FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZXQU v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 15

MIGRATION – Refugee Review Tribunal – failure to consider claim – misconstruction of s.91R(3)(b) of the *Migration Act 1958* – misstatement of relevant tests – whether any impact on decision – application allowed.

Migration Act 1958, ss.91R(3)(b), 91S

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225
Applicant S v Minister for Immigration & Multicultural Affairs (2004) 217 CLR 387
Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 75 ALD 630
Minister for Immigration & Multicultural Affairs v Sarrazola (1999) 95 FCR 517
Sarrazola v Minister for Immigration & Multicultural Affairs [1999] FCA 101
SZJZN v Minister for Immigration & Anor [2007] FMCA 980

Applicant:	MZXQU
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	MLG 675 of 2007
Judgment of:	Riley FM
Hearing date:	22 November 2007
Date of last submission:	22 November 2007
Delivered at:	Melbourne
Delivered on:	7 February 2008

REPRESENTATION

Counsel for the Applicant:	John A Gibson
Solicitors for the Applicant:	Victoria Legal Aid
Counsel for the First Respondent:	Sharon Moore
Solicitors for the First Respondent:	Australian Government Solicitor

DECLARATION

The decision of the second respondent made in matter 071082719 is unlawful, void and of no force and effect.

ORDERS

(1) There be an order in the nature of certiorari bringing in to court and quashing the decision of the second respondent in matter number 071082719 made on 2 May 2007.

(2) There be an order in the nature of prohibition prohibiting the respondents from giving effect to that decision.

(3) There be an order in the nature of mandamus requiring the second respondent to rehear and determine, according to law, the applicant's application for review of the decision of the delegate of the first respondent that was made on 4 December 2006.

(4) The first respondent pay the applicant's costs fixed in the sum of $5,000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 675 of 2007

MZXQU
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

And

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application seeking judicial review of a decision of the Refugee Review Tribunal which affirmed a decision refusing to grant a protection visa to the applicant.

2. The applicant is a 46 year old Burmese Muslim and Rohingya. He claimed that he faced persecution in Burma on account of his race, religion and his own and his family's known opposition to the government.[1] The applicant claimed that his two elder brothers were involved in the 1974 uprising. He said that his first brother fled, spent 25 years in the jungle, and went on to devise pro-democracy

[1] Last paragraph of the applicant's statutory declaration made on 4 September 2006.

strategies. The applicant said his first brother was eventually granted refugee status in the United States in 1999. He said that his second brother was caught and imprisoned for three years. The applicant said, "My whole family's life was ruined by these events."

3. The applicant said that he participated in demonstrations in 1988 against the military junta. As a result, the applicant said that he was sacked from his position as a video editor with the Burmese Television Service.

4. The applicant claimed that his uncle was a close political associate of Aung San Suu Kyi. The applicant said that in 1991 his uncle was taken into custody and in 1993 his uncle was sentenced to 20 years imprisonment because it was thought that he had used his bookstore as a meeting place for people who had planned the 1988 uprising. The applicant claimed that he had been assisting his uncle and took refuge in a village in 1991. He said that in 1997, he came under suspicion when a letter bomb made in Japan was posted to a prominent General. The applicant had been learning Japanese.

5. The applicant claimed that in 2003, he had assisted his sister in law to join her husband in the United States. He said that he obtained a passport for his sister in law and niece by paying bribes. The applicant said that when the authorities discovered that his sister in law and niece had left their home, they began to suspect the applicant. He said that they regarded his assistance as people smuggling.

6. The applicant claimed that since arriving in Australia in July 2006 he and his wife had communicated by letter, email and telephone. The applicant claimed that the authorities had monitored these communications and knew that he had applied for a protection visa in Australia. He said that his wife had been questioned as a result of the communications.

The Tribunal's reasons for decision

7. The Tribunal said that Burma has an "execrable human rights record" and said that the 1988 uprising was "suppressed ruthlessly and systematically" and its leaders were "hunted down, incarcerated and in many instances, liquidated." However, the Tribunal did not accept

that the applicant was a pro-democracy leader or activist. The Tribunal apparently accepted that the applicant was detained and mistreated after the bombing but found that he was subsequently released without charge and experienced no further repercussions.

8. The Tribunal did not accept that the applicant's uncle was arrested and imprisoned for 20 years for pro-democracy activities. The Tribunal apparently did not accept that the applicant's father and brother were detained because of their involvement in the 1974 uprising. However, even if they had been detained, the Tribunal did not accept that the loss of the family's principal breadwinners resulted in harm to the applicant amounting to persecution.

9. The Tribunal accepted that one of the applicant's brothers lives in the United States. However the Tribunal considered that any risk the applicant faced in connection with assisting his sister in law to leave Burma arose from him being suspected of committing a criminal offence and was therefore not Convention based persecution.

10. The Tribunal considered that the applicant's conduct in engaging in certain communications with his wife was for the sole purpose of strengthening the applicant's claim to be refugee. The Tribunal disregarded the communications under s.91R(3) of the *Migration Act 1958* ("the Act").

Ground 1

11. The first ground of review in the further amended application filed on 22 October 2007 is that the Tribunal:

> *…ignored and/or failed to consider at all the claim of feared harm by reason of membership of a particular social group of family of the brother who was a political activist and was granted refugee status in the United States and imputed political opinion which claim was specifically advanced by the Applicant.*

12. The applicant submitted that the claim of fear of harm by reason of the applicant's association with his brother was specifically and expressly advanced by the applicant in the materials as follows:

a) in a post-hearing submission dated 1 March 2007, the applicant's adviser stated that:

> *As the brother of a political activist granted refugee status in the US and the nephew of a man gaoled for 20 years, presumably for opposition to the government, [the applicant] had reason to fear that the government and its agents could easily detain him and abuse him without anyone having any knowledge of it. He had a very real chance of being persecuted and it was this fear that drove him to continue trying to get away from the attention of the government through hiding at Sitha and more recently through going to Malaysia and Thailand. … It was also because he could be identified as coming from a family that had over the years opposed the government that [the applicant] was fearful of being persecuted.*

b) in a statutory declaration made on 9 January 2007, the applicant enclosed a facsimile from his brother in the United States saying that the applicant had assisted his sister in law and niece to escape from Burma and the applicant's life was now in danger as a result;

c) the delegate in the decision record dated 4 December 2006 noted in the claims section that:

> *His two elder brothers were involved in the 1974 U Thant uprising. One brother escaped to the jungle and was accepted as a refugee in the USA in 1999. In 1986 he was involved in the pro-democracy movement and fled again, leaving his wife behind. The other brother was caught and imprisoned for three years. His prison record continues to affect his life and he has no regular job.*

d) in its decision, the Tribunal noted that in his initial application:

> *…the applicant claimed that he should be accorded refugee status because:*
>
> …
>
> - *His two brothers were involved in the 1974 uprising. One went into hiding and was accepted as a refugee by the USA government in 1999, while the other served a three year prison term, and continues to experience various difficulties, including in finding employment.*

13. The applicant noted that the Tribunal in its decision set out the part of the submission quoted in paragraph 12(a) above. However, the applicant said that the Tribunal's only reference to the applicant's brother was confined to acknowledging that he lives in the United States, and was made in the context of addressing the claim to have assisted the applicant's sister in law and niece to obtain travel documents. Otherwise, the applicant argued, the Tribunal completely ignored and overlooked the applicant's claim to face persecution on the basis of his association with his brother and the consequent imputed political opinion.

14. The first respondent submitted that the Tribunal clearly understood that persecution by reason of the membership of a particular social group is a Convention ground and was a claim made by the applicant. That is correct. The Tribunal said at the commencement of its findings that membership of a particular social group is a Convention ground and said that:

> *The applicant has claimed that he is in need of protection for reasons of his religion, race/ethnicity, political opinion and/or his membership of a particular social group.*

15. However, the Tribunal immediately went on to say:

> *The applicant has variously claimed that he fears returning to Burma because he may be imprisoned for assisting his sister in law, and that the authorities would kill him because of his religion, ethnicity, anti-government views or his past political activities.*

In this passage, the Tribunal appears to be confining its consideration of the particular social group question to the applicant's claim that he assisted his sister in law.

16. The first respondent submitted that the Tribunal was under no obligation to consider a case that was not expressly made or did not arise clearly on the materials before it: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1. However, in my view, the applicant's claim to face persecution by reason of his association with his brother, and a particular social group consisting of their family, was clearly and expressly raised in the passage quoted in paragraph 12(a) above.

17. The first respondent argued that the bulk of the applicant's claims were that he was persecuted for reasons of his religion, ethnicity or political opinion. However, it is not to the point that a particular claim is not given prominence if it is in fact expressly or squarely raised.

18. The first respondent then argued that the applicant's agent did not clearly put to the Tribunal that the brother in the USA had been granted refugee status on political grounds. However, the applicant's agent said in a written submission that the applicant was "the brother of a political activist granted refugee status in the US". It is clearly implicit in that statement that the reason the brother was granted asylum was connected with his political activism. Moreover, the brother provided a statement which said that he had to flee from Burma because of his activities against the Burmese authorities and said that he was granted refugee status in the USA. That clearly amounts to a claim that the brother had been granted asylum for reasons of his political opinion.

19. Also in this regard, the first respondent submitted that the Tribunal was not even satisfied that the brother was a political activist. That submission was based on the Tribunal saying that it had:

> …*seen no evidence to corroborate the applicant's vaguely drawn claim that his father and brother were detained by the Burmese authorities because of their political activities during this period [being the 1974 uprising]*.

20. However, this submission misunderstands the evidence. The applicant said he had two brothers, the first who escaped and spent 25 years in the jungle before being granted asylum in the United States and the second who was imprisoned. The passage quoted in the previous paragraph did not address the fate of the first brother who escaped. The Tribunal did not expressly deal with him at all. After the passage quoted in the previous paragraph, the Tribunal went on to deal with the financial difficulties the family would have faced if its main breadwinners, being the father and the second brother, had been imprisoned.

21. In any event, the Tribunal did not categorically reject the claim that the father and second brother were detained. There is no necessity for

claims made by an applicant to be corroborated. Accordingly, the mere observation that there is no corroboration for a particular claim should not without more be construed as a rejection of that claim. In any event, in relation to the U Thant uprising in 1974, the Tribunal concentrated on the consequences that would have arisen if the father and second brother had been detained. To that extent, it seems that the Tribunal was prepared to proceed on the basis that it accepted the claim about the father and the second brother being detained after the uprising.

22. In oral submissions, the first respondent referred to the decision of the Full Federal Court in *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 75 ALD 630 at [47] where the court said:

> *The inference that the tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where, however, there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.*

23. It cannot be said in this case that the Tribunal has identified the relevant issue at any point in its reasons. The Tribunal was obviously aware that a person could be granted refugee status on the grounds that he faces persecution for reasons of his membership of a particular social group. However, the Tribunal in the present case did not identify the relevant issue, being the applicant's membership of a particular social group consisting of the family of the first brother who had been granted asylum in the United States for political reasons.

24. Nor do I consider that there was a factual premise upon which the claim rested which had been rejected. As noted above, the Tribunal

did not deal with the circumstances of the first brother who was claimed to have fled to the jungle and who was then granted asylum in the United States. The claims concerning the second brother and the father who were allegedly imprisoned were not clearly rejected. Those claims were simply dealt with on the basis of the financial impact on the family of its main breadwinners being detained.

25. The first respondent submitted that the claim concerning the applicant's brother in the United States was subsumed in findings of greater generality. The first respondent argued and I accept that the claims that the applicant had experienced persecution by reason of his own political opinion were resoundingly rejected by the Tribunal. The first respondent also argued that the Tribunal rejected the claim that the applicant's uncle had been imprisoned for 20 years for pro-democracy activities. This submission was put on the basis that the Tribunal said that it had seen no evidence to corroborate the claim that the uncle was arrested and imprisoned for 20 years for pro-democracy activities and then said, "Nor does it accept" certain things. Although it was not expressly stated, taken in context, I accept that this does mean that the Tribunal did not accept that the applicant's uncle was arrested and imprisoned for 20 years for pro-democracy activities. However, the findings about the applicant's own political opinion and his uncle's fate do not include a finding about the consequences for the applicant of having a brother who was granted asylum in the USA for political reasons.

26. The first respondent also noted that the Tribunal made general findings to the effect that it did not accept that the applicant had a well founded fear of persecution for any convention reason were he to return to Burma. However, findings of that nature are too general to satisfy the test in *WAEE*. Such findings are in the nature of a summary based on each of the particular matters that the Tribunal has considered. Where the Tribunal has failed to consider a particular matter, a general statement that a person does not face a well founded fear of persecution cannot fill the gap.

27. The Tribunal also considered "the applicant's affluence, education, socio-economic and professional status, continued liberty and mobility as being entirely incompatible with his claimed status as a

victim of persecution by the Burmese junta and a threat to the Burmese political order." However, that conclusion does not address the possibility of it being discovered in the future that the applicant's first brother had been granted asylum in the USA for political reasons and the possible consequences of that discovery for the applicant.

28. All in all, I am not persuaded that the Tribunal understood that the applicant claimed that he faced persecution as "the brother of a political activist granted refugee status in the US". I am not persuaded that the Tribunal considered that claim or dealt with it in findings of greater generality or rejected a factual premise on which the claim rested.

29. Finally, the first respondent submitted that the particular social group relied upon by the applicant is incapable of fulfilling the legal definition of particular social group within the meaning of the Convention. The first respondent noted and I accept, in accordance with *Applicant S v Minister for Immigration & Multicultural Affairs* (2004) 217 CLR 387, that a particular social group:

a) must be identifiable by a characteristic or attribute common to all members of the group;

b) cannot be identified merely by a shared fear of persecution; and

c) must be distinguishable from the society at large.

30. However, it is well established that a family may constitute such a social group: *Sarrazola v Minister for Immigration & Multicultural Affairs* [1999] FCA 101, affirmed in *Minister for Immigration & Multicultural Affairs v Sarrazola* (1999) 95 FCR 517. Section 91S of the Act limits the circumstances in which a family may be a particular social group for the purposes of the Refugee Convention to those circumstances in which the family members are at risk of harm because at least one of them faces or faced persecution for a Convention reason other than being a member of a particular social group consisting of the family. In the present case, it is clear that it was claimed that the applicant's brother in the United States faced persecution for reasons of his political opinion. Accordingly, I

consider that the applicant's family was capable of being a particular social group within the meaning of the Convention.

31. In the circumstances, I am satisfied that the Tribunal has made a jurisdictional error by failing to consider an aspect of the claim that could have resulted in a different outcome. The error is such that the Tribunal's decision should be set aside.

Ground 2

32. The second ground of review is that the Tribunal:

> *In making a finding that the Applicant's conduct in communicating with his wife in Burma was engaged in solely for the purpose of strengthening his claim to be a refugee it misconstrued and/or misunderstood s.91R(3)(b) of the Act and/or did not turn its mind to whether s.91R(3)(b) allows for the existence of other reasons for conduct which might prevent s.91R(3)(b) from applying in this case and/or in adopting the approach of disregarding his conduct failed to deal with the integer of the Applicant's claims of fear of persecution that the wife's actions in Burma led to the authorities having knowledge of the applicant having made a refugee claim in Australia.*

33. In oral submissions, the applicant advised the court that he formally withdrew the first limb of his second ground. That is, the applicant accepted the authorities which indicate that it is sufficient to engage s.91R(3)(b) of the Act that one of the applicant's purposes in engaging in the relevant conduct was to strengthen his claim to be a refugee. However, the applicant did pursue the second limb of the second ground. Essentially, that ground was that s.91R(3)(b) of the Act authorises the Tribunal to disregard the applicant's conduct but it does not authorise the Tribunal to disregard his wife's conduct.

34. Section 91R(3)(b) of the Act provides that in determining whether a person has a well founded fear of persecution the Tribunal may disregard any conduct engaged in by the person in Australia unless:

> *…the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.*

35. The Tribunal dealt with the applicant's *sur place* claim as follows:

> *The applicant claims to have communicated with his wife since arriving in Australia in July 2006, using email and other communication media that he admitted knowing were subject to monitoring by the Burmese authorities. He has claimed that as a result of those contacts, his wife has been questioned by the authorities, who now know he is in Australia seeking a Protection Visa. It is unclear what basis he has for these beliefs about the Burmese authorities' alleged knowledge of his whereabouts and activities. However, the applicant made it abundantly clear to the Tribunal that he and his wife communicated* en clair *despite knowing that their communications could be monitored, and that their comments could disclose the applicant's whereabouts and intentions.*
>
> *In view of the Tribunal's finding that the applicant did not engage in political or other protest activities while in Burma and that he was not subjected to persecution for any Convention reason in Burma, the Tribunal is satisfied for the purposes of subsection 91R(3) of the Act that the conduct the applicant has engaged in since his arrival in Australia has been engaged in solely for the purpose of strengthening his claim to be a refugee. Accordingly, the Tribunal disregards such conduct in accordance with s.91R(3) of the* Migration Act 1958.

36. However, the applicant's actual claims in this regard were somewhat different. The applicant said in a statutory declaration made on 30 October 2006 that:

> *[3] When my wife went to the government Post Office in order to register documents to send to me in Australia, the letter was opened and she was interviewed about why she was sending these documents to me. The authorities took the letter and its contents to another room, where my wife believes they may have copied them. She became very afraid because of the questions they asked her.*
>
> *[4] Recently my wife sent to me by email the document that gave me notice of suspension from work in December 1988 with the Myanmar Broadcasting and Television Service and she also sent the same document to an address in Malaysia, where I was for a few days before I came to Australia. In Myanmar all emails are monitored by the government, so by now the authorities will realise that I am in Australia and am making an application for protection. She did this at my request, but it has made both me*

and her worried about the family's safety because it has revealed to the government where I am.

37. In *SZJZN v Minister for Immigration & Anor* [2007] FMCA 980, Cameron FM considered an argument that s.91R(3)(b) of the Act did not authorise the Tribunal to disregard the conduct of third parties who had assisted an applicant in Australian to become a Christian acolyte. His Honour said at [16] that:

> *Any connection which third parties might have to the applicant's conduct in question is meaningless without reference to that conduct. Even were the Tribunal to have regard to the actions or observations of third parties, as advocated by the applicant, it would only be in the context of the conduct of the applicant which it dismissed as not genuine. As a result, the Tribunal would not be in error by disregarding such conduct of third parties even if it were to have done so on this occasion. But a proper consideration of the Tribunal's decision does not reveal that it did, in fact, disregard the involvement of third parties. The better view would be that, having reached an unfavourable view of the relevant conduct of the applicant, any involvement by third parties was of no assistance to the Tribunal in determining whether the applicant had a well-founded fear of persecution by reason of his religion and thus their conduct was not referred to in its reasons ….*

38. It can be seen that all but the last two sentences of the passage cited in the previous paragraph were obiter. His Honour was simply not satisfied that the Tribunal had disregarded the conduct of third parties pursuant to s.91R(3)(b) of the Act.

39. In any event, s.91R(3)(b) of the Act only expressly authorises the Tribunal to disregard the conduct in Australia of the person claiming refugee status. That provision does not authorise the Tribunal to disregard the conduct of any other person and, more particularly, that provision does not authorise the Tribunal to disregard the conduct of another person who is not in Australia.

40. If the conduct of a third party who is overseas is in fact meaningless without reference to the conduct in Australia of the applicant, it may be appropriate to disregard the third party's conduct under s.91R(3)(b) of the Act. However, in the present case, the conduct of the applicant's wife in Burma stood alone. She went to the Post

Office in Burma to dispatch a letter to the applicant, the letter was opened and she was questioned as a result. Additionally, the applicant's wife sent the applicant an email which made it clear that the applicant was seeking protection in Australia. The applicant claimed and the Tribunal apparently accepted that the email was intercepted by the authorities and they became aware that the applicant was seeking protection in Australia. The fact that the letter and email were sent to the applicant does not transform the wife's conduct into the conduct of the applicant.

41. In my view, the Tribunal in this case was not entitled to disregard the conduct of the applicant's wife in Burma in sending a particular letter and email to the applicant. The Tribunal, by doing so, mistakenly failed to consider an aspect of the applicant's claims, namely, that he was at risk because the authorities in Burma were aware that he had made a claim for protection in Australia. This is a jurisdictional error that requires the Tribunal's decision to be set aside.

Ground 3

42. The third ground of review is that the Tribunal:

> *…misunderstood and/or misconstrued the test of what constitutes a well founded fear of persecution and/or what may satisfy that test when it made a statement that general country information concerning ill-treatment of members of a class or group should only be relied upon where specific information about the applicant's treatment is unavailable or inconclusive. In doing so it ignored and/or failed to appreciate the basic principle that a person can be subjected to and/or have a well founded fear of persecution simply by reason of his or her membership of the group to which he or she belongs to which general country information about that group would by definition apply.*

43. This ground is based on the following passage from the Tribunal's reasons:

> *The Tribunal accepts that independent country information supports in a general way the applicant's claims that the Burmese authorities commonly engage in the abuse and persecution of members of minority groups, including Muslims and Rohingyas, as well as those suspected of membership of proscribed groups,*

or of harbouring or expressing anti-government or pro-democracy beliefs. The Tribunal agrees that independent country information supports in a general way the applicant's claims that there is sometimes persecution of those advocating political reform in Burma, or supporting dissident or outlawed groups, e.g. the NLD. However, the Tribunal's task is to determine whether the specific applicant before it has a genuine fear founded upon a real chance of persecution for a Convention reason if he returns to his country. In approaching that task, the Tribunal's primary point of reference must be evidence pertaining to the applicant personally. The Tribunal recognises the fact that most members of a group or class of persons are treated poorly does not entail that all members of that group will suffer a similar fate. Material of a general nature (e.g. country information concerning the treatment of members of an applicant's ethno-cultural group) should therefore only be relied upon where specific information about the applicant's treatment is unavailable or inconclusive.

44. The applicant argued that the Tribunal in this paragraph displayed a fundamental misunderstanding of the proper test for establishing a well founded fear of persecution. The first respondent submitted that the Tribunal's reasons are not to be construed with an eye keenly attuned to the perception of error. The first respondent said that the Tribunal correctly stated that its task was to determine whether the specific applicant before it has a genuine fear founded upon a real chance of persecution for a Convention reason and correctly stated that in approaching that task the Tribunal's primary point of reference must be the evidence pertaining to the applicant personally. The first respondent submitted that the Tribunal ultimately considered both the applicant's evidence as well as independent general country information and did not make the error alleged by the applicant.

45. In my view, the passage cited from the Tribunal’s reasons in paragraph 43 above displays some fundamental misconceptions. It is implicit in that passage that the Tribunal considered that general country information should be relied upon only where specific information about the applicant's **past** treatment is unavailable or inconclusive. However, it is not necessary for an applicant to have suffered any persecution in the past to have a well-founded fear of persecution in the future. For example, evidence that a government is undertaking a serious and sustained policy of ethnic cleansing would be enough to suggest that an applicant of the relevant ethnic group

would have a well founded fear of persecution. That would be so whether the applicant personally had in the past been detained or ill treated by reason of his ethnicity.

46. The Tribunal said correctly that the fact that most members of the group or class of persons are treated poorly does not entail that all members of that group will suffer a similar fate. However, the fact that most members of the group are treated poorly does suggest that other members of that group could have a well founded fear that they will suffer a similar fate. A well founded fear does not arise only where an untoward outcome is certain or even probable. A well founded fear arises where there is a real risk of an untoward outcome. A real risk is one that is not far-fetched or fanciful. The Convention does not require that an applicant for refugee status **will** suffer persecution. It only requires that an applicant faces a real risk of persecution.

47. Evidence of a real risk can be provided by general country information or by descriptions of an applicant's past personal experiences. It is not correct that, "the Tribunal's primary point of reference **must be** evidence pertaining to the applicant personally (emphasis added)". The Tribunal is required to determine whether a particular applicant faces a real chance of persecution. However, as explained above, a particular applicant may face a real chance of persecution even though he has suffered no harm in the past.

48. Ultimately, of course, the Tribunal's task is to determine whether the particular applicant before it faces a real chance of persecution. In fulfilling that task, the Tribunal is obliged to consider the evidence as a whole. Both the evidence personal to the applicant and the general country information, where relevant, should be considered in an interrelated way.

49. The applicant submitted that the misconceptions contained in the paragraph quoted in paragraph 43 above contaminated the Tribunal's entire decision and undermined a number of its specific findings. For example, the applicant noted that the Tribunal said that:

a) it had seen no evidence to corroborate the applicant's vaguely drawn claim that his father and brother were detained by the Burmese authorities because of their political activities in 1974;

b) it had seen no evidence to corroborate the applicant's claim that his uncle was arrested and imprisoned for 20 years for alleged pro-democracy activities;

c) it had seen no evidence to support the applicant's claim to have been arrested and interrogated for three days in relation to the bombing in 1997;

d) it nevertheless accepted that people fitting the applicant's profile, being a Japanese speaking Muslim who associated with Japanese visitors, may have been suspected of involvement in the atrocity; and

e) it had seen no evidence to support the applicant's claim that he had assisted his sister in law.

50. The applicant submitted that these passages demonstrated that the Tribunal considered that the claim had to fail because there was no evidence personal to the applicant about significant aspects of his claims. Of course, evidence of those claims was provided by the applicant himself in statutory declarations. That evidence did not have to be corroborated. Equally, however, the Tribunal was entitled, on a proper basis, to reject the applicant's bare assertions, and to reject claims that were vague or about which the applicant gave contradictory evidence.

51. In relation to the claims about the detention of the applicant's father and brother, the Tribunal did not explicitly reject the claims and proceeded on the basis that it did in fact accept them. Accordingly, as far as this example is concerned, I am not persuaded that the Tribunal's misstatement of the relevant tests had the consequence contended for by the applicant.

52. In relation to the claims about the applicant's uncle being arrested and imprisoned for 20 years for alleged pro-democracy activities, the Tribunal said that it had seen no evidence to corroborate the claims and then said, "Nor does it accept" certain other matters. This implies

that the Tribunal did not accept that the uncle had been arrested and imprisoned for 20 years for alleged pro-democracy activities simply because there was no evidence additional to the applicant's oral evidence and claims in his statutory declarations about his uncle. This is tantamount to requiring corroboration of the applicant's evidence and is an error.

53. The Tribunal went on to make findings that the applicant's account of his own pro-democracy activities was vague, he was ignorant of his uncle's involvement with the NLD, and the authorities showed no interest in him after his uncle's arrest. This all led to a finding that the applicant himself was not an NLD activist from 1988 to 1991. However, the Tribunal did not use these findings to justify its conclusions about the uncle as such. Accordingly, I am not satisfied that these findings overcome the defect mentioned in the previous paragraph. Nevertheless, I am not persuaded that that defect arose from the misstatement of the relevant tests. That is, I do not accept that the ground relied on by the applicant, in relation to his uncle, is made out. As I have accepted that the Tribunal's decision should be set aside on other grounds, I take this matter no further.

54. In relation to the bombing, the Tribunal apparently accepted that the applicant was detained and ill treated. However, the Tribunal also found that the applicant suffered no further repercussions after being released without charge. I am not persuaded that the Tribunal's misstatement of the relevant tests had any impact on its consideration of the letter bomb incident.

55. In relation to the applicant's claim to have assisted his sister in law and niece to leave Burma, the Tribunal said that it had seen no evidence to support that claim and then said, "Nor is the Tribunal satisfied" of certain matters. This implies that the Tribunal was not satisfied that the applicant had assisted his sister in law and niece to leave Burma simply because there was no evidence additional to the applicant's oral evidence and claim in a statutory declaration that he had assisted his sister in law and niece. This is tantamount to requiring corroboration of the applicant's evidence and is an error.

56. However, the Tribunal went on to say that the applicant had initially said that he suffered no repercussions from helping his sister in law.

On the other hand, he later said that his assistance had been discovered and he had been visited at midnight twice a month since 1999, or, in another version, since 1997, notwithstanding that he was overseas from 1999 to 2002. The Tribunal said that it found these claims to be "incoherent, inconsistent and untenable". In view of these findings, I consider that the Tribunal's rejection of the claim that the applicant had helped his sister in law was justifiable. I do not consider that the Tribunal's misstatement of the relevant tests led it into error in relation to the claims about the sister in law.

57. For these reasons, I am not satisfied that the Tribunal's misstatements of the relevant test led it into error.

Ground 4

58. The fourth ground of review is that the Tribunal:

> *…misconstrued and/or misunderstood the Convention test when having accepted the principle that the prosecution of a Third Party for assisting a victim to escape persecution may constitute persecution of the victim for a Convention reason it made a finding that the prosecution of the rescuer is not persecution for a Convention reason. In making this finding it ignored and/or misunderstood the Convention ground of imputed political opinion and/or failed to appreciate that prosecution for certain acts might be characterised as persecution if the anticipated punishment is likely to be excessive, arbitrary or disproportionate and/or the decision to prosecute involves the imputation of political opinion.*

59. This ground concerns the following passage from the Tribunal's reasons:

> *Nor is the Tribunal satisfied that, even if he were to have [assisted his sister in law to escape] and to have been mistreated or harassed by the authorities as a result, that such treatment amounts to persecution for a Convention reason. On his own account, the basis for his alleged harassment by the authorities is his suspected involvement in two criminal activities - assisting in the provision of false or illegally obtained travel documents, and for 'people smuggling'. The Tribunal accepts that denial of travel documents and restriction of movement for reasons of a person's ethnicity or religion may well amount to persecution for a*

Convention reason. It also accepts that prosecution of the third party for assisting the victim to escape that persecution may also constitute persecution of the victim for a Convention reason. However, the Tribunal does not accept that the prosecution of a third party for aiding the victim in such circumstances can be regarded as persecution of the 'rescuer' for a Convention reason. If indeed the applicant is wanted by the Burmese authorities, it is not because of his ethnicity, religion or any other Convention reason. It is because he - regardless of his ethnicity and religion - is suspected of committing criminal offences.

60. The applicant argued that in this passage the Tribunal demonstrated that it failed to understand that:

a) the applicant, as the rescuer of the family of a known opponent of the governing regime, could be imputed with a political opinion and mistreated for that reason; and

b) the applicant could be punished more harshly by reason of his imputed political opinion than others who had committed the same offences.

61. The first respondent argued that the Tribunal did not accept that the applicant had assisted his sister in law at all. As explained above, I accept that interpretation of the Tribunal's reasons. Accordingly, any misstatement by the Tribunal about the law in relation to criminal prosecution was not an operative reason for the decision and this ground cannot succeed.

62. However, for completeness, I note that the first respondent argued that the Tribunal correctly stated the law when it said that the prospect of being prosecuted and penalised for a criminal offence does not give rise to a well founded fear of being persecuted for a Convention reason. That statement of the law is correct as far as it goes. However, I accept the applicant's submission that where the penalty for a criminal offence may be disproportionately harsh for a Convention reason, the prospect of receiving such a penalty amounts to a Convention ground.

63. I also note that in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, McHugh J said at 291:

> *In cases concerned with political opinion and the membership of particular social groups, the issue of persecution may often be difficult to resolve when the sanctions arise from the proper application of enacted laws. Punishment for expressing ordinary political opinions or being a member of a political association or trade union is* prima facie *persecution for a Convention reason. Nevertheless, governments cannot be expected to tolerate political opinion or conduct that calls for their violent overthrow. Punishment for expressing such opinions is unlikely to amount to persecution. Nevertheless, even in these cases, punishment of the holders of the opinions may amount to persecution. It will certainly do so when the government in question is so repressive that, by the standards of the civilised world, it has so little legitimacy that its overthrow even by violent means is justified. One who fled from the regime of Hitler or Pol Pot could not be denied the status of refugee even if his or her only claim to that status relied on a fear of persecution for advocating the violent overthrow of that regime.*

64. In any event, this question is moot in the present case because of the finding that the applicant did not assist his sister in law. For that reason, the fourth ground of the application is not made out.

Conclusion

65. For the reasons given in relation to grounds 1 and 2, the application must be allowed with costs.

I certify that the preceding sixty-five (65) paragraphs are a true copy of the reasons for judgment of Riley FM

Associate: Melissa Gangemi

Date: 7 February 2008