FEDERAL COURT OF AUSTRALIA

QAAA of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs [2007] FCA 1918

MIGRATION – appeal from a decision of a Federal Magistrate reviewing a decision of the Refugee Review Tribunal – Iranian citizen who lived in the United States of America for 21 years and served in the United States Navy – whether error of law by the Federal Magistrate in not finding that the Tribunal made a jurisdictional error in finding that appellant has no well-founded fear of persecution in Iran – no evidence – whether jurisdictional error in finding that the Iranian authorities would accept the appellant's explanation of his United States Navy service – whether material existed before it on which the Tribunal could have reached this finding – *Wednesbury* unreasonableness – whether a decision which is unreasonable in the *Wednesbury* sense is amenable to judicial review – whether finding not formed reasonably or effected by illogicality

Held: Appeal allowed. Tribunal accepted Iran was a "sworn enemy" of the United States and therefore finding that the Iranian authorities would have little or no interest in the appellant because he "only reached the relatively low rank of airman" during his service in the United States Navy was not open to it on the material before it. No findings as to *Wednesbury* unreasonableness or illogicality.

Australian Citizenship Act 2007 (Cth) s 35
Criminal Code Act 1995 (Cth) Sch div 80.1
Migration Act 1958 (Cth) s 353(2)

Abebe v Commonwealth (1999) 197 CLR cited
Andary v Minister for Immigration and Multicultural Affairs [2003] FCAFC 211 followed
Applicant M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 16 cited
Associated Provincial Picture Homes Ltd v Wednesbury Corporation [1948] 1 KB 223 cited
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 cited
Collins v Minister for Immigration and Ethnic Affairs (1981) 36 ALR 598 cited
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 cited
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB [2004] 207 ALR 12 cited
NACB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 235 cited
re Minister for Immigration and Multicultural Affairs, ex parte Cassim [2000] HCA 50 cited
re Minister for Immigration and Multicultural Affairs ex parte Epeabaka (2001) 206 CLR 128 cited
SFGB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 231 considered
Sinclair v Mining Warden at Maryborough [1975] 132 CLR 473 cited
VWFP and VWFQ v Minister for Immigration and Multicultural and Indigenous Affairs

[2006] FCA 231 cited
VWST v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 286 followed

QAAA OF 2004 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS AND REFUGEE REVIEW TRIBUNAL
QUD138 OF 2006

COLLIER J
6 DECEMBER 2007
BRISBANE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY **QUD138 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**QAAA OF 2004** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**COLLIER J**
DATE OF ORDER:	**6 DECEMBER 2007**
WHERE MADE:	**BRISBANE**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The decision of the Jarrett FM dated 17 March 2006 be set aside.
3. The decision of the Refugee Review Tribunal be quashed.
4. The decision be remitted back to a differently constituted Tribunal to be heard and decided again according to law.
5. The first respondent pay the appellant's costs of the appeal and the application.

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

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AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **First Respondent**
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JUDGE:	**COLLIER J**
DATE:	**6 DECEMBER 2007**
PLACE:	**BRISBANE**

REASONS FOR JUDGMENT

1 This is an appeal against a decision of a Jarrett FM of 17 March 2006. The Federal Magistrate dismissed an application for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") handed down on 19 December 2003. The Tribunal had affirmed a decision of a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister") made on 26 July 2002 to refuse the grant of a protection visa to the appellant.

2 The appellant seeks the following orders:

a. a writ of certiorari to quash the decision of the learned magistrate
b. a writ of prohibition against the first respondent acting on the decision
c. a writ of mandamus remitting the decision back to the second respondent to be determined according to law
d. an order that the first respondent pay the appellant's costs of the appeal and the application.

Background

3 The appellant is a citizen of Iran. He was born in Tehran in 1956. However he has not lived in Iran since 1978, having lived for 21 years in the United States of America. He arrived in Australia from the United States with his son on 20 July 1999 in possession of a three month visitor visa. He did not depart Australia in accordance with the visa requirements and was located by the then Department of Immigration, Multicultural and Indigenous Affairs ("the Department") working illegally in Perth in May 2001. At this time the appellant was granted a bridging visa to make arrangements to leave the country. He did not do so, but instead relocated to Brisbane where he was again located by the Department in May 2002 and placed in detention.

4 On 31 May 2003 the appellant unsuccessfully applied for a protection visa. On 29 July 2003 the appellant applied to the Refugee Review Tribunal for a review of the decision of the delegate of the Minister not to grant a protection visa. The appellant subsequently appealed the Tribunal's decision to the Federal Magistrates Court and the Federal Magistrate's decision to this Court.

5 I understand that when leaving the United States in July 1999 the appellant held a United States permanent residence visa which was valid for a further two years at the time of his departure from the United States. It appears that the appellant was unaware that the permanent residency visa would expire if he spent two years outside the United States. Subsequently, his visa was not renewed. I further understand that the appellants' legal representatives have made inquiries in the United States regarding the appellant's status, but I understand that the appellant now has no more right to reside in the United States than any other potential visa applicant seeking to enter that country. This is further complicated by charges which are pending against the appellant which relate to, *inter alia*, his breach of the custody order in relation to his child. I understand that this means that the appellant may not be able to enter the United States either temporarily or permanently.

The Tribunal's decision

6 The appellant raised a number of issues before the Tribunal in support of his application. These included:

- that the appellant had no right to return to and reside in the United States, and he feared that he would be unjustly imprisoned (in relation to the outstanding charges arising from the Family Court proceedings, and a warrant issued in August 1999 for "unlawful flight to avoid prosecution") and persecuted by members of the community if sent back there. In any event, at the completion of any period of sentence imposed on him he would be returned to Iran
- he had been absent from Iran for 26 years and now has a Western appearance (for example, he now wears Western clothes and speaks Farsi with an accent)
- he had served two years in the United States Navy and would be persecuted in Iran because of this service
- he can be identified as being a supporter of the former Shah of Iran and will be persecuted for this
- he will be persecuted for his conversion to Christianity
- he would be forcibly conscripted and attacked by Muslim soldiers
- he faces serious human rights abuses.

7 The appellant stressed before the Tribunal that his fear of persecution in Iran was as a result of the combination of his claims. In particular that he has not lived in Iran for 26 years and during most of that time he has been living as a Christian in a Christian country that is the sworn enemy of Iran, that he served for more than two years in the United States Navy and that he has publicly supported the former Shah and criticised the government that replaced him.

8 The Tribunal's findings are set out at pp 8-13 of the decision. The Tribunal considered whether the appellant was someone to whom Australia owes protection obligations under the Refugees Convention 1951. The Tribunal found that the appellant's political activity and comments in support of the Shah were now made over 25 years ago and that the appellant has not ever been an active Monarchist. Further the Tribunal held that the available information suggests that many former supports of the Shah continue to live in or visit Iran without being persecuted. While the Tribunal agreed that the appellant would most likely be questioned on his return, if for no other reason than that he has been outside the country for 26 years, it did not consider that he would be persecuted.

9 In regards to the appellant's religion the Tribunal found that the appellant would be

able to fulfil his religious needs by attending church and meeting with fellow practitioners, as he did in Australia. The Tribunal did not believe that there was a real chance of persecution for reasons of religion in the reasonably foreseeable future.

10 Further, the Tribunal did not accept that he appellant would be conscripted and that his fears relating to serving in the Iranian armed services are well founded. It found that the authorities will have no interest in punishing him for his historical connections to the Shah regime, particularly in light of his lack of political activity in the intervening 25 years. It further rejected the assertion that there was a real chance of persecution on account of his service in the United States Navy. The Tribunal found that the authorities could satisfy themselves that he posed no threat to Iran, having only served in the United States Navy for two years some 13 years ago and having only reached a relatively low rank.

11 The Tribunal noted that some Iranian citizens are the subject of serious human rights abuses but that even when considering the cumulative claims of the appellant together the Tribunal could not be satisfied that he appellant had a well founded fear of persecution for a Convention reason. As such he was not a person to whom Australia owed protection obligations.

12 The Tribunal noted at p 8 that they had not considered whether the appellant had effective protection in the United States as the issue did not arise for determination, the Tribunal having found that the appellant did not face a real chance of persecution in his country of nationality.

The Federal Magistrates Court

13 On 16 January 2004 the appellant sought judicial review of the Tribunal decision in the Federal Magistrate's Court of Australia.

14 The grounds for review raised before Jarrett FM were as follows:

- that the Tribunal exceeded its jurisdiction in making its decision to affirm the delegate's decision
- that the Tribunal made a jurisdictional error in finding that the applicant did not have a well-founded fear of persecution should he be returned to his country of

origin in that:

- the Tribunal did not identify the proper legal test for persecution
- having accepted that the applicant had been a Christian for many years, that he had lived in the United States of America for 21 years, that he had served in the United States Navy for more than two years, and that he had not been in his country of origin for more than 25 years the Tribunal made a jurisdictional error in that no reasonable Tribunal could have found that he did not have a well-founded fear of persecution if he returned to that country ("Wednesbury" unreasonableness)
- having found that he would be interviewed by the authorities on his return about his religious beliefs, the Tribunal failed to consider the fact that the laws of Iran prescribed the death penalty for people such as the applicant, a convert to Christianity, and whether that fact could give rise to a well-founded fear of persecution on his part
- having found that the authorities can examine his service records and question him on his return in relation to his service in the United States Navy the Tribunal failed to consider whether the manner in which such questioning could reasonably be expected to be conducted could give rise to a well founded fear of persecution
- the Tribunal made a jurisdictional error in that it failed to have regard to evidence before it concerning arbitrary arrest by the authorities in the applicant's country of origin, imprisonment of people solely on account of their beliefs, torture and ill-treatment of detainees in the prisons of his country or origin, the refusal of the country's governing body to adopt laws against torture and the role of morality forces in attacking opponents of the regime, when considering whether a person such as the applicant had a well-founded fear of persecution in his country of origin
- the Tribunal made a jurisdictional error in that it breached the rules of natural justice in indicating to the applicant at the hearing before it that it did not need to hear any further evidence about the treatment that the applicant could expect at the hands of the authorities in his country of origin.

15 The Federal Magistrate was not satisfied that there was a breach of natural justice as

alleged by the appellant (at [40]) or that the appellant demonstrated any error on the part of the Tribunal (at [41]). Jarrett FM at [24] through [40] analysed the Tribunal's response to each claim of the appellant. In particular, his Honour found:

- there is no basis for the suggestion that the Tribunal did not identify the proper legal test for persecution
- the Tribunal considered the fact that the appellant had converted from Islam to Christianity, and did not ignore the evidence that conversion alone can result in not only "severe repression", but also "administration of the death penalty". However, the Tribunal considered whether there was a real chance that the Iranian authorities would persecute the appellant because of his conversion, and concluded that no real chance of persecution existed
- the reasoning of the Tribunal was neither illogical nor irrational. The appellant's challenge to this aspect of the matter is simply an attempt to review the merits of the Tribunal's decision
- the Tribunal acknowledged the gravamen of the appellant's case, and considered that each of the matters raised by the appellant might have a cumulative effect, however the findings of the Tribunal were open on the facts
- the Tribunal had regard to the country information relied upon by the appellant in his adviser's letter to the Tribunal
- the Tribunal considered the appellant's claim to be a monarchist against the available country information provided by the appellant's advisers
- the Tribunal accepted that interrogation of the appellant might take place
- his Honour was not satisfied that there was a breach of natural justice as the appellant alleged, or that there had been a non-compliance with Div 4 of Pt 7 of the *Migration Act 1958* (Cth).

Appeal to this Court

16 In this Court both the appellant and the first respondent were represented by Counsel. The notice of appeal raised the following grounds of appeal, almost identical to those raised before Jarrett FM:

- Jarrett FM made errors of law in not finding that the second respondent made a jurisdictional error in finding that the appellant did not have a well-founded fear

of persecution should he be returned to his country of origin in that:

- the second respondent did not identify the proper legal test for persecution
- having accepted that the applicant had been a Christian for many years, that he had lived in the United States of America for 21 years, that he had served in the United States Navy for more than two years, and that he had not been in his country of origin for more than 25 years the Tribunal made a jurisdictional error in that no reasonable Tribunal could have found that he did not have a well-founded fear of persecution if he returned to that country
- having found that he would be interviewed by the authorities on his return about his religious beliefs, the Tribunal failed to consider the fact that the laws of Iran prescribed the death penalty for people such as the applicant, a convert to Christianity, and whether that fact could give rise to a well-founded fear of persecution on his part
- having found that the authorities can examine his service records and question him on his return in relation to his service in the United States Navy the Tribunal failed to consider whether the manner in which such questioning could reasonably be expected to be conducted could give rise to a well founded fear of persecution
- the Tribunal made a jurisdictional error in that it failed to have regard to evidence before it concerning arbitrary arrest by the authorities in the applicant's country of origin, imprisonment of people solely on account of their beliefs, torture and ill-treatment of detainees in the prisons of his country or origin, the refusal of the country's governing body to adopt laws against torture and the role of morality forces in attacking opponents of the regime, when considering whether a person such as the applicant had a well-founded fear of persecution in his country of origin
- the Tribunal made a jurisdictional error in that it breached the rules of natural justice in indicating to the applicant at the hearing before it that it did not need to hear any further evidence about the treatment that the applicant could expect at the hands of the authorities in his country of origin.

The applicant's submissions

17 Mr Estcourt QC for the appellant submitted in summary as follows:

- the conclusion of the Tribunal that the appellant did not have a well-founded fear of persecution because:
  - he was only an apostate and not a Christian proslytizer
  - he had not criticised the Islamic Revolutionary government since he first went to live in the United States 25 years ago
  - he only reached the "lowly" rank of airman in the United States Navy and therefore he would not be a person the authorities in Iran would have any interest in punishing

  was "*Wednesbury* unreasonable" and both irrational and illogical
- it was illogical in the extreme, perverse and manifestly wrong in the sense discussed by Young J in *VWFP and VWFQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 231 to conclude that the Iranian authorities would examine the appellants Navy service records and satisfy themselves that they did not disclose that the appellant was any threat to Iran
- the Tribunals' conclusion in relation to the assertion that the appellant "can inform them that he was never properly rewarded for his study efforts in the navy" and other quantitative aspects of the appellants United States Navy serve was capricious, perverse and disclose manifest error going to jurisdiction
- it was not relevant how long the appellant served in the United States Navy, or the level of his rank, or whether he felt sufficiently rewarded or appreciated by the United States Navy to whether he would be of interest to the Iranian authorities. What would be of moment was the authorities' perception of the political conduct of an Iranian opponent of the current government who evaded military conscription in the service of his own country and fled to and joined the armed services of Iran's enemy
- the Tribunal's unreasonable approach failed to appreciate and decide upon the full import of the evidence before it concerning the position as to Iran
- given that the Tribunal found that the appellant would come to the attention of the authorities in Iran and that the legal sanction for apostasy is the death penalty, and given the appellants overall history, the chance of him suffering serious persecution was not one which could be discounted as "farfetched" "remote" or "insubstantial"
- the Tribunal failed to take into account the very relevant considerations of

arbitrary arrest, imprisonment of people solely on account of their beliefs, torture and ill-treatment of detainees, the refusal of Iran to adopt laws against torture and the role of "morality forces" in attacking opponents of the regime to determine whether the appellant (who has 21 years of residence in the United States and served in the United States Navy) has a well-founded fear of persecution

- the Tribunal accepted the appellant's characterisation of the United States as Iran's "sworn enemy"
- to have concluded otherwise than that the appellant had more than a "remote", "insubstantial" or "farfetched" chance of a threat to his liberty or physical harassment or ill-treatment at the hands of the Iranian authorities was so totally unreasonable that no reasonable Tribunal could arrive at such a conclusion and it is an irrational and illogical conclusion not based on any evidence or findings or inferences of fact supported by logical grounds.

The respondent's submissions

18 Mr Bickford for the respondents submitted in summary as follows:

- the grounds of review sought to be advanced by the appellant are not open on a matter of this nature and in any event, there is no basis for any one of the grounds sought to be advanced by the appellant
- the scope of jurisdictional error is very limited and a matter can easily fall out of focus when one spends too much time analysing the Tribunals reasons
- it is not finally settled whether or not a decision which is unreasonable in the sense explained in *Associated Provincial Picture Homes Ltd v Wednesbury Corporation* [1948] 1 KB 223 is amenable to review for jurisdictional error
- however, there is clear Full Court authority that states that a lack of logic in a Tribunal's reasoning does not, of itself, give rise to an error of law or jurisdictional error: *NACB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 235
- in any event, the decision of the Tribunal was not unreasonable in the *Wednesbury* sense or in the sense that it was so irrational or illogical and not based on findings or inferences of fact supported by logical grounds. Even if these grounds gave rise to jurisdictional error they are not made out in this case
- the argument that a finding unsupported by evidence amounts to an illogical

finding is not supported by authorities: *VWST v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 286

- the findings made by the Tribunal with respect to the appellant's United States navy service and how the Iranian authorities might view it were reasonably open to it and the Tribunal had regard to all the available evidence in forming its conclusions
- the Tribunal clearly understood the test as to whether the combination of factors in the appellant's case (including his United States navy service) would give rise to a well-founded fear of persecution for a Convention reason. Further, the Tribunal stated the test correctly and applied the tests to the facts as found
- it would be a wrong approach for this court, under the guise of attacking the Tribunal's reasons as being unreasonable or in some sense giving rise to jurisdictional error, to find that this court would not have reached the same conclusion: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611
- the Tribunal applied the correct test with respect to whether there was a "real chance" of the appellant being persecuted and there is no basis for any contention to the contrary
- the Tribunal dealt with the appellant's claims of persecution based on religion, and the Tribunal's findings that there was not a real chance that he faced persecution by reason of his religion in the reasonably foreseeable future was reasonably open on the available evidence. The Tribunal's findings in this regard were findings of fact and not reviewable by this Court
- inevitably there will not be "perfect" evidence before the Tribunal in cases of this nature. The findings the Tribunal made were open to it on the evidence
- even if the Tribunal's findings were against the evidence and the weight of the evidence, such a result does not give rise to an error of law
- there is no basis for the assertion that the Tribunal failed to take into account relevant evidence.

Consideration

19 It is not in dispute between the parties that:

- the Court is entitled to set aside a purported decision of the Tribunal if the

Tribunal has committed jurisdictional error

- the scope of jurisdictional error is not finally settled
- it is not finally settled whether or not a decision which is unreasonable in the sense explained in *Wednesbury Corporation* [1948] 1 KB 223 is amenable to review for jurisdictional error
- the appellant in this case has claimed a well-founded fear of persecution for a Convention reason.

20 At the hearing, Mr Estcourt QC for the appellant submitted that there were essentially three separate bases for the appellant's case, namely:

1. No evidence: If there is no evidence in the case of a critical step in the Tribunal's ultimate conclusion then that constitutes a jurisdictional error. The critical step in this case was in respect of the Tribunal concluding that, once the appellant went back to Iran and was intercepted and interrogated by the authorities, they would accept his explanation about his United States navy service. There was no material as to how the Iranian authorities might react to the appellant's navy service and that is jurisdictional error: *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231 and *re Minister for Immigration and Multicultural Affairs ex parte Epeabaka* (2001) 206 CLR 128.

2. "*Wednesbury* unreasonableness". The Tribunal's decision must be rational and logical and based on findings: *Wednesbury Corporation* [1948] 1 KB 223, *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231.

3. The state of satisfaction that there was no well founded fear of persecution was not formed reasonably on the material before the Tribunal: *Applicant M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 16.

21 There is clear overlap between bases 2 and 3. I will deal with each of these bases in turn.

No evidence

22 An administrative decision made on the basis of no evidence is invalid: *Sinclair v Mining Warden at Maryborough* [1975] 132 CLR 473 per Barwick CJ at 479-480, Gibbs J at 483, Stephen J at 485, Murphy J at 488; Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 358; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] 207 ALR 12 at [39]-[41]. This may be contrasted with a decision against the evidence or the ***weight*** of the evidence, which does not form the basis of jurisdictional error: *Collins v Minister for Immigration and Ethnic Affairs* (1981) 36 ALR 598 at 601.

23 It is clear that in reaching its decision, the Tribunal is not limited to the evidence that is formally put before it: s 353(2) Migration Act. As observed by the Full Court in *SFGB* [2003] FCAFC 231 at [21]:

> "Subject to the other provisions of the Act, including the implied and express requirements of procedural fairness, the Tribunal can inform itself as it thinks fit, including acting on information that is 'public'. Nor should it be forgotten in this context that in the course of their duties Tribunal members may well come to have a relatively detailed understanding of the political and legal situation in various parts of the world. Within the limits imposed by the Act itself there is nothing to prevent members from using this information."

24 In this case the Tribunal considered both information provided by the appellant, and "public" information. In summary, this information was:

- that the appellant "has been out of the country for 26 years, mostly living in a Christian country that is Iran's sworn enemy; he has worked in the United States Navy and will be imputed to be opposed to Iran for that reason; he has publicly supported the Shah and criticized the government that replaced him; he has avoided military service; and he has become a Christian"
- the appellant held the rank of "airman" in the United States Navy, that his role was to inspect aircraft, and that he had a low security clearance
- that active monarchists who are associated with parties that wield influence outside Iran might encounter difficulties if they returned to Iran. The Tribunal noted a document entitled *Final Report (Iran)* published by the UNHCR and the Austrian Centre for Country of Origin Asylum Research and Documentation

(ACCORD) at the seventh European country of origin information seminar in Berlin (11-12 June 2001)

- the Australian Department of Foreign Affairs and Trade advised on 17 March 2003 that there was no evidence of Iranian authorities actively targeting supporters of the former Shah, although an individual caught handing out pro-monarchist leaflets in Iran would likely be arrested
- the UK Home Office report *Iran Assessment October 2003* which observed that the current regime in Iran has not in the past nor does it now act against Iranians simply because they or their relatives were members of the Rastakhiz Party, which was established by the Shah in 1975 to run a one-party State. The report also noted that:

  > "There is no evidence of any pattern of action by the regime today against Iranians simply because at one time they were middle-level or low ranking functionaries of the Shah's bureaucracy."

- the UK Home Office report *Country Assessment Iran, October 2003* which noted that proselytising apostates who commence preaching Christianity are likely to face execution, although there had been no reports of persons being executed on the grounds of conversion from Islam since 1994, and in practice Muslim converts to Christianity may face obstacles such as not being admitted to university or not being issued with a passport.

25 The appellant submits that, in reaching its decision, the Tribunal erred in concluding that, once the appellant went back to Iran and was intercepted and interrogated by the authorities, they would accept his explanation about his United States military service. The appellant draws attention to the findings of the Tribunal that:

> "It is likely that he will be questioned and his past will be examined and will disclose that his family members were supporters of the Shah, that the Applicant made some critical comments about the government some 25 years ago and that he worked in the USA Navy for more than two years. The Tribunal finds that the authorities will have no interest in punishing him for historical connections to the Shah's regime or for criticising the Revolutionary government when it first came to power, particularly as he has not been politically active or otherwise critical in the intervening 25 years. His service was 13 years ago and he only reached the relatively lowly rank of airman. He voluntarily left after a little more than two years. The Tribunal does not accept the argument that he will be imputed to be an enemy of Iran because he was employed by the Navy. The authorities can examine his service records and

> question him to satisfy themselves that his service does not disclose he is any threat of Iran. He can inform them that he was never properly rewarded for his study efforts in the Navy. It finds that he does not face a real chance of persecution related to his US Navy service, for that reason alone or in combination with other aspects of his claims..."

26 In particular, the appellant submitted that there was no material before the Tribunal as to how the Iranian authorities might react to the appellant's navy service. Accordingly, the findings of the Tribunal in relation to the view the authorities might take was based on no evidence, and amounted to jurisdictional error.

27 In relation to this issue, at the hearing Mr Bickford for the first respondent submitted:

> "So the fact that the Tribunal, in making its finding that he was in its view not likely to suffer a real chance of persecution related to his US naval service for that reason alone or in combination with other matters – doesn't necessarily attract criticism by way of jurisdictional error simply because there was no direct evidence before the Tribunal as to what would happen if he was placed in that situation.
> In other words, inevitably in cases of this nature there won't be perfect evidence before the Tribunal. The Tribunal can't know for absolute certain what will happen in the event that this gentleman is returned to Iran and questioned about these matters. It can only make findings based upon the evidence that it does have and based upon its own experience and its own views. That's all it can do.
> So to say there's no evidence to support a finding that - the actual findings being that he would not be imputed to be an enemy of Iran because he was employed by the Navy, well, that's a finding that's open to them on the evidence that they have. It's not a finding that they must make. They might have gone the other way, but that's their role. It's a fact-finding role and the fact-finding has to be based on the evidence available, which is the evidence offered by the applicant." (TS p 14 ll 27-43)

28 In the case before me, it is clear that the Tribunal considered the submissions of the appellant concerning his pro-monarchist views, his activities over time, and his claims as to his religion and formed conclusions based on the facts as submitted by the appellant and evidence before them, including public evidence. In my view, in relation to his Honour's consideration of the findings of the Tribunal with respect to these issues, no error appears from the decision of his Honour.

29 However, once the Tribunal accepted that the United States was the "sworn enemy" of Iran, as it appeared to have done in its findings, it is difficult to identify the basis upon

which the Tribunal could then conclude that appellant would not have a well-founded fear of persecution upon returning to Iran, having served in the armed forces of that "sworn enemy". The material I have considered, and to which the Tribunal referred, did not appear to be relevant to the findings of the Tribunal with respect to that service - indeed the Tribunal appeared to mix in its findings the clearly separate issues of the political views and religious beliefs of the appellant with his active service in the United States armed forces. By implication, the Tribunal similarly mixed the evidence upon which it was relying in reaching its findings in respect of these issues.

30 In my view, it is noticeable that, notwithstanding the concerns of the appellant as expressed at the hearing before the Tribunal, no reference at all is made by the Tribunal to the obvious and serious tensions existing between the United States and Iran at the time of and in the year prior to the Tribunal decision, or to evidence of those tensions which were widely reported during 2003 and the subject of commentary in reports including those of the United States Department of State (see, for example, www.globalsecurity.org/security/library/report/2003/dos-pgt2002.htm).

31 The only obviously relevant evidence to which the Tribunal referred in concluding that the Iranian authorities would have no or little interest in the appellant because he "only reached the relatively ***lowly rank*** of airman" was that relevant to former low-level bureaucrats in the Rastakhiz Party in Iran to which I have referred earlier, namely the report from UK Home Office and evidence from that report that "there is no evidence of any pattern of action by the regime today against Iranians simply because at one time they were middle-level or ***low ranking functionaries of the Shah's bureaucracy***". However the analogy cannot be supported. There are clearly different circumstances attending membership of a "compulsory" party in Iran several decades ago, compared with the voluntary service by the appellant in the United States Navy, a branch of military service of - as found by the Tribunal - the "sworn enemy" of Iran.

32 As a general proposition, it is true that:

- it is for the appellant to advance whatever evidence or argument he wishes to advance in support of his claim (*Abebe v Commonwealth* (1999) 197 CLR at 576, *re Minister for Immigration and Multicultural Affairs, ex parte Cassim* [2000]

HCA 50 at [9]), and

- as made clear by the Full Court in *Minister for Immigration and Multicultural Affairs v Epeabaka* [1999] FCA 1, a finding of fact will only go to jurisdiction if that finding was not open on the evidence.

33 Further, I acknowledge the submission of Mr Bickford that evidence before the Tribunal will not necessarily be "perfect". However, I cannot see how, in these circumstances, it was open to the Tribunal to conclude on the material before it that the Iranian authorities would have little or no interest in the fact that a returning Iranian had not only lived in the United States for over twenty years, but had served in the armed forces of - as the Tribunal accepted - the "sworn enemy" of Iran. By way of comparison only, I note that Australian law treats as very serious the service by an Australian citizen in the armed forces of an enemy state (for example, s 35 *Australian Citizenship Act 2007* (Cth), div 80.1 in the Schedule to the *Criminal Code Act 1995* (Cth)). The appellant had contended that the cumulative effect of factors relevant to him, including his United States navy service, meant that he had a well-founded fear of persecution. In my view the finding of the Tribunal with respect to the view the Iranian authorities would take of his United States navy service, and accordingly the unlikelihood of the appellant being subject to persecution in Iran, was not open on the evidence before it. Accordingly, the decision of the Tribunal in this respect is attended by jurisdictional error.

Unreasonableness/irrationality/want of logic

34 In view of my decision with respect to evidence in this case, it is not strictly necessary for me to consider the alternative issues raised by the appellant with respect to *Wednesbury* unreasonableness and irrationality and want of logic of the Tribunal's decision. However, I note the findings of his Honour below that reasoning of the Tribunal was neither illogical nor irrational and, having reviewed the decision of the Tribunal, consider that there is no error in his Honour's findings in relation to these contentions. In any event, these grounds do not appear to support claims of jurisdictional defect in terms of Australian law. In particular, I note the decision of the Full Court in *Andary v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 211 with respect to *Wednesbury* unreasonableness, and the decisions of the High Court in *Bond* 170 CLR (particularly per Mason CJ at 356 with whom, on this point, Brennan, Toohey and Gaudron JJ agreed) and the Full Court in *VWST* [2004] FCAFC

286 that want of logic does not form a valid basis of judicial review.

Conclusion

35 In light of my findings the appeal must be allowed. The matter should be remitted to the Tribunal for further consideration in accordance with the law. The appellant should have his costs of this appeal and his costs of the appearance before his Honour below.

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The decision of the Jarrett FM dated 17 March 2006 be set aside.
3. The decision of the Refugee Review Tribunal be quashed.
4. The decision be remitted back to a differently constituted Tribunal to be heard and decided again according to law.
5. The first respondent pay the appellant's costs of the appeal and the application.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Collier.

Associate:

Dated: 6 December 2007

Counsel for the Appellant:	S Estcourt QC, M Plunkett
Solicitor for the Appellant:	Fisher Dore
Counsel for the Respondent:	P Bickford
Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	5 February 2007
Date of Judgment:	6 December 2007