FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZIAY v MINISTER FOR IMMIGRATION & ANOR *[2006] FMCA 1680*

MIGRATION – RRT decision – Columbian fearing persecution for political activities – Tribunal drew unwarranted conclusions from country information – illogical and perverse conclusions from applicant's evidence – failure to assess evidence favouring applicant – decision made recklessly – not genuine attempt to exercise jurisdiction – matter remitted.

Migration Act 1958 (Cth), ss.36, 414, 424A, 424A(1), 430(1), 474(1), 476(1)

Abebe v The Commonwealth of Australia (1999) 197 CLR 510
Applicant WAFV of 2002 v Refugee Review Tribunal (2003) 125 FCR 351
Chan v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 134 FCR 308
Craig v South Australia (1995) 184 CLR 163
Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559
Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323
Minister for Immigration & Multicultural & Indigenous Affairs v NASS [2003] FCA 477
Minister for Immigration & Multicultural & Indigenous Affairs v SGLB (2004) 207 ALR 12
Minister for Immigration & Multicultural & Indigenous Affairs v VOAO [2005] FCAFC 50
NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2) (2004) 144 FCR 1
NACB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 235
NAIS v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 77, (2005) 223 ALR 171
Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476
Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 198 ALR 59
Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Palme (2003) 216 CLR 212
SAAG v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 547
SAAP v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 215 ALR 162
SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs (2006) 150 FCR 214
SZHFC v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 1359

VAAD v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 117
VWST v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 286
Wu v Minister for Immigration & Multicultural & Indigenous Affairs (2002) 123 FCR 23

Applicant:	SZIAY
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG43 of 2006
Judgment of:	Smith FM
Hearing date:	20 October 2006
Delivered at:	Sydney
Delivered on:	14 December 2006

REPRESENTATION

Counsel for the Applicant:	Mr R Turner
Solicitors for the Applicant:	Ray Turner, Solicitor
Counsel for the First Respondent:	Mr G Kennett
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

(1) A writ of certiorari issue directed to the second respondent, quashing the decision of the second respondent handed down on 8 December 2005 in matter N05/51412.

(2) A writ of mandamus issue directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 25 September 1996.

(3) The first respondent must pay the applicant's costs in the amount of $4,000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG43 of 2006

SZIAY
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application filed on 5 January 2006 under s.476(1) of the *Migration Act 1958* (Cth) (**"the Migration Act"**), which seeks orders by way of judicial review of a decision of the Refugee Review Tribunal (**"the Tribunal"**) dated 29 November 2005 and handed down on 8 December 2005. The Tribunal affirmed a decision of a delegate made on 25 September 1996 which refused to grant a protection visa to the applicant.

2. Under s.476(1) the Court has *"the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution"*, but its powers are confined by s.474(1) if the Tribunal's decision is a "privative clause decision". It is such a decision unless I am satisfied that it was affected by jurisdictional error (see *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476). I do not have power myself to decide

whether the applicant's refugee claims should be believed, nor whether he qualifies for a protection visa.

3. In the present case, I am faced with a statement of reasons by the Tribunal which sufficiently identified the refugee claims made by the applicant. It rejected them as *"fabrications"*. It arrived at that conclusion by identifying *"a range of inconsistencies"* and *"inherent implausibility in his claims and evidence"*. When its detailed findings purporting to explain those conclusions are examined, significant elements in its reasoning appear illogical or unsupported by the evidence, its characterisation of its adverse evidentiary points appears extravagant, and there are significant points favouring the applicant which received no expressed attention.

4. The issue, which I have found difficult to decide, is whether the various defects in the Tribunal's reasoning are "mere" errors of fact or logic made within jurisdiction, or whether they allow me to conclude that the Tribunal has failed to exercise its jurisdiction according to a duty to perform its review of the applicant's refugee claims by a process of genuine and rational consideration of the evidence.

5. A requirement that the applicant's evidence should *"be given a proper, genuine and realistic consideration in the decision"* made by the Tribunal appears to be accepted in the High Court (see *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 77 at [9]-[10], [37], [171]-[172]; but compare the previously stated position in the Federal Court: *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* (2004) 144 FCR 1 (***"NABE"***) at [51]). There also appears to be acceptance by the High Court that jurisdictional error may be found if the Court can answer negatively the question *"whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds"* (c.f. Gummow and Hayne JJ, Gleeson CJ agreeing, in *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* (2004) 207 ALR 12 (***"SGLB"***) at [38], citing *Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [34] and [37], and c.f. Kirby J in *Applicant S20* at [81] and [137]: *"not a real exercise"* of jurisdiction).

6. However, these propositions are qualified by the proposition that *"want of logic does not **of itself** suffice to constitute error of law, still less error of law which is jurisdictional"* (*NACB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 235 at [30], followed in *VWST v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 286 at [16], emphasis added). Further, a long line of authorities warn that *"**mere** factual error by the Tribunal will not ground judicial review unless it relates to a jurisdictional fact or is a manifestation of some error of law, substantive or procedural, which constitutes jurisdictional error and thereby vitiates the purported decision"* (see *NABE* (supra) at [53], emphasis added). In the paragraph of *SGLB* containing the statement quoted above, it was said that *"inadequacy of the material before the decision-maker concerning the attainment of that satisfaction [as to a factual matter] is insufficient **in itself** to establish jurisdictional error"* (emphasis added).

7. The poorly defined scope of the jurisdictional obligation on the Tribunal to arrive at its decision by a rational process of thought usually causes a court on judicial review to treat irrational or unsupported factual findings only as potentially evidentiary of a better understood head of jurisdictional error. Such defects may establish a failure to address the refugee claims which were before the Tribunal, or show a misconception of the legal principles governing the Tribunal's review. They may reveal a failure to take into account relevant matters required to be addressed, or the taking into account of irrelevant matters, which themselves may also amount to jurisdictional error (c.f. *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82] citing *Craig v South Australia* (1995) 184 CLR 163 at 179). An erroneous finding as to the effect of significant evidence may reveal only an error of factual assessment made within jurisdiction, or it might allow the conclusion that the Tribunal did not, in fact, consider the evidence and therefore did not *"finish its jurisdictional task"* (c.f. Allsop J in *SZHFC v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 1359 (***"SZHFC"***) at [38]-[42]). In extreme cases, flawed reasoning might support the conclusion that the Tribunal approached its task recklessly, without an honest or genuine attempt to consider the evidence favouring the applicant (c.f. *SAAG v Minister for Immigration & Multicultural & Indigenous Affairs* [2002]

FCA 547 (***"SAAG"***) at [36], *Minister for Immigration & Multicultural & Indigenous Affairs v NASS* [2003] FCA 477 at [34], and the discussion of "bad faith" in the context of the "Hickman principles" in *Wu v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 123 FCR 23 at [57]-[61] and *Applicant WAFV of 2002 v Refugee Review Tribunal* (2003) 125 FCR 351 at [38]-[54]).

8. As will appear below, the present case presents instances where the Tribunal's assessment of evidence suggests that it did not, in fact, consider the contents of significant documents which it claimed to have read. It also raises a broad consideration of the rationality of the Tribunal's whole process of reasoning, and whether a series of defects found in the reasoning collectively establish a *"failure to attend to the statutorily mandated task"* (c.f. *SZHFC* (supra) at [41]).

The applicant's claims

9. The history of the refugee claims made by the applicant and members of his family is tortuous. He arrived unaccompanied in Australia in April 1996. On 7 May 1996 he lodged a protection visa application without any assistance from a migration agent or lawyer. It contained only a brief handwritten statement in English, to explain why he left his country of nationality, Colombia.

10. The statement referred to violent *"paramilitary groups"* paid by the Government and land property owners in the *"zone"* of Uraba, *"where hundreds of innocents workers have been killed lately"*. He said there were *"guerrillas [who] are against"* these groups, and that the guerrillas were allied to drug traffickers and persecuted *"country man"*. As to his own involvement in the violence, he said:

> *I was born in [city] and studied a trade as a welder, then I got married and became the stepfather of my wife's son, he is 8 years old. In [city] my economic situation was worse by the year 1994 and by the end of November of the same year I decided to move to [town] of Uraba territory, to meet my Brother who was doing well and he offered me a job and shared his house with my family. Everything was successful and I helped my Brother to sell food to the banana collectors until February 1995 when we received a threat in writing by the guerrilla ordered us to evacuate the [town] immediately otherwise they would kill us.*

We didn't believe much about the written threat, and the 30 of March 1995 my brother X was shot to death in [town in Uraba].

After his death we left [town in Uraba] and headed to [city], where we stayed in my mother's house whom is economically in a bad situation. Our lives continued to be a constant state of fear. Eventually I found a job as a welder due to my previous work experience; but on the 10 of January 1996 a friend of my Brother X revived that fear telling me that the "Paramilitary group" were trying to find where my family and myself were living and we became very scared.

My uncle helped me to get out of the country by lending me some money to come here to Australia, to save us from the difficult situation we were living.

11. The written statement was curiously inadequate, since it did not offer any explanation of why the applicant and his brother X had received death threats, why this brother was *"shot to death"*, and why a paramilitary group *"were trying to find where my family and myself were living"*.

12. The applicant attended a brief interview with the delegate on 12 September 1996. According to the delegate's notes, the applicant was asked two questions to elicit the motives of the "paramilitary" who the applicant feared:

Why would they kill you?

It is easy to explain. I travelled to where my brother was. He lives in an area, a municipality called [town in Uraba]. I went there with the intention of finding a decent work because my city does not have work. And my brother had a little restaurant where working people ate. I looked upon that as something normal I went to work there. But I never imagined that they are blaming my brother of anything that he would be involved, because I saw him as a very good person. And as result of that I was blind at that time at that moment of what might happen to me. I learned that he knew about many people who came to the restaurant that there had been murders, that there had been massacres of many people involved with the people who came to eat there. At that time I took it as something normal, he was a correct sort of person, I continued to work there. One night I was listening to him comment to me, they had threatened him. I

did not really take a lot of notice of it. I did take notice of it but not react on why they should threaten him. As a result of that my wife became very afraid. And we only found out too late, that they killed him (the brother).

Why did they kill your brother again?

I think, I believe many people went to his restaurant. Many of those people were banana gatherers. And the other people who go there are the owners, the land owners. I believe he knew a lot. He knew a lot about things, deaths that have occurred, I believe that he might have known who was committing those murders. After that I fled to my city. I was afraid I was living with him, they might think that I knew too. When I went back to my city I just worked normally and welding, I am a welder. I continued my work in a normal way. I only became afraid when a friend of his came back to [city]. He told me that they were looking for me. I felt pursued, harassed, as if I were a fugitive. …

13. This evidence still left obscure why the applicant's brother was killed, and why the applicant would be pursued if he was only a waiter in his brother's restaurant. However, the delegate did not explore this with the applicant, but treated the history as one of *"indiscriminate killing"*. He put to the applicant that *"if these people will kill you simply because they hate you and for nothing else, then you may not be covered by what the United Nations Convention is saying"*. The applicant is recorded as responding: *"I do not believe that hatred exists in those people. I believe that there is just this desire to seek out those who may believe know who perpetuate the killings"*.

14. The delegate refused the application on 25 September 1996, and a letter informing the applicant was posted on that date. It is unclear on the material before me when this decision first came to the applicant's attention, but for many years he thought that the time for seeking review by the Tribunal had passed.

15. However, it seems that the delegate's letter was not posted to the correct address, or it otherwise failed to satisfy statutory notification requirements, since in 2005 the Department decided that the applicant was *"a person who is affected by the decision in Srey v MIMIA"* – which I assume to be a reference to *Chan v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 134 FCR 308. A fresh

notification of the delegate's decision was then sent to the applicant on 6 May 2005, and he lodged an application for review on 1 June 2005. This gave rise to the decision of the Tribunal which is now before me.

16. Meanwhile, the applicant's partner had arrived in Australia on 5 January 1997, accompanied by her child. They also made applications for protection visas which were refused in 1997. They also thought that they had lost an opportunity for review by the Tribunal, but were later permitted to make a second visa application in August 1998. They appealed to the Tribunal when this was unsuccessful. Later, another child was born in Australia in March 2004, and he was required to make a separate visa application, which was also unsuccessful. Different members of the Tribunal dealt with the three matters during 2005 and 2006, but the applicants in all three were unsuccessful. Three separate applications were then brought to this Court, and eventually they all reached my docket and were set down for concurrent hearings. However, only the present matter has run to a contested hearing. The applicant's partner has consented to the dismissal of her separate application. The matter involving the applicant's infant son has been adjourned to allow his parents to obtain further legal advice about his rights.

17. Early in this history, in 1997 or 1998, the applicant prepared a statement, which further explained the circumstances upon which he claimed to be a refugee under the Convention. The date when this was first presented to the Department was a matter which was debated before me. According to the folio numbering of his file, it occurred after a notice of change of address was received by the Department on 27 March 1997. However, I consider it probable that this is the *"translated statement by [the applicant]"* which was first presented to the Minister by a migration agent, George Lombard, as an attachment to a letter dated 22 July 1998. I shall therefore refer to it as "the 1998 statement". This was part of a correspondence conducted by Mr Lombard which commenced in June 1998, in which the Minister was requested to exercise his discretion to allow second protection visa applications by both the applicant and his wife. At that time the applicant had been taken into immigration detention. The gist of the discretionary submission was that they were *"victims of an*

unregistered migration agent", who had inadequately presented their refugee claims and had failed to advise them of appeal rights.

18. In his 1998 statement, the applicant presented the political opinions and activities of himself and his brothers as the reason for their persecution in Columbia. He claimed that his father had *"been involved in MOIR (Independent Revolutionary Workers Movement) since the eighties"*. His brother X had been a member of MOIR in a city in Uraba since 1985, where *"the MOIR movement was linked to the leftist group EPL (Hope, Peace and Freedom)"*. The applicant's artistic skills were used to paint murals, paint placards etc, and he also was involved in MOIR meetings and activities. He and another brother XX, were involved in 1993 and 1994 in a union campaign, in which a union president was murdered. He was invited by a farm workers' union to support EPL in Uraba, and *"at the end of March 1995 my brother XX and me settled in"* a city in that region. In August 1995, a union comrade was killed in *"a massacre"*, and another comrade was killed in October 1995. The statement said:

> *… His murder was linked to the inquiry on the [town] massacre.*
>
> *At the end of October, my brothers and me started to receive death threats. They were sent to the restaurant, messages such as: "We don't want you in the region", "leave the region", "death to the revolutionaries", were written on the restaurant's walls.*
>
> *The threats worsened day by day. Finally, my brother XX, fearing for our lives, decided to leave the region and go back to [city], where we were at the end of December. In spite of the threats against his life, my brother X decided to stay in [town].*
>
> *On 1 February 1996, my brother X was killed in the restaurant in [town], together with two MOIR members and four workers who were members of SINTRAINAGRO. It is said that they had met there for political reasons.*
>
> *After these murders, and thanks to the advice of people close to us, I learned that some strangers were looking for my brother XX and me. My brother XX hid away at some friends place on the outskirts of the city. I took refuge in a neighbouring town. According to my family, the persecution was intensified. For this reason, I was forced to leave the country with the help of my partner [name].*

19. The applicant claimed that, after his departure, his partner who had been supplying MOIR with information used in exposing corrupt political leaders was also attacked. She then joined him in Australia. Her cousin was murdered in February 1997, and the applicant's brother XX was murdered in March 1997. He said: *"the deaths of my brothers X and XX were also left unpunished"*.

20. Enclosed with the statement were death certificates, with translations, verifying both of these deaths for causes described as "violent". Press cuttings, with translations, were provided confirming some of these events, including a report on 20 August 1995 of *"another massacre in the Uraba"* in which nine people were killed, including three union leaders linked to EPL.

21. A press report from February 1996, referred to the murder of the applicant's brother X when *"ten heavily armed men, apparently FARC militiamen, burst into"* premises named as *"X's eatery"*. The report said:

> *Close friends of the family said that X and his brothers had received death threats from the guerrilla as they had witnessed the worst massacre, happened at a banana plantation in [town] in August 1995, being then able to escape. After that came the notes and threats to the family, which months later were not slow in coming.*

22. In a submission dated 6 August 1998, which accompanied the partner's second visa application, Mr Lombard referred to difficulty in finding more information about MOIR, but said: *"as I understand it, MOIR was very high profile during the 1970s, as a Marxist organisation, however during the 1980s and 1990s it has been much more focused on labour rights and employment issues"*.

23. The applicant gave consistent evidence to the delegate, when he was re-interviewed on 3 September 1998. The delegate's notes of the interview include:

> ***what is ideology of moir***
>
> *to defend the workers, it has communist ideas based on Marxist ideas. very pro to help human rights. also irregularities with ruling parties. when moir was created in 1960 the idea was to*

defend the peasants and then the proletariat thru the different unions.

is it linked to any guerilla movement

they are allied with EPL which used to be People's Liberation Army who gave their arms back and changed their name to Hope Peace and Liberty. Not all EPL gave arms up, only 40%.

…

would you consider yourself as a Marxist

yes a Marxist Leninist

do you believe in armed revolution

i do believe in Marx's beliefs without the armed struggle. i believe in his theory, but i cannot get involved with them again because they are picking up arms again. the problem is you have to end up with arms because this is a war and you know the casualties according to their numbers, and if you want to fight it is impossible to fight without arms and that also creates violence.

you mentioned a while ago that you are a Leninist and then you are telling me that you do not like the armed struggle. i can't reconcile a person who is a Leninist as someone who shuns violence. it was Lenin who put Marx's theories into practice thru armed struggle.

what we are trying to achieve is showing them we can achieve things without arms. of course i am still a Leninist and i share his ideas but i don't share the ideas of an armed struggle.

moir is very powerful in uraba around the banana plantations. we can say the moir favours the peasants.

MOIR is trying to help people in SINTRAINAGRO union. EPL also supporting them. MOIR doesn't have many people in the area.

…

why did you not mention the moir in the first application for pv

when i arrived in a/a, i was ignorant. most Colombians i knew had been here for 25 years. those people didn't even know about an application for bridging visa. i met a Colombian man and told him about my case. he told me that i could never show in a

country like this one that i was a leftist because i would be rejected. because the policy in this country does not want leftists. this person knew of my brother's death and said it could be blamed on violence in the country. he took me on the wrong path.

i was nervous at my 1st interview not knowing what to say.

but you were not inhibited to tell in your application one of the reasons you left was because of the death of your brother

he told me to mention my brother's death but not as the main reason. i wanted to struggle and fight in Colombia but the armed struggle is not my way of thinking.

what i can't understand is that in your 1st application you said your brother died in march 1995.

i could bring the tape of my 1st interview with all the dates. this person told me not to say anything because this could be investigated and they would find out i was a leftist. it would be helpful to have a transcript of the tape.

AGENT SAYS THAT HE IS HERE TO TELL THE TRUTH NOW.

what would you gain by giving the wrong date of your brother's death. why not tell me the real date of your brother's death at our last interview.

i was advised to change the dates in case they were investigated and change the reasons why your brother was killed.

24. The documents before the Court do not contain any material submitted in support of the applicant's claims between 1999 and 2005, when he was permitted to appeal to the Tribunal.

25. In September 2005, the Tribunal raised with the applicant a number of evidentiary points in a written invitation for comments, before it invited him to attend a hearing. He responded to these points in a written response and at the hearing, which he attended on 17 November 2005. His agent also presented a written submission, and further material. This included reputable reports confirming numerous assassinations of trade unionists by right-wing paramilitary groups with, at least, a failure by the Columbian state authorities to respond with adequate measures of protection. It also included opinions of a

consultant psychologist given in 2001 and 2005, that the applicant had presented with *"clear signs of a Post-Traumatic Stress Disorder"*.

The Tribunal's reasoning

26. The Tribunal's statement of reasons contains a summary of the applicant's claims, which I have sufficiently described above. It then described its hearing, and I shall extract below passages from this description which are relevant to understanding the Tribunal's reasoning. Largely, the Tribunal did not take the applicant through his detailed 1998 statement, but raised with him various "inconsistencies" which it had previously raised in its s.424A letter. It also told him that it found his responses "unconvincing" and "implausible". However, the applicant maintained his 1998 explanation for the omission of reference in his 1996 visa application of any reference to his political activities, and gave other evidence consistent with his 1998 statement.

27. The Tribunal's reasons for affirming the delegate's decision are to be found under a heading *"Findings and Reasons"*. This commenced with a general finding as to the applicant's credibility:

> *Whilst the Tribunal is satisfied that the applicant may have lost his brothers in violent circumstances, it cannot be satisfied that the applicant's claims regarding his involvement in MOIR or* ***any of his other claims*** *are credible. The applicant's claims and evidence in this regard are implausible, contradictory, internally inconsistent and moreover, inconsistent with the independent evidence.*
>
> *In fact, given the range of inconsistencies between the applicant's written claims to the Department of Immigration; his interviews with the Department of Immigration; and his claims at hearing, and the inherent implausibility in his claims and evidence, the Tribunal cannot be satisfied that the applicant has been truthful in his claims and evidence, and cannot be satisfied that he has any claim to have a well founded fear of persecution for a Convention reason.*
>
> *Specifically, the Tribunal does not accept as credible or plausible:*
>
> - *The applicant's claims and evidence regarding his involvement with the political party "Hope, Peace and Freedom"*

- *The applicant's claims and evidence with regard to his involvement in MOIR*
- *The applicant's claims and evidence with regard to why he left Colombia*
- *The applicant's claims and evidence that he fears harm because of his family's political activities.*

(emphasis in original)

28. The Tribunal then discussed, under headings corresponding with the above dot points, specific instances where it found "inconsistency" and "implausibility". It also included discussion under the heading "*Other inconsistencies and implausibilities*". I shall examine this reasoning, after examining Ground 1 of the amended application.

29. Ground 1 contends that the above extract reveals the Tribunal failing to carry out its statutory duties under s.424A(1) of the Migration Act. Counsel argued that the Tribunal's reference to "*inconsistencies between the applicant's written claims to the Department of Immigration"* and "*his interviews with the Department of Immigration"*, shows that it used information from those sources as a part of its reason for affirming the delegate's decision. Counsel argued that, although the instances of inconsistency which the Tribunal subsequently identified "specifically" under the "dot" headings were raised by the Tribunal's s.424A letter, the generality of its opening paragraph suggests that there were more instances which it did not disclose. If so, the Tribunal was obliged, and failed, to give particulars of these and allow written comments on them. The failure to do so would provide jurisdictional error under familiar principles established by *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 215 ALR 162 and *SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 150 FCR 214.

30. The same submission was made in relation to a general reference to "*the significant and numerous contradictions and implausibilities"*, which appears in the Tribunal's final summary of its reasoning:

> ***In summation***
>
> *The applicant was invited in the Tribunal's letter of 7 September 2005 to explain the numerous inconsistencies in his*

> *claims and evidence. The applicant did so through his adviser in submissions dated 28 September 2005 and 17 October 2005. The applicant was also given the opportunity to discuss these matters at hearing on 17 November 2005. The Tribunal has given careful consideration to these responses, both written and oral, but* ***cannot be satisfied*** *that they have clarified the significant and numerous contradictions and implausibilities in any meaningful way.*
>
> *Considering the applicant's mendacity on not only the essential elements of his claim, but other aspects of his claims discussed above, as well as the numerous inconsistencies in her [sic: his] claims and evidence, and the inconsistencies with the independent evidence, the Tribunal finds that the claims of harm, and threats of harm, by paramilitaries in Colombia to be a fabrication. Given the significant adverse findings on credibility in relation to the applicant, the Tribunal cannot be satisfied that the applicant has a real chance of being persecuted for a Convention reason in Colombia in the foreseeable future, and is therefore* ***not satisfied*** *that the applicant's fear of persecution for a Convention reason is well founded.*
>
> (emphasis in original)

31. In answer to Ground 1, counsel for the Minister submitted that I should not draw any inference that the Tribunal relied upon any unindentified information taken from the applicant's statements to the Department. Rather, he submitted, the structure of the Tribunal's reasoning shows that it relied only upon the specific instances of inconsistencies which it discussed, and which I shall examine below. None of these reveals a failure under s.424A(1).

32. I accept this submission, and this interpretation of the structure of the Tribunal's reasoning. The Tribunal was plainly aware of its obligations under s.424A, and I consider that its general references to inconsistencies and implausibilities must have been intended to be read as references only to the instances which it specifically claimed to have identified. To read the reasons in this manner would also accord with the Tribunal's obligations under s.430(1) to explain its reasoning with particular findings and reasons. I therefore reject Ground 1.

33. The consequence of this interpretation of the Tribunal's statement of reasons is, however, that the quality of the Tribunal's discussion of the

specific instances can, and should, inform my assessment of the Tribunal's performance of its duty to give genuine and rational consideration to the evidence which was before it.

34. The effect of Grounds 2, 3, and 4, as developed in oral argument, was that overall the Tribunal's decision *"was based on reasoning that was irrational, illogical and unwarranted assumptions"* [sic], and that there were also specific instances where the reasoning shows that the Tribunal failed to give consideration to relevant and significant evidence supporting the applicant's claims.

35. To examine these issues, I shall discuss the Tribunal's substantive reasoning under each of the headings used by the Tribunal itself.

The applicant's claims and evidence regarding his involvement with the political party "Hope, Peace and Freedom"

36. I have above indicated the applicant's claims in his 1998 statement, that in the city in Uraba where he and his brothers were involved in the MOIR movement, MOIR was *"linked to the leftist group EPL"*.

37. The Tribunal recorded the evidence given by the applicant at the hearing concerning EPL:

> *The Tribunal noted the applicant's claims in regard to MOIR, and asked the applicant if, apart from his claimed involvement in MOIR, he was involved in any political movement, party or organization in Colombia. The applicant stated that he was involved in the party called the Hope, Peace and Freedom. The Tribunal asked the applicant if this party was associated with MOIR or completely separate. The applicant stated that it was completely separate. The applicant stated that he became involved in this party in March 1995 when he travelled to Uraba. The applicant stated where it is situated on the political spectrum. The applicant stated that they were supporting the same ideas as his. The applicant stated that it was a unionist movement. The Tribunal asked the applicant how long he was involved with this party. The applicant stated that he was involved for about seven months.*
>
> *The Tribunal asked the applicant if he held any position in this party. The applicant stated that there was an alliance between MOIR and their job was to investigate human rights abuses in the*

region. The applicant stated that he organized meetings, discuss how they would address letters to the President Samper and to get him involved in the region. The Tribunal noted that this was the activities of the organization, but what did he do personally. The applicant stated that he was involved in writing leaflets – invitations – to get people to come to meetings. The Tribunal asked the applicant if he was involved in any other groups while he was Uraba. He was involved in a collaboration with a union representing agrarian labourers. The Tribunal asked the applicant the background of the Hope, Peace and Freedom party. The applicant stated that they were guerrillas who became unionists. The Tribunal asked if anything happened to them in 1995. The applicant stated that the paramilitaries were pursuing them in the region.

The Tribunal observed that there was a significant event in 1995 that affected his party. The applicant stated that there was a massacre in October 1995. The applicant stated that he would describe Hope, Peace and Freedom as a group to support the banana growers in Uraba and to look into the human rights violations taking place in the region. The Tribunal asked the applicant if his party was ever involved in any human rights violations themselves. The applicant stated that they have never been involved in any.

The Tribunal asked the applicant when they surrendered their weapons. The applicant stated that it was in the 1991. …

38. The Tribunal identified a US Department of State country report for 1995 on Human Rights Practices in Columbia, as one of two sources for information on the situation of the EPL. This report contains the following relevant references to violence affecting the Uraba region and to the EPL. I shall number the extracts, for convenience:

    i) *The banana-producing region of Uraba in Antioquia saw major conflicts. The convergence of paramilitary groups, guerrilla forces, narcotics traffickers, arms traffickers, and common criminals created a climate of unrelenting violence from which the population has suffered for the past 8 years. However, direct armed engagements among these groups or between them and the military, were rare. The military commander in Chigorodo reported that two murders per day were normal for that township. The town of Necocli alone suffered 130 murders, 122 disappearances, and the dislocation of 1,307 families during the February to April period. In January a paramilitary group identifying itself as*

the Self-Defense Forces of Fidel Castano tortured and murdered six alleged guerrillas in Necocli.

According to estimates by Justice and Peace, guerrillas were responsible for the extrajudicial killings of at least 64 civilians between January and June. In the Uraba massacres of August and September alone, guerrillas were responsible for over 60 of the approximately 90 murders. To justify the executions, guerrillas regularly charged that their victims were either informants for the army or related in some other way to the State, or that they simply refused to support the guerrillas' operations. …

ii) *The violence reached a peak when paramilitary and guerrilla elements killed some 90 civilians in a series of massacres between August 12 and September 20. With unusual speed, the authorities arrested 13 paramilitary soldiers within a week of the first of the massacres. Military authorities, regionally elected officials, the Catholic Church, and former guerrilla leaders agreed that of the six massacres during this period, five were probably part of a campaign by the Revolutionary Armed Forces of Colombia (FARC) against members and sympathizers of the Hope, Peace, and Freedom Party. (These are former members of The Popular Liberation Army (EPL) who laid down their arms in the early 1990's.) Critics charged that the army had advance knowledge of the FARC plan to carry out the August 29 massacre but failed to take proper measures to protect the population. The majority of the FARC's victims were banana workers.*

There were no reports of armed confrontations between the FARC and paramilitary groups, despite the fact that the declared purpose of the FARC's so-called dignity plan was to combat paramilitary groups. The FARC massacre of September 20 took the lives of at least 25 banana workers, including 5 women and 2 minors. After summarily executing the workers, the FARC mutilated the bodies of five or six of the dead. In response, the Government declared martial law in the Uraba region and pledged to deploy large numbers of troops to protect the civilian population. A government proposal to establish civilian security cooperatives met with considerable resistance from local community leaders and human rights observers who believed that such cooperatives would raise the level of violence in the area. …

iii) *Children's rights were frequently abused. Vigilante gangs often linked to the police killed street children in several major cities as part of social-cleansing killings (see Section 1.a.). Merchants and citizens' groups allegedly hire off-duty police agents and contract killers to rid neighbourhoods of children suspected to be beggars and thieves; the Office of the Defender of the People reported clear complicity by police officers in some of these killings. In conflict zones, children were also often caught in crossfire between the security forces, paramilitary groups, and guerrilla organizations. Deadly landmines known as "leg breakers" laid by guerrillas killed or mutilated many children in these areas. Despite national and international condemnation, guerrilla groups continued to recruit minors. A survivor of the Uraba massacre of September 21 reported that a boy of 10 to 12 years of age was among the guerrillas who killed 25 farm laborers. Children were the most vulnerable victims of the mass displacement of rural populations. In May nine children died of starvation in the Valencia region of Cordoba as they attempted to escape from paramilitary violence and guerrilla engagements with the army. …*

iv) *Labor leaders throughout the country continued to be the target of attacks by guerrillas, paramilitary groups, narcotics traffickers, the military, police, and their own union rivals. According to figures published by Justice and Peace, during the first 6 months of 1995, 13 labor activists were murdered in connection with their labor activities. Another 2 were murdered presumably because of their labor activities, and 16 were kidnapped, detained illegally, and threatened. In the banana-producing region of Uraba, organized workers historically belonged to the extreme left wing of the labor movement but refused to cooperate with the FARC. Over a 45-day period in August and September, paramilitary and FARC guerrilla forces murdered some 90 civilians in Uraba. Of that number, approximately half may have been targeted for their participation in or sympathy with the National Syndicate of Agro-Industry Workers, a labor union closely associated with the Hope, Peace, and Freedom movement of demobilized EPL guerrillas.*

39. The second source of information on the EPL cited by the Tribunal is a brief December 2001 internet article by the *"co-ordinator of Banana Link in Norwich, Britain"* in the *"New Internationalist"*. This author opined that *"in Uraba genocidal massacres have given way to an*

inspiring process of peaceful reconstruction". His article contains one reference to the EPL:

> *The strongest of the 40-or-so independent unions in COLSIBA is the Colombian Agricultural Workers' Union, SINTRAINAGRO. It organizes 90 per cent of the Uraba banana workers. The history of the union is inextricably linked to the bloody internecine politics of competing revolutionary guerrilla movements here – as is also the case in Guatemala. 'EPL' now stands not for the disbanded Popular Liberation Army but for Esperanza, Paz y Libertad – Hope, Peace and Freedom: a political movement with elected mayors currently running innovative local governments in several of Uraba biggest municipalities.*

40. The Tribunal made three specific criticisms of the applicant's evidence concerning his involvement with the EPL:

i) His evidence at hearing was contradictory because *"on the one hand, he gave evidence that this political party was "completely separate" to MOIR, while on the other hand he gave evidence that they were "in an alliance" together"*.

ii) His knowledge about the party was *"not particularly comprehensive"* and was contradicted by independent evidence preferred by the Tribunal, because *"he was unable to say where, on the political spectrum this party is located. The applicant characterised the party as a "unionist movement". The independent evidence suggests however, that it is "a political movement with elected mayors currently running innovative local governments in several of Uraba biggest municipalities"* (citing the 2001 source extracted above).

iii) The applicant also gave evidence which was contradicted by the US report on the 1995 situation, because when he was *"asked if anything significant happened to the party in 1995, the applicant gave evidence that in October 1995 a massacre occurred of members from the "Hope, Peace and Freedom Party", however, according to independent evidence, the massacres referred to by the applicant actually occurred in August 1995"*.

41. However, in my opinion, the evidence before the Tribunal did not support any of these criticisms:

i) The applicant's evidence could better be regarded as consistent, not inconsistent, when referring to the EPL party as being *"completely separate"* yet in *"alliance"*.

ii) The December 2001 article tended to confirm, rather than deny, that EPL was an organisation which had been involved in supporting agricultural unions and the Uraba banana workers. The article's information, that in 2001 several elected mayors were associated with the EPL, could not support a conclusion that the applicant erroneously described the EPL as a *"unionist movement"* when he was involved in its activities in Uraba in the mid 1990s.

iii) The US report in fact referred to numerous incidents over an extended period, including *"six massacres"* between August 12 and September 20, of which *"five were probably part of a campaign … against members and sympathizers of the Hope, Peace, and Freedom Party"*. One of these is specifically identified as having occurred on 20 September 1995. The US report provides no support for the Tribunal's conclusion that *"the massacres referred to by the applicant actually occurred in August 1995"*. In his 1998 statement, the applicant had claimed that a named *"comrade … who had been a great worker's rights fighter"* was killed on 10 October 1995. In my opinion, it was not open to the Tribunal to conclude that the applicant made a significant error when, in 2005, he recalled that a massacre had occurred in October 1995.

42. The Tribunal's general conclusion in relation to this element of the applicant's claims was:

> *In light of the applicant's inconsistencies at hearing, his apparent inability to locate the party on the political spectrum – despite characterising himself as a political activist, and the inconsistency between his evidence and the independent evidence, the Tribunal cannot be satisfied that the applicant has ever been*

involved with this party. It gives no weight to his claims and evidence in this regard.

43. In my opinion, the Tribunal's decision to *"give no weight to his claims and evidence"* on this part of the applicant's claims must be understood to be based, wholly or very substantially, upon the three reasons which the evidence cited by the Tribunal was incapable of supporting. Moreover, its reasoning and conclusion ignored the substantial support given to the applicant's claims by the country information.

44. I am led to conclude that, in fact, the Tribunal did not consider the actual contents of the country information which it purported to compare with the applicant's evidence. It could not rationally have made its adverse findings which purport to support the conclusions quoted above, if it had done so. In my opinion, its errors found in this part of its reasons, in themselves, establish jurisdictional error of the type found by the Full Court in *VAAD v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 117 at [69]-[77], and *Minister for Immigration & Multicultural & Indigenous Affairs v VOAO* [2005] FCAFC 50 at [5] and [11]-[13], of failing to take into account the actual contents of relevant material.

The applicant's claims and evidence with regard to his involvement in MOIR

45. In relation to this element of the applicant's claims, the Tribunal made a series of criticisms of the applicant's evidence:

i) His explanation for omitting from his original protection visa application and interview his involvement in any political party, and in MOIR in particular, was *"implausible and self-serving"*.

ii) His statement that MOIR was established in 1960 was inconsistent because *"independent evidence suggests that it was not established until 1969"*.

iii) His description of MOIR as *"Marxist"* was inconsistent with *"independent evidence [which] suggests it was actually Maoist"*.

iv) The Tribunal did not find "*convincing*" the applicant's explanation for these "*mistakes*". His explanation was described by the Tribunal:

> *The applicant's explanation was to the effect that "MOIR was created from the begging [sic] of the 60s and it was recognized as proper movement at state level until to the end of the 60s" and that: "In Colombia most of the leftist movements were initiated with a small cell of people, in a specific region, those movements took many years to develop as well as to be recognized as a national movement either political movement or rebel movement". With regard to its ideology the applicant responded in writing that: "every leftist movement in Colombia such as a trade union, political movement or revolutionary movement have its basic principals based in the Marxist/Leninist/Maoist/Trotskyist's theories of changes".*

46. As the result of its criticisms, the Tribunal drew the following conclusion:

> *The Tribunal finds, in regard to his claims to have been involved in MOIR, that the applicant has fabricated his claims regarding his involvement in MOIR to enhance his claim for refugee status. The Tribunal cannot be satisfied that the applicant was ever involved in this political party. It gives no weight to his claims and evidence in this regard.*

47. However, the points made by the Tribunal appear to have dubious substance, and its conclusion from them that it should "*give no weight to his claims and evidence*" as to any involvement in MOIR appears extravagant and disproportionate. Thus:

i) The Tribunal does not explain why it found "*implausible*" the applicant's explanation that he initially followed advice from an unqualified Columbian advisor that he should hide from the Australian government his left-wing political associations and activities. Such an explanation is by no means obviously incredible. Nor does the Tribunal explain why it discounted a number of elements in the history of the applicant's refugee application which pointed in the other

direction, including the curious lack of explanation in his original claims as to the motivations of the people who he claimed had killed his brother and were pursuing him.

ii) It was illogical and unreasonable to refuse to give any credence to the explanation merely by labelling it as *"self-serving"*.

iii) Neither counsel nor I were able to identify in the material cited by the Tribunal the source of its claimed *"independent evidence"* as to the date when MOIR was *"established"* and why the Tribunal found that it was *"Maoist"* but not *"Marxist"*. *Prima facie,* the applicant's explanation for his statements about its political position appears cogent and credible.

48. Overall, this part of the Tribunal's reasoning does not, of itself, establish any jurisdictional error. However, in the context of its other reasoning, it tends to point to a failure by the Tribunal genuinely to assess the evidence favourable to the applicant, and a propensity to adopt illogical or unbalanced reasons for rejecting his evidence.

The applicant's claims and evidence with regard to why he left Colombia

49. The Tribunal concluded that these claims were *"so far-fetched as to be fanciful"*. It reached this conclusion by reference to the applicant's omission in his original visa application to explain his brother's death and his flight from Colombia by reference to his involvement in MOIR. It repeated its conclusion that his explanation of the delay was *"unconvincing"*, and made a point which it apparently thought was damning:

> *Further, the Tribunal notes that in relation to his brother, in his initial claims to the Department of Immigration, the applicant gave a completely different date about when his brother was actually killed. In his first set of claims he stated that his brother was killed on 30 March 1995, while in a subsequent interview with the department on 3 September 1998 the applicant stated that his brother was killed on 1 February 1995. The Tribunal invited the applicant to explain this most significant of inconsistencies in its letter of 7 September 2005. The applicant's*

> *explanation was to the effect that he was ill-advised and feared that he would be "investigated" about his brother's death. The applicant gave evidence at hearing that he had "nothing to add".*

50. The Tribunal expressed no doubt about the brother's death or its violent nature, and this was corroborated both by a death certificate and a contemporaneous press report. These showed, in fact, that the death occurred on 1 February 1996. Moreover, the applicant had consistently referred to that date in his 1998 statement and interview. The Tribunal incorrectly found that he had referred to February 1995 in his 1998 interview (see Court Book p.127), and appears to have overlooked that the death in fact occurred in 1996 shortly before the applicant came to Australia.

51. There is a more significant defect in this part of the Tribunal's reasoning, than its error as to the year of the murder. If the Tribunal had rationally considered the import of the applicant's initial misstatement of the date of his brother's death, it is difficult to see how it could have treated this *"inconsistency"* as anything other than confirmatory of his explanation for the omission of reference to his political background from his original visa application.

52. In my opinion, the applicant presented a rational reason for his original belief that he should disguise the date of the death of his brother X, and the Tribunal did not identify any other reason why he would have misstated the date. It is conceivable that a refugee claimant suffering an anxiety disorder arriving from Colombia might accept advice that he should disguise his leftist politics and connection with the murder of a Marxist activist when making his initial refugee application. The Tribunal shows no appreciation of these points favouring the applicant.

53. I can see no rational basis for the Tribunal's conclusion that it should treat the applicant's misstatement of the date of his brother's murder as the *"most significant of inconsistencies"*, and as a point which significantly explained its rejection of his explanation for delay in putting forward his political background as *"far-fetched"* and its rejection of that background as entirely untrue.

The applicant's claims and evidence that he fears harm because of his family's political activities

54. The Tribunal adopted the same reasoning when discussing this element in the applicant's claims. It again referred to the applicant's delay in presenting his claimed political associations. It said:

> *The Tribunal notes that the applicant characterises himself (in later statements and oral evidence) as a political activist with considerable experience in matters political and social. The Tribunal therefore finds his explanation that he was "afraid" to disclose his and his family's political activities to be thoroughly implausible. Rather, the Tribunal finds his explanation to be self-serving and it finds that he had fabricated his family's involvement in political activities as a means to enhance his application for refugee status. The Tribunal cannot be satisfied that the applicant's family were ever involved in political activities with MOIR or any other party, movement or association and gives this claim no weight.*

55. Here, too, in my opinion, the Tribunal's characterisation of the applicant's explanation as *"thoroughly implausible"*, *"self-serving"* and *"fabricated"* cloaks in extravagant language the failure of the Tribunal to weigh up the possibility that the applicant's claims might be true, at least to the degree required under the "real chance" test (see *Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559 at 575–576, *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510 at 544–545).

56. The Tribunal made no attempt to identify and assess considerations which might point to the possibility that the applicant's explanation might be true. In particular, it made no attempt to consider whether an implication that the applicant's family might be the subject of politically motivated violence might be supported by two facts which it accepted: that one of his brothers was murdered shortly before he came to Australia, and that another brother was murdered after his arrival. As I have suggested above, it made no attempt to consider whether the applicant's account of their deaths was corroborated by country information and press reports of their deaths. It provided no discussion showing any consideration of whether the combined evidence of violent attacks on the applicant's family, the country information, and

the applicant's psychiatric disorder, might support the possibility that his claimed political background might be true.

57. Yet, in my opinion, a genuine consideration of the applicant's refugee claims required a careful assessment of these matters. In the context of the other deficiencies in its statement of reasons, I am led to conclude that the Tribunal did not give them any consideration (c.f. *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at [39], and *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [10], [35], [69] and [75]).

Other inconsistencies and implausibilities

58. Under this heading, the Tribunal identified *"a number of additional inconsistencies in the applicant's claims and evidence which lead the Tribunal to have fatal adverse credibility concerns about the applicant"*. It said that these were:

i) The applicant inconsistently said in his 1996 visa application that he *"decided to move"* to a town in Uraba in November 1994, whereas in his 1998 statement he said that he *"travelled to"* that town in March 1995. The applicant's explanation for this inconsistency: that he contemplated the move in November and in fact moved in March, was *"self-serving"*, *"unconvincing"* and not credible.

ii) The applicant inconsistently said in his 1996 visa application that *"he travelled with his family"* to the town in Uraba, whereas in the 1998 interview he said *"he was not accompanied by his family"*. The applicant's explanation: that he travelled with his brother but not with his partner, was *"self-serving"* and not credible.

iii) It was *"extraordinary"* that the applicant in his 1996 application referred to his leaving the country after his uncle lent him money, without saying – as in his 1998 statement – that he left with the help of his partner. The Tribunal implicitly rejected his explanation *"to the effect that "both statements were accurate" because his uncle lent money for*

the travel expenses and his wife also helped him with emotional support, organizing his documentation to make arrangements for the visitor visa as well as economic support". On the basis of this criticism, the Tribunal found: *"therefore that he has not been truthful in his claims about how he left Colombia"*.

iv) It said: *"The Tribunal finds the applicant's claims to be committed to human rights and the union movement are gravely undermined by the fact that in the nine years he has lived in Australia he has made no contact with any human rights group whatsoever or any union whatsoever"*.

59. In my opinion, the Tribunal's conclusion that these four criticisms were *"fatal"* to believing the applicant's refugee claims shows an approach to the assessment of evidence which can properly be described as manifestly unreasonable, amounting to *"perverse"* or *"capricious"*. Thus:

i) There was neither in logic nor common experience any *"inconsistency"* between someone saying that they decided to move their place of residence in November and did not effect the move until the following March. To describe the making of this point in response to the s.424A letter as *"self-serving"* might be true, but this label could not provide a rational reason for finding an apparently cogent response *"unconvincing"* and not credible.

ii) In fact, the applicant did not make inconsistent statements about being accompanied when he travelled to the town. In the 1996 visa application statement he referred to living in another town with his partner and her son during 1994. He said: *"I decided to move to [town] of Uraba Territory, to meet my brother who was doing well and he offered me a job and shared his house with my family. Everything was successful and I helped my Brother …"*. In relation to the 1998 interview, the notes state: *"Mr [applicant] moved to [town] in march 1995. not accompanied my [sic] Miss [partner]"*. In my opinion, it was not open to the Tribunal to regard these two versions of events as

inconsistent. The first statement said nothing as to who accompanied the applicant during his travel to the town. It was irrational and perverse for the Tribunal to regard the two statements as giving rise to a *"fatal adverse credibility concern"*.

iii) In his 1996 visa application the applicant referred to his departure for Australia in one sentence: *"… we became very scared. My uncle helped me to get out of the country by lending me some money to come here to Australia, to save us from the difficult situation we were living"*. His 1998 statement said: *"According to my family, the persecution was intensified. For this reason, I was forced to leave the country with the help of my partner [name]"*. Patently, neither of these statements purported to give a complete description of how the departure was organised and achieved. In my opinion, it was irrational for the Tribunal to regard the absence of reference to the partner in the first statement as being *"extraordinary"* and as justifying a finding that *"he has not been truthful in his claims about how he left Colombia"*. It was perverse for the Tribunal to describe this point generally as a *"fatal adverse credibility concern"* about the applicant.

iv) It was highly dubious for the Tribunal to assume that a young non-English speaking man who had participated in a Marxist/Leninist political movement in Columbia, and had fled that country with members of his family murdered and suffering an anxiety disorder, would be expected to make contact with an Australian human rights organisation or trade union. For the Tribunal to regard this consideration as *"gravely undermin[ing]"* his claims, and to elevate it into a *"fatal adverse credibility concern"* was, in my opinion, unreasonable and capricious.

Conclusion

60. I have above examined each of the *"specific"* reasons given by the Tribunal for its opinion that the applicant's refugee claims were *"a*

fabrication". I identified significant misstatement of the effect of important country information, which I concluded revealed jurisdictional error. I also identified unsupported, unreasonable and capricious adverse conclusions being presented by the Tribunal to justify its decision. I have pointed to significant evidence providing support for the applicant's claims, which was not rejected by the Tribunal, but which it failed to address. Cumulatively, I consider that the flaws in the Tribunal's reasoning reveal a decision-maker who has not made a genuine attempt to assess all the evidence, so as to make the determination required under ss.36 and 414 of the Migration Act.

61. If necessary, I would characterise the decision as having been made "recklessly" within the authorities cited above. In the language of Mansfield J in *SAAG* (supra) at [36], I have concluded:

> *… the Tribunal approached its review of the applicant's claims on the basis that it should look for reasons why it could reject those claims. … its reasons overall show that it did not address the applicant's claims by asking whether he has a well-founded fear of persecution for a Convention reason, but in substance by asking whether there was evidence which would enable it to reject the applicant's claims.*

62. For all these reasons, I consider that the decision was affected by jurisdictional error, and the applicant is entitled to relief by way of writs of certiorari and mandamus. The Minister has not submitted that there is any discretionary reason for declining to grant that relief.

I certify that the preceding sixty-two (62) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 14 December 2006