FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZFTD v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 1873

MIGRATION – Refugee – applicant claimed fear of persecution by government authorities and supporters of the National Democratic Party – the Tribunal failed to address a principal claim, or integer, of a claim – jurisdictional error – application granted.

Migration Act 1958, s.414

Htun v Minister for Immigration & Multicultural & Indigenous Affairs (2001) 194 ALR 244
NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No. 2) [2004] FCAFC 263
Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473
WAEE v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 184
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Applicant:	SZFTD
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 432 of 2005
Judgment of:	Nicholls FM
Hearing date:	7 September 2006
Date of Last Submission:	6 September 2006
Delivered at:	Sydney
Delivered on:	20 December 2006

REPRESENTATION

Counsel for the Applicant:	Mr. J. R. Young
Solicitors for the Applicant:	Simon Diab & Associates
Counsel for the Respondents:	Mr. J. A.C. Potts
Solicitors for the Respondents:	Clayton Utz

ORDERS

(1) The Refugee Review Tribunal is joined as the second respondent in these proceedings.

(2) The reference to the name of the first respondent be amended to read "Minister for Immigration & Multicultural Affairs".

(3) A writ of certiorari issue, quashing the decision of the second respondent.

(4) A writ of mandamus issue, requiring the second respondent to redetermine the matter according to law.

(5) The first respondent pay the applicant's costs set in the amount of $4,500.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 432 of 2005

SZFTD
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application filed in this Court on 18 February 2005 seeking review of the decision of the Refugee Review Tribunal ("the Tribunal") signed on 31 December 2004 (see Court Book ("CB") page 78) to affirm the decision of a delegate of the respondent Minister to refuse a protection visa to the applicant. The Tribunal is joined as the second respondent in these proceedings.

Background

2. The applicant is a citizen of Nepal who arrived in Australia on 28 March 2004. On 7 May 2004 he lodged an application for a protection visa with the first respondent's Department. On 3 August 2004 a delegate of the respondent Minister refused to grant a protection visa, and on 31 August 2004 the applicant applied for review of that decision.

3. The applicant's claims for protection can be found in his application for a protection visa (reproduced at CB 1 to CB 23, and in particular in an attached statement at CB 24 to CB 27), in a further attached statement enclosing photographs at CB 31 to CB 33, and in his application for review to the Tribunal (reproduced at CB 41 to CB 44).

Claims

4. In short, the applicant's claims derive from what he said was caste-based harassment from "upper caste people" and Hindu fundamentalists in Nepal. Further, that he criticised the monarchical system in Nepal and was accused of being a Maoist by government security personnel. But also was threatened by the Maoists because he refused to join them.

5. The Tribunal set out the applicant's claims in its decision record:

    1) In a statement, in support of his protection visa application, the applicant claimed:

        a) He experienced caste-based discrimination and harassment at the hands of the upper caste people (CB 56.8).

        b) He engaged in activities criticising the monarchical system in Nepal (CB 56.9).

        c) He was asked to join the Maoists by a group in his village (Gujra) but he refused and managed to "disappear" (CB 57.1).

        d) He was threatened by the Maoists on the one hand, and also accused of being a Maoist by government security personnel on the other hand, because he was opposed to the monarchy (CB 57.2).

        e) He was identified as an anti-monarchist and was threatened with arrest and other forms of persecution by the police.

        f) That the cumulative effect of the above instances led him to leave Nepal for Australia (CB 57.3).

g) That in 1998 he joined the Communist party of Nepal (Marxist/Leninist) and worked for the party as a "low profile" activist until 2000 when he left the party (CB 57.4).

h) That in 2001 he established a society called the "Elders Against Corruption Club" in his village where he was appointed as secretary (CB 57.4).

i) That in January 2004 the Maoists came to the village and asked members of the club to join their movement, and subsequently took over (CB 57.6).

j) He pretended he was a Maoist to "escape from their anger" (CB 57.8).

k) The government security personnel accused him of being a Maoist, even though he was not a Maoist (CB 57.9).

l) He was "always" harassed and persecuted by the police and supporters of the National Democratic Party, which is affiliated with the monarchy and is in power in Nepal, because they "suspected" that he was a Maoist (CB 58.2).

m) He faced continued persecution because of suspicions against him that he was a Maoist activist, even though he was "only a former member of the Communist party" (CB 58.3).

2) In evidence to the Tribunal at the hearing before it on 1 December 2004 the applicant:

a) Claimed that immediately before he left Nepal he served as the secretary of an organisation called Elders' Anti Oppression Club and was involved for 2 years with the Communists (CB 59.1).

b) When asked why he left Nepal, claimed he had always been against the monarchy in the country and he also became a victim of the Maoists (CB 60.3).

c) When questioned why he opposed the monarchy, claimed that he was "very disenchanted" by them (CB 60.4).

d) Claimed that he used to be a member of the Marxist/Leninist party and was therefore suspected of being a Communist, which caused the National Democratic Party (aligned with the monarchy) to see him as a "potential Maoist", and further made him the target of police and military (CB 60.7).

e) Claimed that after he left the Communist party and joined the club the National Democratic Party kept harassing him because of his past involvement (CB 61.5).

f) Stated that he was harassed by the police and army because of the suspicion they had that given his former association with the Communist party he could be a Maoist (CB 61.6).

g) Claimed that he was beaten by the police in April/May 2003 in relation to his past association with the Communist party (CB 61.7).

Tribunal's findings

6. The Tribunal's "Findings and Reasons" are reproduced at CB 70.1 to CB 78.6. The Tribunal found:

1) That "it is more probable than not" that the applicant was a member of the Communist party (Marxist/Leninist)" in Nepal (CB 71.2).

2) That it is "most probable" that the applicant may have been a member of the Club of Elders Against Oppression (CB 71.9).

3) It was implausible that the applicant would be targeted, by the National Democratic party or the government security forces, as a Communist four years after he had left the party (CB 72.5).

4) That in the small town of Gujra it would not have been difficult for members of the government security forces or the National Democratic party to know that he had "ceased being a member of the Communist party" (CB 72.7).

5) In the circumstances, that it seemed implausible that government security forces would have targeted and beaten the applicant in

the middle of 2003 given that he was not then a known Maoist, and had belonged to a "party" four years earlier (CB 73.1).

6) It was not persuaded, on the evidence before it, that the applicant was subject to any form of persecution because of his former association with the Communist party of Nepal (CB 73.2). This finding was based on the following reasons:

   a) The applicant, by his own admission, had never been detained, or subjected to any other form of physical or other harassment before leaving Nepal.

   b) The applicant stopped being a member of the Communist Party well before 2003.

   c) There was no evidence to suggest that the applicant was subjected to any form of persecution by the government authorities between the time he ceased to be a member of the Communist party and the incident in 2003.

   d) The applicant did not seem to have any difficulty with the government authorities until he departed Nepal in 2004.

   e) There was no evidence to suggest that the applicant had difficulty exiting Nepal when he left for Australia.

7) That nothing in the evidence before it suggested that the applicant had a profile which would make him a person of adverse interest to the Maoists, and hence was not satisfied that he would be subject to persecution by the Maoists if he were to return to Nepal (CB 74. 4).

8) In relation to the applicant's claim that his family had been subject to beatings, that there was no evidence to suggest that his family had been in danger at any point in time and that his claim was not consistent with earlier assertions he had made (CB 74.10 to CB 75.1).

9) It seemed implausible that the members of the Maoist organisation burned down the applicant's house in broad daylight after asking everyone to leave (CB 75.8).

10) In relation to the applicant's claim that he suffered from caste-based discrimination, that there is no evidence to show that the applicant suffered any threats to his life or liberty as a result and concluded that he was not subject to persecution because of his caste (CB 77.5).

In all therefore, the Tribunal found that the applicant's claims of past persecution "lack credibility", and that it could not find any basis to support his claims of well founded fear of persecution on his return to Nepal.

Representation

7. At the hearing before the Court the applicant was represented by Mr. Young, and the first respondent by Mr. Potts, both of Counsel. The Court relevantly had before it:

For the applicant:

1) The originating application filed on 18 February 2005.

2) An amended application, filed for the applicant on 2 September 2005 by Simon Diab & Associates, containing 6 unparticularised grounds.

3) Written submissions for the applicant filed on 4 September 2006.

4) A further amended application filed for the applicant in Court at the hearing for which leave was granted.

For the respondent:

1) The Court Book filed 5 April 2005.

2) Written submissions filed on 1 September 2006.

3) Further written submissions filed on 6 September 2006.

Grounds

8. The applicant's further amended application filed on 7 September 2006 asserts the following grounds of complaint:

"*1. The Second Respondent made a jurisdictional error by failing to have regard to the integers of the applicant's claims relating to persecution by Government authorities and by supporters of the National Democratic Party.*

Particulars

(a) At CB 70.3 et seq *the Second Respondent had regard only to an alleged claim that Government forces were suspicious of him because of his Communist background.*

(b) The Second Respondent failed to have regard to the applicant's claim that he was perceived a Maoist because of his opposition to the (Monarchical) political system in Nepal.

(c) The Second Respondent failed to have regard to the applicant's claim that he was perceived Maoist "even though" he was a former member of the Communist Party of Nepal (Marxist/Leninist). Instead the Second Respondent treated the applicant's claims as confined to suspicion of him as a Marxist because of his Communist background.

2. The Second Respondent made a jurisdictional error by failing to have regard to a relevant consideration, namely whether a ceasefire agreement in 2003 between government security forces and the Maoists was practically observed.

Particulars

At CB 72-3, the Second Respondent stated that the 2003 ceasefire agreement undermined the veracity of the applicant's claim to have been beaten by security forces. The Second Respondent had before it information at CB 148 that described the agreement as "the ceasefire that never was" and stated that August 2003 marked the formal end to a ceasefire that had existed only in its violation.

3. The Second Respondent made a jurisdictional error in that, contrary to section 424A of the Migration Act, the Second Respondent did not give to the applicant particulars of information that the Second Respondent considered to be the reason for [sic: or] *a part of the reason for affirming the decision under review as required by section 424A(1) of the* Migration Act 1958 *and by one of the methods specified in section 441A of the* Migration Act 1958.

Particulars

> *At CB 59.1-59.3, the Second Respondent put to the applicant matters where it was said that his evidence was inconsistent with his claim in his primary application including a claim in his primary application that he was a businessman."*

Integers of a claim

9. Ground one is a complaint that the Tribunal failed to have regard to an integer of the applicant's claims relating to persecution by government authorities, and by supporters of the National Democratic Party. In particular, that the Tribunal failed to have regard to the applicant's claim that he was perceived to be a Maoist because of his opposition to the (monarchical) political system in Nepal, and treated the applicant's claims as confined to suspicion of him as a Marxist because of his Communist background.

10. In summary, Mr. Young's submission in relation to ground one in the further amended application is that the Tribunal failed to deal with the applicant's claims that, amongst other matters, he feared persecution by government authorities and the National Democratic Party in Nepal because of his views, and activities, as an anti-monarchist. The Tribunal's failure to deal "squarely" with this aspect of the applicant's claims was said to be, on relevant authority, jurisdictional error on the part of Tribunal.

Applicant's statement

11. In a statement attached to his protection visa application (CB 24 to CB 27) the applicant stated:

    1. *"I don't like the political systems in Nepal. The system of government is corrupt. The police and the politicians are corrupt. The king has still too much power under the constitution. I engaged in activities criticising the monarchical system."* (CB 24.8)

    2. *"Consequently I was threatened to kill by the Maoists and on the other hand I was accused of being a Maoist by the government security personnel and the people in authorities because I opposed the monarchical system. I was identified as an anti-monarchy follower and I noticed that I would be arrested and*

harmed by the police or army accusing me of being a Maoist." (CB 25.1)

3. *"The cumulative effect of the numerous instances of harassment, intimidation and assault led to me making the decision to leave Nepal and seek a refugee status in Australia as I have a well founded fear of persecution for reasons of my opposition to the Monarchy and the Maoists."* (CB 25.3)

4. *"I was always harassed and persecuted by the police and supporters of the National Democratic Party which is affiliated with the monarchy and it is in power now. They suspect me that I am a Maoist activist. In June October 2003, I was approached by the police and threatened that if I did not manage to disappear they would kill me."* (CB 26.9)

5. *"I continue to be persecuted because I was always suspected as a Maoist activist even though I was a former member of the Communist Party of Nepal (Marxist-Leninist)."* (CB 26.10)

Applicant's submissions

12. Mr. Young further referred the Court to the Tribunal's decision record and submitted that at CB 70 where the Tribunal commences its analysis under its "Findings and Reasons" it identifies the "principal claim" made by the applicant as being that he feared "persecution by government security forces on the one hand and the Maoists" on the other. The Tribunal stated:

> "The basis for his claims is that:
>
> - The Maoists want him because he was the secretary of a club which he helped to establish and the members of which were used for recruitment by the Maoists; and that he himself as secretary of the club did not cooperate with the Maoists;
>
> - He was a member of the Communist Party (Marxist/Leninist). The government forces have always been suspicious of him because of his Communist background. He claims that they think he may be a Maoist." (CB 70.2)

13. Mr. Young's submission was that when the Tribunal subsequently came to consider the question of whether he was subject to persecution by government authorities in Nepal (CB 72.3) it considered it only in

the context of the "second dot point" above (at CB 70.3). That is, that the Tribunal considered his claims on the basis that government forces had always been suspicious of him because of his Communist background, linked to, the claim that they thought he may be a Maoist. This, it was submitted, was quite a different basis to what was in his primary visa application, which was that he feared persecution because he was perceived to have anti-monarchical views by the authorities and the National Democratic Party.

14. Mr. Young submitted that there may be, as the respondent submits, some explanation for what he describes as the "transmutation" from what appears in the primary visa application to what was ultimately dealt with by the Tribunal. He referred the Court to the Tribunal's account of the hearing that it conducted with the applicant, and in particular at CB 60.3:

> "The Tribunal asked the applicant why he left Nepal. He said he left Nepal because he had always been against the monarchy in the country and he also became a victim of the Maoists. The Tribunal asked him to explain what he meant by saying that he always opposed the monarchy in Nepal. He said he was very disenchanted by the monarchy because there was poverty in the country, while the monarchy had lived in luxury. He was also a victim of the Maoists because the club he belonged to comprised mostly of people from a lower caste; the Maoists consistently asked for assistance and sought to recruit fighters from the lower caste members of the club. He himself did not join the Maoists and consequently became a target. The Tribunal put to him that the reasons he has given so far for leaving his country do not provide any issues regarding persecution, and that his alleged resentment of the monarchy in his country in itself was not a Convention reason, unless he could also demonstrate that because of his resentment of the monarchy he had faced persecution as such. He explained that he used to be a member of the Marxist/Leninist Party. He was therefore suspected of being a Communist. The National Democratic Party which is anti communist and is aligned with the monarchy therefore saw him as a potential Maoist. Because of their suspicions he became the target of the police and the military."

But the "explanation" is not such as to free the Tribunal's decision from jurisdictional error in light of relevant authorities.

Applicant's authority

15. Mr. Young relied on what he described as the "classic statement of the description of integers of the claim", and referred to Allsop J. in *Htun v Minister for Immigration & Multicultural & Indigenous Affairs* (2001) 194 ALR 244 ("*Htun*"), and in particular:

> *"[41] The Tribunal, on a fair and straight-forward reading of its reasons, did not deal with the claim made by the appellant in his application for review by the Tribunal and supported by objective evidence that:*
>
> > *'Due to my participation with Karen community and political groups I have made a number of friends, some of whom are members of the Karen National Liberation Army.'*
>
> *[42] The "participation in the Karen community and the political groups" could be said to have been dealt with by the Tribunal dealing with the appellant's activities in Australia. The friendships (of the appellant, as a Karen) with people in organisations such as the KNLA were not. This is not merely one aspect of evidence not being touched. It is not a failure to find a "relevant" fact. The Tribunal failed to address and deal with how the claim was put to it, at least in part. The requirement to review the decision under s 414 of the Act requires the Tribunal to consider the claims of the applicant. To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on. The claim or claims and its or their component integers are considerations made mandatorily relevant by the Act for consideration in the sense discussed in* Minister for Aboriginal Affairs v Peko Wallsend *(1986) 162 CLR 24; and* Minister for Immigration and Multicultural Affairs v Yusuf *(2001) 180 ALR 1. See also* Sellamuthu v Minister for Immigration and Multicultural Affairs *[1999] FCA 247, at [18], [19], [21] and [50]. It is to be distinguished from errant fact finding. The nature and extent of the task of the Tribunal revealed by the terms of the Act, eg ss 54, 57, 65, 414, 415, 423, 424, 425, 427 and 428 and the express reference in Regulation 866 to the "claims" of the applicant eg 866.211, make it clear that the Tribunal's statutorily required task is to examine and deal with the claims for asylum made by the applicant. If there is a sur place claim made in addition to a claim based on conduct or experiences elsewhere both must be dealt with. If the sur place claim is, or is to be seen as, based on more than one foundation - that is, what has been done by way of political activity and also because of friendships made with other Karen people of arguably*

seriously subversive background, both bases of the claim must be dealt with. The Tribunal did not deal with the latter basis of the appellant's sur place claim based on imputed political opinion. It was not a failure merely to attend to evidence, even probative evidence, and by such route commit a factual error. It was a failure to deal with one part of the claim for asylum on the basis of his imputed political opinion. It is true that when called on at the hearing to articulate orally his fears he did not expressly identify his friendships as distinct from his activities in Australia. However, given the clarity of the expression of this fear in his application for review and the existence of objective material put forward by him to support it, I do not see this basis for the claim as having been abandoned. Conceptually, and in a common sense way, it was quite distinct from his claim based on his activities of the kind referred to earlier."

Applicant's claim of Tribunal's error

16. Mr. Young emphasised that, while the Tribunal may have sought to refine the applicant's claims in the hearing it conducted with him, there was no basis on which it could be said that the applicant had abandoned his clearly stated claim in relation to persecution by reason of his anti-monarchical views. In Mr. Young's submission while the applicant may have added another aspect to his claims, that is, that he was seen by the authorities, and in particular the National Democratic Party, as being a "potential Maoist", he did not abandon his claim to fear persecution on the basis of his anti-monarchical views. He particularly stressed that the Tribunal itself recorded the applicant's claims at the hearing before it that the National Democratic Party was anti-Communist, was aligned with the monarchy, and it was from both of those perspectives that he was seen as a "potential Maoist". As the Tribunal plainly records, that it was because of these suspicions that he became the target of the police and the military.

17. In his submission when the Tribunal came to consider whether the applicant was subject to persecution by government authorities in Nepal (CB 72 to CB 73) it considered the matter purely on the basis of him being a suspected Communist, and his admissions that he had founded a social community class that was devoted to community projects. The Tribunal did not consider his claim also to have been perceived, or to have been thought of, as anti-monarchical, and that this

also led to him being a target of the police and the military and therefore subject to persecution.

Respondent's submission

18. In reply, Mr. Potts submitted that to describe the applicant's claim about his fear of persecution as it arose out of his anti-monarchical activities as the principal claim advanced in the protection visa application, is to give the statement of 7 May 2004 (which accompanied the protection visa application) a construction that cannot be sustained on any fair reading. He described it as "a mishmash of various claims all of which are given no particular prominence". In taking the Court through this document, Mr. Potts emphasised that even when the applicant raised the issue of engaging in activities criticising the monarchical system in this document (CB 24.8), there was no description of what the activities were, when they had occurred, their nature, and how they then brought the applicant to the attention of the authorities. Further, that this was the same when (by CB 25.2 in the same document) he said that he was accused of being a Maoist by the government security personnel because he opposed the monarchical system. Again no detail is provided. By CB 25.3 the applicant asserts the "cumulative effect" of the numerous instances of harassment led to his fear of persecution based on his opposition to the monarchy and the Maoists. Again no detail is provided. In essence, Mr. Potts's central point was that when read fairly the document reveals that the claim of persecution because of anti-monarchical activities was a claim that was put vaguely, without any specificity, and was "mixed in with a number of others and it was unclear how they interrelated or if they did at all". The Tribunal therefore in his submission was entitled at the hearing to seek to clarify what was at best a "bare claim".

19. Mr. Potts submitted that he was not referring to the applicant's initial presentation of claims in any "critical" sense, but to emphasise that the Tribunal was exercising the option given to it, pursuant to the *Migration Act 1958* ("the Act") for the purposes of the review, that it sought to explore these claims at the hearing in order to understand them. Therefore, in light of the vague and very bare description of his claim of fear of persecution, the Tribunal approached the hearing on

the basis of needing to understand the claims that were actually being put forward, and then to be able to deal with them.

20. In Mr. Potts's submission this can be shown when reviewing the Tribunal's account of the "oral testimony" given by the applicant before the Tribunal. In particular in this account, where the Tribunal asked the applicant to explain what he meant by saying that he always opposed the monarchy in Nepal (amongst other things). He submitted that while the applicant provided answers (CB 60.3), the Tribunal put to him that the reasons that he had given so far for leaving his country did not provide any "issues regarding persecution" (CB 60.6) and that his alleged resentment of the monarchy in itself was not a "Convention reason", unless he could also demonstrate that because of this resentment he had faced persecution as such. That what follows, in the Tribunal's record, when read properly in context, coming as it then does after the Tribunal had put him on notice as to its view about what he had said so far, was the specificity of the applicant's claim. This specificity was that it was his activities as a member of the Marxist/Leninist party that gave rise to the fear of persecution (and by implication met his anti-monarchical views).

21. Further, that from what is reported in the decision record, under the heading of "Harassment by Government agencies", the Tribunal, in the context of seeking to ascertain whether he had been detained by authorities in Nepal, asked him the question in general terms and the applicant's response was that he had never been arrested, or detained, but that he had been given "a very hard time" by the National Democratic Party. The Tribunal, again in Mr. Potts's submission, sought to explore detail as to what the applicant meant by this and noted with him what it saw as the implausibility of his initial explanation.

22. In short, Mr. Potts's submission was that the report of the hearing shows that the Tribunal took the "bare" claim made initially by the applicant, sought to give it some specificity and detail, and that what was left by the end of the hearing was that the Tribunal had already put to the applicant that it could not see how his anti-monarchical activities engaged the Refugees Convention. When pressed the applicant presented his fear as being based on suspicions of his former

association with the Communist Party, and that he could be seen as a Maoist. It was for this reason, submitted Mr. Potts, that by the time the Tribunal came to its "Findings and Reasons" it saw the applicant's claims as being that which is represented by the "two dot points" at CB 70 (see paragraph 12 above).

Difference between the parties

23. Mr. Potts summarised the difference between the parties now before the Court as being that Mr. Young's argument was that what was said at the hearing did not "actually cut away from what had already been put in writing", and that what had been put in writing was still the necessary subject of consideration by the Tribunal. However, the respondent's position is that a fair reading of what transpired at the hearing is in fact that what was left of the applicant's claims is that as set out at the "two dot points" at CB 70, and was dealt with by the Tribunal.

Respondent's authorities

24. Mr. Potts referred to *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No. 2)* [2004] FCAFC 263 ("*NABE (No.2)*"), a case dealing with a situation where the Tribunal had made a factual mistake about the nature of the applicant's claim. However, in particular he sought to rely on what was said at [62]:

> *"Whatever the scope of the Tribunal's obligations it is not required to consider criteria for an application never made..."*

Further, in quoting from the Chief Justice of the High Court in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; 203 ALR 112; (2003) HCA 71 at [1]:

> *"… Proceedings before the tribunal are not adversarial; and the issues are not defined by pleadings, or any analogous process. Even so, this court has insisted that, on judicial review, a decision of the tribunal must be considered in the light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant, or an applicant's lawyers, at some later stage in the process."*

Consideration

25. Mr. Potts's submission was that the issue for the Court now is whether, in light of the exchange at the Tribunal hearing, and the questioning of the applicant by the Tribunal, the "anti-monarchy claim" was still "a live one", and one that was therefore required to be dealt with by the Tribunal in discharge of its review functions pursuant to s.414 of the Act.

26. In considering this issue, I must first note that I did not understand Mr. Potts to be critical of the applicant in his description of the statement attached to the protection visa application as a "mishmash". I understood his submission to be that the lack of specificity in that document led to the need for the Tribunal to seek to clarify and to attach some detail and specificity to the claims at the hearing with the applicant.

27. Having said that however, I do not agree with the description of this document as a "mishmash". To the extent that this term has some pejorative element to its meaning, then I do not accept this description. The Macquarie Dictionary (revised Third Edition) defines "mishmash" as:

> *"A hodgepodge jumble."*

I do not see this statement as meeting this definition. Further, given the many such statements seen by this Court in reviewing Tribunal decisions, this document, in my view, stands at the more articulate end of the range of such statements (noting of course that there are many cases where there is not even an attempt to put in any statement).

28. Further, I did not understand the parties to be at odds over whether the applicant actually ever raised (at least, some sort of) claim involving his anti-monarchical views. The respondent's issue was that it was a vague, bare claim that required clarification and explanation. This is what the Tribunal attempted to do at the hearing.

29. In any event, such a claim is plain in the applicant's statement. It must be remembered that this statement was expressed to be "in support of my application" for a protection visa. In answer to the question in his application (CB 17) as to why he left Nepal, the applicant says "see my statement attached". In his answers to subsequent questions relating to

issues going to his fear of persecution the applicant makes reference to "see the statement to follow", which in context, given that no other statement is in the material before the Court now, is the statement of 7 May 2004 set out at CB 24 to CB 27. This statement therefore is plainly meant by the applicant to be his presentation of his claims for a protection visa, that is, his refugee claims.

30. For an applicant who is conversant with English (see the protection visa application at CB 11.8), but nonetheless unrepresented before the Minister's Department, and who, from what is contained in the protection visa application, did not have assistance in preparing his application (CB 8.8 - the applicant indicated that he did not have another person acting for him) and given that the applicant, prior to coming to Australia lived his entire life in Nepal (CB 14.2) and would not necessarily have been conversant with making applications in Australia for refugee protection), there are very clear and plain statements (amongst others) in his statement that he engaged in activities criticising the monarchical system, that he was accused of being a Maoist by the government security personnel, and the authorities, because he opposed the monarchical system, and that he was identified as an "anti-monarchy follower", and that this was linked to his being harmed by the police or army, whom he feared would accuse him of being a Maoist. His statement (at CB 25.3) plainly states that the "cumulative effect" of the instances of harassment, intimidation and assault led to his leaving Nepal because the well founded fear of persecution arose from his "opposition to the Monarchy", and his fear of "the Maoists".

31. The Tribunal well understood these claims when recounting the applicant's claims and evidence and looking at and reporting on what was in the first respondent's file. The Tribunal noted in its decision record under the heading "Claims and Evidence" at CB 56.9:

> "He said the King has too much power under the Constitution and so he, the applicant, engaged in activities criticising the monarchical system in Nepal. The applicant further claimed that he was asked to join the Maoists by a group in his village but he denied or refused to join and managed to 'disappear' from the village. He was consequently threatened with death by the Maoists on the one hand, and also accused of being a Maoist by government security personnel on the other hand because he was

> opposed to the monarchy. He claimed he was identified as an anti-monarchist and was threatened with arrest and other forms of persecution by the police or the army. The cumulative effect of these instances of harassment and intimidation led him to make the decision to leave Nepal and to seek refuge in Australia."

It should be noted that the Tribunal also identified other claims made by the applicant in that document.

32. Mr. Potts submitted that what remained of this aspect of the applicant's claims, following the hearing with the Tribunal, was such that this claim was no longer "effectively on the table" such as to require the it being dealt with in consideration by the Tribunal.

33. In all, I do not agree with Mr. Potts's submission that what was left at the end of the hearing in relation to the issue of the applicant's anti-monarchical views and (unspecified) activities was such that it was not required to be dealt with by the Tribunal. The Tribunal may indeed, as it said, have put to the applicant that the reasons that he had given for leaving his country, which included the reasons related to his views on the monarchy, was not of itself a Convention reason unless he could also demonstrate that he faced persecution. That the Tribunal may have put this to the applicant at the hearing does not in my view adequately deal with the claim that was put by the applicant in his initial statement. It may have been put without detail, but in my view it was plainly put. Further, notwithstanding the Tribunal's apparent view of it formed at the hearing, it was not abandoned by the applicant. The Tribunal may have put a particular view to the applicant at the hearing, but the Tribunal's failure to adequately deal with the claim to which this view related, and indeed to make a finding arising from this preliminary view, when it came to its consideration of the applicant's claims, in my view reveals jurisdictional error on the part of the Tribunal in the sense as set out in *Htun*.

34. I also note what the Full Court said in *NABE (No.2)* at [45] to [63] and in particular:

> *"[58] The review process is inquisitorial rather than adversarial. The Tribunal is required to deal with the case raised by the material or evidence before it – Chen v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 157 at 180 [114] (Merkel J). There is authority for the proposition that the Tribunal*

is not to limit its determination to the 'case' articulated by an applicant if evidence and material which it accepts raise a case not articulated – Paramananthan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28 at 63 (Merkel J); approved in Sellamuthu v Minister for Immigration and Multicultural Affairs (1999) 90 FCR 287 at 293 – 294 (Wilcox and Madgwick JJ)… It has been suggested that the unarticulated claim must be raised 'squarely' on the material available to the Tribunal before it has a statutory duty to consider it – SDAQ v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 199 ALR 265 at 273 [19] per Cooper J. The use of the adverb 'squarely' does not convey any precise standard but it indicates that a claim not expressly advanced will attract the review obligation of the Tribunal when it is apparent on the face of the material before the Tribunal. Such a claim will not depend for its exposure on constructive or creative activity by the Tribunal."

"[60] In SGBB v Minister for Immigration and Multicultural and Indigenous Affairs *(2003) 199 ALR 364 at 368 [17], Selway J referred to the observation by Kirby J in Dranichnikov, at 405, that '[t]he function of the Tribunal, as of the delegate, is to respond to the case that the applicant advances'. He also referred to the observation by von Doussa J in* SCAL v Minister for Immigration & Multicultural & Indigenous Affairs *[2003] FCA 548 that '[n]either the delegate nor the Tribunal is obliged to consider claims that have not been made' (at [16]). Selway J however went on to observe in* SGBB *(at [17]):*

> *'But this does not mean the application is to be treated as an exercise in 19th Century pleading.'*

His Honour noted that the Full Court in Dranichnikov v Minister for Immigration & Multicultural Affairs *[2000] FCA 1801 at [49] had said:*

> *'The Tribunal must, of course, deal with the case raised by the material and evidence before it. An asylum claimant does not have to pick the correct Convention "label" to describe his or her plight, but the Tribunal can only deal with the claims actually made.'*

His Honour, in our view, correctly stated the position when he said (at [18]):

> *'The question, ultimately, is whether the case put by the appellant before the tribunal has sufficiently raised the relevant issue that the tribunal should have dealt with it.'*

This does not mean that the Tribunal is only required to deal with claims expressly articulated by the applicant. It is not obliged to deal with claims which are not articulated and which do not clearly arise from the materials before it."

"[63] It is plain enough, in the light of Dranichnikov, *that a failure by the Tribunal to deal with a claim raised by the evidence and the contentions before it which, if resolved in one way, would or could be dispositive of the review, can constitute a failure of procedural fairness or a failure to conduct the review required by the Act and thereby a jurisdictional error. It follows that if the Tribunal makes an error of fact in misunderstanding or misconstruing a claim advanced by the applicant and bases its conclusion in whole or in part upon the claim so misunderstood or misconstrued its error is tantamount to a failure to consider the claim and on that basis can constitute jurisdictional error. The same may be true if a claim is raised by the evidence, albeit not expressly by the applicant, and is misunderstood or misconstrued by the Tribunal. Every case must be considered according to its own circumstances… as the Full Court said in* WAEE *(at [45]):*

> *'If the tribunal fails to consider a contention that the applicant fears persecution for a particular reason which, if accepted, would justify concluding that the applicant has satisfied the relevant criterion, and if that contention is supported by probative material, the tribunal will have failed in the discharge of its duty, imposed by s 414 to conduct a review of the decision. This is a matter of substance, not a matter of the form of the tribunal's published reasons for decision.'*

35. In my view, what was left at the conclusion of the hearing conducted by the Tribunal was that the applicant's claims, as understood and reported by the Tribunal in its "Findings and Reasons" at CB 70 (the two dot points), did not contain the claim relating to his anti-monarchical views, and the fear of harm that he had said arose from this. What the Tribunal set out at CB 70, may indeed be described, following the hearing, as "the principal claim", and the basis for his claims may indeed include what the Tribunal set out at the two dot points. But what is plain is that the applicant, while he may have made

other claims with more detail at the hearing, did not ever abandon his claims to fear harm, as this fear arose from the perceptions by the authorities and the National Democratic Party relating to his anti-monarchical views. In my view, the Tribunal has not made a finding in relation to this claim.

36. It may be that the Tribunal took a preliminary view, at the hearing, that such a claim did not amount to persecution "as such" and it properly put this to the applicant at the hearing. It may even be argued that the applicant's subsequent responses were not such as to have ultimately satisfied the Tribunal that the applicant objectively feared harm for this reason. But even bearing in mind what the Court said in *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184, as referred to in *NABE (No.2)* at [63], that it comes to a matter of substance, not a matter of the form, of the Tribunal's published reasons for decision. I cannot see that in its analysis the Tribunal addressed what may have been, as Mr. Potts submitted, a "bare" claim, but a claim nonetheless that required proper consideration by the Tribunal. An un-stated (in its analysis as opposed to its report of the hearing which expressed a view that it put to the applicant) reliance of what may have occurred at the hearing lead to this claim ultimately not being recognised as a part of the applicant's overall claims. If the Tribunal had formed a preliminary view about the applicant's claims to having anti-monarchical views and how this was viewed in the context of his claims to fear persecution then, in my view, in considering this claim it was necessary for the Tribunal to at least acknowledge it and deal with it in its analysis. If indeed the claim was bare and lacked substance then the Tribunal could have said so in its analysis. I do not see reporting on what occurred at the hearing (even though it may contain initial, or preliminary, thinking) as being representative of the proper consideration of an applicant's claims. I accept the submission made by Mr. Young that the Tribunal did not deal with this aspect of the applicant's claims which was not abandoned by him at the hearing, and that it was required to do so, and it's failure to do so amounts to jurisdictional error.

37. Further, and as illustrative of this need, and the Tribunal's subsequent failure to address this need, the applicant's initial statement spoke of the "cumulative effect of the numerous instances of harassment" that

led him to leaving Nepal on the basis that he had a well founded fear persecution for reasons of his opposition to the monarchy and his opposition to the Maoists. While I am well-seized of the High Court's statement in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 that a Tribunal decision is not be read with "an eye attuned to the perception of error", the Tribunal's reduction of the applicant's original statement to what occurred at the hearing, and its focus on "the principal claim made by the applicant", (as represented by the two dot points at CB 70), itself leaves open the inference that the Tribunal dealt only with part of the applicant's claims. That is, those parts that it saw as being "principal", and the bases for that principal claim. While it is open to say that what was left at the end of the hearing was that part of the applicant's claims dealing with his anti-monarchical views, which may not have fallen into the category of "principal", it was nonetheless a claim plainly (even though "bare", made and recorded in the analysis and consideration of each of the applicant's claims) required to have been "squarely" addressed by the Tribunal. It was not.

38. For this reason the Tribunal's decision is affected by jurisdictional error such that the relief sought by the applicant should be granted. In light of this it is not necessary to consider grounds two and three. Nor is there anything before me to argue against the granting of this relief and I will make orders accordingly.

I certify that the preceding thirty-eight (38) paragraphs are a true copy of the reasons for judgment of Nicholls FM.

Associate:

Date: 20 December 2006