FEDERAL MAGISTRATES COURT OF AUSTRALIA

WAMC v MINISTER FOR IMMIGRATION & ANOR *[2006] FMCA 1914*

MIGRATION – Protection visa – Refugee Review Tribunal – whether jurisdictional error –whether correct standard of proof – whether decision based on ‘speculation’.

Migration Act 1958

AA v Secretary of State for the Home Departments (2005) UKAIT 00144, 7 October 2005
W396/01 v Minister for Immigration & Multicultural Affairs [2002] FCA 455
Minister for Ethnic Affairs v Guo Wei Rong (1997) 191 CLR 559
Minister for Immigration & Multicultural Affairs v Rajalingham (1999) 93 FCR 220
N1202/01A v Minister for Immigration & Multicultural Affairs [2002] FCAFC 94
WAAD v Minister for Immigration & Multicultural Affairs [2002] FCAFC 399
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Applicant:	WAMC
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	PEG 97 of 2006
Judgment of:	McInnis FM
Hearing date:	3 August 2006
Delivered at:	Melbourne (by video link to Perth)
Delivered on:	20 December 2006

REPRESENTATION

Pro Bono Counsel for the Applicant:	Mr Henry Christie
Counsel for the First Respondent:	Mr P Macliver
Solicitors for the First Respondent:	Australian Government Solicitor

ORDERS

(1) A writ of certiorari issue directed to the Second Respondent, quashing the decision of the Second Respondent dated 27February 2006.

(2) A writ of mandamus issue directed to the Second Respondent, requiring the Second Respondent to determine according to law the application for review.

(3) The First Respondent pay the Applicant's costs fixed in the sum of $5,000.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT PERTH

PEG 97 of 2006

WAMC
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The Applicant was granted leave to rely upon an Amended Application filed 26 July 2006 seeking judicial review of a decision of the Refugee Review Tribunal (the Tribunal) dated 27 February 2006.

2. In its decision the Tribunal affirmed a decision of a delegate of the First Respondent to refuse to grant a protection visa to the Applicant.

Background

3. The Applicant is a citizen of Zimbabwe.

4. He arrived in Australia on 20 March 2005 travelling on a visa subclass UL–679 visitor visa which had been granted on 17 March 2005 and expired on 19 June 2005.

5. On 10 June 2005 the Applicant travelled from Australia to Fiji and was then in possession of an Emergency Travel Document issued at the Zimbabwe Embassy in Canberra on 16 June 2005. After being denied

entry to Fiji the Applicant then returned to Australia on the same day. In Australia he was granted a class TA border subclass 773.213(1)(G) visa which was valid until 26 June 2005.

6. On 25 June 2005 the Applicant lodged a claim for a protection visa.

7. The Applicant's wife, his son, his mother, brothers and sisters reside in Zimbabwe. The Applicant has a brother who lives in Australia and is married.

8. The Applicant's claims were considered and rejected by a delegate of the First Respondent on 6 September 2005. The Applicant then applied to the Tribunal for review of that decision.

The Applicant's Claims

9. The Tribunal conducted a hearing on 2 December 2005. The Applicant gave evidence before the Tribunal which was referred to in some detail in the Tribunal's decision. The Tribunal notes that in his application the Applicant claimed to be 'running away from persecution by state agencies, namely the Central Intelligence Organisation (CIO) and the Military Intelligence Department (MID)". The Tribunal notes the Applicant claimed to be a supporter of the Movement for Democratic Change (MDC) and had joined that party in 1999 when he was a student.

10. In its decision the Tribunal set out the manner in which the claims arose as follows:-

- Because of financial problems experienced during his final year of study at the University of Zimbabwe, he obtained sponsorship from the Zimbabwe National Army (ZNA). He says that the government later realised that he was in favour of the opposition.

- At the beginning of 2005 he 'started to feel insecure' claiming that he was being interrogated and was 'followed by strange people all the time'. In order to protect himself he resigned from the Army in March 2005 and attended an exit interview.

- Due to his association with the MDC he is facing allegations of treason, it being 'totally unacceptable to associate with the

opposition if you are a member or former member of the Zimbabwe army'.

- Political violence is escalating day by day and he fears further persecution from the CIO and MID. He also faces persecution and gaol, it having been alleged that he has passed official secrets to the MDC. If he returns to Zimbabwe he can face death because there is no rule of law at all. His whole family will be at risk as well, for they have been questioned several times about his whereabouts".

(Court Book pp.470-471)

11. The Tribunal then referred to the Applicant's further claimed fear of harm from other civil servants used by the government to allegedly terrorise civilians. Reference was made to the Applicant's belief that he would be harmed as a result of the government intensifying its crack down against opposition supporters and by its clean up program named "Operation Murambatsvina".

12. The Tribunal noted the Applicant had received information from his home that he must return to submit a classified file that he did not even know about. Reference was made to punishment of opposition supporters and that if the Applicant returned authorities would not protect him as there is no rule of law given the law enforcement agencies support the government's policies. The Tribunal further noted that no mercy was shown to civil servants who were not on the government's side but on the opposition's side.

13. The Tribunal then referred to a letter dated 18 October 2005 (Court Book p.146) where the Applicant attached country information and a document entitled, "Further Evidence to my Permanent Protection Visa Application" (Court Book p.153). That document set out in some detail the Applicant's claims and response to the findings by the delegate. The Tribunal accurately summarised the further details in its decision as follows:

- the decision made by the Delegate with respect to Article 1C of the Refugees Convention – is 'without foundation';

- he is not aware of any barriers to travel out of Zimbabwe, though legislation to this effect was proposed two weeks ago;
- asylum cannot be achieved illegally without being thrown into detention or returned to the country of persecution;
- he could not apply to the UNHCR or any country other than Australia because the situation deteriorated and Australia was his first country for claiming asylum. Other circumstances make it impossible to legally and successfully apply for asylum in other countries;
- the bond paid by his brother was to facilitate his exit from Zimbabwe. It assisted in fleeing persecution as he was on a desperate mission to maintain legal immigration status and avoiding breaking the law of, inter alia, Australia;
- he intended to legally enter Fiji and seek advice from the UNHCR about asylum but because he wanted to return to Australia he had no option but to seek asylum in Australia before being deported to Zimbabwe. By 'accepting' the 7 day visa he believed he was averting potential mandatory detention;
- his brother is not his only source of information about protection visas – there is the Internet and other legitimate sources;
- the Delegate did not mention information about the current situation in Zimbabwe, referring only to a report from 2002 (CX712557);
- he was forced back to Australia before he had a chance to seek protection in another country – the circumstances forced him to seek asylum in Australia. The root cause of his seeking asylum is the disastrous political situation in Zimbabwe;
- the Delegate was wrong to base the decision about the Applicant on his brother's immigration history in Australia, frivolously using irrelevant sections of Article 1C and his brother's history, as the sole reason for denying him asylum;

- the gap between the time the Applicant joined the MDC and seeking asylum should not have been used by the Delegate to discredit his application because in the real world things are haphazard and nothing is predictable;
- it would have been illegal for him to have sought asylum on first arriving in Australia on a visa for a short-term stay. By not declaring his intention on his first arrival in Australia he may have saved himself from mandatory detention – a worse outcome than the protection itself – or return to Zimbabwe.
- he did not abuse the system by failing to lodge an application on arrival. He was out there looking for any legal avenue such as the UNHCR or a third country so long as it was legal and did not result in a return to Zimbabwe;
- he joined the MDC as a student at the University of Zimbabwe. The ZNA was apolitical, recruiting cadets on merit but over time the ZNA had become an arm of the dictatorship. He came to realize that espionage and vetting was taking place against his background. The CIO and MID were able to persecute him once they found out about his MDC background. There is no safety for targeted MDC members in Zimbabwe;
- coming to Western countries to claim asylum is treason, and this attracts a maximum penalty of death;
- he chose to come to Australia on authentic travel documents, unlike some refugees who use fake documents to get to safe countries because he is not a criminal and has never committed an offence;
- he graduated from the University in June 2004, then worked in a government dental centre supervised by Dr Nyakudya for 12 months. Dr Nyakudya gave him leave to travel to Australia. In November 2004 the Applicant applied to resign from the ZNA and attended an exit interview in February 2005. He does not owe any money to the ZNA, but instead is owed money in the nature of termination and pension monies;

- he worked as a locum dentist in a number of surgeries in Harare and was already in partnership before he finished his internship, making him one of the highest paid professionals in the country. He did not flee Zimbabwe for economic reasons – life is more important than means of livelihood;

- he planned to seek asylum in Fiji, so did not apply for a transit visa in Australia. He did not know that Fiji had no asylum procedure at all and was marred by political and racial problems almost like Zimbabwe. At Fiji airport he was not given a chance to explain anything and was treated badly;

- leaving Fiji he was terrified and confused and thought that he was going to be put on another flight from Australia to Zimbabwe and was afraid that, if he claimed asylum in Australia he would be thrown into the notorious immigration detention centres. There was no guarantee that he was going to be exempt from definite detention and so found it reasonable to seek asylum in another country with more humane detention systems;

- having obtained a visa that allowed him to stay in Australia for 7 days, he realized that there was no safe country in which he could seek asylum and the only option left for him was Australia. At the Immigration Department in Sydney he was told that he could apply for protection without being detained;

- It was apparent that he was going to be tortured or face death if he had remained in or gone back to Zimbabwe for, as part of the resignation process, he had signed an oath with respect to the Official Secrets Act;

- he did not pass any useful information to the MDC but that did not stop the ZNA from persecuting him and making threats against him during the time he has spent in Australia. Threats were passed on to him directly and indirectly whilst in Australia on a visitor's visa. He rang the army to establish the basis of the threats and found that he was under investigation and liable to arrest upon return. He fears for his safety and therefore had no option but to seek asylum;

- Contrary to the delegate's finding, MDC supporters are not safer in the cities. Operation Clean Up (Operation Murambatsvina) has resulted in the destruction of homes, businesses and vending sites, the displacement and dispossession of hundreds of thousands of people. The Applicant refers to findings of the UN Special Envoy to suggest that Operation Murambatsvina occurred in the context of the failure of the government of Zimbabwe to respect human rights and uphold the rule of law, and to the BBC News which described the operation as a political vendetta against residents of the MDC's urban strongholds. In light of these acts it is unsafe for the Applicant to go back and stay in Zimbabwe under the present government. The CIO has been used to facilitate the disappearance of young people deemed a threat to state security. The Applicant then lists numerous cases of persons who have been harmed or killed at the instance of the Zimbabwe government;

- the assertions against him, that he has obtained a file which it is demanded that he return, are manufactured so that if he returns he can be arrested. To be sent back is like a death sentence for him, especially as the army is looking for him. He would be punished and made an example to doctors and other members of the army who hold the same political opinion as he, to discourage them to flee;

- he has not sought to come to Australia on economic grounds, owes no financial obligations to the army or the government of Zimbabwe and implies, but does not directly state, that he submitted a police report in order to obtain his Zimbabwe travel document.

  (Court Book pp.471-475)

14. I have deliberately set out in some detail the Tribunal summary of the Applicant's claims as it provides relevant background to the Application before the Court.

The Tribunal Decision

15. In its decision, the Tribunal set out in considerable detail the Applicant's claim not only in the application and the supporting letter dated 18 October 2005 referred to earlier but also the evidence given by the Applicant at the hearing (Court Book p.475). It is not necessary to restate that material, save to observe that the Tribunal set out that information in appropriate and considerable detail in a decision comprising 46 pages.

16. The Tribunal considered detailed country information including reports which I accept, as submitted by the Applicant, revealed widespread and systematic denial of human rights for MDC supporters and opponents of the regime. There was evidence of increased repression in 2003 and 2004 through to 2005 with the "operation restore order" described appropriately as a political vendetta which had commenced in May 2005 and had left more than 700,000 people homeless without access to food, water and sanitation (the United Kingdom Home Office Country Report, Zimbabwe, October 2005) (Court Book p.487). The operation was also described as "Operation Murambatsvina" (drive out rubbish).

17. The Tribunal referred to a report from Dixon Marisa dated 23 April 2005 concerning "Ratidzo," who had been deported from the United Kingdom after having overstayed a student visa. It was not suggested that Ratidzo (not her real name) had been an asylum seeker, though on her return was interrogated and assaulted by officers of the CIO for three hours with questions concerning seeking asylum in the United Kingdom, being a trained mercenary and other matters along with being an MDC reporter. The interrogation ceased only because she was able to contact an uncle who was a high-ranking ZNA officer. The material concerning Ratidzo is set out in paragraph 63 of the Tribunal's decision as follows:

> *"63. With respect to the claim concerning the return to Zimbabwe of failed asylum seekers, the following materials have been noted.*
>
> > *AS BRITAIN steps-up its efforts to deport failed asylum seekers back to Zimbabwe, those who have already made the dreaded trip report of a real 'Gestapo' welcome at the Harare International Airport.*

'We have a right to ask whether these would be deportees or Blair's mercenaries of regime change or plain law-abiding Zimbabweans returning home after having been abused and dehumanised in Britain. Their treatment will depend on which is which,' Information Minister Jonathan Moyo said recently.

Moyo's comments are not idle chatter.

Ratidzo (not her real name) said she was one of three deportees forced into a plane from the UK after the Home Office had refused to extend her student visa She also reports of structural changes to the arrival lounge at Harare International Airport which has been changed drastically to house Central Intelligence Organisation Interview rooms.

She said all deportees were told to use a different entrance and behind the wooden doors were mean-looking plain clothes officers who identified themselves as state security agents.

'We were separated and each was led into a different office. As soon as they closed the door the two officers started shouting at me,' she told New Zimbabwe.com.

She said her inquisitors wanted to know:

• Why had you run away from Zimbabwe?

• How does it feel to be home again?

• Why did they send you back?

• Why had you claimed asylum in the first place?

• How long were you in the UK?

• What did they teach or train you to be?

• How much are you going to be paid to effect regime change?

• We have information that you are a mercenary, can you prove otherwise?

• Which division of the British Army did you train with?

• Why are you coming back just as we are preparing for elections?

• Are you going to vote?

• Who are you going to vote for and why?

• What is going to be your role in the MDC?

• What method of communication will you use to link with the British spies?

• Give us all your contacts in UK.

'The intimidating officers fired question after question shouting abuse and threatening me with incineration at the notorious torture chambers of Goromonzi Prison,' Ratidzo narrated.

"At one time an officer hit me across the mouth when I asked him why they did not believe that I was just a student wrongly deported. He said, '... we have a job to do here and sell-outs like you have no grounds to ask us about anything!'

Ratidzo said her interrogation continued for about three hours and only stopped when she remembered that she had an uncle serving in the Zimbabwe national army. "1 told them about him and asked that they make a phone call so they could confirm my story. They did and my uncle asked them to let me go, promising that he will keep me in check. If it was not for that connection, I really do not know which direction my life would have taken.

By the time they released her she was close to a mental breakdown.

"From the time I was picked up by the British immigration officials to the time I faced the CIO inquisitors, events kept changing in my life so fast that I could not cope. The most cruel were the British who seem keen to play a numbers game with people's lives, claiming to have deported such and such simply because there is an election coming up in the UK.

"As for the Zimbabwean side. I have no words to describe the insanity. They seem to believe Moyo's paranoid guess work when he announced that UK was not really deporting the Zimbabweans but simply deploying specially trained agents to cause trouble in Zimbabwe. This is really insane but the CIO operatives are more than convinced that it's true. As I left the building I could still hear shouts and groans from the other two deportees."

Ratidzo, who had not been in Zimbabwe for the past three years is now living in squalor and depravity since the British did not

allow her time even to withdraw her money from the bank. All her personal belongings which were in Coventry have since been stolen.”

(Court Book pp.493-495)

18. The Tribunal also had before it a further report from the United Kingdom Asylum and Immigration Tribunal in the matter of *AA v Secretary of State for the Home Departments* (2005) UKAIT 00144, 7 October 2005 (Applicant AA). This decision was provided in full to the court and became Exhibit R1 by consent. A Tribunal reference to *Applicant AA* appears in the following paragraphs of its decision:

> *“64. The United Kingdom Asylum and Immigration Tribunal in AA v. Secretary of State for the Home Department 2005] UKAIT 00144, 7 October 2005 reviewed a large amount of evidence and country information touching the question of the fate of returning asylum seekers. The Tribunal noted the procedures applied by the UK authorities and the airline in deporting asylum seekers and the procedures at Harare airport for receiving them. In particular, regard was had to the activities of the Zimbabwe Central Intelligence Office (CIO). There was evidence that asylum seekers were detained at Harare airport and interrogated and whilst it was likely that returnees from the UK were likely to be mistreated, it was difficult to predict who would be. Although there were special reasons why returnees from the UK were particularly likely to be interrogated – such as the belief of the Mugabe government that they were likely to be spies. There was some evidence before the Tribunal that the Zimbabwe authorities treated arrivals from other white Anglophone countries, including the United States, Australia and New Zealand with suspicion the Tribunal stated: The Tribunal went on to say that:*
>
> *[I]t is in our view clear that the CIO take a particular interest in arrivals from the United Kingdom. Nevertheless, it appears to be the case that ordinary travel to and from the United Kingdom, including voluntary departures by those who have had dealings with the immigration authorities of this country, are dealt with in the usual way by immigration officers (not the CIO) at the airport in Harare. [at 155]*
>
> …..
>
> *What is clear is that, as a result of a combination of the CIO’s interest in flights from the United Kingdom and the Respondent’s and the airlines way of dealing with the documents of those*

removed involuntarily, such persons are not dealt with by the ordinary immigration service, They are drawn immediately to the attention of the CIO. [156]

65. The Tribunal concluded, at 166][that the process by which the United Kingdom Government enforces the involuntary return of rejected asylum seekers to Zimbabwe exposes them to a risk of ill treatment at the hands of the CIO. Although the applicant in that matter had made a false claim to be a refugee, having regard to the risks that he now faces upon return, he had become a refugee. The Tribunal went on to say:

[I]t is possible that we might have taken a different view if the Government had made any arrangements to ensure so far as possible that those returned voluntarily and those returned involuntarily are not so readily distinguishable on arrival. A part of the risk we have identified arises from the Government's apparent disinterest in the precise way in which passengers documents are dealt with by airline staff. [at 170]"

19. It appears to be common ground that the Applicant provided the report from Dixon Marisa and the decision of the UK Tribunal in *Applicant AA*. The Applicant relied on information to support his fear should he return to Zimbabwe.

20. The Tribunal in its findings accepted evidence of widespread and arbitrary human rights abuses in Zimbabwe directed against known or suspected MDC supporters. The Tribunal further accepted that persons known or suspected of being asylum seekers from the United Kingdom were at risk of persecution. It is relevant to set out the following significant findings from the Tribunal decision:

97. The applicant raises as an additional claim that the Zimbabwe government's campaign to suppress its opponents has been intensified, and that he may himself become a victim of the "clean up" programme, Operation Murambatsvina, which targets the opponents of the government both in urban and rural areas. There is ample evidence of the harm to individuals and entire communities that Operation Murambatsvina has caused and is still causing. There is no evidence that the applicant's family, which remains in Zimbabwe, has been affected by Operation Murambatsvina. Nor do 1 accept that there is a real chance that now or in the reasonably foreseeable future the applicant would suffer the destruction of any property that he owns for the purpose of forcing his relocation to another part of Zimbabwe.

98. The applicant also claims that, to return to Zimbabwe as a failed asylum seeker would lead to his being punished. He claims that a person who travels to a Western country to seek asylum commits the offence of treason, an offence which attracts the death penalty. The Tribunal is unable to substantiate, by reference to the laws of Zimbabwe, that seeking asylum in another country constitutes the offence of treason, but notes the opinion of the United States State Department in its Country Reports concerning Zimbabwe that the Official Secrets Act and the Law and Order Maintenance Act, (now replaced by the Public Order and Security Act CAP.11:17) give extensive powers to the police, the Minister for Home Affairs and the President to prosecute anyone for political and security crimes that are not clearly defined. The Tribunal has also considered the provision made in the Criminal Law (Codification and Reform) Act CAP. 9.23 which contains the substantive law upon treason – see sections 20, 21 and 22. Again, there is nothing in those provisions that support the assertion that a claim for refugee status made outside Zimbabwe constitutes the offence of treason or any cognate offence.

99. Country information with respect to returning failed asylum seekers has been set out above. The information from the Department of Foreign Affairs and Trade is outdated and not consistent with the evidence and findings of the United Kingdom Asylum and Immigration Tribunal in the matter noted above. I accept, in light of the extensive evidence before the UK Tribunal, and its conclusions, that returning asylum seekers are likely to be questioned upon arrival at Harare airport and, if they return involuntarily and their documentation is dealt with as described in the UK Tribunal's reasons, they may be interrogated by the CIO. However, I understand the practice of the Australian authorities returning persons involuntarily, it is probable that the returnee would be dealt with by the immigration authorities, not the CIO. In respect of this matter, the s.424A notice sent to the applicant explained that the policy of the Department of Immigration and Multicultural Affairs did not require, in the case of a non-escorted and compliant removal from Australia, the retainer by cabin crew of travel documents until the returnee reached their destination: see Migration Series Instruction (MSI 408), relevantly set out at paragraph 66 above."

21. Specific findings were made in relation to the Applicant and have been accurately summarised in the Applicant's submissions as follows:

> *"a) The Applicant was a member and supporter of main opposition party in Zimbabwe, the Movement for Democratic Change (MDC)*
>
> *b) That he had been interviewed and warned by an army Major about his support for the MDC*
>
> *c) That he had joined the Zimbabwe National Army (ZNA) in order to have financial assistance with his university studies.*
>
> *d) The Applicant had been followed whilst in Harare. He had also received threatening phone calls from unidentified people who said that they were watching him.*
>
> *e) The Applicant's family had been questioned about an Army file alleged to have been taken by the Applicant whilst he was in Australia. He had telephoned and spoken to an army administrator and was told he would be prosecuted if the file was not returned. The army allegations about a missing file were invented; all that he had was some papers related to his proposed appointment as a Director Dental Services.*
>
> *f) That if he was now returned to Zimbabwe he would be sent to prison the stated reason would be the missing file, but the real reason would be his support for the MDC and, if he was known to have sought asylum in Australia, anything could happen.*
>
> *g) As a former member of the ZNA, he was not permitted to associate with the opposition."*

22. It is also relevant to note specifically the following findings which appear in the Tribunal's decision:

> *"101. In that response, the applicant stated that: '[t]he information supplied by the Department does not apply to me because I am non-compliant as far as being returned to Zimbabwe is concerned for the simple reason that I am a high-risk removee as already evidenced by the information I supplied. Therefore information from the department about the non-escorted removals from Australia of a complaint or low risk removee is irrelevant to my case.*
>
> *102. The applicant appears to use the phrase 'high-risk removee' in the sense that he claims to be at 'high-risk' should be return to Zimbabwe, rather than as an converse of the phrase 'low-risk removee' used in MSI 408, where the risk referred to is the risk that the returnee will lose or destroy his or her travel documents.*

I will assume however that the applicant intends to be non-compliant should he be removed to Zimbabwe.

103. l am not satisfied, on the basis of the available country information, that a returnee from Australia, including the applicant, would be exposed to the harm that has been alleged with respect to returnees from the United Kingdom. The evidence before me does not suggest that returnees from Australia have been exposed to the kind of harm referred to by Dixon Marisa or the UK Tribunal. There is no reason to assume that the procedure adopted, in respect of UK deportees – that is requiring them to enter the International Terminal by a different door which leads to an area occupied by officers of the CIO – is or would be applied to a returnee from Australia. Further, I am satisfied that the suspicion held in Zimbabwe that UK-returnees are spies or opponents of the regime does not apply so strongly to returnees from Australia and is not likely to be applied to the present applicant who would be returning on a current, valid Zimbabwe passport. I find that, if the applicant were to be 'non-compliant', as he suggests he would, there is no real chance that he would be exposed to serious harm in the nature of persecution for a Convention reason because his travel documents had been retained by cabin crew until the applicant reached Zimbabwe.

104. Importantly. as I am not satisfied that the applicant is sought in Zimbabwe by reason of any conduct or association on his part which has a Convention nexus, I find that he is not a person likely to be of interest to the CIO or the immigration authorities in Zimbabwe for such a reason. Accordingly, in all the circumstances I am not satisfied that the applicant, as an asylum seeker returning from Australia, would be exposed to serious harm amounting to persecution for that reason."

23. I have set out the significant findings of the Tribunal in some detail which need to be considered against the Applicant's claims and the grounds relied upon in this application. As indicated elsewhere in this judgment, it is clear the Tribunal in its detailed decision has given careful consideration to the claims and indeed at one point has been prepared to indicate that it rejects as out of date country information provided by the Department of Foreign Affairs and Trade and appears to accept, in preference, more recent information before the United Kingdom Asylum and Immigration Tribunal.

The Amended Application - Grounds

24. In the Amended Application the Applicant appears to raise four grounds; namely:

    1. *The Tribunal failed to have regard to relevant considerations.*

    2. *The Tribunal failed to have regard to the Applicant's accepted claims cumulatively.*

    3. *The Tribunal failed to apply the correct standard of proof.*

    4. *The Tribunal made findings which were not based on any evidence before the Tribunal but rather on speculation.*

25. Before the court, the key issue which emerged from the grounds was claimed by counsel for the Applicant to be whether "the Tribunal accepted that the person who was known to be a failed asylum seeker would be at risk of persecution if that person returned to Zimbabwe". It was submitted in support of this key issue that the Tribunal did not make an appropriate finding and simply proceeded on the assumption that the Applicant would be able to pass through Harare Airport without being so identified. Reference was made to paragraph 103 of the Tribunal's decision set out earlier in this judgment.

Ground 1: The Tribunal Failed to Have Regard to Relevant Considerations

26. In the Amended Application the Applicant set out relevant considerations which, it is claimed, the Tribunal failed to consider as follows:

    "i) In reaching its decision that the Applicant was not at risk of interrogation and mistreatment amounting to persecution on return to Zimbabwe, the Tribunal failed to have regard to the following relevant considerations:

    i The Applicant's visa to visit Australia had expired in June 2005 and therefore if he returned to Zimbabwe, a perusal of his passport would show an unexplained period without a visa of about 9 months, which would raise suspicion that the Applicant had made a claim for asylum. If questioned by the Authorities, there was no reason to suppose that the

Applicant would be able to convincingly deny making such claim.

ii The Tribunal had accepted that the Applicant was wanted for questioning about a missing file of the ZNA. It would follow from this that, if the Zimbabwe immigration officials were or became aware that the Applicant was wanted for questioning by the ZNA, he might be handed over to the CIO at the Airport.

iii Once questioning began, such questioning was likely to include the Applicant's extended stay in Australia without apparent reason or permission, his claim for Asylum in Australia and his membership of the MDC; all of which matters the Applicant may find impossible to deny.

iv The Applicant's previous membership of the ZNA would increase the risk of him being regarded as a spy and a traitor by reason of being a member of the MDC, overstaying his Australian visa and/or making a claim for asylum."

27. The Applicant submitted that the failure by the Tribunal to have regard to these relevant matters which significantly involved the combination of the unexplained absence, the missing file and previous membership of ZNA and membership of MDC were factors which should have been considered separately or in combination. The failure to consider these matters, it was submitted, resulted in jurisdictional error.

28. The First Respondent submitted that the Applicant, in relying upon this ground, effectively seeks to challenge the merits of the Tribunal decision. It was argued the Tribunal did not fail to take into account these relevant considerations or commit jurisdictional error. The Applicant, it was noted, made a *'sur place'* claim on the basis of his return to Zimbabwe as a failed asylum seeker and that this would lead to being punished for political reasons.

29. It was acknowledged by the First Respondent that the Tribunal was bound to consider that claim and a failure to do so may constitute jurisdictional error. However, the Tribunal's decision demonstrated, according to the First Respondent, that it considered the Applicant's claimed fear of persecution upon return to Zimbabwe as a failed

asylum seeker. Reference was made to paragraphs 98 to 104 of the Tribunal decision set out earlier in this judgment.

30. It was submitted by the First Respondent that the Tribunal considered whether, as a returning asylum seeker from Australia, the Applicant would suffer serious harm amounting to persecution. It did not reject his claim because of a finding that the immigration authorities at Harare would not know the Applicant had applied for asylum in Australia. It was submitted that the Applicant effectively is seeking to reagitate the merits of the Tribunal decision in relation to this first relevant matter.

31. Again it was submitted that reference to the missing file of the ZNA leading to a claim that the officials were or became aware that the Applicant was wanted by the ZNA and might be handed over to the CIO at the airport again, according to the First Respondent's submission, seeks to deal with the merits of the claims. The Tribunal in this instance stated it was not satisfied that the Applicant was sought in Zimbabwe by reason of any conduct or association on his part which may have a Convention nexus and found specifically that he was not likely to be of interest to the CIO or the immigration authorities in Zimbabwe for that reason (see paragraph 104 of the Tribunal decision set out above).

32. Reference made by the Tribunal to "any conduct or association" in that passage clearly indicates, according to the First Respondent's submission, a reference to the Applicant's claims concerning the alleged missing ZNA file.

33. It was noted by the First Respondent that the Tribunal concluded that "in all the circumstances" it was not satisfied that as an asylum seeker returning from Australia, the Applicant would be exposed to serious harm amounting to persecution for that reason. The circumstances included the Applicant's claim that he had been questioned about the alleged missing file. It was argued therefore that there was no basis for the Applicant's claim that the Tribunal failed to have regard to that matter.

34. The other relevant matters, the First Respondent submitted, also deal with the merits of the Applicant's claims. It was submitted that the

Applicant seeks to argue why the Tribunal should have found that as a failed asylum seeker returning from Australia, he had a well-founded fear of persecution for a Convention reason. The Tribunal, it was submitted, considered the Applicant's claim to fear persecution as a failed asylum seeker returning to Zimbabwe and was not satisfied that he would be exposed to serious harm amounting to persecution for that reason. Accordingly, no jurisdictional error occurred as there was no failure by the Tribunal to take into account a relevant consideration when dealing with the claim.

Reasoning

35. To some extent this ground is also in part relied upon in support of ground 4 to the extent that at least reference is made to "an unexplained absence". Nevertheless this is a discrete ground which relates to the combination of that absence together with the missing file and previously membership of the ZNA and membership of MDC.

36. In my view the Tribunal has properly considered these claims. They were not rejected because of a finding that the migration authorities in Harare would not know the Applicant had applied for asylum in Australia as submitted by the First Respondent. The Tribunal did consider the question of the missing file and this ground seeks in my view to re-agitate that issue and is effectively a complaint about the Tribunal's adverse finding. I accept that in its decision and in particular paragraph 104 of the decision the Tribunal deals directly with whether the Applicant would be of interest to the CIO or immigration authorities in Zimbabwe by reason of conduct or association on his part which has a Convention nexus. The specific findings made in relation to the Applicant were findings reasonably open to the Tribunal which in my view are free of jurisdictional error.

37. For the purpose of this ground I accept the submissions made by the First Respondent that the Tribunal at least addressed the claimed fear of persecution as a failed asylum seeker returning to Zimbabwe and concluded that the Applicant would not be exposed to serious harm amounting to persecution for that reason. Accordingly I accept the submissions from the First Respondent that no jurisdictional error has occurred in relation to this ground as there was no failure to take into

account the relevant consideration when dealing with the claim. Accordingly this ground should fail.

Ground 2: The Tribunal Failed to Have Regard to the Applicant's Accepted Claims Cumulatively

38. In the Amended Application the Applicant refers to the failure of the Tribunal to have regard to the Applicant's accepted claims cumulatively; namely that:

> *"j) The Tribunal in finding that it was not satisfied that the Applicant would be exposed to the harm that it accepted occurred to UK refugees failed to have regard to the Applicant's accepted claims cumulatively, namely that:*
>
> *i He was a member of the MDC;*
>
> *ii He and his family had been questioned and he would be further questioned about a missing ZNA file;*
>
> *iii As a ZNA member, his membership of the MDC would make him a traitor;*
>
> *iv As a returning asylum seeker, he was at risk of being suspected of being a traitor, a spy and an MDC supporter.*
>
> *That if these claims had been considered together and cumulatively, the Tribunal would reasonably have concluded that there was a real chance that the Applicant would be interrogated and mistreated as a member of the MDC, as a failed asylum seeker and/or as a spy."*

39. It was submitted that the failure to consider the increased risk of the Applicant being identified for questioning and, when questioned, at increased risk of the issues of MDC membership and being an asylum seeker arose because the Tribunal considered the claims in separate segments and did not consider the claims cumulatively, which together would have amounted to a well-founded fear of persecution (see *W396/01 v Minister for Immigration & Multicultural Affairs* [2002] FCA 455 (W396/01) at paragraphs 31-33).

40. The First Respondent submitted that this ground also seeks to review the merits of the Tribunal decision. It was submitted that the Tribunal in its reasons was clearly aware of the Applicant's claims regarding

membership of the MDC, his former membership of the ZNA and questioning about the alleged missing ZNA file.

41. Reliance by the Applicant upon *W396/01* was misplaced. In that case the Tribunal failed to assess the appellant's sur place claim having regard to all the events which occurred after departure from Iran. It was submitted that is not the situation in the present application. In this application the Tribunal considered all relevant circumstances in reaching its conclusion that it was not satisfied the Applicant would be exposed to serious harm amounting to persecution as an asylum seeker returning from Australia to Zimbabwe.

Reasoning

42. In my view the First Respondent's submissions in relation to this ground are correct. The Tribunal in some detail considered the claims both separately and cumulatively and save for an issue concerning a returning asylum seeker raised in ground 4, the Tribunal satisfactorily and comprehensively dealt with the claim but did so in a manner free of jurisdictional error. I accept as submitted by the First Respondent that the Tribunal was aware of the Applicant's specific claims concerning membership of the MDC and former membership of the ZNA together with issues arising out of the missing ZNA file. The Tribunal did comprehensively deal with all the separate segments of the claim and I conclude dealt with them separately and in general considered them cumulatively. In my view this ground should fail as it discloses no jurisdictional error.

Ground 3: The Tribunal Failed to Apply the Correct Standard of Proof

43. In the Amended Application the following appears:

> *"k) In reaching its decision that the Applicant was not a refugee, the Tribunal failed to apply the correct standard of proof as to its satisfaction in this regard. It its ultimate finding the Tribunal concluded that it was not satisfied that there was a real chance that the Applicant would suffer serious harm amounting to persecution by reason of his political opinion or for any Convention reason. Nevertheless, in a number of previous*

findings the Tribunal adopted a test based on balance of probabilities, including:

i 'It is probable that the returnee would be dealt with by the immigration authorities and not by the CIO.'

ii There is no reason to assume that the procedure adopted in respect of UK deportees ... is or would be applied to an Australian deportee'

iii '... the suspicion held in Zimbabwe that UK returnees are spies is not likely to be applied to the present applicant ...'

iv '... I find that he (the applicant) is not a person likely to be of interest to the CIO or the immigration authorities in Zimbabwe for such a reason.'"

44. It was submitted on behalf of the Applicant that the findings concerning "balance of probabilities" demonstrates a misunderstanding of the law. It was further submitted that where the Tribunal is not sure of the findings and the lack of any certainty is clearly expressed, as demonstrated in the passages set out above from the Amended Application, then it is required to consider what may occur if it is wrong in respect of those findings. A failure to do so in the present case should be regarded as a failure to take into account relevant considerations *(see Minister for Ethnic Affairs v Guo Wei Rong (1997) 191 CLR 559; Minister for Immigration & Multicultural Affairs v Rajalingham (1999) 93 FCR 220 at pp.239-241* (Rajalingham); *N1202/01A v Minister for Immigration & Multicultural Affairs [2002] FCAFC 94 at paragraphs 54-57; and WAAD v Minister for Immigration & Multicultural Affairs [2002] FCAFC 399 at [23-39]* (WAAD)).

45. The First Respondent submitted that a claim to have a well-founded fear of persecution for a Convention reason must be assessed by determining whether there is a real chance the Applicant would be persecuted for a Convention reason if returned to the country of nationality. Accordingly it is submitted that the required satisfaction as to whether an Applicant has a well-founded fear of persecution for a Convention reason is not to be determined upon a balance of probabilities test.

46. It was submitted, however, that there is no error in a decision-maker making findings of fact on the balance of probabilities or in finding that something is more probable than not or that something is likely or not likely to happen. Attribution of greater weight to one piece of information as against another or an opinion that one version of the facts is more probable than another is not necessarily inconsistent with the correct application of the "Chan test" (see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (Wu Shan Liang) at 281).

47. The First Respondent specifically referred to what was submitted to be a similar argument raised by the Applicant in *Wu Shan Liang* and rejected by the High Court where Brennan CJ, Toohey, McHugh and Gummow JJ stated:

> *"24. A similar argument as is now raised by the Applicant was made in Wu Shan Liang, but was rejected by the High Court. Their Honours Brennan CJ, Toohey, McHugh and Gummow JJ stated:*
>
> > *'As a matter of ordinary experience, it is fallacious to assume that the weight accorded to information about past facts or the opinion formed about the probability of a fact having occurred is the sole determinant of the chance of something happening in the future: the possibility that a different weight should have been attributed to pieces of conflicting information or the possibility that the future will not conform to what has previously occurred affects the assessment of the chance of the occurrence of a future event. There is no reason to assume that the delegates of the Minister engage in some artificial and fallacious manner of reasoning when they are assessing the chance that an applicant for refugee status may suffer the persecution he or she fears." (at 281.6-281.6)*

48. It was submitted that in the present case the Tribunal was aware that a person would have a "well-founded fear" of persecution under the Convention if they have a genuine fear based upon a "real chance" of persecution as opposed to one that is remote or insubstantial or a far-fetched possibility. After examining the claims, the Tribunal concluded that it was not satisfied there was a real chance the Applicant would suffer serious harm amounting to persecution by

reason of his political opinion or for any other Convention reason if he was to return to Zimbabwe.

49. The reasons for the Tribunal's decision should be given a beneficial construction and not be scrutinised by overzealous judicial review according to the First Respondent's submissions. The Tribunal, it was submitted, properly assessed the Applicant's claims to have a well-founded fear of persecution for a Convention reason by applying the "real chance" test.

Reasoning

50. It appears to be common ground that when the Tribunal determines whether it is satisfied as to whether the Applicant has a well founded fear of persecution for a Convention reason then that it not to be determined upon the balance of probabilities. However, I accept that in the process of reaching the appropriate level of satisfaction no error has occurred by the Tribunal when it made findings of facts on the balance of probabilities or found that one particular fact was more probable than not. The Tribunal's method of reaching its decision by attributing greater weight to one piece of information against another or finding one version of facts more probable than another I accept is not inconsistent with the correct approach of the Chan test (See *Wu Shan Liang*).

51. I accept as submitted by the First Respondent that this appears to be a similar argument to the one raised and rejected by the High Court in *Wu Shan Liang*.

52. The Tribunal in the present case clearly examined the claims and properly informed itself of the appropriate test in determining whether the Applicant had a well founded fear of persecution under the Convention. In my view this ground should fail as there is no jurisdictional error. I am satisfied the Tribunal has properly assessed the Applicant's claims as submitted by the First Respondent.

Ground 4: The Tribunal Made Findings Based on Speculation

53. In the Amended Application the Applicant refers to this ground in the following terms:

> *"l) The Tribunal made findings for which were not based on any evidence before the Tribunal but rather on speculation, namely the Tribunal's finding that the evidence before the Tribunal did not suggest that returnees from Australia have been exposed to the kind of harm faxed by UK deportees and that there was no reason to assume that the procedure for UK deportees would apply to a returnee from Australia. There was no evidence before the Tribunal as to the treatment of Australian returnees in recent years, or even whether there had been any returnees."*

54. It was submitted that in the present case there was no country information concerning the return of failed Australian asylum seeker. Instead, reference was made to the decision in *Applicant AA* relating to failed United Kingdom asylum seekers. It was argued that the Tribunal had no basis for its statement that "The evidence before me does not suggest that returnees from Australia have been exposed to the kind of harm referred to by Dixon Marisa or the UK Tribunal."

55. It was submitted there was no evidence at all concerning the exposure to risk of Australian returnees but only to South African and United Kingdom returnees and that the Australian returnees could be treated with similar suspicion to United Kingdom returnees.

56. It was submitted that a finding or an inference made without any evidence to support it constitutes jurisdictional error. Acceptance of the evidence that United Kingdom returnees had been persecuted on return to Zimbabwe, it was submitted, makes a decision that there is no risk to the Applicant border on irrationality where there is no country material to support that finding *(see WAAD at [29-31] and Rajalingham at pp.235 and 241).*

57. The First Respondent submitted that no error was made by the findings of the Tribunal in relation to returnees from Australia. Specific reference was made to the Tribunal decision at paragraph 103 where in part the Tribunal states:

> *"... The evidence before me does not suggest that returnees from Australia have been exposed to the kind of harm referred to by Dixon Marisa or the UK Tribunal. ..."*

58. In reaching that conclusion, it was submitted, there is no jurisdictional error and the conclusion was correct. There was no evidence before the Tribunal that Australian returnees had in fact been exposed to harm of the kind referred to in the material.

59. In relation to the specific finding in paragraph 103 by the Tribunal that there is "no reason to assume that the procedure adopted, in respect of UK deportees ... is or would be applied to returnees from Australia", it was submitted that evidence before the Tribunal referred to the specific procedure adopted in respect of United Kingdom deportees. The Tribunal considered whether that procedure was or would be applied to an Australian returnee.

60. It was submitted that to the extent that that reasoning may be said to involve "speculation" as to what might happen to a returnee such as the Applicant if he were to return to Zimbabwe, then that speculation was necessarily involved in assessing the real chance test (see *Wu Shan Liang* at 277.5 and 288.8). There is no jurisdictional error, it was submitted, by the Tribunal in this aspect of its reasoning.

61. It was further submitted in any event that the requirement that a protection visa Applicant have a well-founded fear of persecution has subjective and objective elements. The Applicant must be able to show a subjective fear of persecution and that subjective fear must be well-founded. Even if the Tribunal's decision involved an error of the kind raised by the Applicant in the grounds of the Amended Application, it was submitted it was not a jurisdictional error as it did not affect the Tribunal's exercise of power. In this case the Tribunal also concluded the Applicant did not have a subjective fear of persecution (see paragraph [105] set out above).

Reasoning

62. This ground in my view is far more problematic for the First Respondent given the finding made which has been set out in

paragraph 103 of the Tribunal's decision and in particular where it states,

> *"There is no reason to assume that the procedure adopted in respect of UK deportees – that is requiring them to enter the international terminal by a different door which leads to an area occupied by officers of the CIO – is or would be applied to a returnee from Australia".*

63. In my view there is simply no evidence before the Tribunal regarding the treatment of Australian returnees during the relevant period.

64. I accept as submitted by the Applicant that the Tribunal did not have any basis for the statement that, "The evidence before me that does not suggest that returnees from Australia have been exposed to the kind of harm referred to by the Dixon Marisa or the UK Tribunal". In my view a finding or an inference made without any basis or evidence to support it can constitute a jurisdictional error. In this case it was noted that the Tribunal had before it the evidence set out in *Applicant AA* and referred to by Dixon Marisa. It did not have any contrary country information and nor am I able to detect any other basis upon which this conclusion can be reached.

65. It tends to beg the question to suggest as submitted by the First Respondent that, "There was no evidence before the Tribunal that Australian returnees had in fact been exposed to harm of a kind referred to in the material". The absence of evidence may well lead the Tribunal to consider what has occurred to Nationals of other countries who despite the perceived increased risk that they might be regarded as "spies or opponents of the regime" does not relieve the Tribunal from making a finding based on actual evidence in relation to what might happen to Zimbabwe returnees from Australia.

66. In my view this error was one which affected the Tribunal's exercise of power notwithstanding the submission by the Respondent that the Tribunal had concluded the Applicant did not have a subjective fear of persecution. By making the assumption and findings without a basis in fact and/or speculating as to the treatment of an Australian returnee the Tribunal has deprived itself of properly assessing whether the Applicant had any or any basis for fear of persecution upon return for a Convention reason.

67. In my view therefore this ground should succeed and the application be allowed. I should add however that the Tribunal throughout its detailed reasons has given careful and diligent attention to the claims and otherwise considered the material in a manner free of jurisdictional error. It will be evident of course that whilst I have not upheld other grounds the fact that I have upheld this ground to some extent may provide support for the Applicant's submission in relation to ground 2 as this factor may form part of what could be regarded as the cumulative material. However, as a separate consideration I am prepared to find that the Tribunal reached its conclusion concerning returnees from Australia based upon an assumption which could properly be construed as mere speculation without any factual basis. Accordingly, I am satisfied this ground succeeds for the reasons given.

68. In my view the assumption made by the Tribunal was not an assumption reasonably open in the absence of evidence.

Conclusion

69. It follows therefore the application should be allowed with costs.

I certify that the preceding sixty-nine (69) paragraphs are a true copy of the reasons for judgment of McInnis FM

Associate:

Date: 20 December 2006