

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*MZXJI v MINISTER FOR IMMIGRATION & ANOR* [2006] FMCA 1921

MIGRATION – Protection visa – Refugee Review Tribunal – whether jurisdictional error – whether failure to consider social group – whether integer of claim – whether failure to provide state protection – relevance of finding of Convention related reason for persecution – application allowed.

*Migration Act 1958*

*Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244

*NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1

*SCAT v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 625

*MZWDG v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 497

*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323

*Applicant A v Minister for Immigration and Ethnic Affairs (Chinese One Child Policy case)* (1997) 190 CLR 225

*SDAE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 111

*Chen v Minister for Immigration & Ethnic Affairs* (1994) 36 ALD 587

*Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1

*Minister for Immigration and Multicultural and Indigenous Affairs v*

*Respondents S152/2003* (2004) 205 ALR 487

*MZ RAJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1261

*Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630

Applicant: MZXJI

First Respondent: MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

Second Respondent: REFUGEE REVIEW TRIBUNAL

File number: MLG 474 of 2006

Judgment of: McInnis FM  
Hearing date: 27 November 2006  
Delivered at: Melbourne  
Delivered on: 21 December 2006

## **REPRESENTATION**

Pro Bono Counsel for the Applicant: Mr M. Goldblatt together with Ms E. Latif  
Counsel for the First Respondent: Mr R. Knowles  
Solicitors for the First Respondent: Clayton Utz

## **ORDERS**

- (1) A writ of certiorari issue directed to the Second Respondent, quashing the decision of the Second Respondent dated 20 February 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  
MELBOURNE**

**MLG 474 of 2006**

**MZXJI**  
Applicant

And

**MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS**  
First Respondent

**REFUGEE REVIEW TRIBUNAL**  
Second Respondent

**REASONS FOR JUDGMENT**

1. The Applicant relies upon a 'Further Amended Application' for judicial review filed 16 October 2006.
2. The Further Amended Application seeks judicial review of a decision of the Refugee Review Tribunal (the Tribunal) dated 20 February 2006. In its decision, the Tribunal affirmed a decision of a delegate of the First Respondent not to grant a protection visa to the Applicant.

**Background**

3. The Applicant is a citizen of Sri Lanka. He entered Australia on 11 September 2005. On 5 October 2005 he applied for a protection visa. On 29 November 2005 a delegate of the First Respondent refused to grant the visa, and the Applicant then applied on 6 December 2005 to the Tribunal for review of that decision.

## The Applicant's claim

4. The Applicant is a Tamil and a practising Muslim. In his application for a protection visa (Court Book p.13), the Applicant refers to his language as "*Tamil*", his religion as "*Islam*", and his ethnic group as "*Sri Lankan Muslim*".
5. The Applicant claimed to fear death from the Liberation Tigers of Tamil Ealam (the LTTE). When asked "*Do you think the authorities of that country can and will protect you if you go back?*", the Applicant stated, "*NO. BECAUSE THEY ARE INEFFECTIVE*" (Court Book p.22).
6. In support of his application before the Tribunal, the Applicant relied upon a statement annexed to a letter dated 13 January 2006. It is relevant to set out extracts of that statement as follows:

*“2. At the beginning of 1998 I bought a rice mill about half a kilometre away from my house and started a business growing and selling rice. I registered the business on 28 January 2000. For 6 years my business did very well. Whilst the Liberation Tigers of Tamil Ealam (LTTE) have been operating in my are for many years, they generally left the Tamil Muslims alone until about mid 2004. After this time some local Tamil Muslims began to cooperate with government forces and provide information about the activities of LTTE supporters. This angered the LTTE and they began to harass Tamil Muslims in the area.*

*3. In June 2004 the LTTE came to my property for the fist time. I cannot remember the day they came to the mill. My rice mill is positioned on the border of the Tamil Tiger region, right near the jungle, so they have easy access to the mill. The first time they came to the mill there were 6 men with guns. They came to my office and demanded money. I told them I did not have any money. They said that they would kill me if I did not give them money. So, as I feared for my life, I gave them 25,000 Rupees.*

*4. Approximately a month later 3 people came with guns demanding money again. I knew by then that it was futile to protest so I gave them 100,000 Rupees (11ak).*

*5. Things were quiet for a while, but in approximately March 2005 7 armed Tamil Tigers came to my rice mill in a truck*

*and demanded I give them sacks of rice or they would kill me. At first I refused but I was very scared and so gave them 20 bags of rice weighing 50 kilos each. They left. I did not have any money to give them.*

6. *On these occasions I did not call the police because I thought that the Tigers would leave me alone if I just gave them what they wanted. Sometimes they just stop coming after a while and I did not want to cause any unnecessary trouble if that was going to be the case. But, it was not the case. The Tigers did not stay away.*
7. *In June 2005, 8 Tigers came to the mill. They asked for money and bags of rice and loaded many bags of rice into their lorry. They held a gun at my neck and made threats to me. I decided to try and confront them on this occasion. My business was not going well and I did not have money or rice to spare for them. My employees were also very supportive of me because if my business had to close they would all lose their jobs. I struggled with one of the LTTE members and my employees chased the others away. I realised that there would be consequences from our actions from the LTTE, but I was very angry at the time and we hoped to show that our community was opposed to the LTTE.*
8. *After this incident, I paid my staff their wages and told the security guard to watch things for me. I went to the police station and reported the incident. They said they would look into the situation. I then went home briefly to say goodbye to my family and then fled to Nagalle, which is 3 and half hours away from my city. I stayed with my father in law for 2 weeks and hoped the police would do something about the situation, but judging by police action I have seen in the past I knew there was not much chance. The police are scared of the Tamil Tigers, so they usually listen to your complaint but fail to take action.*
- ...
10. *When the police failed to protect me I fled to Moratuwa, Colombo. My cousin lives there. I was safe in Colombo for that time period because I was far away from my city, however if I were to stay there longer they would circulate my photo and eventually find me. In Colombo there are many Tamil Tigers, you cannot escape them. There are Muslims that are part of the group as well and they inform*

*the Tigers of the whereabouts of other Muslims which are wanted by the group. While there are Muslims that are part of the Tamil Tigers, if you are a Muslim that does not support the group you are targeted more than a non-Muslim.*

11. *I stayed in Colombo from June 2005 to September 2005 when I was able to escape to Australia with the help of a private agent. The agent organized a visa for me to go to Australia with some false documentation. I have a Sri Lankan drivers license which I will submit to the Tribunal to prove my correct identity. The documents I have provided in support of my application are genuine. I do not think that DIMIA case officer has taken proper account of the fact that not all persons speak good English in Sri Lanka and do not always write letters in the format that would be expected in Australia with dates and details.*

...

14. *Sri Lanka is a very small country and it is impossible to hide from anyone for very long. I so speak some Sinhalese but could not safely relocate anywhere else in the country, including Colombo. When you have a problem with the LTTE, you have a problem right throughout the country.”.*

(Court Book pp.166-169)

7. Based on the claims and the statement together with the material provided to the Tribunal, a reasonable summary of the Applicant's claims includes the following:
- a) He was born in a village which is predominantly Sinhalese, which has a Muslim minority.
  - b) He owned an operated a rice mill in the village.
  - c) The LTTE had operated in the area for many years, and in mid 2004 Tamil Muslims began to cooperate with the government and provide information about LTTE supporters. This angered the LTTE and they began to harass Tamil Muslims in the area.
  - d) Commencing in 2004, the LTTE came to the Applicant's property demanding money and threatened to kill him. The Applicant claimed to fear for his life, and accordingly complied with their requests.

- e) In March 2005 the LTTE returned to the Applicant's rice mill and demanded money. The Applicant refused by the LTTE took 20 bags of rice.
- f) In June 2005 the LTTE again demanded money and threatened the Applicant and began to load a lorry of rice from the Applicant's rice mill. The Applicant refused to cooperate and confronted one of the assailants. An altercation between the Applicant and his employees on his behalf and the LTTE members allegedly ensued, and ended with two LTTE members being beaten and detained and the lorry which the LTTE members had arrived in was set fire to and destroyed. The Applicant claimed that he realised there would be consequences for not cooperating, but he was very angry and he and his staff hoped to show that their community was opposed to the LTTE.
- g) The Applicant feared he would be the subject of revenge attacks so he shut down the mill and went into hiding. The following day he learned that part of his mill had been burnt down and members of the LTTE were searching for him.
- h) The Applicant made a report to the police but they failed to protect him. He left Sri Lanka to "*escape death at the hands of*" the LTTE.
- i) Political persecution of Tamil Muslims has worsened over the last few years, and the Applicant believed the LTTE had singled him out as a Tamil Muslim. The LTTE knew that the Applicant as a Tamil Muslim did not support the LTTE. Having been in an attack against the LTTE, the Applicant claimed that he would be seen as their enemy and there would be further attempts on his life.

(Court Book p.169)

- 8. Before the Tribunal, the Applicant provided further material in support of his claims including certain country information, and he attended the hearing conducted by the Tribunal on 14 February 2006.

## The Tribunal's Decision

9. In its decision, the Tribunal sets out details of the Applicant's claims and evidence. It specifically states, "*He is a Tamil-speaking Sri Lankan Muslim*" (Court Book p.183). In another part of its decision when considering the claims and evidence, the Tribunal recites that, "*He said he was mainly targeted because he was a Tamil Muslim; a Tamil businessman would not have been harassed to the same extent*" (Court Book p.184).
10. The Tribunal then sets out further information provided at the hearing, and refers to country information in some detail. Part of that country information includes reference to alleged attacks by the LTTE upon Muslims and Muslim communities. Reference is also made to violence between Singhalese and Muslims. It does not seem to be disputed in the present application that the Applicant has not suggested in his claim for a protection visa and other material provided to the Tribunal that he feared harm from Singhalese in his community.
11. The "Findings and Reasons" of the Tribunal comprise five paragraphs or approximately one page. It is convenient to set out the findings and reasons in full as follows:

*“Based on the information on the file, the Tribunal finds that the applicant is a Sri Lankan national.*

*The Tribunal accepts that the applicant is at risk of extortion by the LTTE as he has a rice mill located close to Tiger territory, and the Tamil Tigers are known to practice extortion. (It does not accept that he is under an active threat – he would have left his wife and children in Polonnaruwa if this was the case. He did not provide an adequate explanation for having done so in the circumstances claimed. Moreover, the applicant could not say which of the factions was extorting him. While taking into account his argument that the Karuna faction is not seen as qualitatively different from the Vanni faction, the Tribunal would expect that if he had actually been targeted for extortion in 2004 when the Karuna faction broke away and came to prominence in its own right, he would have a view on who the likely perpetrator was given the location of his rice mill.)*

*However, the Tribunal does not accept that such harm constitutes persecution within the meaning of the Convention. As stated*

*above, persecution has an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. The country information indicates that the Sri Lankan authorities, notwithstanding the cost and difficulty, and the ruthlessness of the LTTE's guerrilla tactics, have successfully held back the LTTE from the cleared areas through a massive expansion of their forces and powers since major conflict erupted in 1983. Although they cannot guarantee the safety of each individual, the Tribunal finds that the Sri Lankan authorities do not condone, and that they do have the ability to control the harm the applicant fears. Their forcefulness and vigilance against the LTTE meets international standards for effective state protection of a person in the applicant's circumstances.*

*The applicant did not claim he was at risk of persecution by the majority Sinhalese community due to his religion; indeed he said the Muslim minority in his village was amicable with them. This is consistent with the country information. The Tribunal finds that the applicant does not face a real chance of persecution due to his religion.*

*The Tribunal is not satisfied that the applicant has a well-founded fear of persecution within the meaning of the Convention."*

## **The Amended Application**

12. There is only one ground relied upon in the Further Amended Application, namely, ground 3, where the Applicant claims as follows:

*"3. The Tribunal failed to deal with an essential element or integer of the Applicant's claims.*

### *Particulars*

*(a) The Tribunal failed to deal with the applicant's claim that he had a well-founded fear of persecution by reason of his ~~ethnicity~~ race (as a Tamil), membership of a particular social group (as a Tamil Muslim) and actual or impugned political belief (of opposition to the LTTE).*

*(b) The Tribunal did not deal with these claims and instead found that the applicant did not have a well-founded fear of persecution by reason of his religion.*

(c) *The Tribunal did not deal with the applicant's evidence supporting his claim of persecution by way of letters from his village head, the president of his mosque, and his local MP. Instead, without addressing this evidence, it found that the applicant faced a risk of extortion but was under no 'active threat'.*

13. Other grounds set out in the Further Amended Application were not pursued, and accordingly I do not need to consider them in this decision.

### **The Applicant's submissions**

14. It was submitted by the Applicant that the Tribunal did not make any findings regarding the Applicant's claim of persecution as a Tamil Muslim (ie by reason of his race and/or membership of a particular social group) or by reason of his actual or imputed political beliefs.
15. It was submitted that the ground relied upon in the Further Amended Application alleges that the Applicant feared persecution by reason of his race, membership of a particular group, and/or political beliefs and the Tribunal did not address or deal with this aspect of his claims. It was submitted that this requires the court to determine:
- a) whether these claims are raised;
  - b) what the elements of the claims were; and
  - c) whether the Tribunal addressed them.
16. It was submitted that the Applicant made a claim of persecution by reason of his race as a Tamil and membership of a particular social group, namely a "*Tamil Muslim*", and political beliefs, namely opposition to the LTTE. These matters, having been raised, should have been dealt with by the Tribunal on the material or evidence before it (see *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244 at [42], and *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1, and *SCAT v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 625).

17. It was noted that the question of whether or not issues had been raised expressly may be apparent either on the face of the material before the Tribunal, or arise by reason of the Tribunal's findings (see *MZWDG v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 497 at [39]) as follows:

“39 *On the authorities, the Tribunal is obliged to consider at least three types of claim: first, those that are explicitly put by the applicant; secondly, those that are implicit in the material before the Tribunal; and thirdly, those that emerge from the Tribunal's findings or conclusions. For the purposes of this case, it is unnecessary to explore the boundaries of the Tribunal's role any further. But it is important to recognise that in each type of case, regardless of what is put by the applicant or the Minister, the Tribunal must ask itself the right question - whether the applicant has a well-founded fear of persecution for a Convention reason. Where the material before the Tribunal, or the Tribunal's own findings or reasoning process, indicates that the applicant has modified or would modify his or her behaviour if returned to the country of citizenship, the question must be asked why the applicant would do so: see Appellant S395/2002, esp per McHugh and Kirby JJ at 489 [39] and per Callinan and Heydon JJ at 503 [88].*”

18. In the present case, it was argued that the claim arising by reason of the Applicant's race, membership of a particular social group and/or political beliefs and ethnicity was "*at the forefront of the Applicant before the Tribunal and was squarely raised in the statutory declaration*" referred to earlier in this judgment. Reliance was placed upon particular paragraphs from the declaration set out above, including reference to "*Tamil Muslims*" and the Applicant hoping to show "*that our community was opposed to the LTTE*". Country information also raised the claims, according to the Applicant's submissions. In particular, reference was made to the country information which stated according to the Applicant's submissions that Tamils are a distinct race in Sri Lanka (Court Book pp.188 - 190) and that "*Muslims in Sri Lanka view themselves as an ethnic minority*" and have been killed and intimidated, and questioned the police ability to protect them (Court Book pp.187, 188 and 192).

19. In dealing with the elements or integers of the claim, it was submitted that based upon the material provided to the Tribunal and the Applicant's evidence the following elements or integers may be distilled:
- a) The Applicant is a Tamil Muslim and opposed to the LTTE.
  - b) The LTTE has singled the Applicant out for attack as a Tamil Muslim.
  - c) The LTTE has singled the Applicant out for attack as a person who does not support the LTTE.
  - d) Muslims in Sri Lanka are an ethnic minority.
  - e) Tamils are a discernible race in Sri Lanka.
  - f) Tamil Muslims form a distinct social group in Sri Lanka.
20. It was submitted that the claims were raised expressly by the Applicant and required an answer from the Tribunal. The Tribunal, it was submitted, was required to examine and deal with all claims for asylum made by the Applicant.
21. It was argued that in this instance there was an absence of findings on each of the critical issues, which as I understood it were led to be integers of the claim. The Tribunal, it was submitted, did not pose the correct questions and accordingly failed or constructively failed to exercise its jurisdiction (see *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]).
22. It was submitted that the claim by reason of membership of a particular social group, namely "*Tamil Muslim*" required consideration by the Tribunal, to assess whether there is some characteristic other than persecution that unites a collection of individuals.
23. It was submitted that the characteristic must set the group apart from the rest of the community and make it distinguishable from the rest of that society. The question, which it was submitted remains unanswered, was whether Tamil Muslims form a particular social group in Sri Lanka. The Tribunal, it was submitted, failed to make the

appropriate findings (see *Applicant A v Minister for Immigration and Ethnic Affairs (Chinese One Child Policy case)* (1997) 190 CLR 225).

24. It was further submitted that the claim of persecution by reason of opposition to the LTTE required the Tribunal to make a number of factual findings including whether a person in Sri Lanka who was opposed to the LTTE amounts to a political opinion for the purpose of the Convention, and whether a person from Sri Lanka who is believed to be opposed to the LTTE amounts to political opinion for the purpose of the Convention. Further, it required the Tribunal to make findings as to whether the Applicant has or would be imputed to have that political opinion. It was submitted the Tribunal failed to make the appropriate findings.
25. Likewise, it was submitted that the Applicant's claims for asylum require the Tribunal to make factual findings as to whether Tamils are a race for the purpose of the Convention and whether the Applicant is a person of that race. The Tribunal, it was submitted, failed to make the relevant finding.
26. It was further submitted that the Tribunal was then required to determine whether the Applicant has a fear and whether that fear is well-founded, and whether there exists a causal connection between the Applicant's fear and the Convention reason claimed. Again it was submitted the Tribunal did not examine or deal with these issues. It was argued the Tribunal characterised the claim as arising from the Applicant's ownership of the rice mill, and otherwise failed to address the elements of the Applicant's claims arising from his race, membership of a particular social group, and/or political opinion. Reference was made to the Tribunal's findings, where it accepts, "*That the Applicant is at risk of extortion by the LTTE as he has a rice mill...*" (emphasis added).
27. The Applicant referred to the Tribunal's claimed failure to set out the Applicant's claims of political persecution and its description of the Applicant as a "Tamil-speaking Sri Lankan Muslim" (Court Book p.183). It was claimed that this is different from the description that the Applicant gave himself, namely as a "Tamil Muslim" (Court Book p.169). It was submitted there was an absence of any findings as to political persecution, race, or membership of a particular social group.

28. The Applicant submitted that the Tribunal failed to characterise the claims properly, and although the reasons may demonstrate what could be described as a "general awareness of the facts leading to the Applicant's fear", the Tribunal had failed "utterly to address the claims as the Applicant put them".
29. It was further submitted that where the Tribunal fails to deal with a claim raised by the evidence and contentions before it which, if resolved in one way would or could be dispositive of the review, that failure on the facts of the case can constitute a failure to conduct the review required by the *Migration Act 1958* (see *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [60]). In the present case, it was submitted, the Tribunal was required to consider the Applicant's claims cumulatively to determine whether they attracted the protection obligations. The failure to consider the claims cumulatively was relied upon as a separate basis for judicial review (see *SDAE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 111, *Chen v Minister for Immigration & Ethnic Affairs* (1994) 36 ALD 587).
30. During the course of submissions, counsel for the Applicant submitted that any claim by the First Respondent that it was unnecessary to make findings in relation to the specific claims referred to above were not cured by the finding concerning the availability of state protection. As I understand the submissions, the availability of state protection does not relieve the Tribunal of making findings in relation to the specific claims referred to in the Applicant's submissions.

## **The First Respondent's Submissions**

31. The First Respondent accepted that the Tribunal did not make a finding about the reasons why the Applicant claimed to fear harm at the hands of the LTTE. It was submitted that the Tribunal did not address whether or not the Applicant's claimed fear of harm would arise for a Convention-related reason. It was submitted, however, that it was unnecessary for the Tribunal to do so in the present case. The Tribunal, it was noted, referred to the Convention and set out the appropriate definition of a refugee as any person who:

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

32. It was submitted the Applicant did not claim, expressly or implicitly, that he faced harm at the hands of Sri Lankan authorities or Sinhalese Sri Lankans. Nor was it claimed that he faced harm merely by reason of his Tamil race. Instead, the Applicant's claimed, it was submitted, only related to fear of harm at the hands of the LTTE by reason of his background as a Tamil Muslim or his political profile of opposition to the LTTE.
33. The First Respondent submitted the Applicant did not claim that the Sri Lankan authorities would refuse to provide him with protection from the LTTE on the basis of any Convention-related reason. It was argued he did not claim that any inaction by the Sri Lankan authorities to protect him from harm inflicted by the LTTE could be selective and discriminatory for a Convention reason (see *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at [29]-[31], [84]-[85] and [115]-[118]). It was submitted that no claim was made that the Sri Lankan authorities would fail to provide adequate protection due to the Applicant's Tamil race or his membership of a particular social group, namely that of Tamil Muslims, or his actual or imputed political opinion of opposition to the LTTE.
34. According to the First Respondent's submissions the Tribunal considered relevant country information and did not accept the Applicant's claim. The Tribunal was aware that effective state protection would not require that the authorities could guarantee a person's safety, and specifically found that the authorities' "*forcefulness and vigilance against the LTTE meets international standards for effective state protection of a person in the Applicant's circumstances*" (Court Book p.193). Those findings, it was submitted, do not disclose any misapplication of the legal principles relating to effective state protection (see *Minister for Immigration and Multicultural and Indigenous Affairs v Respondents S152/2003* (2004) 205 ALR 487 at [26]). It was submitted that harm inflicted by non-state agents such as the LTTE for a Convention-related reason cannot constitute

"persecution" for the purposes of the Convention unless it is "officially tolerated or uncontrollable by the state authorities" (see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 233).

35. During the course of submissions, the First Respondent relied upon the decision of Heerey J in *MZ RAJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1261 at [8], where the court states,

*“Whenever the protection of the Applicant's country is available and there is no ground based on well-founded fear for refusing it, the person concerned is not in need of international protection and is not a refugee.”*

36. It was submitted by the First Respondent that once the Tribunal found that the Applicant returned to Sri Lanka the authorities would provide him with effective state protection which would meet international standards then the claims to be a refugee could not be sustained. Having made the finding about the effectiveness of protection provided by the Sri Lankan authorities, it was unnecessary for the Tribunal, according to the First Respondent's submissions, to ascertain whether or not the harm which the Applicant claimed to fear at the hands of the LTTE would be inflicted for a Convention-related reason. Any failure to make a finding about this issue does not therefore give rise to jurisdictional error because the Tribunal's exercise of its power would not be affected (see *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82] and *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at [45]-[47]).

37. It was noted that courts have recognised that a decision of the Tribunal can stand on one of several alternative and independent bases, and in the present case its decision was capable of standing on the Tribunal's effective protection finding alone.

## **Reasoning**

38. A proper reading of the Tribunal's decision, when compared with the claims made particularly in the statement of the Applicant, clearly

indicate, and it appears to be conceded, that the Tribunal has failed to consider what I regard to be essential claims of fear of persecution of the Applicant as a Tamil Muslim by reason of his race and/or membership of a particular social group or his fear by reason of his actual or imputed political beliefs. I accept the submissions of the Applicant that the claims which are essential to his application are that he is 'a Tamil Muslim opposed to the LTTE' and that the LTTE had singled the Applicant out for attack as a "Tamil Muslim". He was singled out by the LTTE as a person who does not support the LTTE. I further accept that Muslims in Sri Lanka are an ethnic minority and that Tamils are a discernible race in Sri Lanka. Further, I accept that an essential part of the claim in this instance was that the Applicant is a Tamil Muslim as part of a distinct social group in Sri Lanka. These claims were raised clearly by the Applicant and the Tribunal failed to consider those claims.

39. The question which arises for consideration, however, is whether the failure to consider the claims in the manner alleged by the Applicant which I have found is sufficient to constitute jurisdictional error.
40. Whilst I accept that in some cases a finding concerning the availability of state protection would of itself provide a "stand-alone" basis upon which a decision of the Tribunal cannot be impugned for jurisdictional error, it seems to me that in considering the question of state protection it is first necessary to identify the Convention-related claims to determine the extent and nature of the state protection.
41. In my view, where a claim is made that a member of a particular social group, that is, a 'Tamil Muslim who has expressed opposition to the LTTE', has claimed to suffer persecution then it is incumbent upon the Tribunal to at least make a finding in relation to those claims so that it can then properly assess whether state protection is indeed available to the required degree for that target group or target individual. The target of persecution appears to me to be clearly relevant in assessing the extent to which state protection is available. The ability of an Applicant to avail himself of the protection of his country in my view will be determined by the nature of his Convention-related claims to fear persecution. A person who is a member of a mainstream group in society may well be more easily afforded state protection than a person

who is a member of a minority group which, as in the present case, has special features namely, being a "*Tamil Muslim*", which is a combination of being a member of a minority group and a person belonging to a religion which is not the mainstream religion of the race to which he belongs. Added to that is the imputed political belief as a result of the conduct of the Applicant as a Tamil Muslim in providing information to the government concerning the activities of the LTTE. All of those claims were squarely raised by the Applicant, and in my view needed to be addressed by the Tribunal before it could then make a proper and appropriate assessment of the availability of state protection for the Applicant.

42. Its failure to do so in my view does constitute a jurisdictional error and the obligations of the Tribunal to properly consider the claims are not avoided by simply moving directly to the question of state protection. If a Tribunal was able to simply determine the question of state protection then it would not be necessary to consider any of the Convention-based fears of persecution claimed by an Applicant. It would only be necessary for the Tribunal to make a general assessment of the availability of state protection, and this would in turn result in the elimination of all claims in most countries where the Tribunal was satisfied that the authorities had attained the appropriate international standards for the protection of its citizens. Clearly, each case must be determined according to the particular basis upon which the fear of persecution is claimed.
43. In the present case, on my reading of the Tribunal's conclusions, it appears to me that the Tribunal has overlooked and/or ignored the substantial claims set out earlier in this judgment (Court Book p.166) namely, those claims arising out of the Applicant being a Tamil Muslim and the events which occurred since 2004. Instead, the Tribunal has then simply made findings concerning extortion by the LTTE arising from the Applicant's ownership of a rice mill located close to the LTTE territory, and then made further adverse findings against the Applicant due to his lack of knowledge of the factions of the LTTE who are undertaking extortion. The Tribunal has failed entirely to consider what I regard to be the integers of the claim as submitted by the Applicant.

44. Accordingly, it follows that the application should be allowed and appropriate orders made.

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**I certify that the preceding forty-four (44) paragraphs are a true copy of the reasons for judgment of McInnis FM**

Associate:

Date: 21 December 2006