FEDERAL COURT OF AUSTRALIA

MZXTZ v Minister for Immigration & Citizenship [2009] FCA 888

CORRIGENDUM

MZXTZ v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
VID 18 of 2009

GRAY J
17 AUGUST 2009 (CORRIGENDUM 17 AUGUST 2009)
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 18 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **MZXTZ**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **GRAY J**
DATE OF ORDER: **17 AUGUST 2009**
WHERE MADE: **MELBOURNE**

CORRIGENDUM

1. On page 1 paragraph 1 of the short minutes of order delete "applicant" and insert "appellant".

2. On page 2 paragraph (5) of the short minutes of order delete (5) and insert 5.

I certify that the preceding two (2) numbered paragraphs are a true copy of the Corrigendum to the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 17 August 2009

FEDERAL COURT OF AUSTRALIA

MZXTZ v Minister for Immigration & Citizenship [2009] FCA 888

MIGRATION – visa – protection visa – whether Refugee Review Tribunal obliged to exercise powers to seek additional evidence – assertion that Malaysian identity card contained information as to appellant's religion, embedded in chip – whether Tribunal should have taken steps to access this information – whether Tribunal required to obtain medical opinion that scars borne by appellant were caused by torture

MIGRATION – visa – protection visa – appellant gave Tribunal further document shortly before decision handed down – Tribunal proceeded to hand down decision without considering document – Tribunal required to consider document – whether relief should be refused because Tribunal member subsequently looked at document and stated that there was no need to alter decision

MIGRATION – visa – protection visa – whether Tribunal failed to deal with actual claim made by appellant – Tribunal characterised claim as one of forcible conversion to Islam – claim was that appellant persuaded by benevolent employer to sign document signifying conversion when he was 14 years old and illiterate, and that authorities thereafter forced him to continue to be a Muslim

Migration Act 1958 (Cth), ss 5(1), 36, 91R, 424A, 425, 427(1)(d), 430A
Acts Interpretation Act 1901 (Cth), s 33(2A)

Convention relating to the Status of Refugees done at Geneva on 28 July 1951
Protocol relating to the Status of Refugees done at New York on 31 January 1967

MZXTZ v Minister for Immigration & Anor [2008] FMCA 1716 reversed
Minister for Immigration & Citizenship v Le [2007] FCA 1318 (2007) 164 FCR 151 applied
Minister for Immigration & Multicultural Affairs v Bhardwaj [2002] HCA 11 (2002) 209 CLR 597 cited
X v Minister for Immigration & Multicultural Affairs [2002] FCA 56 (2002) 116 FCR 319 cited

MZXTZ v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL
VID 18 of 2009

GRAY J
17 AUGUST 2009
MELBOURNE

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ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

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Appellant

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First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGE: **GRAY J**
DATE OF ORDER: **17 AUGUST 2009**
WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The appellant have leave to amend the notice of appeal by deleting grounds 3 and 4 and substituting a ground that the decision of the Refugee Review Tribunal was attended by jurisdictional error, in that the Tribunal failed to deal with the case put by the applicant as to the circumstances of his conversion to Islam at the age of 14.

2. The appeal be allowed.

3. The order of the Federal Magistrates Court, made on 22 December 2008, that the appellant's application to the Federal Magistrates Court be dismissed, be set aside.

4. There be substituted for that order the following orders:

    (1) A writ of certiorari issue, directed to the second respondent, removing into the Federal Court of Australia the decision of the second respondent, signed on 7 February 2008 and handed down on 20 February 2008, affirming the decision of the first respondent not to grant the appellant a protection visa, for the purpose of quashing that decision.

(2) The decision of the second respondent, signed on 7 February 2008 and handed down on 20 February 2008, affirming the decision of a delegate of the first respondent not to grant the applicant a protection visa, be quashed.

(3) A writ of mandamus issue, directed to the second respondent, requiring it to hear and determine the appellant's application for review of a decision of a delegate of the first respondent not to grant the appellant a protection visa according to law.

(4) The first respondent pay the appellant's costs of the proceeding in the Federal Magistrates Court.

(5) The first respondent pay the appellant's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 18 of 2009**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**MZXTZ** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGE:	**GRAY J**
DATE:	**17 AUGUST 2009**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

The nature and history of the proceeding

1 This appeal, from the judgment of the Federal Magistrates Court of Australia in *MZXTZ v Minister for Immigration & Anor* [2008] FMCA 1716, raises several issues about the manner in which the second respondent, the Refugee Review Tribunal ("the Tribunal") dealt with the appellant's application for review of a decision of a delegate of the first respondent, the Minister for Immigration and Multicultural Affairs ("the Minister"), refusing to grant a protection visa to the appellant. The first issue concerns the circumstances in which the Tribunal is required to exercise its powers to seek further information before making a finding adverse to an applicant for review. This issue is raised with respect to two classes of evidence before the Tribunal. One was the appellant's evidence that the microchip on his Malaysian identity card recorded him as a Muslim. The second was whether there should have been evidence, other than that of the appellant, that scars he bore were caused by injuries inflicted on him by police. The second issue is whether the Tribunal had completed the performance of its statutory function when the appellant handed to the Tribunal officer who was about to hand

down the Tribunal's decision an additional document, which he said was relevant to his case. The learned federal magistrate held that the Tribunal had not completed the performance of its function when the document was handed to the Tribunal officer, but declined to give relief because the Tribunal member who had made the decision subsequently considered the document and concluded that, because the document was not written in English, it would not have made any difference to the outcome. The remaining issue was raised by an application for leave to rely on an argument not put to the federal magistrate. Counsel for the Minister took no objection to leave being granted. The argument was that the Tribunal had failed to deal with the case put by the appellant. The Tribunal treated the case as one in which the appellant alleged that he had been forced to convert from Hinduism to Islam in Malaysia, whereas the case put by the appellant was that he had been lured into such a conversion, and that the authorities thereafter would not permit him to revert to his original religion.

2 The appellant is a citizen of Malaysia, who arrived in Australia on 21 June 2007. On 6 August 2007, he applied for a protection visa. On 2 October 2007, the Minister's delegate refused to grant the appellant a protection visa. The appellant was notified of this decision by letter posted on 8 October 2007. The appellant applied to the Tribunal for review of the delegate's decision. The Tribunal conducted a hearing on 18 December 2007, at which the appellant was represented by a migration agent, and at which he gave oral evidence through an interpreter. The Tribunal's decision is dated 7 February 2008. In accordance with the requirements of s 430A(2) of the *Migration Act 1958* (Cth) ("the Migration Act"), the Tribunal invited the appellant to be present when the decision was handed down. The handing down date was fixed for 20 February 2008. On that date, the appellant attended at the Tribunal. When a Tribunal officer was about to hand down the decision, the appellant handed to that officer an additional document, which he said was relevant to his claims. The Tribunal officer proceeded to hand down the decision. Subsequently, the member constituting the Tribunal for the purpose of dealing with the appellant's application for review wrote a "case note", stating that the Tribunal considered itself "functus officio" and that the Tribunal was satisfied that there was "no need for it to alter its decision in this case."

3 By s 36 of the Migration Act, there is a class of visas to be known as protection visas. A criterion for a protection visa is that the person applying for it be a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees

Convention as amended by the Refugees Protocol. The terms "Refugees Convention" and "Refugees Protocol" are defined in s 5(1) of the Migration Act to mean respectively the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol relating to the Status of Refugees done at New York on 31 January 1967. It is convenient to call these two documents, taken together, the "Convention". For present purposes, it is sufficient to say that, pursuant to the Convention, Australia has protection obligations to a person who:

> *owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country*

The appellant's claims

4 The appellant claimed to have a well-founded fear of persecution, if he should return to Malaysia, for the reason of his religion. He said that, as a Hindu Tamil, he had renounced Islam and feared that the Malaysian authorities would imprison him.

5 In a statutory declaration accompanying his application for a protection visa, the appellant said that he had left school when his father passed away in 1993. As he was his mother's only child, he was forced to work to support himself and her. He was employed at a restaurant as a kitchen hand and a cleaner and said that he was "forced to follow Islam at my early days." In 2005, his employer found out that he was having an affair with a Hindu woman and was not strictly following Islamic principles, so terminated his employment. The appellant worked as a cleaner in Singapore for a few months and returned to Malaysia in June 2005. He then worked as a lorry driver until his departure for Australia. In April 2007, he decided to marry and filed notice of intention to marry. The registrar refused to accept the application because the appellant was intending to marry under the Hindu tradition. The registrar insisted that the appellant was a Muslim, so the marriage could not take place under the Hindu tradition. On 16 March 2007, the Hajee Police, who enforced the Islamic code, visited the appellant's house and interrogated him about his intention to marry a Hindu woman under the Hindu custom. They found that the appellant was worshipping Hindu idols, contrary to Islamic principles. They ransacked his room and took him to the police station. There they detained him for a night and assaulted him with an iron rod and cigarette butts. His employment was terminated abruptly at the behest of the

Hajee Police. His fiancée was threatened with harm for attempting to marry him under the Hindu tradition. The appellant then applied for a passport and approached an agent who arranged for him to go to Australia.

6 In a submission to the Tribunal, the appellant's migration agent also made a claim that the appellant had a well-founded fear of persecution for reasons of his race (Tamil) and his membership of a particular social group, "namely as a forcibly proselyte Muslim who was prevented by the state from marrying under Hindu tradition."

7 In his evidence to the Tribunal, the appellant confirmed that he was Tamil and that his religion is Hindu. He said that in his birth certificate he is recorded as a Hindu Tamil, but that his identity card had been altered so that the information inserted in the chip was that he was a Muslim. After looking at the identity card, the Tribunal asked where on the identity card it said that the appellant was Muslim. The appellant replied, "In the chip". The Tribunal pointed out that this information could not be read from looking at the card. The appellant said:

> *It has to be used in a machine and the machine will read...*

The transcript of the Tribunal hearing records that the Tribunal member asked how the appellant knew that he was described as a "Hindu Muslim" on the card and the appellant replied:

> *I went for registration and they checked my IC and - on my Identify [*sic*] Card and said that it is - they have said that I am a Muslim and then I didn't believe so I went to the Registration Department and asked them. They said that I am a Muslim and I asked my = my friend also told me that I am a - I have been identified as a Muslim on the Identity Card.*

8 The appellant also told the Tribunal that, whilst he was working in Singapore, he visited Johor on several occasions, and was assaulted and robbed of his wages by persons unknown to him. He reported these incidents to the Singaporean police, who said they had no jurisdiction to deal with offences in Malaysia, and to the Malaysian police, who did not investigate the offences.

9 The transcript of the appellant's evidence to the Tribunal records the following exchange between the Tribunal member and the appellant:

Have you been forced to change from being a Hindu to a Muslim?---Yes they tried.

*When did they try?---Before I worked in Hammed Corner they got signed papers from me. That is the reason why the Hajee are insisting that I should be practicing [*sic*] Muslim.*

How old were you when they got the signed papers from you?---I was small. I think it is I was 14 or so.

Did you know what you were signing?---I don't know how to read.

So did you sign a piece of paper?---It was a document - a written document and they asked me to sign it. Then I was taken to the hospital to do operation on my genitals but I ran away from the hospital.

Is this after you signed the paper?---They tried to circumcise me so that's why I was trying to find (indistinct) but I ran away from there.

Did they try and circumcise you before or after you signed the paper?---That happened after I signed and they changed my Identity Card and everything. It is my second Identity Card.

What did they do with the first one?---The indication here is - that 02 is indicating that is the second. If it is the first it is 01. They took the first Identity Card from me and they took it with papers that I have signed so they gave - issued this one after that. At that time I did not know what's going on.

So who forced you to sign the paper?---My boss.

10 The appellant went on to say that the first time he had a problem with his employer was when he fell in love with a Tamil girl, who was a Hindu. His boss said he should not be having a relationship with her. When the relationship continued, the boss terminated his employment. He described how his attempt to register his marriage had been rejected and that friends had advised him that another friend had the same type of problem and was killed by the police. They accused him of some sort of crime and beat him to death. The friends advised the appellant to leave the country, so he applied for a passport.

11 In describing his arrest and detention on 16 March 2007, the appellant showed the Tribunal member the marks of cigarette burns and of an injury to his leg. He said that, if he were to complain to the civil police, they would check his identity card, find out that he was registered as a Muslim, and would tell him that he could not have a relationship with a Tamil and that this was the reason for the Hajee's action.

The Tribunal's reasons for decision

12 In its reasons for decision, the Tribunal devoted almost two pages of single-spaced text to summarising an exchange between the Tribunal member and the appellant's representative at the hearing. The purpose of this summary was said to be "to avoid any suggestion that the Tribunal may have misled the representative regarding any of the matters raised at the hearing or the Tribunal's need for any further submissions from him." The summary is defensive and self-justificatory. In the course of it, the Tribunal dealt with the appellant's claim that he was a Hindu whose identity card described him as a Muslim. The summary on that aspect is as follows:

> *The Tribunal observed that there was nothing on the identity card translation on the departmental file before it to indicate that the applicant had been identified in documents as a Muslim by the Malaysian authorities. The representative responded that this was because the information was contained on the microchip on the identity card. The Tribunal stated that whilst it understood this was the explanation, the applicant had not presented supporting evidence to substantiate the claim that the applicant is identified on his Malaysian identity card as a Muslim. The representative responded that the onus was not upon him to prove this matter. In response the Tribunal noted that it was up to the applicant and his representative to present evidence to support his client's case.*

13 The Tribunal member referred to a substantial quantity of what it described as "information from a range of authoritative external sources regarding the issue of forced Islamic conversions and marriage between Muslims and non-Muslims in Malaysia." Under the heading "**FINDINGS AND REASONS**", the Tribunal described the appellant's claims as follows:

> *The applicant claimed that he is a practising Hindu who was forced to convert to Islam and who is now prevented from marrying a Hindu woman in accordance with Hindu tradition. Accordingly, the applicant claims that he fears persecution in Malaysia on the basis of his ethnicity/race and religion as well as his membership of a particular social group, namely, as a "forcibly proselyte Muslim" who is prevented from marrying a non-Muslim in Malaysia.*

14 The Tribunal acknowledged that "the independent country information before it indicates that non-Muslims who wish to marry Muslims in Malaysia must convert to Islam" and that "this evidence also indicates that Indian Tamils and religious minorities in Malaysia, including Hindus, can and do face some discrimination in a range of economic and social matters."

15 In relation to the appellant's claims of assaults by unknown Malays in Johor, the Tribunal found that, if they were true, the essential and significant reason why the appellant was targeted was that he was identified as a suitable victim for the purposes of monetary theft. The Tribunal therefore did not accept that any such assaults were related to a Convention reason.

16 Under the heading "*The Applicant's claim to have been forced to convert to Islam in Malaysia*", the Tribunal discussed at length the appellant's claim that he was treated as a Muslim against his will. The Tribunal summarised the claim as follows:

> *The applicant stated that when he was approximately 14 years of age his employer asked him to sign certain documents, but due to his illiteracy he was not aware of what he was signing. The applicant stated following the signing of these documents arrangements were made for him to be circumcised, which he managed to evade. In addition, he was also issued with a new Malaysian identity card that he claims identified him as either a "Hindu Muslim" or a "Muslim".*

17 The Tribunal then said:

> *However, the Tribunal observes that the [*sic*] other than his oral evidence the applicant has not submitted any evidence, such as the actual document he allegedly signed for his employer, to substantiate his claims to have signed documents that amounted to his consent to convert to Islam. Nor has the applicant submitted any documentary evidence to corroborate his claim that arrangements were made for him to undergo the medical procedure associated with circumcision at a hospital in Malaysia in or about 1995 or at any time thereafter.*

18 The Tribunal acknowledged that the appellant may have some difficulty producing this kind of documentary or substantiating evidence. It met this by saying that, although the events were alleged to have taken place in approximately 1995, the appellant stated that he remained with the same employer until 2005. The Tribunal then said:

> *Whilst the Tribunal recognises the difficulties the applicant may face in providing documentary evidence or the like to establish his claims, the Tribunal does not find the applicant's claims to have been forcibly converted to Islam when he was aged 14 years by his employer plausible. The Tribunal does not accept, even having regard to the impoverished nature of the applicant's family circumstances, that the applicant would run away from an attempt to forcibly circumcise him as part of a forced conversion to Islam arranged by his previously benevolent Muslim employer, but continue to remain with the same employer for another decade after these events allegedly took place. This is particularly so given the applicant's oral evidence that*

> *he did not have any problems with his employer until the employer expressed disapproval of his personal relationship with a Hindu woman in approximately 2005. As a result, the Tribunal considers these claims to be far-fetched and does not find this claim to be plausible.*

19 The Tribunal then discussed the question of the information on the appellant's identity card. It said:

> *The Tribunal is prepared to accept that the microchip present on a Malaysian identity card may well contain information regarding the holder's personal details, including his race, ethnicity and religion. However, given the country information before the Tribunal doe [*sic*] not indicate that Hindus are forcibly required to convert to Islam, together with the Tribunal's earlier findings regarding the implausibility of the applicant's claims, the Tribunal does not accept that the contents of the information in the embedded microchip contained on the applicant's identity card indicate that the Malaysian authorities have identified the applicant to be a Muslim rather than a Hindu.*

20 The Tribunal did not consider that the fact that the appellant may have been issued with a second identity card necessarily established that the second card was issued because he had been forcibly or otherwise required to convert to Islam. The Tribunal then gave weight to the fact that the appellant had not provided it with any independent or documentary evidence, other than his passport and his identity card, to indicate that he was identified by the Malaysian authorities as a Muslim, rather than a Hindu. It stated that the independent country information did not support the claim that Hindus are forcibly required to convert to Islam in Malaysia. Nor did such evidence support the claim that employers can, or have, required employees to sign documents to convert to Islam, either openly or by deception, as part of their employment in Malaysia.

21 The Tribunal did not accept that the Malaysian authorities would identify the appellant as a protest organiser, protestor, leader or member of HINDRAF or any other Hindu rights group. The Tribunal was not satisfied that there was a real chance that the appellant would be subjected to persecution in Malaysia in the reasonably foreseeable future on the basis of any imputed political opinion, his religion as a Hindu, his Tamil ethnicity or his race as an Indian. It was not satisfied that any discrimination the appellant might encounter as an ethnic Tamil Indian upon his return to Malaysia would amount to serious harm, within the meaning of s 91R of the Migration Act. Again, the Tribunal expressed its finding in terms that:

> *the Tribunal does not accept that the applicant was forced to convert to Islam at any point in time prior to his arrival in Australia. Nor does the Tribunal accept that the applicant has been or is identified by the Malaysian authorities as a Muslim rather than a Hindu.*

The Tribunal continued:

> *Accordingly, given the fact that the Tribunal does not accept the applicant's claim to be a "proselyte Muslim", the Tribunal does not accept the applicant's claim that he was detained and beaten by the Hajee or religious police in Malaysia on 16 March 2007 because he was a Muslim who had entered into a relationship with a Hindu woman, notwithstanding the evidence that he has a number of physical scars on his body. Apart from the applicant's own evidence on this point, there is little in the evidence before the Tribunal to identify the nature or likely cause of these scars upon the applicant's body.*

22 The Tribunal then rejected the appellant's claim so far as it was based on the fact that his fiancée had been forced to marry another man by her family. The Tribunal said it was not satisfied that this evidence established that the appellant, as distinct from his fiancée, had a well-founded fear of persecution by the Malaysian authorities for a Convention-related reason. In expressing its conclusions as to whether the appellant's fear of persecution was well-founded, the Tribunal again referred to "the implausibility of the applicant's claims regarding his forced Islamic conversion".

The grounds of application to the Federal Magistrates Court

23 The grounds of the appellant's amended application to the Federal Magistrates Court are in the following terms:

> 1. *The Tribunal has denied the applicant natural justice and procedural fairness.*
>
> *Particulars*
>
> *a) The tribunal commented on the absence of documentary evidence to substantiate his claim regarding the circumstances of his conversion to Islam more than 14 years ago.*
>
> *b) The Tribunal reason for not ascertaining the information in the embedded miscrochip [*sic*] of the applicant's identity card and the torture marks on his body.*
>
> *2. The Tribunal has failed to consider the applicant's claims under the convention and protocol and section 91R of the Migration Act and failed to consider information and relevant integers of the claims*

Particulars

a) Taking the applicant's claim as a forced conversion from Hinduism to Islam, thereby ignoring the facts and circumstances that occurred about 14 years ago.

b) Misconstruing the applicant's claim under the section 91R of the Act as discrimination that the applicant may suffer upon his return to Malaysia as an ethnic Tamil.

c) That country information indicates that the Hindus are not prevented from marrying other Hindus. (Which was not the applicant's claim)

d) Failing to consider the seriousness of the country information it had itself cited.

3. The Tribunal has breached section 425 of the Act in its operation

Particulars

a) The Tribunal has failed to warn the applicant of the apparent unavailability of corroborative evidence.

b) Failing to elicit the circumstances of his attempt to avoid forcible circumcision.

c) Failing to provide the evidence to find that the applicant's previous employer was a benevolent employer.

d) Failing to provide a meaningful hearing of the applicant's claim.

e) Failing to contact/write to the appropriate authorities and/or the applicant to ascertain the information on the embedded microchip of the applicant's identity card.

*4. (a) The Tribunal denied the applicant procedural fairness when it failed to consider a document that was handed down to the Tribunal at the handing down of the decision and before the decision was handed down, and although the applicant did say that the document stated that his family house was raided and he cannot go back home because he would be harmed killed [*sic*] (CB 187).*

(b) The Tribunal erred jurisdictionally in saying that it was "functus officio" even before the handing down process was complete. The Tribunal erred in its interpretation of sections 430B (3), (4) & (5), section 441A (2) and section 441C (2) of the Migration Act.

The Federal Magistrate's reasons for judgment

24 The federal magistrate's rejection of the appellant's claim that the Tribunal denied him procedural fairness by failing to take steps to ascertain what information was contained

in the microchip in the appellant's identity card is summarised in [14] of his Honour's reasons for judgment:

> *There is no evidence as to what information is contained on the microchip, nor what would usually be contained in such a microchip. Most importantly, there is no evidence as to what steps could be taken to read the microchip. In the absence of some evidence that the Tribunal could have, as a matter of fact, ascertained the contents of the microchip the applicant's claim in this regard must fail at the threshold. In the absence of evidence that it was possible for the Tribunal to ascertain the contents of the microchip, there is no need to consider whether the tribunal ought to have taken the steps to have that information produced in a human readable form.*

25 Similarly, at [17], his Honour rejected the suggestion that the Tribunal was required to gather evidence, or obtain medical reports, to identify the nature or likely cause of scars on the appellant's body, which the appellant said had been caused by torture inflicted by police enforcing the Islamic code.

26 At [18]-[22], the federal magistrate rejected the appellant's submissions that the Tribunal had failed to consider all of his claim. His Honour held that all of the claims referred to in the appellant's application to the Federal Magistrates Court had been dealt with.

27 At [23]-[26], his Honour considered and rejected the appellant's arguments that the Tribunal ought to have provided him with information, and given him an opportunity to comment, pursuant to s 424A of the Migration Act, and had failed to invite him to a hearing that complied with s 425.

28 The federal magistrate dealt at greater length with the appellant's claim that the Tribunal had wrongly failed to take into account information contained in the document he had submitted to a Tribunal officer on the day appointed for the handing down of the Tribunal's decision. At [27]-[29], his Honour set out the relevant facts as follows:

> *On the day the decision of the tribunal was to be handed down, the applicant handed the Tribunal officer an untranslated copy of a document written in Malay and having an official appearance. The applicant claimed the document stated that his family house had been raided and he could not return to Malaysia because he feared that he would be harmed or killed. The applicant requested that the document be shown to the Tribunal member.*

> *The handing down officer took the document, and then proceeded with the handing down ceremony, handing the written decision to the applicant.*
>
> *Following the handing down ceremony, the case officer at the handing down spoke with the Tribunal member. The member noted, on 26 February 2008:*
>
> ...
>
> *The applicant told the handing down officer that he received the document at folio 112 the week before the handing down on 20 February 2008...*
>
> *However, the applicant did not choose, in these circumstances, to provide this particular document to the Tribunal until after the handing down process had actually commenced on 20 February 2008.*
>
> *In the circumstances, the Tribunal considers itself "functus officio" in this case.*
>
> *In any event, the Tribunal observes in this case that, whilst it has had regard to the document provided to the handing down officer on 20 February 2008, the document is untranslated and therefore the Tribunal is not in a position to verify its contents. Nor can the Tribunal determine to what extent this evidence would have assisted the applicant's claims for refugee status and whether or not it would have altered the Tribunal's decision. In the circumstances, the Tribunal is satisfied that there is no need for it to alter its decision in this case.*

29 His Honour then proceeded to discuss authorities, and the relevant provisions of the Migration Act, concerning the point at which the Tribunal completes the performance of its statutory function and is no longer obliged to consider information placed before it. At [46], his Honour concluded that the decision in the present case had not been handed down at the time the document was handed to the Tribunal officer. At [47], his Honour held that the Tribunal member dealing with the case had not had an opportunity to consider, and did not consider, the document, or whether the Tribunal ought to receive the document. Nevertheless, at [49]-[51], his Honour held that the Tribunal member proceeded to consider the document after the decision had been handed down. The Tribunal member then decided that the Tribunal was not in a position to "verify the contents" of the document. His Honour held that this indicated that the Tribunal was aware that the appellant claimed that the document detailed an incident in which his family home had been raided, but that the Tribunal could not confirm that the document said this. Because the Tribunal had had regard to the document, after the decision had been handed down, and had stated that there was no need to alter its decision, his Honour saw no purpose in granting relief that would involve setting aside the decision and returning the matter to the Tribunal "to consider whether the document alters the outcome." His Honour said that:

Whilst the tribunal member erroneously considered the document after the decision was handed down, the document has nonetheless been considered, making it apparent that the same outcome will flow even if the decision is set aside remitted to the Tribunal member to formally decide again based upon the extra document.

30 For these reasons, his Honour dismissed the application.

The grounds of appeal

31 The grounds expressed in the appellant's notice of appeal are as follows:

1. *The learned Magistrate erred when he said that "there is no evidence as to what steps could be taken to read the microchip" and therefore "there is no need to consider whether the Tribunal ought to have taken steps to have the information provided in a human readable form".*

2. *When referring to the physical scars on the appellant and the Tribunal having failed to have the appellant referred to an appropriate organisation, the learned magistrate erred when he said that "the Tribunal is not required to gather evidence, nor obtain medical reports of the type contemplated by the applicant". In this ground and the proceeding ground the learned magistrate has erred in finding that the Tribunal had not erred by its inaction.*

3. *The learned Magistrate erred in saying that the Tribunal had clearly considered the appellant's claims that the appellant was challenging failed findings and that incorrect weight was placed on country information which did not constitute jurisdictional error, in-spite [*sic*] of the Tribunal saying that "the Tribunal does not accept that the contents of the information in the embedded microchip" without having the microchip decoded.*

4. *The learned Magistrate erred in saying that there was no failure to comply with sections 424A and 425 of the Migration Act.*

5. *Having found that the Tribunal was not functus officio at the time the document was handed to the Tribunal, the learned magistrate erred in not issuing the necessary constitutional writs.*

6. *Having held that the Tribunal was not functus officio at the time the document was handed to the Tribunal and saying that "whilst the Tribunal member erroneously considered the document after the decision was handed down", the learned magistrate erred in saying that "the document has non the less [*sic*] been considered making it apparent that the same outcome will flow even if the decision is set aside remitted [*sic*] to the Tribunal member to formerly [*sic*] decide again based upon the extra document" whilst the Tribunal said "the document is un-translated and therefore the Tribunal is not in a position to verify its contents. Nor can the Tribunal determine to what extent this evidence would have assisted the applicant's claim for*

> *refugee status and whether or not it would have altered the Tribunal's decision. In the circumstances the Tribunal is satisfied that there is no need to alter the decision in this case".*

32 At the hearing of the appeal, counsel for the appellant sought leave to raise a ground not raised in the Federal Magistrates Court. The substance of the ground was that the Tribunal had failed to deal with the claim in one specific respect. That was that the Tribunal had treated the claim in relation to the appellant's conversion to Islam at the age of 14 as a claim of forced conversion, when in fact the appellant had claimed that his employer inveigled him into signing documents that had the effect of signifying a conversion to Islam, and his references to "forced conversion" were to subsequent events, when he said that the authorities were compelling him to maintain the reality of this conversion, although he wished to continue to be a Hindu. Counsel for the Minister did not oppose the application for leave to raise this ground of appeal, but contended that the appellant could not succeed on the ground proposed. I reserved my judgment on the application for leave to add the additional ground of appeal, on the basis that I would determine whether the ground had substance before deciding whether to grant leave to rely on it.

33 The proposed additional ground was said to be in substitution for grounds 3 and 4 expressed in the notice of appeal. Accordingly, three distinct issues were argued on the appeal. The first is the question whether the Tribunal was obliged to exercise its powers to seek additional evidence in relation to information contained in the microchip in the appellant's identity card and in relation to the scars borne by the appellant. The second issue was whether the federal magistrate was in error in refusing to grant relief in respect of the failure of the Tribunal to consider information contained in the additional document handed to the Tribunal officer before the handing down of the Tribunal's decision. The third issue is that raised by the additional ground which the appellant sought leave to argue, whether the Tribunal failed to deal with the actual claim made by the appellant in relation to his conversion to Islam.

The Tribunal's obligation to obtain further evidence

34 In *Minister for Immigration & Citizenship v Le* [2007] FCA 1318 (2007) 164 FCR 151 at [60]-[67], Kenny J discussed at some length the authorities concerning the circumstances in which a Tribunal established by the Migration Act may be obliged to

pursue further information before making a decision. At [60], her Honour referred to two propositions. The first is that such a Tribunal "has no general obligation to initiate enquiries or to make out an applicant's case for him or her." The second proposition, which her Honour described as a "limited proposition" is that "in certain rare or exceptional circumstances, the Tribunal's failure to enquire may ground a finding of jurisdictional error because the failure may render the ensuing decision manifestly unreasonable in the sense used in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223". At [63], her Honour said:

> *The concept of vitiating unreasonableness has been extended to the manner in which a decision was made. Thus, a failure by a decision-maker to obtain important information on a critical issue, which the decision-maker knows or ought reasonably to know is readily available, may be characterised as so unreasonable that no reasonable decision-maker would proceeded [sic] to make the decision without making the enquiry...In this circumstance what vitiates the decision is the manner in which it was made. Since this is a limited proposition, it does not conflict with the larger statement that the Tribunal is under no general duty with respect to making enquiries.*

I respectfully adopt her Honour's formulation of the relevant propositions of law.

35 There can be no doubt in the present case that the question whether the appellant was regarded by the Malaysian authorities as having converted to Islam was critical to the outcome of the appellant's case. It was the Tribunal's rejection of the appellant's claim to be what the Tribunal described as a "proselyte Muslim" that led the Tribunal not to accept his claim that he had been detained and beaten by the religious police. So much is revealed by the passage from the Tribunal's reasons for decision quoted in [21] above. The importance of the issue is underlined further by the fact that the Tribunal took the trouble to refer in detail in its reasons for decision to the exchange that took place between the Tribunal member and the appellant's representative at the Tribunal hearing, to which I have referred in [12] above. If it had been possible for the Tribunal to find out that the appellant's evidence that the information in the chip in his identity card did disclose that he was classified as a Muslim, this may well have caused the Tribunal member to accept the claim that the authorities regarded the appellant as a Muslim, and therefore as an apostate in seeking to marry a Hindu woman according to Hindu rites. In its reasons for decision, when it discussed evidence as to religious freedom in Malaysia, the Tribunal referred specifically to a case of a Muslim woman and a Hindu man who married in a Hindu temple in July

2006. The Muslim woman's home was raided by officers of the Selangor Islamic Affairs Department on 28 April 2007, her Hindu marriage was deemed void and she was placed in detention for religious rehabilitation for being in close physical proximity to a man other than her husband. There can be little doubt that, if a similar fate had befallen the appellant, he would have been subjected to persecution for the reason of his religion.

36 The importance of the issue is not sufficient to require the Tribunal to undertake its own searches for evidence. The second proposition of law enunciated by Kenny J in *Le* requires that the evidence be readily available, and that the Tribunal either know or be in a position to know of its availability. There was no indication given to the Tribunal as to how any data embedded in the chip in the appellant's identity card might be obtained by the Tribunal. It is not readily apparent that access to such data would be possible. The appellant did not advance any suggestion to the Federal Magistrates Court. The only suggestion the appellant's counsel made on the hearing of the appeal was that the Tribunal could have had access to the devices used by officers of the Department of Immigration and Citizenship to read information embedded in microchips embedded in passports. Whether such devices, or the software they use, would be compatible with those required to interpret the data in a Malaysian identity card is a matter of speculation. There was no obvious way in which the Tribunal could have gained access to any data embedded in that card. On this ground, the appellant does not bring himself within the narrow principle referred to by Kenny J.

37 The cause of any scars borne by the appellant was a less critical issue. As the passage I have quoted in [21] demonstrates, the principal reason for the Tribunal's rejection of the appellant's claim to have been detained and beaten by religious police was its refusal to accept that he was regarded as a Muslim. Having rejected the claim that the appellant was detained and beaten by religious police on that basis, the Tribunal then pointed out that the limited evidence about scars did not enable the Tribunal to identify the nature or likely cause of those scars.

38 At best, there could have been evidence of expert opinion that scars borne by the appellant were consistent with his account of torture. Such evidence would not have gone far enough to require the Tribunal to find that the scars had been inflicted by torture. Even

if the Tribunal had been persuaded by opinion evidence as to the consistency of the scars with their infliction by torture, it would not have been required to find that the torture had been inflicted by the religious police in Malaysia, by reason of an official view that the appellant was a Muslim and ought not to follow the Hindu religion or seek to marry according to Hindu rites. It is unlikely that the Tribunal would have reached this conclusion, because it had disbelieved the appellant on these claims as a result of disbelieving his claim that the authorities regarded him as a Muslim.

39 For another reason as well, evidence of expert opinion about consistency between scars and the appellant's claim as to how he got them would not fit within the limited principle to which Kenny J referred. Evidence of that nature is not readily available to the Tribunal. It would be necessary to identify an appropriate expert and to ensure that the expert examined the appellant and provided a report to the Tribunal. An appropriate expert might well wish to charge a fee. It is unlikely that the Tribunal would have money available within its budget to pay the fees of experts, in order to obtain evidence in individual cases. If the appellant had wished to rely on expert evidence about the scars, it was always open to him to consult an appropriate expert, pay any necessary charges, and obtain a report, which he could have tendered to the Tribunal. In the circumstances of this case, he could not cast upon the Tribunal the burden of doing what he had not done. The Tribunal has an express power, given by s 427(1)(d) of the Migration Act to require the Secretary to the Department of Immigration and Citizenship to arrange for a medical examination that the Tribunal thinks necessary with respect to a review, and to give the Tribunal a report of that investigation or examination. The word "may" is used in conferring the power. By s 33(2A) of the *Acts Interpretation Act 1901* (Cth), the use of the word "may" denotes the conferral of a discretion to exercise a power. In the case of the power conferred by s 427(1)(d), the power can only be exercised if the Tribunal thinks that a medical examination is necessary with respect to the review it is conducting. Apart from anything else, the inconclusive nature of any expert opinion in relation to the claim of the appellant about torture makes it unlikely that the Tribunal would have reached the conclusion that a medical examination was necessary. The Tribunal did not reach such a conclusion and it is impossible to say that it was required to do so.

40 For these reasons, the federal magistrate was correct to reject the appellant's application to the extent that it was based on the Tribunal's failure to take steps to ascertain what information was in the microchip in his identity card and to the extent that it was based on the suggestion that the Tribunal should have taken steps to obtain evidence of an expert nature in relation to the appellant's scars.

The document handed up on the day of delivery of the decision

41 The federal magistrate was correct to hold that the Tribunal was obliged to consider any evidence the appellant provided to it prior to the time when it had completed the performance of its statutory function. His Honour was also correct in finding that the additional document handed to the Tribunal officer on the day of the handing down of the decision was provided to the Tribunal before it had completed the performance of its statutory function. On appeal, counsel for the Minister did not take issue with either of these propositions. It follows from them that the Tribunal had failed to take account of material it had received before the completion of its statutory function, as it was obliged to do. The federal magistrate was correct to recognise this.

42 The refusal of the federal magistrate to grant relief on the basis of this jurisdictional error was based solely on the fact that the Tribunal member had looked at the document after the handing down of its decision and decided that it was satisfied that there was no need to alter the decision. What happened is expressed in what is described as a "case note", apparently written by the Tribunal member concerned, and dated 26 February 2008, ie. six days after the handing down of the decision. The note reads as follows:

> *I have considered the document at folio 112 that was given to the handing down officer after handing down had commenced and note the following:*
>
> *- The applicant was represented by a registered migration agent throughout the review application.*
>
> *- The applicant and the representative were told at the Tribunal hearing on 18 December 2007 that they could provide additional evidence in support of the review application to the Tribunal up until the decision was handed down.*
>
> *- The applicant's representative was advised by fax on 12 February 2008 that the decision would be handed down at 10.30am on 20 February 2008.*

> *- The applicant told the handing down officer that he had received the document at folio 112 the week before the handing down on 20 February 2008 and suspected that the decision would be adverse to him.*
>
> *- However, the applicant did not choose, in these circumstances, to provide this particular document to the Tribunal until after the handing down process had actually commenced on 20 February 2008.*
>
> *- In the circumstances, the Tribunal considers itself "functus officio" in this case*
>
> *- In any event, the Tribunal observes in this case that, whilst it has had regard to the document provided to the handing down officer on 20 February 2008, the document is untranslated and therefore the Tribunal is not in a position to verify its contents. Nor can the Tribunal determine to what extent this evidence would have assisted the applicant's claims for refugee status and whether or not it would have altered the Tribunal's decision. In the circumstances, the Tribunal is satisfied that there is no need for it to alter its decision in this case.*

43 What power the Tribunal thought it was exercising in looking at the document is not clear. If, in truth, it had completed the performance of its statutory function, the Tribunal could not look further at the merits of the case. Its adverse comments about the appellant's delay in handing up the document could not form part of any proper exercise of its powers. The Tribunal member could only have looked at the additional document for the purpose of determining whether the Tribunal's decision was tainted by jurisdictional error. If it found that there was jurisdictional error, the Tribunal could then disregard the decision and proceed to deal with the matter again. See *Minister for Immigration & Multicultural Affairs v Bhardwaj* [2002] HCA 11 (2002) 209 CLR 597. In looking at the document, the Tribunal member wrongly concluded that the Tribunal had completed the performance of its statutory function. If it had recognised that the handing down of the decision without consideration of the additional document amounted to jurisdictional error, it could not have reached that conclusion. The Tribunal member also wrongly proceeded to determine whether consideration of the document would have altered the Tribunal's decision. The conclusion was that there was no need for the Tribunal to alter its decision. The Tribunal had no power to alter its decision. It had a power to deal with the matter afresh if it reached the conclusion that there was jurisdictional error. If it had dealt with the matter afresh, it would have been forced to decide whether it would refuse to consider the document on the ground that it was in a language other than English and untranslated. It is well-established that the Tribunal cannot refuse to consider material that is written in a language other than English. See *X v Minister for Immigration & Multicultural Affairs* [2002] FCA 56 (2002) 116 FCR 319 at [26]-[31] per Gray J and [49]-[52] per Moore J. The Tribunal could have

obtained its own translation of the document, or could have invited the appellant to provide a translation, verified in some appropriate way.

44 For these reasons, it is necessary to disregard the Tribunal member's view, expressed in the "case note", that the Tribunal was satisfied that there was no need for it to "alter its decision" in the case. Such an expressed view could not deprive the appellant of the right he had to a decision of the Tribunal free of jurisdictional error. Having decided that there was jurisdictional error, the federal magistrate should have acted upon that basis and granted the necessary relief, to set aside the Tribunal's decision and require the Tribunal to hear and determine the appellant's application for review according to law.

The nature of the appellant's conversion

45 There is no doubt that the material supplied to the Tribunal by and on behalf of the appellant contained the proposition that the appellant's conversion to Islam was forced. In a statutory declaration accompanying his application for a protection visa, the appellant had said that, when he was working as a kitchen hand and cleaner, he was "forced to follow Islam at my early days." In a submission to the Tribunal by his representative, the appellant was described as "a forcibly proselyte Muslim". In the passage I have quoted at [9] above from the transcript of the Tribunal hearing, the applicant answered affirmatively several leading questions from the Tribunal member as to whether he had been forced to become a Muslim.

46 The Tribunal's summary of the evidence was as follows:

> *The applicant told the Tribunal that at the invitation of his employer he attended prayers with his employer and the latter's family and that he also participated in Ramadan; in fact, he stated that his employer treated him kindly and often referred to him as "brother". The applicant gave evidence that when he was approximately aged 14 years his employer asked him to sign some papers and, as he was illiterate, he did so. The applicant gave evidence that subsequently he was taken to hospital for an attempted circumcision, but he ran away. The applicant stated that after he signed the documents his employer had given him he was issued with a second identity card. To support this claim the applicant referred the Tribunal to the fact that the number "02" on his Malaysian identity card indicated that this was the second identity card issued to him.*

47 This passage seems to suggest that the Tribunal understood the appellant's evidence as being that he was persuaded, or duped, into signing papers that would signify his

conversion to Islam, rather than being compelled to do so. This was the sense in which the Minister's delegate had apparently understood the appellant's claim, when he said:

> *I accept that the applicant is recorded as being Muslim on his ID card and that this resulted from subterfuge on the part of a previous employer.*

48 Despite the references to the forced nature of any conversion, it is apparent that this was not the substance of the appellant's claim about what had happened to him at the age of 14. Rather, the notion that he was forced to be a Muslim was a reference to subsequent events, that involved the appellant losing his job as a result of his relationship with a Hindu woman, being prevented from marrying the woman, and being detained and assaulted by the religious police. In other words, the appellant's claim was that, at the time he left Malaysia to come to Australia, he was being forced to be a Muslim, because he had unwittingly signed papers proffered to him by his benevolent employer when the appellant was young and illiterate. The Tribunal's finding that it was unlikely that the employer would have continued to employ the appellant if the appellant had not proceeded to allow his conversion to be perfected by circumcision was based on the assumption that the employer knew that the appellant had run away from hospital to evade circumcision. The Tribunal member does not appear to have asked the appellant whether the employer did know this. For these reasons, I am of the view that the Tribunal failed to deal with the actual claim of the appellant as to the nature of his original conversion. Notwithstanding its summary of the evidence, the Tribunal consistently dealt with the claim as if it were one in which the appellant had been forced to convert at the age of 14. Such a characterisation did not do justice to the appellant's case. Its misconception as to the nature of the appellant's claim about his conversion at the age of 14 led the Tribunal to rely on propositions such as "the independent country information before the Tribunal does not support the claim that Hindus are forcibly required to convert to Islam in Malaysia" and "Nor does the independent evidence before the Tribunal support the claim that employers can or have required employees to sign documents to convert to Islam, either openly or by deception, as part of their employment in Malaysia." Its reliance on these propositions is likely to have been important in the Tribunal forming its view that the appellant's claim of forced conversion was implausible. If the appellant's claim had been understood properly, the Tribunal would not have needed to take into account such propositions. Its apparent acceptance of the

propositions I have quoted in [14] above suggests that it might have taken a more favourable view of the appellant's claims if it had understood their nature.

49 If this ground had been argued before the federal magistrate, the federal magistrate ought to have found that there was jurisdictional error. On that basis, his Honour ought to have granted the relief necessary to quash the decision of the Tribunal and compel the Tribunal to hear and determine the appellant's application for review of the decision of the Minister's delegate according to law.

Conclusion

50 The appellant has therefore succeeded in establishing jurisdictional error on the part of the Tribunal in two respects. The first was failing to have regard to materials supplied by the appellant in support of his claims prior to the Tribunal completing the performance of its statutory function by handing down its decision. The Tribunal was not absolved from this jurisdictional error by the subsequent note of the Tribunal member concerned to the effect that there was no reason to alter the decision. The second jurisdictional error was the failure of the Tribunal to deal with the actual case put by the appellant as to the circumstances of his conversion to Islam at the age of 14.

51 The appellant should be granted leave to rely on the additional ground of appeal his counsel proposed, notwithstanding that the point was not argued in the Federal Magistrates Court. The appeal must be allowed. The order made by the federal magistrate on 22 December 2008, dismissing the appellant's application to that court, must be set aside. In lieu thereof, there should be an order that a writ of certiorari issue, directed to the Tribunal, removing into this Court the Tribunal's decision, for the purpose of quashing it. There should be an order quashing that decision. There should also be an order that a writ of mandamus issue, directed to the Tribunal, requiring it to hear and determine the appellant's application to the Tribunal for review of the decision of the Minister's delegate according to law. The Minister should be ordered to pay the appellant's costs of the proceeding in the

Federal Magistrates Court. There should also be an order that the Minister pay the appellant's costs of the appeal.

I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 14 August 2009

Counsel for the Appellant:	Mr TA Fernandez
Solicitor for the Appellant:	Mr TA Fernandez
Counsel for the Respondents:	Mr M Felman
Solicitor for the Respondents:	DLA Phillips Fox
Date of Hearing	6 March 2009
Date of Judgment:	17 August 2009