most current information in determining the application for refugee status. This ground turned on the way the Tribunal had dealt with the post-hearing submission, and the material to which it referred. However, as the Federal Magistrate noted in his reasons (*MZYTS v Minister for Immigration & Anor* [2012] FMCA 1109 at [31]), and the visa applicant contended before this Court:

> Ultimately, the Applicant put the argument on the basis that it was either an integer case, in that the Applicant argued that the Tribunal failed to consider the Applicant's risk as a result of the recent development of events since 2010, or a case where the Tribunal had failed to have regard to the most recent material.

24 His Honour identified (at [16]) the "real issue" as:

> …whether or not the reference at para.67 [of the Tribunal's reasons] was a sufficient

> engagement with the material provided by the Applicant's adviser to demonstrate that the Tribunal did have regard to, or take into account or at least consider, the more recent material referred to by the Applicant.

25 The Federal Magistrate considered it significant that none of the post-hearing material (relating to escalating violence) was actually referred to in the Tribunal's reasons, and "nothing since 2010 appears to have been referenced in the decision", although the submission itself was acknowledged in the Tribunal's reasons. His Honour found there was a "stark contrast" between the reports relied on by the visa applicant and the findings of the Tribunal, on an issue that was central to its decision-making process.

26 The Federal Magistrate found (at [37]) the Tribunal's decision affected by jurisdictional error either because it failed to have regard to the most recent country information available to it (in the sense of "engaging" with that material, as it found the authorities required) or because it failed to consider the visa applicant's claims as at the time of the Tribunal decision, rather than at a time prior to the 2010 reports, upon which the Tribunal relied.

ISSUES IN THE APPEAL

27 The Minister's appeal centred, as his counsel submitted, on three issues:

1. Whether the Federal Magistrate was entitled to find particular material had not been considered by the Tribunal. The Minister submitted his Honour was in error reaching that decision. A finding in favour of the Minister on this ground disposes of the appeal.

2. If his Honour was entitled to make that finding, the second issue is whether the Tribunal's failure to consider that material constitutes a jurisdictional error, or an error within jurisdiction. The Minister submitted, if anything, it is an error of the latter kind because it is simply a failure to consider "mere" pieces of evidence.

3. Alternatively, the Minister submitted that, insofar as his Honour found the Tribunal's decision to be affected by jurisdictional error because of a failure to consider the most recent material available, there is no such kind of jurisdictional error.

28 Prior to the appeal, the parties had also been invited to make additional written submissions about the decision of Robertson J in *Minister for Immigration and Citizenship v*

SZRKT (2013) 212 FCR 99 (***SZRKT***). The relevance and correctness of this decision was also addressed in oral argument by both parties. At the hearing, the Court was informed that this decision was the subject of an application in the High Court for special leave to appeal by the Minister. After the hearing, on 11 October 2013, the Minister's application for special leave to appeal was refused. The Minister submitted Robertson J's decision was erroneous in several respects. For reasons which we explain in more detail below, we agree with Robertson J's characterisation of the concept of jurisdictional error, but it is otherwise unnecessary for us to express any view on the decision in *SZRKT*.

FIRST ISSUE: DID THE TRIBUNAL CONSIDER THE POST-HEARING SUBMISSION AND THE COUNTRY INFORMATION REFERRED TO IN IT?

What was contained in the post-hearing submission and the country information to which it referred?

29 The post-hearing submission dated 21 February 2011 from the visa applicant's migration agent addressed a number of issues which had arisen in the hearing before the Tribunal, not all of which are relevant to the appeal. However, on the relevant matters, the migration agent made the following submissions:

> 1. Updated Country Information
>
> The situation in Zimbabwe remains volatile and, in our submission, increasingly dangerous for actual or perceived MDC supporters. The United Kingdom (UK) has expressed 'deep concern' about the 'upsurge in political violence and intimidation in recent weeks' and the European Union has extended sanctions against Zimbabwe for another year. The UK Foreign Secretary has further observed that '[e]ssential reforms to promote the rule of law, human rights and democracy, as agreed under the Global Political Agreement, have not yet been implemented.
>
> Violent attacks have been reported both in Harare and in more rural parts of the country. On 2 February 2011, it was reported that 'Zanu-PF has in the past few weeks unleashed violence on suspected MDC supporters especially in Harare's high density suburbs of [three named areas] and already dozens of people have been hospitalised'. We recall that [one named area] is the applicant's home area.
> …
>
> The BBC has also reported that MDC supporters have been forced to flee violence in the capital, and claims that the police have even been arresting those that fled:
> …
>
> Concerns about the current and escalating violence in Zimbabwe have also been raised by non-governmental organistaions [sic] in the country, who have called on the Southern African Development Community and the African Union to 'intervene in response to the recent escalation of political violence amid expectations of 2011 elections':

…

That the Unity Government failed to bring durable or substantial change to the situation in Zimbabwe is made clear in the recently released Human Rights Watch report, which states as follows:

> Two years into Zimbabwe's power-sharing government, President Robert Mugabe and the Zimbabwe African National Union- Patriotic Front (ZANU-PF), have used violence and repression to continue to dominate government institutions and hamper meaningful human rights progress. The former opposition party, the Movement for Democratic Change (MDC), lacks real power to institute its political agenda and end human rights abuses.
>
> The power-sharing government has not investigated widespread abuses, including killings, torture, beatings, and other ill-treatment committed by the army, ZANU-PF supporters, and officials against *real and perceived* supporters of the MDC.
>
> Political Violence during Constitutional Outreach Program
>
> In 2010 the power-sharing government began a series of community outreach meetings called the Constitutional Outreach Program to elicit popular views on a new constitution. *However, the meetings were marked by increasing violence and intimidation, mainly by ZANU-PF supporters and war veterans allied to ZANU-PF.* In February police disrupted MDC-organized preparatory constitutional reform meetings, beat participants, and arbitrarily arrested 43 people in Binga, 48 in Masvingo, and 52 in Mt. Darwin. *The violence worsened in Harare, the capital, and led to the suspension of 13 meetings in September.*
>
> On September 19, ZANU-PF supporters attacked MDC supporters and prevented some from attending an outreach meeting in Mbare, Harare. The meeting ended when violence broke out. *ZANU-PF supporters and uniformed police assaulted 11 residents and MDC supporters from Mbare with blunt objects as they left the meeting. One resident, Chrispen Mandizvidza, died from his injuries on September 22.'* …

In our submission, country information indicates that incidents of human rights abuses and serious political violence in Zimbabwe are growing and that persons such as the applicant face a real risk, one that is not remote or fanciful, of persecution in Zimbabwe.

(footnotes omitted; emphases in original)

30 The country information quoted in the submission is not directed at risks for "high-profile" MDC members or supporters. It may not use the adjective "ordinary", but a plain reading of the source material demonstrates the commentators are describing risks to large numbers of rank and file MDC supporters and members, who were at constitutional reform meetings, present in public places like shopping centres, or trying to flee the capital to escape the violence. The information itself also expressly refers to risks to those perceived to be MDC supporters.

Failure to consider may not be an appropriate description

31 Before both the Federal Magistrates Court and this Court the asserted error in the Tribunal's decision was often described as a "failure to consider more recent information". That description might suggest as a corollary some kind of freestanding legal obligation on the Tribunal to consider the most recent information. In our opinion, while those descriptions may explain the path leading to error, the error itself is a failure to perform the statutory task imposed on the Tribunal by the relevant provisions of the Migration Act.

32 The Tribunal's task on review under s 414 of the Migration Act is to form, for itself and on the material before it, the requisite state of satisfaction under s 65 of the Migration Act in respect of the criterion (or criteria) for a visa in issue before it. Relevantly, and almost uniformly for the Tribunal (putting complementary protection to one side), the criterion is the one set out in s 36(2)(a) of the Migration Act, which picks up Art 1 of the Refugees Convention.

33 The occasion on which the application of this criterion is to be considered is the prospect that a person currently in Australia will be returned to her or his country of nationality, the risks if any she or he might then face, and the reasons she or he may face those risks. It is, as the authorities have consistently emphasised, a predictive exercise involving speculation as to circumstances in the future on the basis of material in the present, and what has happened to the person in the past: *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (***Chan***) at 391, 432; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 (***Guo***) at 571-573.

34 Critically to the determination of the issues raised in this appeal, lawful formation of that state of satisfaction (one way or the other) involves, first, a correct understanding of the basis (or bases) on which the visa applicant says she or he has a fear of persecution in her or his country of nationality and, second, a correct understanding of how, in respect of each of the bases articulated, it is to be determined whether that fear is objectively well founded.

35 The determination of whether there is an objective basis for the person's fear is the central part of the predictive or speculative task referred to in *Chan* and *Guo*. It can only be undertaken by reference to an assessment of, and findings of fact about, the circumstances in the person's country of nationality at the time the person is likely to be returned there. It is

appropriate to recall how the task was described by Gummow and Hayne JJ in *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 (***S395***) at [73]-[76]:

> The objective element requires the decision-maker to decide what may happen if the applicant returns to the country of nationality. That is an inquiry which requires close consideration of the situation of the particular applicant. It requires identification of the relevant Convention reasons that the applicant has for fearing persecution. It is necessary, therefore, to identify the "reasons of race, religion, nationality, membership of a particular social group or political opinion" that are engaged.
>
> Because the question requires prediction of what may happen, it is often instructive to examine what has happened to an applicant when living in the country of nationality. If an applicant has been persecuted for a Convention reason, there will be cases in which it will be possible, even easy, to conclude that there is a real chance of repetition of that persecution if the applicant returns to that country. Yet absence of past persecution does not deny that there is a real chance of future persecution.
>
> Again, because the question requires prediction, a decision-maker will often find it useful to consider how persons like the applicant have been, or are being, treated in the applicant's country of nationality. That is useful because it may assist in predicting what may happen if the applicant returns to the country of nationality. But, as with any reasoning of that kind, the critical question is how similar are the cases that are being compared.
>
> Because reasoning of the kinds just described is often employed, it is perhaps inevitable that those, like the Tribunal, who must deal with large numbers of decisions about who is a refugee, will attempt to classify cases. There are dangers in creating and applying a scheme for classifying claims to protection. Those dangers are greatest if the classes are few and rigidly defined. But whatever scheme is devised, classification carries the risk that the **individual** and **distinctive features** of a claim are put aside in favour of other, more general features which define the chosen class.
>
> (emphasis added)

36 In that sense, to say there has been a "failure to consider recent information" or a "failure to consider a claim" may be no more than descriptions or explanations of the manner in which the Tribunal's task has miscarried, but it is the miscarriage of the task which constitutes the jurisdictional error.

The error revealed by the Tribunal's reasons

37 The visa applicant claimed, and the Tribunal accepted, that he was an "ordinary" member and supporter of the MDC. He claimed — before, during and after the hearing before the Tribunal (both himself and through his adviser's submissions) — that political violence in Zimbabwe went in cycles around the election periods and that the foreshadowed elections in 2011 meant there was an increased risk of politically-motivated violence by ZANU-PF supporters, either sanctioned or at least not controlled by the Zimbabwean

authorities, against those people supporting the MDC, or those perceived to be doing so. The Convention basis for protection which he articulated then was that, at the time of the Tribunal hearing in early 2011 and for the foreseeable future after early 2011, there were growing risks of politically-motivated violence for people like him in Zimbabwe, if he were to be returned there. This basis, together with the terms of ss 65 and 36(2)(a), read with the content of Art 1 of the Refugees Convention, required the Tribunal to assess and determine what might happen to him if he were compelled to return there in 2011, or in the near future thereafter.

38 That task could not be lawfully undertaken without a consciousness and consideration of the submissions, evidence and material advanced by the visa applicant most likely to give the Tribunal an accurate picture of the ongoing circumstances on the ground in Zimbabwe for him if he were to be returned there. While it is most certainly the case that "[i]t is for the applicant to advance whatever evidence or argument she [or he] wishes to advance in support of her [or his] contention that she [or he] has a well-founded fear of persecution for a Convention reason", the Tribunal "must then decide whether that claim is made out": *Abebe v Commonwealth* (1999) 197 CLR 510 at [187]. Evidence and material about what it was like for "ordinary" MDC supporters and members in 2002, or 2007, or 2010 might give the most accurate picture, but that decision could only be made by the Tribunal after evaluation of all the pertinent material put forward by the visa applicant in support of the specific claim (and, of course, any contradictory information to which the Tribunal chose to make reference), including the most recent material and a decision about whether or not things had changed, were changing, were likely to change or had stayed much the same. The evaluation, in the context of a country like Zimbabwe and in the context of the very specific terms of the visa applicant's claim, needed to include consciousness about the cycle of political violence around foreshadowed and/or actual elections, and other circumstances particular to both the visa applicant and to his country of nationality. This much is clear from the decision of the High Court in *S395*.

39 The Tribunal's reasons do not disclose that it understood and undertook this task. Rather, the reasons — including what is expressed and what is not — disclose the Tribunal did not assess in any real or active way what the situation would be in mid to late 2011 or thereafter for an "ordinary" MDC supporter being returned to Zimbabwe. Nor do the reasons disclose any consciousness that what the visa applicant was articulating (through his own

statements and the post-hearing submission of his adviser) was that there was an increased risk of generalised politically-motivated violence due to the foreshadowing by President Mugabe of new elections for later in 2011 and the breakdown of the transitional government's authority; these events arising, critically, after the publication of the 2010 UK Border Agency fact-finding mission report.

40 In the part of the Tribunal's reasons headed "Country Information" there are two sub-headings — "General information" and "Returnees to Zimbabwe". Under the heading "General Information", the Tribunal extracts information from the 2009 US State Department country report on Zimbabwe (published in March 2010), and an October 2010 Operational Guidance Note for Zimbabwe from the UK Border Agency. Under the heading "Returnees to Zimbabwe" the Tribunal extracts further information from three UK Border Agency publications, namely, the "Country of Origin Information Report" 2009, the "Country of Origin Information Report" 2010 and the "Report of the Fact Finding Mission to Zimbabwe" (**FFM**) originally published on 21 September 2010, but reissued on 27 October 2010. From the extracts in the Tribunal's reasons, these documents do not appear to contain reports of any major or specific incidents during 2010. The executive summary to the FFM (extracted by the Tribunal) includes the statement that: "*While some organisations noted that influential MDC supporters could be at risk, ordinary opposition and MDC supporters were not thought to be at any particular risk*".

41 As the Tribunal's reasons disclose (at [58]), this is the statement which was put, verbatim, to the visa applicant at the hearing on 31 January 2011. This is also the statement, verbatim, which appears in the single finding of the Tribunal at [87] of its reasons, to which we have already referred. Chronologically, in between these two events is the post-hearing submission and the considerable material to which it refers. Nothing in the Tribunal's reasons suggests any re-evaluation by the Tribunal of what it put to the visa applicant at the hearing on this point, in the light of the post-hearing submission and the additional country information. Rather, the reasons suggest no consciousness of the contents of these post-hearing materials (as opposed to their existence), although the effect of that material was to support a proposition that circumstances in Zimbabwe had become increasingly dangerous for actual or perceived MDC supporters, and incidents of human rights abuses and serious political violence in Zimbabwe were growing during 2011. We are not suggesting the

Tribunal was bound to accept the effect of that material, we are emphasising the absence of any consideration of it.

42 There are no references at all in the "Country Information" part of the Tribunal's reasons to the country information referred to in the post-hearing submission. Nor is any of that country information extracted. Unsurprisingly then, there is then no subsequent discussion by the Tribunal of the strengths or weaknesses of the more recent country information, as it may or may not have applied to the "individual features" of the claim before it.

43 The Tribunal seems to have proceeded on an assumption that the situation as reported by the UK Border Agency fact-finding mission in October 2010 was the current situation in Zimbabwe by reference to which it could decide if the visa applicant's fears of persecution were well founded. It refers to the UK fact-finding mission report in [104] of its reasons as "more recent information", although the extracts from this report in the Tribunal's reasons do not appear expressly to refer to anything occurring later than 2009, except perhaps an unparticularised and undated observation that low-level violence, or the threat of violence had increased with "discussion about the new constitution". In fact, there was a body of more recent and detailed information than that, provided by the visa applicant's adviser.

44 Finally, despite country information extracted by the Tribunal containing many references to the volatility of the situation in Zimbabwe, and the tendency of politically-motivated violence to follow election cycles, and despite both the visa applicant himself and his adviser being recorded in the reasons as expressly putting to the Tribunal that the circumstances in mid 2011 and thereafter involved increased risk of such violence, what is also absent from the Tribunal's reasons is any evaluation of the situation in Zimbabwe at the time of its decision. The absence of any such evaluation in the face of what the visa applicant and his adviser submitted, and in the context of the Tribunal's statutory task, can only signify a constructive failure to exercise jurisdiction.

45 The absence of any evaluation of the post-hearing submission on the point and the material said to support it is all the more telling given the Tribunal did not make its decision until November 2011. It was at that date the statute, read in light of the authorities, required the Tribunal to consider whether or not it was satisfied that the visa applicant's fear of

persecution in Zimbabwe by reason of being an actual or perceived supporter of the MDC was objectively well founded. Where the Tribunal's reasons disclose no evaluation at all of the latest information or evidence available to it, we do not consider it can be inferred that it formed the state of satisfaction required of it.

46 Although in one sense this might be described as a "failure to consider" most recent country information, or a failure to consider a claim about increased risk of persecution on return to Zimbabwe, in our opinion the error is, fundamentally, a failure to form the state of satisfaction (one way or the other) required for the purposes of the review in respect of the criterion in s 36(2)(a). Judicial review of the formation, by an inferior tribunal, of the state of satisfaction required by the empowering provision may be, as the High Court pointed out in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 (***Kirk***) (at [64]) best described as a "functional exercise" (citing Jaffe, 1957). Affixing a pre-existing label or meta-description to what a decision-maker did in purported exercise of a statutory power, for example "a failure to consider", may assist the analysis, although it may also provide a distraction. To the extent Robertson J made similar observations in *SZRKT* at [98] and [111], we respectfully agree.

47 On one view, the Tribunal's finding at [88] of its reasons that it did not find credible the visa applicant's claim that he would explicitly or actively support the MDC might suggest that the error we have identified above is immaterial. For the following reasons, however, we reject this proposition. First, that submission was not developed by the Minister in oral argument at all. Secondly, we would reject it in any event because it does not overcome the fact that, as his post-hearing submissions and additional material made clear, the visa applicant's case was put on the basis of him being both, and either, a member and active supporter of the MDC and the Tribunal accepted his claim to be a MDC member (and in this sense, an "ordinary supporter"). The country information forwarded to the Tribunal after the hearing dealt with risks confronting both MDC members and active supporters.

No inference available that the Tribunal preferred other material

48 The Minister's submission was that this first question — whether the Tribunal has in fact ignored or overlooked any recent and significant material which is centrally relevant to the decision — can be answered by an inference to be drawn from the Tribunal's reasons. He submitted the Court could not infer the Tribunal had ignored any such material. Rather,

he submitted the Tribunal simply preferred other material which was probative of the question about what would happen to the visa applicant on return to Zimbabwe, as an "ordinary" MDC member and supporter.

49 The Court is entitled to take the reasons of the Tribunal as setting out the findings of fact the Tribunal itself considered material to its decision, and as reciting the evidence and other material which the Tribunal itself considered relevant to the findings it made: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (***Yusuf***) at [10], [34], [68]. Representing as it does what the Tribunal itself considered important and material, what is present — and what is absent — from the reasons may in a given case enable a Court on review to find jurisdictional error: see *Yusuf* 206 CLR 323 at [10], [44], [69].

50 We do not accept the Minister's submission. The Tribunal's reasons disclose no process of weighing evidence and preferring some over the other. In the context of two or more pieces of apparently pertinent, but contradictory, evidence an expression of a preference for some evidence over other evidence generally requires an articulation of the different effects of the evidence concerned, and then some indication as to why preference is given. All these are matters for the trier of fact. The absence from the recitation of country information of the material referred to in the post-hearing submissions is indicative of omission and ignoring, not weighing and preference.

Consistency with other authorities

51 None of this is to trespass on existing authorities about the nature of the obligation in s 430 of the Act and the process of drawing inferences from statements of reasons by the Tribunal. We accept that the judgment of French CJ and Kiefel J in *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594 (***SZGUR***) at [31] (Heydon and Crennan JJ agreeing) draws a distinction between the omission of a matter from the Tribunal's reasons as indicating the Tribunal did not consider the matter material, and that omission indicating the Tribunal did not consider the matter at all. Gummow J makes a similar point in his judgment (Heydon and Crennan JJ agreeing). For present purposes, the important point from *SZGUR* appears in Gummow J's judgment (241 CLR 594 at [69]) about the effect of the passages in *Yusuf* (206 CLR 323 at [10], [34] and [68]), to which we have already referred and will return to shortly. *SZGUR* concerned an alleged failure by the Tribunal to deal with a request by a visa applicant that the Tribunal arrange for an independent assessment of his client's mental

health, on the basis that the visa applicant's mental health affected his memory and his appearance of credibility. At [69] Gummow J stated:

> Contrary to the reasoning in the Federal Court, para (b) of s 430(1) does not create any requirement that the Tribunal record generally "what it did" in conducting its review, and does not require the Tribunal, in every case, to describe or state the procedural steps taken by it in reviewing the relevant decision. The obligation under s 430(1) **focuses upon the thought processes of the Tribunal in reaching its decision on what it considers to be the material questions of fact** (63). The absence of reference in the Tribunal's reasons to its consideration of the request for a medical examination of the first respondent is to be contrasted with an absence of reference to findings of fact or to evidence and material upon which such findings are based. Section 430(1) deals with the latter in paras (c) and (d); it does not deal with the former. The statute does not require the Tribunal to disclose procedural decisions taken in the course of making its "decision on a review". There may be situations where a procedural decision forms part of the Tribunal's "reasons for the decision" under para (b), but that is not so here.
>
> (emphasis added)

52 In the present case, the issue is squarely whether the Tribunal's reasons do identify the material questions of fact necessary for it to address the claims made by the visa applicant, and how the evidence and material it has set out may be used to infer it has, or has not, addressed those claims. It is not, as in *SZGUR*, a procedural issue. Further, the omission cannot be sensibly understood as a matter considered, but not mentioned, as contemplated by French CJ and Kiefel J at [31] of *SZGUR*. The issue here was, as we have explained above, an essential integer of the visa applicant's claim; evidence of which was led to consolidate his claim and contradict information raised by the Tribunal at the hearing. In the particular circumstances of this claim, **if** the material had been considered, one could expect that it would be referred to, even if it were then rejected.

53 It is uncontroversial to say that, before a court on judicial review of these matters, an applicant assumes the burden of persuading the court to draw the inference of a failure to deal with a claim or consider a matter the tribunal was obliged to consider, or make the finding of jurisdictional error, for which she or he contends. Some of the decisions to which the Minister referred the Court make this plain: for example, *SZDXZ v Minister for Immigration and Citizenship* [2008] FCAFC 109 at [25]; *SZGUR* 241 CLR 594 at [67]. The visa applicant in the present appeal accepted that burden and has, in our opinion, discharged it.

54 We also accept that a line must be maintained between a court's emphatic disagreement with the merits of a tribunal's reasoning process, and the identification of a level of irrationality, unreasonableness or lack of proportionality which reveals a constructive failure to exercise jurisdiction by a tribunal. That is the distinction identified in *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 (***SZJSS***) at [34]. This distinction is not, however, relevant to our analysis of the Tribunal's failure in this case to **address a claim** made by the visa applicant, and therefore to perform its statutory task.

Relevance of the s 430 obligation

55 The Minister submitted a question raised in the present appeal is whether the Tribunal was obliged to demonstrate in its statement under s 430(1) of the Migration Act an "engagement" with the information in its reasons, for example, by explaining why it did not rely on the information or why it preferred to rely on other country information in preference to the additional information.

56 He also submitted that it is wrong to infer from the absence of any discussion of the additional country information in the Tribunal's reasons that the Tribunal overlooked or failed to consider that additional country information.

57 A focus on whether the Tribunal has complied with its obligation in s 430 of the Migration Act is not a necessary part of the legal analysis in the present case. In different circumstances (particularly, a circumstance where the Tribunal had made an express finding rejecting certain evidence), the observations of McHugh J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 58 ALD 609 at [65], about there being no legal obligation on the Tribunal to give a "line-by-line" refutation of evidence where the Tribunal makes contrary findings of fact, may be important. They do not assist the resolution of this appeal. We are not concerned with the quality of the Tribunal's reasons, or with its compliance with s 430. We are concerned with what its reasons, as they are, reveal about the Tribunal's performance of its statutory task.

58 Against this background, we now return to *Yusuf*. The conclusions reached by the Court in *Yusuf* concern more than the nature of the obligation in s 430: they concern the consequences for review of a decision of the Tribunal either under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or s 75(v) of the *Constitution*, given the nature of

the reasons obligation. What matters about *Yusuf* for the determination of this appeal is how the Court approached the possible legal consequences in respect of what is present, and what is absent, from a tribunal's written reasons.

59 Aside from Kirby J in dissent, all members of the Court agreed about the nature of the obligation in s 430, critically that it required the Tribunal to set out the findings it had made, and the evidence or information it considered material. Gleeson CJ then described (at [10]) the possible legal consequence of a tribunal complying with this obligation:

> By setting out its findings, and thereby exposing its views on materiality, the Tribunal may disclose a failure to exercise jurisdiction, or error of a kind falling within a ground in s 476(1) other than s 476(1)(a), or may provide some other ground for judicial review.

60 Gaudron J stated (at [35] and [44]):

> The corollary to the construction of s 430(1)(c) of the Act set out above is that it is to be inferred from the absence of a reference to, or, a finding with respect to some particular matter that the Tribunal did not consider that matter to be material. As will later appear, there may be cases where that will indicate error of a kind that will ground review under s 476(1) of the Act or, even, jurisdictional error which will ground relief under s 75(v) of the Constitution.
> …
>
> It follows from what has been written above that the failure of the Tribunal to make findings with respect to a particular matter may, at the same time, reveal failure to exercise jurisdiction, whether actual or constructive, and, also, failure to conduct a review as required by the Act.

61 McHugh, Gummow and Hayne JJ stated (at [69]):

> Understanding s 430 as obliging the Tribunal to set out what were its findings on the questions of fact it considered material gives the section important work to do in connection with judicial review of decisions of the Tribunal. It ensures that a person who is dissatisfied with the result at which the Tribunal has arrived can identify with certainty what reasons the Tribunal had for reaching its conclusion and what facts it considered material to that conclusion. Similarly, a court which is asked to review the decision is able to identify the Tribunal's reasons and the findings it made in reaching that conclusion. The provision entitles a court to infer that any matter not mentioned in the s 430 statement was not considered by the Tribunal to be material. This may reveal some basis for judicial review by the Federal Court under Pt 8 of the Act, or by this Court in proceedings brought under s 75(v) of the Constitution. For example, it may reveal that the Tribunal made some error of law of the kind mentioned in s 476(1)(e) of the Act, such as incorrectly applying the law to the facts found by the Tribunal. It may reveal jurisdictional error. The Tribunal's identification of what *it* considered to be the material questions of fact may demonstrate that it took into account some irrelevant consideration or did not take into account some relevant consideration.

(citations omitted; emphasis in original)

Conclusion on the first issue

62 As we have set out above, the visa applicant's claim to be, or to be perceived to be, a member or supporter of the MDC if he were to have to return to Zimbabwe required the Tribunal to form a state of satisfaction about what might happen to him, and why, given the prevailing circumstances in Zimbabwe on his return. As we have also set out above, the Tribunal's reasons do not disclose any consciousness, nor any consideration, of those prevailing circumstances in any part of 2011, nor of the effect of the election cycle in Zimbabwe. They disclose no consciousness, nor any consideration, of what were submitted to be increasing incidents of political violence directed not at high-profile people but at "ordinary" MDC supporters or members. The absence of these matters from the reasons, combined with the centrality of them to the visa applicant's claimed fear of persecution as clearly articulated to the Tribunal before, during and after the hearing, allow us comfortably to infer that the Tribunal did not consider these matters, or consider these matters material to the task of asking whether or not the visa applicant had a well-founded fear of persecution. For the Tribunal to form the latter view reveals a misunderstanding of its statutory task on review at the most fundamental level. A failure to consider the claim advanced by a visa applicant is plainly and uncontroversially a failure to perform the statutory task imposed on the Tribunal. The absence of these matters from the reasons allows, as *Yusuf* recognises could be the case, a conclusion of error on judicial review.

SECOND ISSUE IN THE APPEAL: IS THE ERROR JURISDICTIONAL?

63 It will be apparent from our reasoning to this point that it is our opinion the error made by the Tribunal is jurisdictional. The Tribunal failed substantively to perform its statutory task. Its reasons do not disclose it formed a state of satisfaction one way or the other about whether as at November 2011 there was a real chance of the visa applicant suffering persecution, by reason of him being or being perceived to be a MDC supporter and member, in light of the claims that politically-motivated violence in Zimbabwe was once again increasing.

64 The Minister's contention that any error was of a factual nature, not going to jurisdiction, was developed in large part by reference to a line of cases said to support a distinction between a "relevant consideration" or claim and a "mere failure to deal with evidence". We are not persuaded the line is as bright, or the distinction as encompassing, as

the Minister submits. As already discussed above, the concept of "relevant consideration" can be ill-suited to an analysis of the Tribunal's task in forming a state of satisfaction about the criterion in s 36(2)(a), beyond the obvious proposition that this criterion requires a decision-maker to take into account (and evaluate) the reasons advanced by a visa applicant for her or his fear of persecution. There is no inconsistency between the approach we have taken and the observations of Allsop J in *Rezaei v Minister for Immigration and Multicultural Affairs* [2001] FCA 1294 at [57], relied on by the Minister. In that case, particular conduct — the endorsement of the applicants' passports with protection visas — was contended to be a relevant consideration in the sense raised in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (***Peko-Wallsend***). Allsop J rejected that contention. That issue finds no parallel with the issues in this appeal. The issue here does not pertain to particular conduct said to be neglected and a relevant consideration. Rather, it pertains to a fundamental feature of the visa applicant's claim, *consideration* of which is an essential feature of the Tribunal's statutory task.

65 Here, the visa applicant's contention has never been that the Tribunal failed to take into account a piece of evidence. Rather, it is that the Tribunal did not perform its statutory task, because it failed to determine the visa applicant's claim that the risk to him on return to Zimbabwe from early 2011 onwards had increased because of the election cycle and consequent political violence in that country, together with his status as an actual or perceived MDC supporter.

66 The visa applicant's contention is correct, and the learned Federal Magistrate was correct to so decide.

67 We consider this approach to be consistent with *Yusuf*, with *SZJSS*, with *Kirk* and with the principles outlined by Robertson J in *SZRKT* at [98] and [111].

68 In *SZJSS* at [27]-[28] (a passage extracted by Robertson J in *SZRKT* at [96]) the joint judgment of the Court recognised as a proposition flowing from *Yusuf* that "*jurisdictional error may include ignoring relevant material in a way that affects the exercise of a power*". In this passage, the Court is not dealing with relevant considerations in the *Peko-Wallsend* sense. Rather, as we consider Robertson J recognised in *SZRKT* (at [97]), it is describing an example of jurisdictional error where, in a given case, ignoring relevant material

demonstrated a failure to perform the statutory task cast upon it by the combined provisions in the Migration Act because of the nature of the claims made and the nature of the material ignored.

69 In *Kirk* (at [60]-[70] and especially [69]), the High Court made express what has always been implicit in the use and application of the term "jurisdictional error". Specifically, the Court explained that jurisdictional error is a term that takes its colour from its context and that, when the High Court in *Craig v South Australia* (1995) 184 CLR 163 explained why it was not prepared to follow *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 and why tribunals, unlike courts, could not "authoritatively" determine questions of law, there lay behind the use of the term "authoritatively" unexpressed premises about what is meant by jurisdictional error. The Court did not seek to define the concept in *Kirk*, but rather acknowledged the futility of doing so, since limits on power with respect to a particular decision can only be found in the relevant statute, in the context of a particular decision, particular reasons and particular evidence and material on which the decision is based.

70 With respect, we consider this is the conclusion reached by Robertson J in *SZRKT*, most directly expressed at [98], where his Honour states that the identification of jurisdictional error cannot "put out of account the actual course of decision-making by the Tribunal" and cannot proceed "by reference to categories or formulas", observing that "there are many ways, actual or constructive, of failing to consider the claim". His Honour develops this at [111] by disavowing any jurisdictional/non-jurisdictional distinction between claims and evidence and instead finding, correctly in our respectful opinion, that the "fundamental question must be the importance of the material to the exercise of the Tribunal's function and thus the seriousness of any error". We agree with his Honour's analysis.

71 How Robertson J applied this analysis to the case before him is not a matter we need to examine on this appeal.

THIRD ISSUE IN THE APPEAL: IS A FAILURE TO CONSIDER MOST RECENTLY AVAILABLE INFORMATION A JURISDICTIONAL ERROR?

72 As we observed at the outset of these reasons, to say the flaw in the Tribunal's decision is "failing to consider most recent information" is an inapt description. In this context something must be said of using the language of "considering" a matter or issue.

The statutory task here in issue differs from the one in *Tickner v Chapman* (1995) 57 FCR 451 (***Tickner***), where the verb "consider" appeared in the statutory obligation itself. In that circumstance, some construction must be given to what Parliament meant when it used that verb in describing a ministerial function, and that is what the Full Court did in *Tickner*. Here, the statutory task is described at a broader level and the question whether the state of satisfaction about whether a person is owed protection obligations under Art 1 was lawfully formed will not necessarily be answered by expansive definitions of what the word "consider" means.

73 Whatever might be the general principle that administrative decision-making should be based on the most up-to-date information (see *Peko-Wallsend* 162 CLR 24 at 45) in the context of decision-making about s 36(2)(a) of the Migration Act and Art 1 of the Convention, attention to current information is not merely preferable, it is a core aspect of lawful formation of a state of satisfaction. This is, as we have endeavoured to explain, because of the predictive and speculative nature of the task involved in determining whether a person's fear of persecution for a Convention reason on return to her or his country of nationality is well founded.

74 That is not to say decision-makers cannot rely on information which is several years old. They may do so lawfully as part of a weighing process after considering all information available to them, and deciding which information best and most reliably supports the prediction of future risk they are called on to make. Perhaps more recent information simply confirms older and more detailed information. Perhaps the older information is more specific to the visa applicant's circumstances. Perhaps more recent information is from less reliable, or tainted, sources. There are many possibilities about why a decision-maker may choose, lawfully, to rely on older information and still perform the task required by s 36(2)(a) and Art 1. In such cases, one would expect the Tribunal's reasons to disclose this kind of evaluation process, and the conclusion it reached would be within its jurisdiction.

75 We agree, with respect, with the approach taken by Rares J in *SZJTQ v Minister for Immigration and Citizenship* (2008) 172 FCR 563 at [36]-[42]. That approach is consistent with what we have identified as the Tribunal's statutory task under the Migration Act in relation to s 36(2)(a) and Art 1 of the Refugees Convention. The Minister submitted that the distinction drawn by Rares J at [37] between two statements by Mason J in *Peko-Wallsend*

(162 CLR 24 at 39-42 and 45 respectively) was wrong. We reject that submission. Recalling first that Mason J was considering these matters in the context of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and not s 39B of the *Judiciary Act 1903* (Cth) or s 75(v) of the *Constitution*, we consider his Honour was articulating two separate, but related, principles. In introducing that part of his reasons dealing with this, his Honour said (at 42):

> In the present case, the respondents submit that the Minister, in failing to consider the submissions which they had made to his predecessors, neglected to take into account a consideration which he was bound to take into account in making his decision. It is convenient to divide this central issue into two separate, but related, questions. The first is whether the Minister is bound to take into account the comments on detriment which the Commissioner is required by s 50(3)(b) of the Act to include in his report to the Minister. The second is whether he is also bound, as opposed to merely entitled, to take into account submissions made to him which correct, update or elucidate the Commissioner's comments on detriment.

76 Having found (at 44) by implication from the statute that the Commissioner's comments on detriment were a relevant consideration, Mason J then described it as "but a short and logical step" to find that consideration of that factor must be based on the most recent and accurate information to hand. After applying that approach to the facts before him, Mason J continued (at 45):

> In one sense this conclusion may be seen as an application of the general principle that an administrative decision-maker is required to make his decision on the basis of material available to him at the time the decision is made. But that principle is itself a reflection of the fact that there may be found in the subject-matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker.

77 In that passage it is clear Mason J makes a separate statement of principle about the use by administrative decision-makers of the most current material available. Of course we have found that the subject matter, scope and purpose of s 36(2)(a) of the Migration Act requires such an approach in any event, so it is unnecessary to rely on any more general implication. Nevertheless, we agree with Rares J that Mason J's judgment does articulate two distinct principles.

CONCLUSION

78 For the reasons we have stated, the Federal Magistrate was correct to identify jurisdictional error in the Tribunal's decision. We would dismiss the appeal, with costs.

I certify that the preceding seventy-eight (78) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Kenny, Griffiths and Mortimer.

Associate:

Dated: 16 October 2013