FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZLND & ORS v MINISTER FOR IMMIGRATION & ANOR *[2008] FMCA 1047*

MIGRATION – Review of decision of Refugee Review Tribunal – whether the Tribunal received "information" from sources other than the applicant – whether applicant's parents were "other sources" – applicant's parents appeared in their capacity as the applicant's representatives.

MIGRATION – Review of decision of Refugee Review Tribunal – complaint that Tribunal ignored applicants' claim of persecution – Tribunal entitled to prefer independent country information – findings open to Tribunal on what was before it – applicant seeking impermissible merits review – Tribunal dealt with applicants' claims.

MIGRATION – Review of decision of Refugee Review Tribunal – complaint that Tribunal ignored relevant information – no evidence of document put before Tribunal – decision record of another Tribunal hearing not of assistance to applicant – each application for review to be decided on its own merits – Tribunal not bound by another Tribunal's decision – no jurisdictional error – application dismissed.

Migration Act 1958 (Cth), ss.48A, 411, 48, 412, 424A, 425, 65, 36

SAAP v Minister for Immigration and Multicultural and Indigenous Affairs; [2005] HCA 24; (2005) 79 ALJR 1009
Kopalapillai v Minister for Immigration and Multicultural Affairs (1998) 86 FCR 547
W148/00A v Minister for Immigration and Multicultural Affairs (2001) 185 ACR 703
Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors [1996] HCA 6; (1996) CLR 259
SZANK v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1478
NAHI v Minister for Immigration and Multicultural Affairs [2004] FCAFC 10
VQAB v Minister for Immigration and Multicultural Affairs [2004] FCAFC 104
Attorney-General (NSW) v Quin [1990] HCA 21 (1990) 170 CLR 1
Applicant A & Anor v Minister for Immigration & Ethnic Affairs [1997] HCA 4; (1997) 190 CLR 225
S v Minister for Immigration and Multicultural Affairs [2004] HCA 25; (2004) 217 CLR 387; 206 ALR 242
Morato v Minister for Immigration, Local Government and Ethnic Affairs

[1992] FCA 637; (1992) 39 FCR 401,
Ram v Minister for Immigration & Ethnic Affairs & Anor (1995) 57 FCR 565
Chan v Minister for Immigration & Ethnic Affairs [1989] HCA 62; (1989) 169 CLR 379
Minister for Immigration and Ethnic Affairs v Guo & Anor [1997] HCA 22, (1997) 191 CLR 559
Htun v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 244; [2001] FCA 1802
NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No2) [2004] FCAFC 263
SZFDE v Minister for Immigration and Citizenship [2007] HCA 35

Applicants:	SZLND, SZIUY, SZIWU
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 3243 of 2007
Judgment of:	Nicholls FM
Hearing date:	21 April 2008
Date of Last Submission:	21 April 2008
Delivered at:	Sydney
Delivered on:	31 July 2008

REPRESENTATION

Counsel for the Applicants:	Nil
Solicitors for the Applicants:	Nil
Counsel for the Respondents:	Mr J Mitchell
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) The application made on 18 October 2007, and amended on 21 January 2008, is dismissed.

(2) Applicants SZIUY and SZIWU pay the first respondent's costs set in the amount of $7,500.

(3) Within seven (7) days, the first respondent's solicitors write to the applicants, SZIUY and SZIWU, in relation to the second order, and notify them of rule 16.05 of the *Federal Magistrates Court Rules 2001* (Cth).

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3243 of 2007

SZLND, SZIUY, SZIWU
Applicants

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application made under the *Migration Act 1958* (Cth) ("the Act") on 18 October 2007, and amended on 21 January 2008, seeking review of the decision of the Refugee Review Tribunal ("the Tribunal") signed on 4 September 2007, and handed down on 25 September 2007, which affirmed the decision of a delegate of the respondent Minister to refuse to grant protection visas to the applicant, SZLND.

2. In respect of applicants, SZIUY and SZIWU, the Tribunal found that it did not have jurisdiction to consider their applications.

Background

3. The respondent has filed two bundles of relevant documents in these proceedings (the Court Book ("CB") and the Supplementary Court Book ("SCB")), from which the following can be discerned.

4. The applicants before the Court are son (“the applicant” – “SZLND”), father (“the applicant father” – “SZIUY”), and mother (“the applicant mother” – “SZIWU”). They are all citizens of Indonesia, of Chinese ethnicity, and of Christian faith.

5. On 19 April 2007 they all applied for protection visas (application reproduced at CB 1 to CB 36). The applicant was the primary applicant, who submitted his own claims to be a refugee. The applicant father and applicant mother each made their applications on the basis of their membership of their son’s family unit.

6. Although the applicant was born in Australia (and is currently four years of age) he claimed to fear persecution if he were to go to Indonesia, based on what was said to be the treatment of Chinese Christians in Indonesia. His claims, to a large part, were based on what was said to have occurred to his parents (particularly, his father) while they were in Indonesia, and what was generally said to be the discrimination, harassment, and threats made to Chinese Christians in Indonesia.

7. The applicant father arrived in Australia on 13 May 1996 (SCB 82). He applied for a protection visa on 2 September 1996 (SCB 69). He put forward claims to be a refugee in his own right on that occasion. This application was refused. He then sought review by the Tribunal, which was unsuccessful. He also unsuccessfully sought intervention by the then Minister in 2004 (SCB 69 to SCB 149).

8. The applicant mother arrived in Australia on 3 May 1998 (SCB 26). She applied for a protection visa in her own right on 7 May 1998. This application was made in conjunction with her then husband (not the applicant father) (SCB 1). This application was refused. She sought review by the Tribunal and this was also unsuccessful (SCB 1 to SCB 68).

The Delegate

9. In relation to the application of 19 April 2007, the first respondent’s Department wrote to the applicants on 7 May 2007, notifying them that as the applicant father and the applicant mother had unsuccessfully applied for protection visas previously, their applications as members

of their son's family unit were "invalid" pursuant to s.48 of the Act (CB 37 to CB 38). The applicant's application, however, proceeded to assessment.

10. On 22 May 2007, the applicant's application for a protection visa was refused (CB 39 to CB 49). Independent country information available to the delegate caused her to accept that the anti-Chinese riots did occur in some parts of Indonesia in 1998, and that this has caused some ethnic Chinese in Indonesia to have a subjective fear of harm as Chinese Indonesians. However, in reliance on other independent country information before her, she could not be satisfied that the applicant had: "an objective fear of persecution on the basis of race should he reside in Indonesia" (see, in particular, CB 49.3) and "on the basis of being Christian" (CB 49.5).

The Tribunal

11. On 18 June 2007 all three applicants sought review by the Tribunal (CB 50 to CB 53).

12. I should just note that it is a somewhat absurd notion that a three-year-old child (the applicant was three and a quarter years old at that time) would have the comprehension or capacity necessary to have made such an application for review. Nor, for that matter, that he could have made the application for a protection visa over two months earlier.

13. Nonetheless, the application is clearly expressed as having been made by the applicant as "Applicant 1", and his father and mother as "Applicant 2" and "Applicant 3" respectively (CB 50). While it may be something of a fiction that the applicant actually signed the application for review (CB 53), (the Court does not profess any expertise in hand writing recognition), nonetheless the Tribunal's subsequent actions, and in particular, its communications with the applicants and its dealings with them, must be seen in light of the "fiction" created by the applicants themselves which compelled the Tribunal (in order to comply strictly with the relevant statutory procedural requirements) to communicate directly with the applicant, and to deal with his claims, in a sense, as if they were actually made by him.

14. I note, in this regard, that the application which asserts to be made by the applicant as the primary applicant (that is, "Applicant 1") did not notify the Tribunal of the existence of any authorised recipient or anyone otherwise authorised to act for the applicant (or applicants) in relation to the application (CB 51). In this regard, therefore, it was appropriate for the Tribunal to communicate directly with the applicant (by way of letters) (CB 56 to CB 58).

15. On 26 June 2007 the Tribunal invited the applicant to a hearing (CB 59 to CB 60). The invitation enclosed a "Response to Hearing Invitation" form (CB 61), including a form for the applicant to complete if he wanted witnesses to be called on his behalf (CB 62). The "Response to Hearing Invitation" form was completed and returned to the Tribunal on 16 July 2007 (CB 65).

16. Relevantly, the form was completed as follows:

> ***"DO YOU WANT TO COME TO A HEARING?***
>
> …
>
> ☒ ***YES***
>
> *2a. If your application includes other family members, does any family member want a separate hearing?* *Yes* ☐ *No* ☒
>
> *2.b. Do you need an interpreter?* *Yes* ☒ *No* ☐
>
> Language – INDONESIA Dialect (if Applicable) …
>
> *Do you want the Tribunal to take oral evidence from any witnesses?...* *Yes* ☐ *No* ☒
>
> …
>
> *Do you want to bring someone else with you to the hearing? …*
>
> Yes ☐ No ☒
>
> *Signed on behalf of, and with the consent of, all family members included in the application..*
>
> *Signature … [signed]… Date: 9/07/07"*

17. On the day of the hearing the applicant was noted as "not present". The applicant father and applicant mother attended (CB 66).

18. The Tribunal's account of what occurred at the hearing is set out in its decision record at CB 95.5 to CB 97.6.

19. In all, the Tribunal understood the applicant's claims to protection in his protection visa application (CB 95) to be that the applicant's parents (the applicant mother and applicant father) were not married, but had lived in a de facto relationship since a time before the applicant was born. The applicant was born in Australia. He claimed that the applicant father and applicant mother were subject to "discrimination" in Indonesia by reason of their Chinese ethnicity and Christian religion, and that he would suffer, as they had suffered, if he were sent to Indonesia.

20. He claimed that the applicant father had suffered having stones and eggs thrown at him, people had called him names, and he had been harassed in the streets of Jakarta. He claimed that the applicant father could not practise his religion, even privately, as "[M]uslim fanatic would disturb and harass my father every time he wanted even to pray at home" (CB 20.3).

21. The applicant claimed to fear violence, as a Christian, at the hands of Muslims on return to Indonesia, and to fear that his parents would be unable to provide for him and protect him in Indonesia.

22. The applicant and his parents attended a hearing before the Tribunal on 24 July 2007. The applicant father and applicant mother were said by the Tribunal to have given evidence in relation to the issue as to why their son could not go to Indonesia.

The Tribunal

23. The Tribunal found that it did not have jurisdiction in relation to the applicant father's and the applicant mother's application for review. Having regard to the decision of the delegate, neither had made a valid application on the basis that they were statute-barred by s.48 of the Act for doing so. That "decision" was not an "RRT-reviewable decision" for the purposes of s.412 of the Act (CB 90 and CB 110).

24. The Tribunal records (CB 89.7) that it invited the applicant father and applicant mother to make submissions at the hearing on this issue, but that "they had nothing further to say" (CB 89.7).

25. The Tribunal assessed the applicant's claims as against Indonesia, the claimed country of nationality (CB 104.10 to CB 105.1). It accepted that the applicant's ethnicity was Chinese, and that he was Christian.

26. The Tribunal found that he had not suffered Convention-related harm in Indonesia in the past on the basis that the applicant, having been born in Australia, had never been to Indonesia (CB 105.2).

27. The Tribunal then went on to consider whether the applicant would be subject to persecution if he were to go to Indonesia. It considered the applicant's claim to fear harm on three separate bases:

    (1) Chinese ethnicity.

    (2) Christian religion.

    (3) Membership of "his family" as a particular social group.

28. The Tribunal understood the applicant's claims to be based on the incidents that had occurred to the applicant mother and the applicant father while in Indonesia (CB 105.3).

29. The Tribunal accepted that there had been inter-racial riots in the past in Indonesia, and that there had been incidents of racial violence such as those claimed by the applicant's father (CB 106.7). It found that since the applicant's father departed Indonesia, the Indonesian Government had put in place changes that have: "improved the lives of the ethnic Chinese and the Christian Chinese". Accordingly, it rejected the claimed "fear of daily living" as a Chinese Christian in Indonesia (CB 107.6).

30. The Tribunal considered the applicant's claim to fear harm in Indonesia as a member of particular social groups in the following way:

    (1) "[E]thnic Christian Chinese born in Australia".

    (2) "[E]thnic Christian Chinese born in Australia to parents who live in a de facto relationship".

(3) [M]embership of “his family” (CB 107.6).

31. The Tribunal found that there was no corroborative independent evidence to support the applicant claim to fear harm on the basis of (i) or (ii) above (CB 108.2), and preferred to rely on independent evidence that suggested that ethnic Chinese are able to obtain protection from Indonesian authorities (CB 108.4). It did not accept that the Indonesian police discriminate against ethnic Chinese and do not protect them (CB 108.5). The Tribunal specifically indicated its preference for the independent evidence over that of the claims put forward by the applicant’s father (CB 108.6).

32. In relation to the claims made at the hearing by the applicant mother that she feared harm in Indonesia from her former husband, the Tribunal found this claim did not fall within any of the Convention ground and was instead a fear of harm from her former husband because of what the applicant mother had done (CB 108.8). It rejected the claim that the applicant would be harmed by his mother’s former husband on the basis that there was no evidence of threats made against the applicant, and that any threat of harm was remote (CB 108.9). In addition, the Tribunal found that there was no evidence to suggest that in the event of a threat of harm from the mother’s former husband, the Indonesian police would withhold protection (CB 108.10 to CB 109.1).

33. The Tribunal found that there was no independent evidence to suggest that ethnic Chinese are singled out by Indonesian authorities for discriminatory treatment, and that there was no evidence that the authorities “promote, condone or permit persecution of Christians in Indonesia or withhold reasonable protection” (CB 109.5).

34. Further, it found that religious and ethnic tolerance is promoted in Indonesia by the Indonesian government, and that it was committed to ensuring religious freedom (CB 109.6). It did not find evidence of a denial of protection to women, Christian Chinese or other non-Muslims, and that there were avenues of complaint available in the event that the applicant was harmed (CB 110.4).

35. The Tribunal concluded, therefore, that the applicant did not face a real risk of persecution if he were to go to Indonesia (CB 110.5), and that Australia did not owe protection to him.

Application to the Court

36. The application to the Court filed on 18 October 2007 puts forward the following grounds:

> *"1. The Refugee Review Tribunal decision is affected by error of law as it relies on information and ignored the persecution suffered by the parents as being of Chinese descent.*
>
> *2. The Tribunal erred in law and failed to wait for information to be provided by the father as a result of the investigation regarding his shop.*
>
> *3. The Tribunal erred in law by underestimating the effect of being bullied while attending a Public School.*
>
> *4. The Tribunal erred in law by ignoring that the parents have a well founded fear of persecution as membership of at least three particular social groups, namely ethnic Christian Chinese born in Australia, Ethnic Christian Chinese born to parents who live in a de facto relationship in Australia and membership of his family."*

37. The amended application filed on 21 January 2008 puts forward the following grounds:

> *"1. The decision made by the Refugee Review Tribunal (the Tribunal) is affected by an error of law because the Tribunal misunderstood the subjective fear of persecution which is well founded and ignored the real chance for the parents to be persecuted should they be compelled to return to Indonesia.*
>
> *2. The Tribunal erred in law by ignoring the case of the father's brother who was an applicant for refugee and whose name was mentioned in V97/07405 dated 21 May 1998 a copy of which was given to the Tribunal and ignored.*
>
> *3. We also rely on the grounds of the first application lodged with the Court.*
>
> *4. As stated in the response – general federal law filed in court on 31 October 2007 by the respondent on point 2 the unsuccessful judicial review proceedings made by the second and third named applicants are acknowledged but both applications were misunderstood by the Tribunal*

Members, especially when the brother of the applicant, who had exactly the same circumstances, was accepted as a refugee on 21 May 1998 and the current applicant was refused because the Tribunal member who dealt with the case misunderstood the case and made a decision contrary to the law. Once again I submit copy of the decision of my brother [name of brother] for the current Judge's attention.

Particulars

1. *The Tribunal failed to look at V97/07405 dated 21 May 1998 which was before it.*

2. *The first applicant in this case is a child, unable to represent himself and the Tribunal failed to see what happened to his father and that the future in Indonesia is not secure and unsafe and his fear of persecution is similar to his father and his Uncle Agus and the Tribunal ignored the subjective well founded fear of persecution. The Tribunal ignored the seriousness of the circumstances of his father and mother.*

3. *The applicant informed the Tribunal how he was cheated by an Indonesian migration agent who acted in bad faith and the Tribunal failed to look at the evidence given previously and currently to establish the well founded fear of persecution."*

38. Annexed to the amended application is a copy of a Refugee Review Tribunal decision record (dated 21 May 1998 – "RRT Reference: V97/07405") in respect of the applicant's uncle (his father's brother).

Hearing before the Court

39. At the hearing before the Court, the second and third named applicants (the applicant father and the applicant mother) appeared in person. They were assisted by an interpreter in the Indonesian language. Mr J Mitchell of Counsel appeared on behalf of the first respondent. I also have before me written submissions prepared by Counsel and filed on behalf of the first respondent.

40. Given the age of the first named applicant, it was appropriate to appoint a litigation guardian. I appointed the second named applicant

(the applicant father) as his litigation guardian pursuant to rule 11.11 *Federal Magistrate Court Rules 2001* (Cth).

41. The applicant father submitted that the applicants sought to rely on the amended application filed in this matter (although, I noted that Ground Three in the amended application asserts: "We also rely on the grounds of the first application …").

42. The applicant's father essentially made one submission in support of the application before the Court. He referred the Court to a Tribunal decision made in May 1998 in relation to his brother, which was attached to the amended application. He referred the Court to page 6 of the document and, in particular, referred to that Tribunal member's finding (in relation to his brother):

> *"Credibility*
>
> *The Tribunal observes that the applicant's claims are broadly consistent with those made by his brother (the applicant father) …"*

43. He then asked the Court to compare this with the decision made (by a differently constituted Tribunal) in September 1997, which affirmed a decision of another delegate of the first respondent, to refuse a protection visa to him (SCB 137 to SCB 149). He particularly drew the Court's attention to that Tribunal's findings that "The Tribunal accepts the Applicant's account of his experiences" (SCB 145.4).

44. He also drew attention to a request made to the then Minister for Immigration by letter dated 28 October 1997 in which he sought the Minister's intervention, which was ultimately unsuccessful (CB 109 to CB 113).

45. Yet, further, he referred the Court to another decision made by yet another differently constituted Tribunal in February 2000 relating to the applicant mother (a joint application with her then husband – SCB 60 to CB 68) where the Tribunal, yet again, said:

> *"The Tribunal considers the Applicants candid" (SCB 66.5).*

46. In all, therefore, the submission on behalf of all of the applicants before the Court was that the applicant's father's brother was found to be a

refugee by the Tribunal in 1997 in circumstances where that Tribunal made positive comments about the applicant father's credibility, yet both the applicant father and the applicant mother (in 1997 and 2000 respectively), in spite of the fact that both the Tribunals found their account of their experiences in Indonesia to be credible, rejected their claims to be refugees. The applicant father stressed that the Tribunal, that made the decision in relation to him in 1997, accepted his evidence as truthful "but the member of the Tribunal a long time ago make an error in understanding my situation and refused me to be a refugee while another member in Melbourne accept my brother as refugee on the same ground."

47. The applicant father also stressed that he and his wife were "too scared" to themselves go, back to Indonesia, or to let their son go, because of their fear of persecution which was "at least subjectively" well-founded.

48. The applicant father appeared to accept that the situation in Indonesia may have changed, but I understood him to be saying that the Court should act to rectify "the mistake" made by the two Tribunals in 1997 and 2000, in relation to the decisions relating to himself and his wife.

49. In that regard, I should just note that the applicants acknowledge (see ground four of the amended application) that both those decisions have been the subject of judicial review and both were unsuccessful for the respective applicants. A search of the Court's records reveals that the applicant father had his application dismissed in August 2006 (SYG 1329 of 2006), and the applicant mother had her application dismissed in June 2006 (SYG 1535 of 2006). No appeal to the Federal Court appeared to have been made in respect of these judgments.

50. Explicit in the applicants' complaint (see ground two of the amended application) was that the Tribunal erred in law by ignoring the outcome in the applicant father's brother's case, and that a copy of this decision had been given to the Tribunal. Given that there was no evidence of this before the Court, I gave the parties the opportunity to make further submissions, both in relation to this issue, and to the current status of any appeals to the Federal Court in relation to the applications for judicial review made separately by the applicant father and applicant mother previously.

51. The written submissions from the applicants were that:

(1) The applicants (although the submissions appear to be written from the perspective of the applicant father) insisted that a copy of the decision of his brother's application was given to the Tribunal, but that they/he "could not find the evidence from the Post Office that the application was express posted to the Tribunal".

(2) The Tribunal ignored the contents of the decisions relating to both the applicant father and applicant mother made previously by them. (That it confirmed that it had those decisions before it, yet it "overlooked the subjective fear of persecution and what happened to the parents in the past would happen to the child who was born in Australia.")

(3) The Tribunal overlooked "important information" that it should have considered. This was that previous tribunals had found both the applicant father and applicant mother to be credible in the evidence that they gave "a long time ago".

Consideration

52. Given that the applicants were unrepresented before the Court, I did consider the question as to the status and role of the applicant father and applicant mother before the Tribunal, and how it related to the applicant.

53. The applicant applied as a refugee in his own right. The applicant father and applicant mother applied for protection visas as members of his family unit. Their application, made on 19 April 2007, for protection visas was plainly made in circumstances where they had both made applications for protection visas previously, both of which had been refused.

54. Section 48A(1) operates to "bar" both applicants from making a further application for a protection visa. Both applicants are subject to this provision, notwithstanding that their latest application was made as members of the applicant's family unit.

55. I note that the criteria required to be satisfied, as at the time of an application for a protection visa, contemplates an applicant who claims to be a person to whom Australia has protection obligations on the basis of making specific claims under the Refugees Convention, or who claims to be a member of the same family as such a person (see Schedule 2 to the *Migration Regulations 1994* (Cth) "Subclass 866 – Protection" – 866.211).

56. The delegate found that the applicant mother's and the applicant father's applications were "invalid" because they were prevented by s.48A of the Act from making a further protection visa application, which included an application as a member of the family unit (CB 37.4).

57. In the application for review all three applicants applied, although the applicant was noted as "Applicant 1". No authorised recipient for the purposes of receiving communications from the Tribunal was notified (CB 51).

58. As referred to above, only the applicant father and applicant mother gave evidence at the hearing before the Tribunal. In relation to their own applications, they were given the opportunity before the Tribunal to address the Tribunal's "preliminary view" that it did not have jurisdiction in relation to their application because the "decision" made by the delegate in respect of them did not satisfy the definition of an "RRT-reviewable decision" contained in s.411 of the Act. At the hearing on 24 July 2007 they were invited to make submissions in relation to this issue and are reported to have responded with: "they had nothing further to say" (CB 89.7).

59. The Tribunal ultimately found that in the circumstances they were "statute barred" from making any further visa applications because of s.48. (In the circumstances, I saw this as encompassing, and linked to, s.48A.) In these circumstances, I cannot see error in the Tribunal's finding that their application for review was not valid for the purposes of s.412 of the Act (given the provisions of s.411).

60. The hearing continued, however, and both the father and mother gave evidence and made submissions to the Tribunal. I considered whether their evidence and submissions were such as to come within the

circumstances found in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*; [2005] HCA 24; (2005) 79 ALJR 1009 ("*SAAP*"), where evidence given by a family member was held to be "information" for the purposes of s.424A(1). The Tribunal's failure to subsequently write to the applicant in that case, pursuant to that section, and give her the opportunity to comment in writing, was found to be jurisdictional error.

61. At [50] of *SAAP* per McHugh J (who was part of the majority in that case) the Court said:

> *"50 The obligation on the Tribunal to give the invitation and to invite comment on the information is expressed in broad and general terms. The obligation does not apply to information that the applicant gives, regardless of when that information is given (see s 424A(3)(b). It applies to information received by the Tribunal from sources other than the applicant. It also does not apply to all information that the Tribunal receives. It only applies to information that the Tribunal considers 'would form part of its reason for refusing the application for review'. Nevertheless, the object of the section must be to provide procedural fairness to the applicant by alerting the applicant to material that the Tribunal considers to be adverse to the applicant's case and affording the applicant the opportunity to comment upon it."*
>
> [Footnote omitted]

62. In the current case, the applicant before the Tribunal was, at that time, a three-year-old child. It cannot seriously be said, in these circumstances, that the application for a protection visa by the applicant, nor, relevantly, the application for review, was made by him. Nor have the second and third named applicants, his father and mother, asserted that this was the case.

63. Further, in the "Response to Hearing Invitation" form, having regard to the answers provided in the relevant part of that form (see [16] above), it is clear that the subsequent appearance of the second and third named applicants at the hearing (and having regard to the Tribunal's account of what occurred at the hearing – the only account put before the Court now) indicated that the applicant's parents appeared at the hearing in their own right (in relation to their own applications for review), but

also as the representatives to speak on behalf of their infant son, who was clearly, in all the circumstances, unable to speak for himself.

64. They were clearly not there as witnesses. The answer to question 2c on that form was that the applicants did not want the Tribunal to take oral evidence from any witnesses. Nor did they maintain any "fiction" that the applicant was able to speak for himself. Clearly, the answer to Question 2d ("Do you want to bring someone else with you to the hearing?"), being "No", represented to the Tribunal that the applicant's parents saw themselves as attending the hearing on the behalf of the applicant, in circumstances where the invitation to the hearing had only been extended to the applicant alone.

65. This letter is reproduced at CB 59. It was addressed to the applicant at the address for service It stated:

> *"I am writing about the application for review made to the Tribunal by:*
>
> *[The applicant's name]*
>
> *The Tribunal has considered the material before it but it is unable to make a favourable decision on this information alone.*
>
> *This letter is an invitation to the applicant listed above, to appear before the Tribunal to give oral evidence and present arguments. The Tribunal has arranged for ..."*

66. The letter clearly contained no reference to the second and third named applicants. Plainly, given the Tribunal's "preliminary view" (CB 89.7) that it did not have jurisdiction in relation to the parent's application, it was not required to invite them to a hearing pursuant to s.425 of the Act. However, importantly, the Response to Hearing Invitation form was signed by the second and third named applicants, and the signatures are plainly consistent with the signatures appearing in the application for review as against "Applicant 2" and "Applicant 3" respectively (noting, of course, that the signature appearing opposite "Applicant 2" is identical to the signature appearing opposite "Applicant 1").

67. Despite not being invited to the hearing (because they were not "applicants" in respect to whom the Tribunal had obligations pursuant

to s.425) they both acted in such a way as to indicate that they would, in any event, attend the hearing before the Tribunal. In my view, this could only have been in circumstances where they were exercising their parental role to represent, speak for, and make submissions on behalf of, their infant son.

68. In one sense, had the Tribunal wanted to take a strict view, given that the applicant did not subsequently appear to give evidence at the hearing in person, it would have been open to the Tribunal to have proceeded to consider his application in his absence, without hearing any submissions from his parents. Presumably, it would have refused the application given its preliminary view expressed in the letter of invitation to hearing.

69. In my view, appropriately, the Tribunal chose not to exercise its discretion in this fashion, and rather heard evidence and submissions from the applicant's parents. In so doing, it gave the applicant the opportunity to be personally heard before the Tribunal in the only way that any three-year-old could realistically be heard before a Tribunal. That is, to be heard by, and through, his representatives. In this case, his parents.

70. In this case, once their own situation had been addressed ("they had nothing further to say"), I saw the evidence and submissions subsequently made by the applicant's parents at the hearing, as being the evidence and submissions of the applicant himself.

71. This is confirmed in the only account of what occurred at the hearing put before the Court:

> *"The second named and third named applicants attended a joint Tribunal hearing with the applicant on 24 July 2007. As the applicant is a three year old child, the parents, the second named applicant (hereinafter called the father) and the third named applicant (hereinafter called the mother) gave evidence and present[ed] arguments on his behalf ...*
>
> *When asked why their son cannot go back to Indonesia ..."* (CB 95.5).

72. In these circumstances, therefore, the current case before the Court can be distinguished from the circumstances in *SAAP*, in that the Tribunal

did not receive information "from sources other than the applicant". The applicant's parents plainly spoke to the Tribunal in their capacity as the applicant's representatives, the applicant being unable to speak for himself.

Ground One – Reliance on independent information

73. Ground one in the application asserts that the Tribunal fell into jurisdictional error when it relied on independent information and that it "ignored the persecution suffered by the [applicant's] parents as being of Chinese descent."

74. Any plain reading of the Tribunal's decision record reveals that it did not ignore the parents' claims to have feared, or to have suffered, harm in the past. It understood that these claims of past harm on their part were put forward as the basis for the applicant's claims to fear harm in the future if he were to go to Indonesia, as well as his status as a Chinese Christian born in Australia (CB 105.3).

75. The Tribunal accepted that the applicant's father had been bullied at school and had suffered from "indigenous Indonesians" when he sought to attend church (because of his Chinese ethnicity) (CB 107.3).

76. Further, the Tribunal considered the applicant's mother's claims that she and her son would not receive protection from the authorities, for harm which was feared from her former husband, because of her Chinese ethnicity (CB 108).

77. Ultimately, the Tribunal did consider the claims of past harm on the part of the father and mother, and the claims of harm by the mother of domestic violence by her former husband as they related to the applicant.

78. The Tribunal, however, preferred independent evidence before it that adequate protection would be available from the authorities to the applicant (CB 108.5). It noted claims that had been put in place by the Indonesian government since 1998 (CB 107.4) which had "improved the lives of the ethnic Chinese and the Christian Chinese" (CB 107.5). Further, that there was no evidence that the "Indonesian police would withhold protection from the mother or the applicant in such

circumstance" (being the claimed fear of harm from the former husband – CB 109.1).

79. The Tribunal made extensive reference to independent information before it relating to the ability of Chinese people in Indonesia to practice their religion (CB 109 to CB 110). It was not satisfied that there was (at the time of its decision – 2007): "a pattern of persecution of Christians or Chinese in Indonesia" (CB 110.3). In any event, it found that the state would not tolerate or condone "violent incidents against non-Muslims" (CB 110.2), and would make "genuine and effective efforts to protect the lives and property of its ethnic Chinese minority and Christian minority as well as the removal of official discriminatory practices" (CB 110.5).

80. The Tribunal accepted what was said to have occurred to the parents in the past, but found that, in the circumstances of the independent evidence before it, there was not a real chance that the applicant was at risk of persecution should he "return" (go) to Indonesia.

81. This finding was open to the Tribunal on what was before it, and for which it gave reasons (*Kopalapillai v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 547 (see particularly at 558 to 59), *W148/00A v Minister for Immigration and Multicultural Affairs* (2001) 185 ACR 703 at [64] to [69] per Tamberlin and RD Nicholson JJ).

82. Given what is plainly set out in its decision record this ground does not rise above a request for impermissible merits review (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang & Ors* [1996] HCA 6; (1996) CLR 259 ("*Wu Shan Liang*"))

83. Further, the choice and use of independent country information, and the weight to be given to such material, is a matter for the Tribunal – *SZANK v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1478 at [16], per Hely J, *NAHI v Minister for Immigration and Multicultural Affairs* [2004] FCAFC 10 at [11], *VQAB v Minister for Immigration and Multicultural Affairs* [2004] FCAFC 104 at [32].

84. As Mr Mitchell submits, the Court cannot review the fairness of the Tribunal's performance of that task. (*Attorney-General (NSW) v Quin* [1990] HCA 21 (1990) 170 CLR 1 ("*Quin*")).

Ground Two – Failed to wait for further information to be provided

85. Ground Two in the application asserts that the Tribunal erred in law in failing to wait for the applicant's father to provide further information in relation to the : "investigation regarding his shop".

86. The "investigation" referred to in this ground appears to be the claimed investigation by Indonesian police into the burning down of the applicant father's shop in 1998 (see the Tribunal's decision record at CB 106.8). In relation to this matter, the Tribunal noted that some nine years later, the applicant father did not know the outcome of this investigation (CB 106.9).

87. There is no indication in the Tribunal's decision record (the only record of what occurred at the hearing put before the Court), or in any of the material put before the Court, that the applicant's father requested an opportunity to provide further information to the Tribunal in relation to this, or any other such matter, but alone that the Tribunal denied such an opportunity. Nor in the circumstances can I see that the Tribunal had any obligation to provide any further time. If the matter was of such importance, then the applicant's father had nine years to have made his enquiries. This ground does not succeed.

Ground Three – Underestimated the effect of bullying

88. Ground Three in the application asserts that the Tribunal erred in law by "underestimating the effect of [the applicant father] being bullied while attending a Public School".

89. A plain reading of the Tribunal's decision record reveals that it considered this claim put forward by the applicant's father. It accepted that the applicant's father had been bullied while attending "a public school" but then noted the evidence before it to the effect that the applicant's father had subsequently attended a private school and that it did "not suggest that he suffered bullying at his new school". The

Tribunal clearly dealt with this aspect of the applicant father's experience in Indonesia prior to his departure from Australia, and considered this against the claims put forward by the applicant to fear such harm in Indonesia were he to go there in the future (CB 106.10 and CB 107.5).

90. I note that the Tribunal records discussion of this aspect of the applicant father's claim with the applicant father, who indicated that he could put the applicant into a private school but that "he feels fear of daily living" (CB 107.5). In light of independent information available to it, the Tribunal rejected this explanation. It is clear from the decision record that the Tribunal dealt with this aspect of the applicant's claims. In all, this ground does not rise above a request for impermissible merits review (*Wu Shan Liang*. See also, *Quin*).

Ground Four – Tribunal ignored applicant son's parents' fears of harm

91. Ground Four in the application asserts that the Tribunal ignored that the applicant's mother and applicant's father have a well-founded fear of persecution on the basis of their membership of three particular social groups, namely ethnic Christian Chinese born in Australia, ethnic Christian Chinese born to parents who live in a de facto relationship in Australia and membership of his family.

92. The first part of this ground, as stated, appears to assert that the Tribunal's error in law was that it ignored that the parents had a well-founded fear of persecution because of their membership of three particular social groups.

93. First, it should be noted that in the application for a protection visa (made on 19 April 2007) the applicant's father and applicant's mother did not assert that they had any claims to be refugees in their own right. They applied as members of their son's family unit, and it was the son who was said to have been putting forward the claims to be a refugee. The Tribunal further dismissed the application for review in so far as it was said to be made in relation to the parents in circumstances where it said it had no jurisdiction to consider their application. The Tribunal's decision in this regard was plainly the correct (see [59] above). The

Tribunal, therefore, was not obliged to otherwise consider the claims to fear persecution made by the applicant's parents in their own right.

94. To the extent, however, that this ground complains that it is the applicant who has the well-founded fear, because of his membership of the three particular social groups, and that his fear of harm is informed by, and to a large extent, based on, the fears held by the parents, then given what appears in the Tribunal's decision record, this complaint does not arise above a request for impermissible merits review.

95. The Tribunal plainly understood the applicant's claims (as put forward by his parents) that he feared harm in Indonesia for his membership of three particular social groups (CB 107.6). It identified the three groups as now put forward in ground four.

96. The Tribunal had regard to relevant authority as to what constitutes "membership of a particular social group" *(Applicant A & Anor v Minister for Immigration & Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225 ("*Applicant A*"), *S v Minister for Immigration and Multicultural Affairs* [2004] HCA 25; (2004) 217 CLR 387; 206 ALR 242 ("*Applicant S*"). It accepted that the applicant was a member of the particular social group, his "family" (CB 107.10) and also accepted that the other two groups put forward were particular social groups. However, the Tribunal's finding was that there was no evidence before it to suggest that a member of such groups would suffer persecutory harm in Indonesia for the purposes of the Refugees Convention (CB 108.3).

97. The applicant (through his father) was given the opportunity to address the Tribunal's view that there was no such evidence (CB 108.3). He responded that persons of Chinese ethnic background (the common element to each of the particular social groups identified) would not be able to obtain effective or adequate protection from the police in Indonesia. The Tribunal, however, ultimately said that it preferred "to rely on the independent evidence that does not suggest that ethnic Chinese in Indonesia do not obtain the protection of the Indonesian authorities" (CB 108.5).

98. The Tribunal therefore found that the applicant's claim to fear persecutory harm because of his membership of those groups was not

well-founded. Having regard to relevant leading authorities in this area (*Applicant A, Applicant S, Morato v Minister for Immigration, Local Government and Ethnic Affairs* [1992] FCA 637; (1992) 39 FCR 401, and *Ram v Minister for Immigration & Ethnic Affairs & Anor* (1995) 57 FCR 565), I cannot see (as Mr Mitchell correctly submits) that there was any error in the Tribunal's analysis in relation to this issue. Ultimately, the Tribunal did not "ignore" this claim. To the extent that it found against the applicant, this finding was open to it for the considered reasons that it gave. I cannot see error.

Ground One in the Amended Application

99. Ground one in the amended application asserts that the Tribunal "misunderstood the subjective fear of persecution which is well founded and ignored the real chance for the parents to be persecuted should they be compelled to return to Indonesia."

100. Again, to the extent that this asserts that the Tribunal should have found that the applicant's parents would face a real chance of persecution were they to return to Indonesia, the Tribunal plainly was not required to make a finding in this regard, given that it had found that it had no jurisdiction in relation to the application brought by the applicant's father and the applicant's mother.

101. To the extent, however, that it was claimed by the parents that the applicant had a subjective fear of persecution, and that such subjective fear is therefore well-founded for the purposes of the Convention, such a claim misunderstands, and misrepresents, the relevant test, and ignores that such a fear requires an objective basis to be made out.

102. In *Chan v Minister for Immigration & Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 ("*Chan*") (see, also in this regard, *Minister for Immigration and Ethnic Affairs v Guo & Anor* [1997] HCA 22, (1997) 191 CLR 559) the High Court considered that aspect of the definition of "refugee" in Article 1A(2) of the Convention relating to a fear of persecution, being a "well-founded fear". In *Chan* the High Court said that "well founded fear" involves both a subjective and objective element. At 396 of *Chan* per Dawson J:

> *“The phrase ‘well-founded fear of being persecuted’ has occasioned some difference of opinion in the interpretation of the relevant Article of the Convention. Upon any view, the phrase contains both a subjective and an objective requirement. There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear.”*

103. It is clear that the subjective element of well-founded fear concerns the state of mind of the applicant. In the current case, to the extent that the applicant’s parents have put the applicant’s claims to the Tribunal on his behalf, it is understood that what they were asserting before the Tribunal (and clearly what they complain about now) is that they (and in the sense of their son, if he could formulate such a thought) would have a subjective fear of persecution if he were “compelled” to go to Indonesia. But this complaint ignores that the relevant issue is whether an applicant has a genuine, that is, a well-founded, fear. That is, whether such a fear objectively can be said to exist. This is a question of fact to be determined by the Tribunal.

104. The Tribunal did not ignore that the applicant’s parents (again, in the sense of putting forward the applicant’s claims) held a subjective fear. It accepted that the events that had occurred in the past had occurred as claimed. But based on independent evidence available to it, it found that such a fear was not well-founded in the sense of being objectively made out. In *Chan* (see, in particular, per McHugh J at 429) the Court said that a “well-founded fear” requires an objective examination of the facts to determine whether the fear is justified. See also per Dawson J at 396:

> “The phrase “well-founded fear of being persecuted” has occasioned some difference of opinion in the interpretation of the relevant Article of the Convention. Upon any view, the phrase contains both a subjective and an objective requirement. There must be a state of mind - fear of being persecuted - and a basis – well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.”

105. Plainly, therefore, the Tribunal was required not only to consider the applicant’s claims and evidence (as put before it by his parents) but was required to assess what it found to be the relevant independent

evidence against which to test the objective part, or element, of whether the fear was therefore well-founded.

106. Any plain reading of the Tribunal's decision record reveals that this is precisely what the Tribunal did. It gave the applicant every opportunity to put forward his claims (plainly, in the circumstances, through his parents) and it considered each aspect of their evidence and submissions, but ultimately found, without necessarily rejecting that there was a subjective fear (at least held by the parents on his behalf), that such a subjective fear was not well-founded because, with regard to independent evidence before it, such fear could not be objectively made out. I cannot discern error in what the Tribunal has done in this regard. This ground does not succeed.

Grounds Two and Four in the Amended Application

107. Grounds two and four in the amended application assert error on the part of the Tribunal because the Tribunal was said to have ignored the case of the applicant's father's brother, who was recognized as a refugee by a differently constituted Tribunal in May 1998.

108. There is nothing in the material that was before the Court at the hearing of this matter to show that the applicants had provided a copy of this decision record to the Tribunal, or that they had referred the Tribunal to it, during the course of the hearing, or otherwise.

109. While references were made to their earlier applications for protection visas (see CB 19 and CB 37), I cannot see any reference to the father's, and brother's, decisions put before this Tribunal. Further, I note that, as submitted by Mr Mitchell, the Tribunal's record of what documents were provided at the hearing (see CB 67) makes reference to "passportes [sic] photocopies [sic]". It makes no reference to any decision record from 1997 relating to the father's brother being given to the Tribunal.

110. In submissions before the Court during the hearing the applicant father stated that when they received the letter (being the invitation to the hearing), in that letter the Tribunal stated that if there were any further documents that "they" wished it to consider, such documents should be sent to it. He claimed that they had posted the earlier Tribunal decision

record to the Tribunal. He submitted that what he sent to the Tribunal did not contain any covering letter referring the Tribunal to his case, but that simply the earlier decision record was put in an envelope and sent to the Tribunal. He told the Court he would look for the postal receipt and could provide it to the Court.

111. Given that the applicants were unrepresented before the Court, I agreed to the applicants being given the opportunity, subsequent to the hearing, to put before the Court (in the appropriate way) any further evidence that they wished the Court to consider, and any written submissions that they wished to make in this regard.

112. Subsequently, in written submissions, the applicant father submitted that he "regret[ted] to inform" the Court that he could not find the relevant postal receipt. Nonetheless, the applicants press that the Tribunal "ignored important information" being the decision made by the Tribunal, as differently constituted in 1998, in relation to the applicant father's brother.

113. Despite opportunity, the applicants failed to put any evidence before the Court now to show that they ever referred the Tribunal to this decision, let alone that a copy of this decision was provided to it. In my view, the applicants have failed to establish the factual basis for this assertion.

114. But even if the Tribunal had been referred to this decision, I cannot see that this can assist the applicants now. I can well understand that the applicant father, in particular, may be aggrieved that he and his brother applied for recognition as refugees in Australia at approximately the same time in 1997, and that two different Tribunals came to two "different" conclusions, even in circumstances where one Tribunal (that dealt with his brother) found that the applicant father's claims were similar to those of his brother. (Though how that was relevant to the assessment of the applicant's brother's claims, which was the relevant issue before that Tribunal, remains unexplained).

115. Each application for review must be decided on its own merits. It is for each Tribunal member constituted for the purposes of the particular review to determine the outcome of the application for review, and to reach, or not reach, the requisite level of satisfaction (as statutorily

required – ss.65 and 36(2) of the Act) as to whether the applicant meets the definition of "refugee" or not.

116. Ultimately, the Tribunal member charged with deciding this application for review (and for that matter, the member who made the decision in relation to the applicant father in 1998) is not "bound" by any decision made by another Tribunal member in relation to another person. This Tribunal was required to consider the claims to fear persecution made by the applicant (and, to the extent relevant to his claims, what was said to have occurred to his parents when they were in Indonesia). I cannot see how some Tribunal decision made nine years earlier in relation to the father's brother could have assisted the applicant now in relation to his application. Plainly, the Tribunal did not reject the proposition that circumstances in Indonesia for Christian Chinese were such in the past that the harm claimed by the parents could have occurred. The Tribunal's reasoning was, however, that in the intervening nine years, circumstances had had changed in Indonesia, such that the applicant's claim of persecutory harm was not well-founded.

117. As set out above, there is no evidence before the Court that the applicants referred the Tribunal to the decision relating to the applicant father's brother. Nor that they put such a decision before this Tribunal. But even if they had, it is difficult to conceive of circumstances as to how this would have assisted the applicant.

118. The Tribunal is only required to consider an applicant's claims, and all integers of an applicant's claims (*Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244; [2001] FCA 1802, *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No2)* [2004] FCAFC 263). The Tribunal is not required to deal with all pieces of evidence that may be put before it. At the very best, the "earlier" Tribunal's decision of nine years earlier, relating to the applicant's uncle, could only have been a piece of evidence, and not an integer or part of the applicant's claims. The Tribunal properly dealt with what was put before it. I cannot see that the evidence before the Court sustains the applicant's submission that they attempted to put the copy of the earlier decision before it. But even if they had, it would still not have assisted the applicant.

119. I should just note, nor is the Tribunal required, of its own initiative, to go through all previous decisions made by other "constituted Tribunals" to determine whether any relative of an applicant has otherwise been granted a protection visa.

120. In listening to the submissions made by the applicant father to the Court, and in looking at what is stated in the particulars to ground four of the amended application, and considering, in particular, paragraph [3] of the applicants' written submissions, it is quite clear that what the applicant father and applicant mother remained aggrieved about (and in one sense, fail to come to terms with) is that two brothers made claims to be refugees in 1996-1998. One brother was successful, and the other was not. Their grievance is exacerbated by the situation two years later, when the applicant mother made a claim (albeit, in conjunction with her then husband). She too was unsuccessful. Their grievance is further heightened by what they understood each of the Tribunal members at that time to have found in relation to their credibility.

121. Each of the differently constituted Tribunals found, at the time, that the applicant's father, the applicant's uncle and the applicant's mother to have been credible in their claims. Yet only the applicant's uncle was successful, at that time. The applicant mother and applicant father were ultimately found not to have a well-founded fear of persecution despite what they said was the credibility of their claims ("the credibility of the parents in giving their evidence a long time ago").

122. I understood the complaint therefore to be, ultimately, that this Tribunal should have addressed the "mistakes" made by the two earlier constituted Tribunals (in relation to the applicant father and applicant mother) and should have redressed this "mistake" by finding that they, and their son, were refugees and therefore owed protection by Australia.

123. This complaint plainly misconceives the Tribunal's role, and plainly misconceives and misunderstands what the Tribunal was required to do in the application for review that was before it, and what it actually did.

124. The Tribunal does not sit on review from other Tribunal decisions. That the applicant's father's brother was successful before a differently

constituted Tribunal, and that the applicant father and applicant mother were not successful, does not assist the applicant father and mother, or their son, before this Tribunal. Plainly, this Tribunal found, correctly in my view, that it did not have jurisdiction to consider the parents' claims to be refugees for a second time.

125. In any event, to the extent that what they may have said to the Tribunals in 1998 and 2000, respectively, in relation to their claims, and to the extent that that was said to be relevant and the basis for the applicant's claims to have a well-founded fear, the Tribunal did not "ignore" the credibility of what the parents said.

126. The Tribunal did not find against the applicant because it rejected the credibility of what was said by the applicant's parents, either before it, or in 1998 and 2000. To the contrary, it accepted that the situation in Indonesia, at that time, was such that they may have been subjected to such harm.

127. However, the Tribunal is required to consider the chance of a well-founded fear of persecution in relation to the applicant before it, if such an applicant were to return to, or go to, the country of claimed persecution in the reasonably foreseeable future. In this regard, the Tribunal found that circumstances had changed in the intervening nine years since the applicant father (and for that matter, his brother) had been considered for refugee status. It is not correct to say that the Tribunal ignored what they had said in the past.

128. But what is relevant to the task that was before the Tribunal was the chance of a well-founded fear of persecution to the applicant if he were to now go to Indonesia. In that regard, given the changes that had occurred in the intervening years in Indonesia, whatever may have been the situation in 1998 (and for that matter 2000) does not assist the applicant now. This complaint, therefore, does not succeed.

The Particulars to the Grounds in the Amended Application

129. In particulars one and two in the amended application deal with matters already considered above. (That the Tribunal "failed to look at" the applicant's uncle's decision and failed to appreciate "what happened to his father.")

130. At particular three the following is asserted:

> *"The applicant informed the Tribunal how he was cheated by an Indonesian migration agent who acted in bad faith and the Tribunal failed to look at the evidence given previously and currently to established a well founded fear of persecution."*

131. The latter part of this particular has already been dealt with above and does not assist the applicant for the reasons already given.

132. To the extent that this particular makes reference to "the applicant", it is clearly not a reference to the (infant) applicant before the Court now. Given the way that relevant material has been put before the Court, this is clearly a reference to the applicant father (although what follows applies equally to the applicant mother).

133. In the application for review there was nothing before the Tribunal to indicate that the applicants had engaged a migration agent in relation to the application, nor is there any evidence to show that any such claim was made to the Tribunal.

134. When asked to clarify this complaint at the hearing before the Court, the applicant father explained that at the time when he made his first application for a protection visa at the same time as his brother, he was cheated by a migration agent in that he was told that he and his brother should put in a "separate application" (he suggested that this was done so that they could be charged separately for two applications) and that as a result, his brother was successful, and he was not.

135. Given the applicant father's explanation, and in all the circumstances, I did not see that such a complaint showed (noting, of course, that no evidence whatsoever was put before the Court) that this conduct amounted to fraud in any event, on the part of the migration agent, or that it was similar to the circumstances as considered by the High Court in *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35.

136. But even if it had, it would not assist the application before the Court now. No such assertion was made in relation to the application for the review by the Tribunal, which is currently the subject of this judicial review. Even if some fraud had been perpetrated by a migration agent,

nine years ago, in relation to another application for a protection visa by the applicant father, and may even be said to have vitiated the process before the Tribunal at that time (that is, the decision made by the differently constituted Tribunal at that time, noting, of course, that no evidence whatsoever has been put before the Court to indicate that such a claim would be successful), it is that decision which would need to be tested before the Court.

137. In this regard, and in any event, that decision was the subject of judicial review before this Court. I am unaware of any finding of fraud made by the Court in relation to that decision.

138. The applicants have sought judicial review by way of application (as amended) of the Tribunal's decision of September 2007. No claim as to fraud by a migration agent has been made in relation to that decision, and the process leading to that decision. This complaint also does not succeed.

Conclusion

139. In all, for the applicants to succeed before the Court in this application, the Court would need to discern jurisdictional error on the part of the Tribunal. I cannot discern such error on any of the bases as put forward by the applicants now, nor otherwise. For this reason, this application is dismissed.

I certify that the preceding one hundred and thirty-nine (139) paragraphs are a true copy of the reasons for judgment of Nicholls FM

Associate: C Darcy

Date: 31 July 2008