FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZPAC v MINISTER FOR IMMIGRATION & ANOR *[2011] FMCA 517*

MIGRATION – Review of decision of Independent Merits Reviewer – procedural fairness – independent country information – where reviewer turned to country information in response to information provided by applicant – whether information was credible, relevant and significant to decision of reviewer – whether documents containing country information need be disclosed – whether opportunity to respond required – whether reviewer misunderstood the definition of a refugee under the Convention – whether claim for refugee status requires past experience of persecution to succeed.

Migration Act 1958 (Cth), ss.36(2), 477(2)

Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia [2010] HCA 41
Darabi v Minister for Immigration & Anor [2011] FMCA 371
Kioa v West (1985) 159 CLR 550
Applicant VEAL of 2002 v Minister for Immigration [2005] 225 CLR 88
Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah (2001) 206 CLR 57
VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 82
SZMIB v Minister for Immigration [2008] FMCA 1433

Applicant:	SZPAC
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	ADOLFO GENTILE IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER
File Number:	SYG 345 of 2011
Judgment of:	Raphael FM
Hearing date:	29 June 2011
Date of Last Submission:	29 June 2011

Delivered at:	Sydney
Delivered on:	7 July 2011

REPRESENTATION

Counsel for the Applicant:	Mr N Poynder
Solicitors for the Applicant:	Legal Aid
Solicitors for the Respondents:	Australian Government Solicitor

DECLARATION

The Court declares that, in recommending to the Minister that the Applicant was not a person to whom Australia owed protection obligations, the second Respondent made an error of law in that he, by not putting to the Applicant for comment the substance of the information from the UNHCR July 2010 Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka and extracts from reports in the *Daily Mirror* (Sri Lanka) dated 1 October 2010 and 28 October 2010, failed to observe the requirements of procedural fairness.

ORDER

(1) The First Respondent shall pay the Applicant's costs assessed in the sum of $5,800.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 345 of 2011

SZPAC
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

ADOLFO GENTILE IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER
Second Respondent

REASONS FOR JUDGMENT

1. The applicant is a Sri Lankan of Tamil origin who left his homeland on 8 February 2010 and obtained passage on a vessel that departed from India and was intercepted by Australian authorities on or around 1 March 2010. The applicant was taken to Christmas Island where he was interviewed by an Australian Immigration Official on 3 May 2010. During the course of that interview he made a claim for protection based upon the convention grounds of imputed political opinion and race. The applicant's claims were considered by an assessor who, on 26 May 2010, determined that the applicant did not meet the definition of a refugee as set out in Article 1A of the 1951 Convention Related to the Status of Refugees and its 1967 Protocol and was not a person to whom Australia owed protection obligations. The applicant was offered the opportunity to have this finding reviewed by an Independent Merits Reviewer in respect of which he was assisted by a migration agent who made a submission in writing to the reviewer. The applicant also prepared his own statement for the reviewer and

submitted it together with certain other written evidence. He was interviewed by the reviewer on 17 October 2010 in the presence of his migration agent/lawyer. On 13 January 2011 the Independent Merits Reviewer found that he did not meet the criterion for a protection visa set out in s.36(2) of the *Migration Act 1958* (the "Act") and recommended to the Minister that he not be recognised as a person to whom Australia had protection obligations under the Refugee Convention and Protocol.

2. The respondent does not take issue with the applicant's right to seek judicial review of the Independent Merits Reviewer's decision consequent upon the decision of the High Court of Australia in *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41. The respondent advised the court that it did not believe that the application was out of time unless it could be said that the original application was not competent because it sought only a declaration and not an injunction restraining the Minister from relying upon the reviewer's recommendation; *Darabi v Minister for Immigration & Anor* [2011] FMCA 371 at [30 –33]. In these circumstances the respondent indicated to the court that it would not oppose the court's grant of an extension of time pursuant to s.477(2) of the Act. Consistent with the views expressed by Nicholls FM in *Darabi* at [35 – 37] (save that this is not the first matter brought) I would hold that it is in the interests of the administration of justice to extend the time pursuant to s.477(2) without having regard for this purpose as to the merits or prospects of success of the grounds of the application as pleaded.

3. Put briefly the applicant's claims to be a person to whom Australia owed protection obligations were twofold. He told that as he had between 2004 and 2006 worked as a deminer for two NGOs in the northern part of Sri Lanka he believed that he was a person of interest to the Sri Lankan army ("SLA") who imputed to deminers a direct association with the LTTE. The applicant told that on about 19 November 2007 he was on a motorbike with a friend when the friend was shot and killed. He believed that the friend was shot by the CID and they were trying to kill him as well. In December 2007 the applicant left for Colombo where he lived for some time but in February 2008 he claimed to have been arrested by eight officers,

blindfolded and assaulted. He claimed he was held for seven days in a CID building where he was tortured and beaten. He told that his grandfather, who had been a member of the Provincial Council in Hatton paid a bribe to obtain his release. He moved into his grandfather's house in Hatton where he remained until December 2008:

> *"In March 2009 he went to Kotahena because they were rounding up people in Hatton. He was nevertheless caught in a round up in Kotahena. He was taken to the Prevention of Terrorism Unit and showed them a letter from his grandfather. He was released and was asked to go and sign daily in Kollupitiya. He did this until May 2009 and then from 25 May 2009, when he heard that 2 people who went there to sign were beaten and one was killed and the other disappeared, he decided that he would not keep going there to sign. His grandfather found him a place with one of his friends in Kandy where he stayed until he left for Australia in February 2010."* [CB 187]

4. The reviewer accepted that he worked as a deminer and noted that he had agreed that his work with Halo Trust concluded in about June 2006 and that the shooting incident took place more than a year later [CB 193]. The reviewer noted that the applicant had provided some articles about persons working for demining operations being abducted or killed including an article on Tamilnet which appeared to refer to the motorcycle incident. The reviewer was prepared to accept that the incident occurred but not that the applicant was riding on the motorcycle with the person who was shot or that he was a target:

> *"The fact that he had left the employ of the Halo Trust one a half years earlier and that he had remained at his address in Jaffna without incident for that period of time leads me to conclude that he was not targeted by any one because he had worked for NGOs carrying out demining operations. As indicated by the chronology which forms part of the Tamilnet articles there appears to have been a peak in the abductions and disappearances of Halo Trust employees in 2006 when the claimant was still working for the company yet he has not reported any interest in him."* [CB 193]

5. The reviewer, having concluded that the applicant was not targeted by the Sri Lankan authorities concluded that there was no evidence to suggest that he would be targeted in the reasonably foreseeable future for that reason. The reviewer also concluded from documentary evidence produced by the applicant that he had been registered at addresses in Colombo during 2008 and that he was not in Hatton in

August 2008 or in Kotahena. The reviewer concluded that the applicant was not hiding in Colombo:

> *"The fact that he was registered indicates that he was complying with the emergency regulations and is consistent with the fact that even if he was detained as he claims he was then released. The fact that he was released two times following roundups by the security forces even if I were to accept that he was asked to sign a register daily indicates to me that the security forces had no interest in the claimant despite the fact that he is a Tamil from the north. If he had actually been suspected of having links with the LTTE country information leads to the conclusion that he would not have been released nor would the interventions by his grandfather had secured his release. Furthermore, he was able to travel to many places in Sri Lanka where he would have to negotiate checkpoints and he did this on repeated occasions without incident."* [CB 194]

6. During the course of the interview with the reviewer the following exchange took place:

> "REV: When you were taken in roundups, both in Colombo and in Kotahena as far as I am aware these are no longer occurring?
>
> APP: I don't say its (indistinct) but what I say is I escaped from that place and they are searching for me and they are going into a house and searched a house after I came here. They assaulted my brother.
>
> REV: Where have they gone exactly?
>
> APP: To a house.
>
> REV: In Jaffna?
>
> APP: I told that at the last enquiry.
>
> REV: This is a couple of months ago is it?
>
> APP: Yes."

7. In the reviewer's findings and reasons he states:

> *"He has claimed that the authorities, "a couple of months ago", searched a family house in Jaffna and assaulted his brother ostensibly because they were looking for him. I do not accept that this occurred. I find it to be a "spur of the moment" embellishment of his claims. He had made no attempt to provide this information earlier nor had he mentioned this in the prepared letter he gave me at the interview."*

8. In this way the reviewer concluded that he could not be satisfied of the veracity of the special claims made by the applicant that related to him

personally. He then turned to consider the second of the applicant's claims, namely that he was a Tamil from Jaffna for whom a return to Sri Lanka would place him in a position of danger in respect of which he held a well founded fear. In his findings and reasons with regard to this claim the reviewer stated:

> *"The UNHCR July 2010 Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Sri Lanka (UNHCR Guidelines) state on p.1, when discussing the scope of the guidelines:*
>
> > *In light of the improved human rights and security situation in Sri Lanka, there is no longer a need for group-based protection mechanisms or for a presumption of eligibility for Sri Lankans of Tamil ethnicity originating from the north of the country.*
>
> *"The UNHCR Guidelines specifically recommend continuing protection for those persons with the following profiles: persons suspected of having links with the LTTE, journalists and other media professionals, civil society and human rights activists, women and children with certain profiles, and lesbian, gay, bisexual and transgender individuals. In addition, since the publication of the guidelines and as cited above, all checkpoints in Colombo have been removed and some re-trained LTTE cadre have been released from camps and training centres back in the community.*
>
> *The improvement in the situation faced by those Tamils who were placed in camps after May 2009 and about whom considerable information has been provided above, indicates to me that a person with the profile of the claimant who did not originate from an area held by the LTTE immediately prior to May 2009, who has no history of links with the LTTE and who has endured at least two periods of questioning by the authorities in order to establish precisely whether he had any links with the LTTE, in a context where the security situation for Tamils in general is improving, leads me to the conclusion that the chance that the claimant would face persecution on return for reasons of his ethnicity, imputed political opinion or any convention reason, is remote."* [CB 194]

9. In his Further Amended Application to this court the applicant sought final orders for a declaration that the recommendation of the second respondent was not made in accordance with law and an injunction restraining the first respondent by himself or by his department etc from relying upon the recommendations of the second respondent. The grounds of application were:

> "1. The IMR failed to comply with the common law rules of natural justice by failing to provide the applicant with an opportunity to deal with country information that was credible, relevant and significant to the decision to be made.

Particulars

(a) The IMR failed to provide the applicant with an opportunity to deal with various items of "country information" referred to at pages 5-10 of the assessment.

(b) The country information was credible, relevant and significant to the finding by the IMR that the applicant was not at risk upon return to Sri Lanka, and that Australia did not therefore owe protection obligations to the applicant.

2. The decision of the IMR was based on a factual finding for which there was no evidence.

Particulars

(a) The IMR rejected the applicant's claim that the authorities had recently searched his family home in Jaffna and assaulted his brother because they were looking for him on the grounds that this claim was a 'spur of the moment embellishment' and that he had made no attempt to provide this information earlier.

(b) In fact the applicant had made this claim:

(i) in his entry interview on 27 March 2010; and

(ii) in his interview with an officer of the second respondent on 3 May 2010."

The first ground

10. The independent country information referred to consists first of extracts from a report from the International Crisis Group which the applicant claims is adverse to him when it says:

> "The government's decision to "open" the camps to a considerable degree as of 1 December 2009 was a positive and welcome move. Inmates are now allowed to leave the camps and travel virtually anywhere within Sri Lanka for designated periods of time. Still problems remain."

11. The second piece of information is an extract from a United Kingdom Home Office Country of Information Report – Sri Lanka dated 11 November 2010 which refers to a BBC news report on 11 September 2009 about the granting of bail to two former Tamil Tiger civilian officials who had been in government custody for more than four months. The third piece of information was an extract from the

UNHCR Eligibility Guidelines for assessing the international protection needs of asylum seekers from Sri Lanka dated 5 July 2010 which stated inter alia:

> *"In May 2010, the Government, however relaxed the Emergency Regulations by withdrawing several provisions, including those dealing with the imposition of curfews, propaganda activities, printing of documents and distributing them in support of terrorism, as well as those restricting processions and meetings considered detrimental to national security. Amongst issues relevant to the termination of eligibility for refugee protection are allegations by a number of sources regarding: torture of persons suspected of LTTE links in detention centres; death of LTTE suspects whilst in custody; as well as poor prison conditions, which include severe overcrowding and lack of adequate sanitation, food, water and medical treatment. According to some reports young Tamil men, particularly those originating from the north and east of the country, may be disproportionately affected by the implementation of security and antiterrorism measures on account of their suspected affiliation with the LTTE. In the light of the foregoing, persons suspected of having links with the LTTE may be at risk on the grounds of membership of a particular social group"* [CB 191]

12. Fourthly, the reviewer referred at [CB 192] to two reports from the Daily Mirror Sri Lanka in October 2010, the first being post hearing, about removal of checkpoints in Colombo and the release of persons from the rehabilitation camps.

13. Finally and most significantly, the applicant pointed to the extract from the UNHCR July 2010 Eligibility Guidelines set out in [8] of these reasons indicating that there was no longer a need for group based protection mechanisms or for a presumption of eligibility for Sri Lankans of Tamil ethnicity originating from the north of the country. This extract was not referred to in the section entitled "country information" found commencing at [CB 187] in the reviewer's report. It is common ground that it was not put in terms to the applicant.

14. This court is conscious of the requirement spelt out by Brennan J in *Kioa v West* (1985) 159 CLR 550 at [628 - 629] that the duty upon the decision maker is to put to an applicant information that is adverse to his interests and is credible, relevant and significant to the decision to be made. The court is cognisant of the explanation of this term made by the High Court in *Applicant VEAL of 2002 v Minister for Immigration* [2005] 225 CLR 88 at [16] and [17] and in particular the opinion that:

> “”Credible, relevant and significant” must therefore be understood as referring to information that cannot be dismissed from further consideration by the decision maker before making the decision.”

In *M61/69* the High Court said in respect of the requirement to provide procedural fairness in relation to country information at [91]:

> “Third, procedural fairness required the reviewer to put before the plaintiff the substance of matters that the reviewer knew of and considered may bear upon whether to accept the plaintiff's claims. The Migration Act makes special provision about how the Refugee Review Tribunal is to conduct its reviews. It provides that the Tribunal must give an applicant "clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review". But that obligation is subject to qualifications. In particular, it does not extend to information "that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member". Hence country information is treated as a class of information which need not be drawn to the attention of applicants for review by the Refugee Review Tribunal. But those provisions were not engaged in respect of Independent Merits Reviews of the kind now under consideration or, we would add, in respect of the initial Refugee Status Assessments. The reviewer should have put to the plaintiff for his consideration and comment those aspects of country information known to the reviewer which the reviewer considered may bear upon the claims the plaintiff made. He did not.”

The facts upon which the *M61/69* decision was made are relevantly contained at [85]:

> “The third point to notice about the reviewer's reasons is that he did not accept that the plaintiff had left his country, and could not return there, for the reasons he claimed. An important basis for the conclusion that the plaintiff's fears were not well founded was information provided to the reviewer by the Department as country information. In the course of the reviewer's interviewing the plaintiff, none of that country information was put to the plaintiff. In particular, none of the propositions recorded in the reviewer's reasons – that groups whom the plaintiff said he feared were now joining and integrating into the mainstream of politics, that magistrates and judges were ordering the release of LTTE suspects, and that the way in which the authorities dealt with persons returning to Sri Lanka did not accord with the plaintiff's description of his treatment on return from Egypt in 2008 – were raised with him or his adviser for their comment or consideration.”

15. The applicant argues that all the information to which I have referred is adverse to his claim that he is at risk as a Tamil male from the north. He says that this is particularly so in the case of the July UNHCR report that came out after the Refugee Status Assessment that was

made on 16 June 2010 and the two newspaper articles, one of which came out on October 1 before the interview with the reviewer and one of which came out on 28 October after that interview. These latter three documents were all utilised by the reviewer in his findings and reasons for the purposes of determining that the applicant's claim in this regard could not be upheld. He argued that as such those documents were clearly adverse, credible, relevant and significant and this is a submission with which I would have to agree. In *Darabi* FM Nicholls considered a similar, but by no means identical, problem where the argument was put that it was incumbent upon the Tribunal to produce the actual documents upon which it relied.

16. FM Nicholls reiterated that country information may be required to be provided to a claimant (*Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah* (2001) 206 CLR 57) but need not necessarily be provided if the issues of concern are raised and the claimant has the opportunity to put his or her case (*VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 82 at [27]-[28]).

17. FM Nicholls rejected the submission that fairness never required the provision to an applicant of documents or specific texts of country information in which the information might be contained [96]. The Minister had relied on Allsop J's opinion in *VHAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC in which he stated:

> "[27] Natural justice and the analysis of whether, in any case, it was afforded is not a process of syllogistic reasoning. One does not approach it thus: the person is entitled to adverse material, this material was relied on in reaching an adverse result, that makes it adverse material, it was not provided in terms, therefore there has been a failure to afford natural justice.
>
> [28] **Natural justice is ultimately a question of fairness**. The appellant here came to the Tribunal armed with her material about her country of origin in order to persuade the Tribunal to reach a state of satisfaction about her, China, and her future: that she had a well-founded fear of persecution for a Convention reason should she be required to return to China. In order to perform the task required of it by ss 36 and 65 of the Migration Act 1958, the Tribunal was required to inform and educate itself about China generally, and about aspects of Chinese life and

> affairs pertinent to the appellant's claims. In so analysing that material the Tribunal might form a view about the appellant or her version of events, which fairness dictated, must be raised. That was done here. The Tribunal will often have a store of experience and knowledge about the country in question without the need for specific reference to material. Sometimes, as here, it will reach for specific material for assistance. In doing so it was only informing itself of matters against which to assess the claims of the appellant. If, as here, subjects of concern are raised, I do not see how fairness requires provision of the specific text of country information seen to be of relevance." (emphasis added)

18. However, FM Nicholls highlighted that at the core of Allsop J's opinion was that the essential question was one of fairness (as emphasised above). Such that "what is required is such as to ensure that the claimant knows the case against him [or her], and has the opportunity to put his [or her] case" (*Danabi* at [100]).

19. This may apply where issues, derived from documents containing country information, are raised such that a response can be made to them without the need for the provision of the specific documents. However, the supply of the documents may be necessary where the issues are raised in such a way, or if they are of such a character, that the claimant cannot respond to them meaningfully without being provided with the documents [99]. It depends on the circumstances of the case [98].

20. In the context of both cases (*Darabi* and *VHAP*) the reviewer turned to country information to answer issues raised by the applicants' provision of information. That is what occurred here. The applicant submitted a considerable body of information tending to support the proposition that young male Tamils from the north remained in danger notwithstanding the emergence of the peace process. At [T31] this question was raised by the applicant:

> "REV: Is there anything else that you wanted to say to me that you think is relevant to your claims?
>
> APP: I would like to talk now. They say one reason for rejection is about country situation.
>
> REV: That's right.

APP: So I would like to talk about that.

REV: Yes, go on.

APP: They say there are no problems in our country but the problems in our country the outside word doesn't know.

REV: No, I didn't say there was no problems. I didn't say there was no problems. The assessment is about you, not about the country, you know? Anyway, you go on. I'll let you go on.

APP: Not that you don't know, so you will be in the know about that.

REV: No, I was just simply making the point that you have to be more precise in what you say. You can't just make statements like, "The decision said that there are no problems in my country." That's not true. They did say there are problems, but they're looking at your case. If you can tell me about your case, why you think you would be persecuted, then that's what I'm here for."

APP: If I go back to the country they will definitely shoot me. They will torture me and shoot me."

21. There was a further discussion of the applicant's country information commencing at [T37] where the applicant indicates that his information suggests that the LTTE are again reorganising. He referred to an article dated 4 August 2010 and then about another article dated 12 October 2010 in respect of which the reviewer said:

"REV: Amnesty International? I understand why you want to give me stuff, but it's really, you know, difficult to do things this way. You should have sent this stuff to your advisor, and then she could have given it to me with a translation or with a summary or with something. These are general stuff. I understand what you're saying to me. But apart from that piece of newspaper which I've got there which talks about the shotting in Jaffna on the date that you mentioned, this is – I understand what you're saying, but it's very difficult to do this this way. Do you understand?

APP: I thought this was in English.

REV: Your advisor probably hasn't got a copy of these either. I'll give you these back. You can give me copies of those too. Anything else you want to say before I go?

APP: Because it's connected to me only I thought it's ---

REV: **Yes, I understand that, and that's fine. I don't want to discourage you but I'm simply saying to you that general information is only of a certain**

> **value. I have to sit down and think about whether you personally would be persecuted if you returned. Okay? I also want to tell you, to reassure you, that it's not only the stuff that you give me that I read to know what's going on in Sri Lanka. I have other, many, many sources. Do you understand? It's not that I'm just reading those newspaper articles and saying, "Ah, this is what's happening." Do you understand that? Are you clear? Because I don't want you to walk out of here with ideas that are not right.** (emphasis added)
>
> Those ones that I'm getting photocopied, obviously they will be cited here in my decision, my recommendation. Do you want to say anything else before I close?
>
> APP: When will I get to know your decision?"

22. Whilst I can accept that the general proposition concerning the status of male Tamils from the north was put on the table by the applicant, I have real concerns about the manner with which it was dealt by the reviewer. The reviewer appears to be indicating that he is not disposed to give consideration to what could be described as a generic claim but only to a claim that is supported by some personal experience on the part of the applicant. The effect of this would be to deny asylum to any member of a particular social group who was in danger because of his or her membership of that group but who had not yet experienced some form of persecution because, for example, he or she had escaped prior to the arrival of his or her persecutors. This cannot possibly be correct because the convention definition relates to fear, not to experience. In *The Law of Refugee Status* (1st ed., Butterworths, 1991), James C. Hathaway states [at p87]:

> *"Past persecution is in no sense a condition precedent to recognition as a refugee. The Convention is concerned with protection from prospective risk of persecution, and does not require that an individual should already have been victimised."*

He continues to affirm that:

> *"It is thus unnecessary to establish past persecution in order to succeed on a claim to refugee status. Where evidence of past maltreatment exists, however, it is unquestionably an excellent indicator of the fate that may await an applicant upon return to her home. Unless there has been a major change of circumstances within that country that makes prospective persecution unlikely, past experience under a particular regime should be considered probative of future risk."* [p88]

23. It seems to me that the reviewer misunderstood and misapplied the appropriate law and that this led him to believe that he had no obligation to provide the applicant with details of the rebuttal material that he intended to use against the applicant's claims. The question that the court has to answer is whether or not this action was "fair". None of the UNHCR guidelines or newspaper articles were available at the time of the assessor's decision. The decision does refer to certain country information indicating continued improvement in relations between the government and the Tamil community [CB 114 – 115] and I think it must be accepted from the nature of the documents submitted by the applicant to the independent reviewer that he understood that the improving situation was a matter of concern. The bold statement at the commencement of the UNHCR guidelines extracted by the reviewer is, to my mind, of such importance because it comes from the universally accepted arbiter of refugee matters and is so conclusively adverse to the applicant's general claim that it would not be fair not to provide the applicant with an opportunity to respond to it.

24. The document was available to the reviewer at the time the review interview was held and may have been one of the documents he referred to in the extracted conversation with the applicant. Whilst I agree with the views expressed by FM Nicholls concerning the requirement to provide actual documentation to an applicant I would say that in this particular case, given the authority of the document's provenance he should, at the very least, had been told that it was an UNHCR publication. The two newspaper articles really do no more than corroborate the UNHCR opinion. If I am correct in the view that I have expressed that the reviewer, at least at the time of the interview, misunderstood his responsibilities in relation to the applicant's generic claim, then I would find that the failure to bring the newspaper articles to the applicant's attention corroborated that finding and emphasised the Tribunal's jurisdictional error. If my views are found to be incorrect, then I would indicate that where a specific piece of evidence is intended to be used to justify adverse views fairness would require that an applicant be provided with an opportunity to respond.

25. I am satisfied that in this instance the reviewer failed to provide the applicant with procedural fairness by not providing him an opportunity to respond to adverse information that was credible relevant and significant to his claim.

The second ground

26. The second ground of the application relates to the Tribunal's findings concerning the applicant's personal claims of being subjected to persecution. In particular it relates to this passage from the Tribunal's Findings and Reasons at [CB 194]:

> *"He has claimed that the authorities, 'a couple of months ago' searched the family house in Jaffna and assaulted his brother, ostensibly because they were looking for him. I do not accept that this occurred, I find this to be a 'spur of the moment' embellishment of his claims. He had made no attempt to provide this information earlier nor had he mentioned this in the prepared letter he gave me at the interview."*

27. Both the applicant and the respondent flatteringly regard what fell from me in *SZMIB v Minister for Immigration* [2008] FMCA 1433 at [13 – 18] as representative of the law in relation to the "no evidence" rule. I noted at [13]:

> "However, a finding of the Tribunal that is a "critical step in its ultimate conclusion" for which there is no evidence in support can constitute jurisdictional error: *SFGB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 231 at [19]. The fact of which there is said to be "no evidence" must be a jurisdictional fact; i.e. ""an essential preliminary to the decision-making process" as distinct from "a fact to be adjudicated upon in the course of the inquiry"": see *VWBF v Minister for Immigration* [2006] FCA 851 per Heerey J at [19] citing *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 442-442, *VXDC v Minister for Immigration* [2005] FCA 1388; (2005) 146 FCR 562 at [13]. Otherwise a finding on credibility could not be disturbed: *Re Minister for Immigration; Ex parte Durairajasingham* [2000] HCA 1; (2000) 168 ALR 407 at [67]."

28. Before turning to whether or not the finding of the reviewer constituted a jurisdictional fact it worth investigating the respondent's claim that there was evidence to justify the statement. In the applicant's entry interview statement there is found at [CB 19] the following:

> *"I can't go back, I've mentioned my problems before (see Part C Q1), I was taken away and beaten. To consolidate this I ran away illegally and stopped signing my name with the Terrorist Prevention Division, and ever since my departure my whereabouts have been investigated back home.*
>
> *One of the paramilitary groups, not sure which, came a few times to my family home and demanded money. They held guns to my family and said they knew one brother was in France and I had escaped. They demanded my whereabouts, threatened my brother saying they would include him as part of what I was accused of and arrest him."*

29. In the interview transcript annexed to the second affidavit of Elizabeth Biok the following discussion takes place with the assessor:

> "APP: I don't – it may happen like that, but generally it may be so, but my particular problem is, I don't think they have eased anything on – regarding my family, because two weeks ago, they had gone to my place and they had also gone round the compound and had dug out everything to see whether I had left any ammunition there. My mother had told me not to take calls to her house. Yes, the paramilitary group come and demand money.
>
> …
>
> ASS: Okay, now, you know, my information is not only they would be (indistinct) but they were also looking for weapons. So you know, really, in reality what they're doing is their job. They're going around evidently through the whole northern – and they have been, they've been finding weapons and getting rid of them because it looks like the LTTE, and not necessarily you, because we know that you're in the LTTE, have stashed weapons anywhere and everywhere. So I'd like to think there were no weapons there, but your parents are renting the house, so it's not their house anyway, and even if they found them – not necessarily your parents, the LTTE, and not the villagers, they're just doing their job; they're just searching the whole area for weapons.
>
> APP: They went to my home and asked for me in particular."
>
> ASS: Right, and when did they do this?
>
> APP: Two weeks ago they went. They went and dug up the house in 2007.
>
> ASS: Dug up the house?
>
> APP: After I left, dug out the land – and all the land around the house in 2007, but two weeks ago they went to inquire about me.
>
> ASS: Mm-hmm, yes.
>
> APP: They asked for me, my name in particular.
>
> ASS: And weapons? Did they find any weapons?
>
> APP: No.
>
> ASS: Okay. All right."

30. In the hearing before the reviewer the exchange concerning this incident commences at [T32]:

"REV: No. I was just simply making the point that you have to be more precise in what you say. You can't just make statements like, "The decision said that there are no problems in my country." That's not true. They did say there are problems, but they're looking at your case. If you can tell me about your case, why you think you would be persecuted, then that's what I'm here for.

APP: If I go back to the country they will definitely shoot me. They will torture me and shoot me.

REV: You think that there's no difference between your situation before the end of the war and after the end of this war? You don't think there's any difference?

APP: Yes. For me, the same. After the war, there's nothing different for me.

REV: And why not?

APP: Because I've told earlier, I mean (indistinct) there are people who have been killed, and I have escaped from the country and come here, and if I go back, definitely, they will shoot me. It's not an easy thing, I've been going an signing the TIC, CID, that place; and escaping from that place, they won't leave it. The people you will have heard of, the people who got three deported from here, they are not gone to their homes.

REV: Yes, perhaps that's true, but I don't know why, I don't know the circumstances.

APP: For me, in my own liking, I will never get back to my country. If I go forcibly to my country and there's no other way other than I join the forces with the army and showing people – and that also if they allow me, like (indistinct) but for me I will try to show people, for me to escape I'll tell that, do that. That's a thing I don't want to do.

REV: When you were taken in round ups, both in Colombo and Kotahena, as far as I'm aware, these are no longer occurring?

APP: I don't say it's (indistinct) but what I say is I escaped from that place, and they are searching for me and they're going into a house and searched a house, after I came here. They assaulted my brother.

REV: Where have they gone, exactly?

APP: To a house.

REV: In Jaffna?

APP: I told that at last inquiry.

REV: This is a couple of months ago, is it?

APP: Yes.

REV: Anything else that we haven't discussed that you want to say?

APP: Nothing else, but I have come here illegally. Please forgive me."

31. The respondent says that the critical matter for the reviewer was the reference to the assault on the applicant's brother which appears in the extracted part of the transcript above. The respondent says that there is no reference to his brother in the extract from the interview with the assessor and that the reference to a threat to his brother contained in the interview document dated 27 March 2010 is not a reference to an assault upon him (other than in the strictest legal sense) and in any event occurred long before the events that were two weeks before the interview with the assessor on 3 May 2010 and therefore could not be the same incident. The respondent is correct in saying that there is no reference to the assault upon the brother in the letter to the reviewer found at [CB 154 – 155] and I am of the opinion that if one looks at the finding without a mind attuned to the detection of error it is capable of being read as an accurate reflection of the position relating to the applicant's claims concerning the alleged assault upon his brother. The conclusion reached by the reviewer was a conclusion available to him on the evidence. In those circumstances there is no need to discuss further whether or not this paragraph could constitute a jurisdictional error on the part of the reviewer for coming to a conclusion upon a jurisdictional fact which was not based upon evidence.

32. Although the applicant has asked that the court grant an injunction restraining the Minister from acting upon the reviewer's recommendation the Minister has requested that consistent with the views of the High Court in *M61/69* I should grant only a declaration. The applicant did not resist that submission and that will be the course that I propose to take. The applicant having succeeded in his claim the respondent shall pay his costs which I assess in the sum of $5,800.00.

I certify that the preceding thirty-two (32) paragraphs are a true copy of the reasons for judgment of Raphael FM

Date: