FEDERAL COURT OF AUSTRALIA

VSAB v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 239

MIGRATION – appeal from Federal Magistrate's decision – finding by Refugee Review Tribunal that nationality of appellant husband that of Former Yugoslav Republic of Macedonia – claim that finding made without any evidence to support it – meaning of "nationality" – whether Refugee Review Tribunal bound to act only upon direct evidence, such as text of statute, or expert evidence, when determining questions of "derivative acquisition of nationality" – whether distinction to be drawn between "original acquisition of nationality" and "derivative acquisition of nationality"

Applicants in V 722 of 2000 v Minister for Immigration & Multicultural Affairs [2002] FCA 1059 discussed
Joyce v Director of Public Prosecutions [1946] AC 347 referred to
Minister for Immigration and Ethnic Affairs v Petrovski (1997) 73 FCR 303 referred to
Nolan v Minister for Immigration and Ethnic Affairs (1988) 165 CLR 178 referred to
Nottebohm Case (Liechtenstein v Guatemala) (Second Phase) [1955] ICJ Rep 4 referred to
Oppenheimer v Cattermole (Inspector of Taxes) [1976] AC 249 referred to
R v Burgess; ex parte Henry (1936) 55 CLR 608 referred to
Re Patterson; ex parte Taylor (2001) 207 CLR 391 referred to
SFGB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 231 referred to
Sykes v Cleary (1992) 176 CLR 77 referred to
Tji v Minister for Immigration and Ethnic Affairs (1998) 55 ALD 508 referred to
VHAJ v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 186 cited

VSAB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS and REFUGEE REVIEW TRIBUNAL

VID 1076 OF 2004

WEINBERG J
17 MARCH 2006
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 1076 OF 2004**

BETWEEN:	**VSAB** **FIRST APPELLANT**
	VSAC **SECOND APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**

JUDGE: **WEINBERG J**

DATE OF ORDER: **17 MARCH 2006**

WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The Refugee Review Tribunal be joined as a respondent to this proceeding.
2. The appeal be dismissed.
3. The appellants pay the first respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 1076 OF 2004**

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	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**
JUDGE:	**WEINBERG J**
DATE:	**17 MARCH 2006**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1 This is an appeal from a judgment of Connolly FM delivered on 24 August 2004: *VSAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FMCA 520. His Honour ordered that an application for judicial review of certain decisions made by the Refugee Review Tribunal ("the Tribunal") on 7 June 2002 be dismissed.

2 The issue raised by this appeal is whether the Federal Magistrate erred in declining to set aside the Tribunal's decision, it having been contended before his Honour that the Tribunal had mistakenly found that the second appellant ("the husband") was a citizen of the Former Yugoslav Republic of Macedonia ("FYROM").

THE FACTUAL BACKGROUND

3 The first appellant, ("the wife"), and at least one, and possibly both, of the appellants' children, are citizens of FYROM. The wife and children arrived in Australia on 13 December 2000, as the holders of visitor visas. The husband followed them several weeks later, on 3 January 2001. He entered Australia on a FYROM passport issued on 23 July 1998. However, despite that fact, he claimed from the outset that he was a national of

Bosnia-Hezergovina, and not a national of FYROM.

4 On 25 January 2001, the husband lodged an application for a protection visa. The wife and the two children were included in this application as members of the family unit. In the application, the husband described his current citizenship as Bosnian, and stated that he sought protection in Australia so that he would not have to return to Bosnia-Herzegovina. He claimed that he feared harassment and persecution from Serb nationalists if required to return to Bosnia-Herzegovina because of his opposition to their policies, and his "mixed marriage" to a Macedonian. He insisted that he was not, and never had been, a national of FYROM. He also claimed that he was not entitled to reside in that country.

5 On 12 April 2001, a delegate of the respondent Minister refused to grant the husband and the other members of his family a protection visa. The delegate rejected his claim that he had no right to reside in FYROM, and found that he was, in fact, a national of that country. The delegate noted that the husband had not been mistreated in FYROM, and that he did not claim to fear persecution if required to return to FYROM.

6 On 31 May 2001, after the delegate's decision was given, the wife lodged a separate application for a protection visa. Included in that application were the husband, and the two children, again as members of the family unit. The wife claimed to fear harm in FYROM "on account of the widespread ethnic violence in that country", and the "total breakdown of law and order in Macedonia with the uprising of the Albanian minority".

7 Perhaps not surprisingly (given that the wife's claim did not really address the issue of persecution on Refugees Convention grounds), a different delegate of the respondent Minister, on 15 November 2001, refused the wife's application for a protection visa. The delegate noted that the wife did not claim to have suffered discrimination, or to have been persecuted, in FYROM in the past. The delegate accepted that the husband might have difficulty in finding employment in FYROM because of his Serbian ethnicity. However, the delegate concluded that any discrimination that the husband might suffer in that regard would not be of sufficient gravity to amount to persecution. Importantly, the delegate did not accept that there was more than a remote chance that the wife would become a victim of any instability or conflict between Albanians and Macedonians in the foreseeable future if she returned to FYROM.

8 In two separate decisions delivered on 24 May 2002, the Tribunal affirmed the two separate decisions by the different delegates not to grant the husband or the wife protection visas. The key findings of the Tribunal in relation to the husband's application were as follows:

> *"The Applicant lived in the country that is now known as FYROM, from 1991 until he departed for Australia, apart from periods spent in Bosnia, where he comes from and went to in order to check his property, and significant time spent on the road in Europe, pursuing his livelihood. He traveled with a passport issued by FYROM authorities in 1998, a passport that replaced another that had been issued in 1995. His new passport showed his usual family address in Skopje as his residential address. He was equivocal about his nationality, stating that he paid bribes for the passport and had never attended a citizenship ceremony. His wife stated that he had the right to enter FYROM with that passport.*
>
> *The Applicant has been married to a citizen of FYROM since 1986 and has lived in that country for many years. His children are Macedonian nationals, including one child who was born in Serbia and the Applicant has owned property and conducted his business from Skopje without trouble. He has been the recipient of two passports issued by FYROM authorities and has habitually departed and re-entered that country using his FYROM passport without hindrance. The Australia Department of Foreign Affairs and Trade (DFAT) advised in 1994:*
>
> > *"More stringent requirements for acquiring Macedonian citizenship were introduced and the fee was raised from 50 to 500 US dollars with effect from 10 November. In addition to 15 years' residence or 3 years' marriage, applicants must provide a medical certificate, a certificate of fluency in the Macedonian language, confirmation that they have no criminal record, and proof of residence."*
> > *[CX2432: "FYR Macedonia, November – December 1993" Cable BG 61260, 14 January 1994]*
>
> ***At that stage, the Applicants had been married for seven years. The Applicant speaks Macedonian and his application form states he has no criminal record. His spouse suggests he has the right to enter and reside in FYROM. Having regard to the circumstances, the Tribunal is satisfied that he is a national of FYROM, as evidenced by the issue of the passport to him, notwithstanding that he may have paid some bribes when it was issued. It is plausible that he is also a national of Bosnia/Herzegovina. If that is the case, each of those countries is an appropriate country of reference in assessing his refugee status.*** *In this matter, the Tribunal finds, for the reasons given below, that he is not a refugee in reference to FYROM, so it is unnecessary to assess his status* vis a vis *Bosnia / Herzegovina."* (emphasis added)

9 The Tribunal went on to discuss a number of more general matters. It then referred to certain additional written submissions that had been filed on behalf of the husband by his adviser.

Relevantly, those additional submissions included the following claims:

> "**[The husband]** ***is not able to obtain Macedonian citizenship. The purchase of a passport does not guarantee citizenship for himself and his daughter (a Yugoslav). As a Serb the citizenship application will be denied.*** [The husband] *has made enquiries to obtain citizenship but without a massive bribe he was not able to secure documentation. This discrimination is entirely on account of his ethnicity. Without Macedonian citizenship* [the husband] *is unable to purchase property, access what social security and justice is available and obtain any rights. To obtain any access to services will require bribing officials. Renewal of his passport will require an even higher bribe as he is at the mercy of a corrupt policeman."* (emphasis added)

10 The Tribunal addressed these additional written submissions in the following terms:

> *"After the Tribunal had initially signed off this determination on 20 May 2002, it received further written submissions from the Applicants' adviser. Those submissions reiterate the Applicant's objections to Serbian nationalist policies and his avoidance of fighting for the Serbian cause, as well as the situation for Serbs in FYROM. They reiterate his claim that he is not a Macedonian citizen, and only holds a Macedonian passport because he bought one, adding the further explanation that he has only lived in FYROM for six months as he was constantly on the move. He stated that he had evaded repatriation to his place of birth through possession of his FYROM passport, but he was at risk of being "moved on". The submissions also reiterate evidence given by the Applicants about the consequences of having a mixed marriage, both for themselves and their children.*
>
> *The Tribunal has considered the contents of the post-hearing submissions. It remains satisfied that the Applicant is, in fact, a national of FYROM. It notes the apparent inconsistency between claims that the Applicant has avoided repatriation to, and persecution in, his home town and his own evidence that he went there on several occasions to check family property. It remains satisfied, in the context of the information canvassed in the body of the record of this decision, that the Applicant and his family members do not face a real chance of persecution should they return to FYROM".*

11 In substance, therefore, it may be seen that the Tribunal found that the husband was a national of FYROM, notwithstanding his protestations to the contrary, because:

- he had lived there, on and off, since 1991;
- he was in possession of a FYROM passport that had been issued to him in 1995, and renewed in 1998;
- the passport nominated Skopje, the capital of FYROM, as his place of residence;

- he had travelled regularly using the passport;
- he had been married to a national of FYROM since 1986;
- at least one, and possibly both, of his children were nationals of FYROM;
- his wife had told Australian immigration authorities, after her arrival in this country, that he had the right to enter FYROM on his FYROM passport, and to reside there; and
- Department of Foreign Affairs and Trade ("DFAT") information relating to FYROM, which set out the requirements for acquiring FYROM citizenship, suggested that the husband met those requirements. In particular, as the Tribunal noted, the husband had been married to a Macedonian national for more than the requisite three years, spoke Macedonian, and had no criminal record.

12 It was essentially for these reasons that the Tribunal concluded that, irrespective of whether the husband was a national of Bosnia-Herzegovina, as he claimed, he was also a national of FYROM.

13 Having found that the husband was a national of FYROM, and having also found that he could return to that country and live there in safety, the Tribunal concluded that it was unnecessary to go on and determine whether his claims regarding the risk of persecution in Bosnia-Herzegovina had any substance.

THE FEDERAL MAGISTRATE'S DECISION

14 The focus of the proceedings before the Federal Magistrate, and in the present appeal, involves a challenge to the Tribunal's finding that the husband was a national of FYROM. It was accepted, on his behalf, that if that finding stood, the Tribunal had been entitled to refrain from considering whether he had a well-founded fear of persecution if required to relocate to Bosnia-Herzegovina. On the Tribunal's finding, that question was moot.

15 It is important to appreciate that, before the Federal Magistrate, the husband did not challenge the Tribunal's finding that neither he, nor his wife, had a well-founded fear of persecution if required to return to FYROM. In other words, there was no challenge to the Tribunal's conclusion that, though the husband might be subjected to some low-level discrimination in FYROM, this would not be of sufficient seriousness to amount to persecution.

16 Before the Federal Magistrate, it was submitted on behalf of the husband that the Tribunal's reasons disclosed jurisdictional error on three separate grounds:

(a) it had failed to determine whether the husband was a national of Bosnia-Herzegovina, and therefore failed to deal with an essential aspect of his claim;

(b) it had misunderstood the requirements which had to be established in order to find that the husband had acquired FYROM nationality; and

(c) it had found that the husband was a national of FYROM with no evidence to support that conclusion. Alternatively, there was insufficient evidence to support that finding.

17 In relation to ground (a), it was accepted that the Federal Magistrate's finding that the husband was a national of FYROM, and could return there at any time would, *if valid*, justify the Tribunal's decision not to consider his position as regards Bosnia-Herzegovina.

18 In relation to ground (b), it was contended that in a case of this type, involving what was described as "derivative acquisition of nationality", there were stringent requirements that had to be met before such a finding could be made. In particular, it was submitted that the Tribunal had been required, as a matter of law, and as a matter of irreducible evidentiary standards, to acquaint itself with the domestic law of FYROM regarding acquisition of nationality, whether through the text of the relevant statute, expert evidence, or scholarly works.

19 In relation to ground (c), it was contended that the only basis upon which the Tribunal had found that the the husband was a national of FYROM was his possession and use of a FYROM passport. If, however, as the husband claimed, he had bribed officials to secure the issue and renewal of that passport, it could not properly be assumed that the passport provided any evidence of FYROM nationality.

20 The Federal Magistrate rejected each of these grounds. In particular, he concluded that the Tribunal's finding that the husband was a FYROM national had not been based solely upon his possession of a FYROM passport. It had also been based upon other evidence concerning his background, together with the country information to which the Tribunal referred regarding the domestic requirements for obtaining such nationality.

21 Accordingly, his Honour rejected the contention that the Tribunal's finding should be set aside as unreasonable in the Wednesbury sense. He also rejected the alternative contention that the material upon which that finding was based was so inadequate that the only inference that could be drawn was that the Tribunal had applied the wrong test.

APPELLANTS' CONTENTIONS ON THE APPEAL TO THIS COURT

22 The appellants challenged the finding by the Tribunal that the husband was a national of FYROM primarily on the basis that there was no evidence to support that conclusion. Their case was essentially put that way because they recognised that anything short of that contention might not give rise to jurisdictional error.

23 The second ground upon which the appellants relied related to the manner in which the Tribunal had gone about the task of determining the husband's nationality. As indicated, they submitted that the Tribunal had been required to have regard to the domestic statute governing the acquisition of FYROM nationality, or at least expert evidence, of some type, as to that matter.

24 Mr Gibson, counsel for the appellants, developed these submissions in the course of a helpful argument. He contended that at common law, and under customary international law, a person's nationality had to be determined by the municipal law of the State in relation to which nationality was claimed. He cited *Tji v Minister for Immigration and Ethnic Affairs* (1998) 55 ALD 508 at 513-4 per Finkelstein J, and *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249 as authority for this proposition. He next submitted that a distinction should be drawn between what Finkelstein J in *Tji* referred to as "original acquisition of nationality", and what his Honour described as "derivative acquisition of nationality": see *Tji* at 516. In international law, generally speaking, original acquisition of nationality, that is nationality acquired at birth, was based on descent from a national, or birth within the territory of a State, or both. Derivative acquisition of nationality (which Mr Gibson contended was at issue in this case) could take place in one of only two ways. These were through naturalisation (in consequence of an application for citizenship), or by operation of law (for example, through the emergence of a new State, and principles of succession). See generally the discussion of these principles in *Tji* at 516.

25 Mr Gibson then submitted that where, as in the present case, the husband was a national of

Bosnia-Herzegovina, and claimed a well-founded fear of persecution if required to return to that country, no finding could be made that he was a national of a different country by derivative acquisition of nationality without detailed attention being given to the domestic law of that other country. He submitted, as is plainly the case, that ascertainment of the law of FYROM was a question of fact for the Tribunal. Indeed, the content of any foreign law is question of fact, about which evidence can be adduced.

26 It was in that context that Mr Gibson submitted that a sharp distinction had to be drawn between these two forms of acquiring nationality. In cases of original acquisition, a finding of nationality could be based upon nothing more than the fact that the person was born in a particular country. However, in cases of derivative acquisition, no finding of nationality could be made without careful attention being given to the domestic law of the country in question governing such matters.

27 Mr Gibson submitted that, in the present case, there was little indication that the Tribunal had paid any attention to the domestic law of FYROM when it found that the husband was a national of that country. The Tribunal did not obtain the text of the relevant FYROM statute. Nor did it seek the views of an expert on FYROM law regarding such matters. Nor even did it have regard to any scholarly works by experts on this subject.

28 Mr Gibson submitted that in reality the only evidence before the Tribunal regarding the husband's nationality (apart from his possession of a FYROM passport) was the country information that had been provided by DFAT, to which the Tribunal briefly referred in its reasons for decision, set out above at [8]. Accordingly, so it was submitted, the Tribunal's finding on this critical issue had been made without any, or at least without any adequate, reference to the appropriate law regarding that subject.

29 Mr Gibson noted that the Federal Magistrate had relied upon the judgment of Ryan J in *Applicants in V 722 of 2000 v Minister for Immigration & Multicultural Affairs* [2002] FCA 1059 ("*Applicants V 722*") in dealing with the ascertainment of foreign law. His Honour's approach was approved, on appeal, by the Full Court in *VHAJ v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 186.

30 In substance, Ryan J held, at [32]-[33], that while findings relating to the law of a foreign

country are questions of fact, and therefore susceptible to proof by expert evidence, it is not necessary to resort to such evidence to make "a finding as to the effect of a relevant law of a foreign country". He stated at [33]:

> *"If, for example, the text of a presumably relevant statute of that country or an authoritative statement in a legal text book or other authority appears to suggest with sufficient precision the effect of the law in question, the court or tribunal is entitled, in the absence of contradictory expert evidence, to make a finding accordingly (*Evidence Act (Cth) 1995 *s 174(1)).*"

31 It should be noted that Ryan J did not stipulate that the only way in which foreign law can be proved is through one of the means set out above. These were examples, rather than an exhaustive statement of the methods of proof that were legally permissible.

32 In any event, Mr Gibson submitted that Ryan J's judgment needed to be understood in context. He contended that, to the extent that his Honour's reasoning might be thought to broaden the types of evidence upon which a finding as to foreign law could be made, *Applicants V 722* was distinguishable from the present case on the following bases:

> *"i) the issue requiring an examination of foreign law in that case was the entitlement of the applicants to remain in, or re-enter Italy*
>
> *ii) this was a different issue to that of establishing nationality, and in any event, there were a number of evidentiary matters raising a* ***presumption*** *that they would not be precluded from returning to Italy i.e. long term residence coupled with possession of* ***valid*** *passports endorsed with Australian visitor's visas. The presumption was strengthened by their possession of unexpired Italian temporary residence permits and had pending applications for permanent residence permits.*
>
> *iii) Raising a rebuttable presumption regarding the entitlement of a non-citizen to re-enter a foreign state is not the same thing as establishing that a person holds the nationality of a foreign state, and as the judgment shows a lesser evidentiary basis may suffice in the former situation.*
>
> *iv) The case is otherwise distinguishable on its facts as it was accepted that the passport was valid. Here the First Appellant's case was that his passport and its renewal had been acquired by* ***fraudulent*** *means – purchase through the agency of a corrupt policeman by payment of massive bribes without which he would not have been able to secure documentation … In light of the basis on which his case was put, acceptance by the Tribunal … that he may have paid some bribes without any further explanation (or rejection of any aspect of this*

story) totally undermines any prima facie presumption of nationally by reason of the issue and possession of a FYROM passport".

33 Mr Gibson then submitted that nothing said by Ryan J in *Applicants V 722* detracted from his central proposition that the issue of nationality, and particularly nationality derivatively acquired, raised a question of fact, and had to be proved. He further submitted that it was no answer for the Minister to contend, as her counsel had, that it had been open to the husband to provide evidence of the relevant law governing nationality in FYROM. He submitted that before the Tribunal could properly make any finding on a critical issue of this nature, it was obliged to ensure that it had sufficient material before it to support such a finding.

34 With regard to the husband's possession of the FYROM passport, Mr Gibson submitted that the Tribunal had acknowledged, and accepted, the husband's account of how he had initially acquired that passport, and later had it renewed. It was always the husband's case that upon the expiry of his former Yugoslav passport, he had managed to purchase a FYROM passport through his contacts with a corrupt policeman. In other words, his claim, which it was submitted had been accepted by the Tribunal, was that he had obtained the passport only through the payment of bribes. It was submitted that whatever weight might ordinarily be given to the possession of a particular passport when considering the question of nationality, no weight could attach to that fact in circumstances where the passport had only been obtained through bribery.

35 Mr Gibson also criticised certain aspects of the reasoning of the Federal Magistrate. At one point, his Honour had put forward the hypothesis that even though the husband may have paid bribes in relation to the passport, it did not necessarily follow that the passport could not provide some evidence of nationality. His Honour's reasoning, implicitly at least, was that the husband may have been entitled to the issue of a FYROM passport, but paid a bribe in ignorance of that fact. Alternatively, the husband may have paid bribes simply in order to speed up the process of obtaining the passport to which he was, in fact, in any event entitled. Mr Gibson submitted that each of these hypotheses consisted of nothing more than speculation and conjecture. He further submitted that they indicated that the Federal Magistrate had failed to appreciate the fact that the case before the Tribunal had been put on a basis that did not admit of any such reasoning. That was because, implicit in that case, was the contention that the husband obtained his passport by bribery, and that he was not legally

entitled to one.

36 Mr Gibson therefore submitted that, contrary to the Federal Magistrate's findings, the Tribunal had considered and evaluated the husband's claims against the wrong country. It ought to have carried out its statutory task by reference to Bosnia-Herzegovina, the country of which the husband was an acknowledged national, and not by reference to FYROM, a country in which he had only occasionally resided.

THE MINISTER'S SUBMISSIONS

37 Mr Horan, counsel for the Minister, acknowledged that whether the husband was a national of FYROM did indeed raise a question of fact. He submitted that the Tribunal had determined that question of fact lawfully, and in an appropriate manner. It had identified the relevant issue correctly, and had properly concluded, on the basis of the material before it, that the husband was a national of FYROM.

38 Mr Horan submitted that there was, in fact, a substantial body of evidence and other material before the Tribunal to support that conclusion. This included, in particular, the various matters set out in the passage from the Tribunal's reasons for decision extracted above at [8]. He submitted that it could not be said that the Tribunal had failed to address any of the husband's claims, or that it had misconstrued, misunderstood or overlooked any relevant criteria for the grant of a visa. In classic terms, it could not be said that the Tribunal had identified a wrong issue, asked itself a wrong question, ignored relevant material or relied on irrelevant material.

39 Mr Horan submitted that, contrary to Mr Gibson's contention, there were no "irreducible minimum evidentiary requirements" to be satisfied in order to establish that the husband was a national of FYROM. Nor was there any "minimum standard of proof" that had to be met. He contended that Mr Gibson's submission, when properly understood, amounted to nothing more than a claim that there was insufficient evidence to support the Tribunal's finding. Even if that claim could be substantiated, it would not demonstrate the existence of jurisdictional error. The appellants would have to go further, and show that there was "no evidence" to support the Tribunal's finding. This they plainly could not do.

40 Mr Horan next submitted that, contrary to Mr Gibson's contention, Australian law did not

require that there be direct evidence as to the relevant laws governing the acquisition of nationality in FYROM in order to enable the Tribunal to find that the husband was a national of that country. Rather, it was open to the Tribunal to make such a finding on the basis of the evidence and other material as a whole. The Tribunal was also entitled to draw appropriate inferences from any primary facts that were established.

41 Mr Horan accepted that the Tribunal had not rejected the husband's claim that he had paid bribes in connection with the obtaining of his passport. However, he submitted that it was going too far to suggest that the Tribunal had accepted that claim. What the Tribunal actually said was:

> *"… the Tribunal is satisfied that he is a national of FYROM, as evidenced by the issue of the passport to him, notwithstanding that he may have paid some bribes when it was issued."*

42 Mr Horan submitted that the Tribunal had been entitled to accept the passport as some evidence of the husband's nationality, even if bribes had been paid in connection with its issue, and renewal. There was nothing to suggest that the passport, which had been used on a regular basis, was not a valid document.

43 Mr Horan then submitted that when the Tribunal's reasons were read as a whole, it was apparent that its finding that the husband was a national of FYROM did not depend solely upon the fact that he had been issued with a FYROM passport. That fact was simply one of a number that the Tribunal had been entitled to act upon in support of its conclusion.

44 In Mr Horan's submission, the Federal Magistrate correctly held at [26]:

> *"There was therefore clearly some evidence upon which the Tribunal could make a finding that the applicant husband was a national of FYROM. Indeed apart from the applicant husband's assertions that he was not a citizen of FYROM and had no right of residence in FYROM, there was no evidence to the contrary."*

45 Mr Horan relied upon the following observation of the Full Court regarding the "no evidence ground" in *SFGB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 231 at [20]:

> *"On the other hand, if there is sufficient evidence or other information before*

> *the Tribunal on which it could reach the conclusion it did then it is for the Tribunal to determine what weight it gives to that evidence. Indeed, unless the relevant fact can be identified as a 'jurisdictional fact', there is no error of law, let alone a jurisdictional error, in the Tribunal making a wrong finding of fact:* Attorney-General (NSW) v Quin *(1990) 170 CLR 1 at 35-36. It is for the Tribunal to determine the merit of the claim. The line between merit review and jurisdictional error may not be a 'bright line', but it is nevertheless an essential one:* Minister for Immigration and Ethnic Affairs v Wu Shan Liang *(1996) 185 CLR 259 at 272."*

46 Mr Horan noted that Mr Gibson had not submitted that the question of the husband's nationality gave rise to a "jurisdictional fact". It was clear that it did not.

47 Mr Horan therefore submitted that the appellants' case, taken at its highest, amounted to nothing more than an assertion that the Tribunal's finding that the husband was a national of FYROM was factually incorrect. However, consistently with *SFGB* and numerous other authorities, even if factual error of that kind could be demonstrated, it would not give rise to jurisdictional error. And the second limb of Mr Gibson's argument, namely his submission that the Tribunal had been required to refer to direct evidence only of the relevant laws of FYROM, was unsupported by any authority, and could not be sustained.

CONCLUSIONS

48 It should be noted, at the outset, that the concept of "nationality", which is central to this appeal, is a term somewhat lacking in precision. It is generally used to signify the legal connection between an individual and a State. The primary relevance of nationality under international law is to provide a basis upon which a State can exercise jurisdiction over persons. However, the term is employed in different ways in international law, and domestic law.

49 Questions of nationality are generally determined in accordance with the municipal laws of the State concerned: *Convention on Certain Questions Relating to Nationality*, opened for signature 12 April 1930, LNTS 179 89, arts 1 and 2 (entered into force 1 July 1937, ratified by Australia 10 November 1937) and *Tji* at 513-14. There are, however, limits on the extent to which such municipal laws will be recognised under international law: See *Nottebohm Case (Liechtenstein v Guatemala)* [1955] ICJ 4 at 20-23; *R v Burgess; ex parte Henry* (1936) 55 CLR 608 at 649 per Latham CJ, and 673 per Dixon J; and *Sykes v Cleary* (1992) 176 CLR

77 at 105-6 per Mason CJ, Toohey and McHugh JJ, 112 per Brennan J, 127 per Deane J, 131 per Dawson J, and 135 per Gaudron J.

50 One of the terms that is often used synonymously with "nationality" is "citizenship". It has become usual to employ the term "citizen" instead of "subject" in States that adopt a republican form of government. In *Sykes v Cleary*, Brennan J observed at 109, in relation to the expression "subject or citizen of a foreign power" in s 44(i) of the Commonwealth Constitution,

> *"subject being a term appropriate when the foreign power is a monarch of feudal origin; citizen when the foreign power is a republic."*

51 Of course, while remaining constitutional monarchies, both Australia and the United Kingdom have by statute adopted the concept of "citizenship". See *Nationality and Citizenship Act 1948* (Cth) (now titled the *Australian Citizenship Act 1948* (Cth)), and see also the *British Nationality Act 1981* (UK). The notions of citizenship and nationality were considered by the High Court in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 186, and in *Re Patterson; ex parte Taylor* (2001) 207 CLR 391 at 467 (per Gummow and Hayne JJ).

52 In any event, it is sufficient for present purposes to accept that the term "citizenship" overlaps with the term "nationality". Both notions embody some form of link to, or membership of, a State giving rise to the existence of reciprocal rights and duties. International legal instruments, such as art 15 of the *Universal Declaration of Human Rights*, generally use the term "nationality", rather than the term "citizenship". However, nothing of any consequence turns upon this.

53 Article 1A(2) of the Refugees Convention speaks of nationality, and not of citizenship. For present purposes, the question whether the appellant husband was a national of FYROM was effectively answered by asking whether he was a citizen of FYROM. That had to be determined in accordance with the domestic law of that country regarding such matters.

54 It is at the next stage that the appellants' argument breaks down. In my view, the possession and regular use by the husband of a FYROM passport provided some evidence that he was, as the Tribunal found, a national of that country. At common law, the issue of a passport

involved an exercise of the royal prerogative by which the protection of the Crown was extended to a citizen of the country in whose name the passport was issued who travelled abroad: see *Joyce v Director of Public Prosecutions* [1946] AC 347 at 369-70; and *Minister for Immigration and Ethnic Affairs v Petrovski* (1997) 73 FCR 303 at 307. Under ss 7 and 8 of the *Australian Passports Act 2005* (Cth), an Australia passport can only be granted to an Australian citizen. The same appears to be generally true of other countries. The issue of a passport does not, of itself, amount to a grant of citizenship. It may not amount to conclusive evidence of nationality, but it seems to me to be at least some evidence of that fact.

55 The complicating feature of this case lies in the peculiar status of FYROM, which is a new State that assumed responsibility for the governance of the particular area in which the husband resided at the time that Yugoslavia dissolved into a number of separate States. In international law, a succession of States occurs when one State replaces another in taking over responsibility for the international relations of a particular territory. This may occur when several States unite into a single State. It may also occur when a single State dissolves into several new States, or when part of the territory of one State is transferred to another State.

56 In general, the conferral of the nationality of the successor State or States, and the withdrawal of the nationality of the predecessor State or States, is governed by the municipal laws of the relevant States. However, some attempts have been made to formulate general rules or principles governing the conferral or withdrawal of nationality in such circumstances. For example, the International Law Commission has adopted Draft Articles on the "Nationality of Natural Persons in relation to the Succession of States" which were submitted to the United Nations General Assembly in 2000. The Draft Articles have no official or legal status, beyond that fact, unless any of their provisions are said to reflect customary international law.

57 In my view, there is no rule of the type for which the appellants' contend that when nationality is disputed in a case of derivative acquisition of nationality, the Tribunal can act only upon direct evidence as to the law regarding such acquisition in the foreign country, and is required to disregard circumstantial evidence that bears upon that question. No authority was cited for that proposition, and that was hardly surprising. There is no reason in principle why the Tribunal should be so constrained. Evidence which bears rationally upon the issue in question, in this case the domestic law of FYROM regarding acquisition of nationality,

whether it be based on the text of a FYROM statute, the views of an expert in FYROM law, scholarly works upon the subject, or whether it be based on a series of primary facts that lead to an inference as to the requirements of that domestic law, is nonetheless still evidence. If there is a question of fact to be resolved, such as whether a particular person is a national of a particular State, there is no reason, from the point of view of judicial review, why one type of evidence should be preferred to another.

58 It may be accepted that the rules under which nationality can be acquired through derivative acquisition will vary from country to country. So much was conceded by Mr Horan. It was, however, open to the Tribunal to acquaint itself with as much of the foreign law of the relevant State as was necessary for it to make findings regarding this issue. In my view, it was open to the Tribunal to do so by reference to secondary sources of a non-scholarly nature, including country information of the type utilised in this case.

59 I consider that the Tribunal acquainted itself with the laws of FYROM relating to derivative acquisition of nationality adequately by having regard to the DFAT information to which it referred in its reasons for decision, as set out above at [8]. The fact that there might be more up to date, and better sources of information available regarding this matter may be a basis for criticism of the way in which the Tribunal went about its task. However, that criticism seems to me to go largely to the merits of the Tribunal's decision. It does not, of itself, demonstrate jurisdictional error.

60 If it cannot be said that there was "no evidence" to support the Tribunal's finding that the husband was a FYROM national, the challenge to the sufficiency of that evidence goes nowhere. The fact that others might not have come to the same conclusion as the Tribunal did regarding this issue, equally does not demonstrate jurisdictional error.

61 I should interpolate at this stage that I agree with Mr Horan's submission that the Tribunal's finding regarding the payment of bribes in connection with the obtaining of the passport was by no means as clear, and unambiguous, as Mr Gibson submitted. It is not correct to say that the Tribunal accepted the husband's account of having paid bribes. It is, however, correct to say that it did not reject that account. The Tribunal was saying no more than that, even if bribes were paid, it did not follow that the passport could not be used as some evidence of nationality.

62 I accept that the Federal Magistrate's "hypotheses" might be regarded by some as speculative, or conjectural. In substance, however, they seem to me to have only made explicit what was already implicit in the Tribunal's reasons. It is by no means absurd to think that a person of Serbian ethnicity, residing in FYROM, might have some difficulty in obtaining a FYROM passport, even through he might be entitled, as a matter of law, to FYROM citizenship, and therefore to such a passport. Again, it is by no means absurd to think that bribes might be paid to facilitate obtaining such a passport.

63 I note that one of the points made in the additional written submissions to the Tribunal filed on behalf of the husband was that possession of a FYROM passport had nothing to do with FYROM nationality. As previously indicated, the additional submissions stated:

> "[The husband] *is not able to obtain Macedonian citizenship. The purchase of a passport does not guarantee citizenship for himself and his daughter. As a Serb the citizenship application will be denied."*

64 It is true that the Tribunal did not deal with all aspects of this contention. In some circumstances, a failure to address a claim that is central to an applicant's case may give rise to jurisdictional error. In the present case, however, the Tribunal's failure to deal with the suggestion implicit in these three sentences that the possession of a FYROM passport is disconnected entirely from FYROM citizenship does not give rise to such error.

65 In the first place, no claim of such disconnection was ever distinctly made. The assertion contained in the passage set out above related to "the purchase" of a passport. In context, what was claimed was that the passport had been obtained by bribery, and therefore should not be regarded as evidence of nationality. In substance, that was always the case presented on behalf of the husband. That case was carefully considered, and rejected by the Tribunal. It was not bound to go on and consider a different case, based upon a proposition that was never squarely put, that in FYROM, passports are generally available to non-citizens. There was nothing before the Tribunal to support that assertion. It also seems to be somewhat counter-intuitive. Most countries do not issue passports to non-citizens, at least as a general rule.

66 In any event, the Tribunal came to its conclusion in relation to the husband's nationality not on the basis of the FYROM passport alone, but also on the basis of the evidence relating to

the husband having lived in FYROM, being married to a FYROM national and satisfying other criteria specified in the DFAT country information relating to derivative acquisition of citizenship, as discussed at [11] of these reasons for judgment.

67 Furthermore, this "disconnection point" was not raised before the Federal Magistrate. Nor was it raised as a ground of appeal before me. No application was made to amend the notice of appeal. If such an application had been made, it would have been refused.

68 It follows that no appealable error has been demonstrated. The appeal must be dismissed, with costs.

69 In accordance with the High Court's decision in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162, the Tribunal has been joined as a respondent to this proceeding.

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Weinberg.

Associate:

Dated: 17 March 2006

Counsel for the Appellants:	Mr J.A. Gibson
Solicitors for the Appellants:	Erskine Rodan & Associates
Counsel for the Respondents:	Mr C. Horan
Solicitor for the Respondents:	Australian Government Solicitor
Date of Hearing:	14 February 2006
Date of Judgment:	17 March 2006