FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZXGK v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 1469

MIGRATION – Protection visa – failure to take into account relevant country report – whether jurisdictional error.

Singh v Minister for Immigration and Multicultural Affairs (2001) 109 FCR 18
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Minister for Immigration and Ethnic Affairs v Guo Wei Rong (1997) 191 CLR 559
Abebe v Commonwealth of Australia (1999) 197 CLR 510
Htun v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 244
Chen v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 157
Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559
Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 75 ALD 630
NAJT v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 134
NAHI v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 10
VQAB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 10

Applicant:	MZXGK
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	MLG 46 of 2006
Judgment of:	McInnis FM
Hearing date:	18 July 2006
Delivered at:	Melbourne
Delivered on:	10 October 2006

REPRESENTATION

Counsel for the Applicant:	Mr T. Mitchell
Solicitors for the Applicant:	Newland Migration Law Services
Counsel for the Respondent:	Mr R.C. Knowles
Solicitors for the Respondent:	Clayton Utz

ORDERS

(1) A writ of certiorari issue directed to the Second Respondent, quashing the decision of the Second Respondent dated 28 November 2005.

(2) A writ of mandamus issue directed to the Second Respondent, requiring the Second Respondent to determine according to law the application for review.

(3) The First Respondent pay the Applicant's costs.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 46 of 2006

MZXGK
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The Applicant seeks judicial review of a decision of the Refugee Review Tribunal (the Tribunal) dated 28 November 2005. In its decision, the Tribunal affirmed a decision of the First Respondent's delegate to refuse to grant to the Applicant a protection visa.

2. The Applicant relies upon an amended application dated 31 March 2006. In addition, the Applicant relied upon a transcript of the proceedings before the Tribunal annexed to an affidavit of the Applicant's solicitors sworn 28 April 2006. Further material was sought to be relied upon including country information annexed to a further affidavit of the Applicant's solicitors sworn 12 January 2006. The court was provided with a Court Book containing relevant information together with a supplementary Court Book, both prepared by the First Respondent's solicitors. The supplementary Court Book provided two country information reports which became relevant during the course of the hearing.

Background

3. The Applicant is a citizen of Burma (Myanmar) who arrived in Australia on or about 5 April 2004 as a seaman and was granted a short stay visitor visa.

4. On 16 April 2004, the Applicant lodged an application for a protection visa. The application was supported by a statutory declaration from the Applicant and another witness together with country information relating to Burma and photographs of the Applicant engaged in pro-democracy activities in Australia. In addition, the Applicant relied upon a decision of the Tribunal relating to the Applicant's uncle dated 13 December 1995.

5. On 4 May 2005, a delegate of the First Respondent refused to grant the Applicant a protection visa.

6. The Applicant had claimed that if he returned to Burma in the reasonably foreseeable future, he faced a real chance of persecution by the authorities on account of his political opinion of support for the National League for Democracy (the NLD) and the Burmese pro-democracy movement in Australia.

7. On 17 November 2005, the Tribunal conducted a hearing by video-link with the Applicant in Melbourne and the Tribunal in Sydney. The hearing was conducted with the assistance of an interpreter and the Applicant was represented by an adviser. The Applicant relied upon one witness, an Australian citizen of Burmese origin who claimed to have involvement in pro-democracy activities in Australia.

8. The Applicant was permitted to provide post-hearing submissions and did so by letter from his then solicitors dated 24 November 2005 (Court Book page 222) which, it is noted, comprised seven typed pages together with enclosures which included a further statutory declaration by the Applicant and specifically made reference to other country information together with decisions of the Federal Court and two decisions by the Tribunal.

9. Relevantly, one of those decisions, with an RRT reference of V02/14489 (16 July 2003) included a reference to a country report regarding the treatment of political dissidents in Myanmar; namely,

a CIS on-line country information report, CX77468. An extract from that report was specifically referred to in the Applicant's post-hearing submissions and relevantly included the following paragraph:

> *"According to Amnesty International. Myanmarese authorities pay considerable interest to overseas dissident activities. Amnesty International is aware of cases of returnees who have engaged in peaceful political activity abroad who have been tortured, detained or even executed. Even low profile dissidents who do not hold office within a political organisation and who have engaged in minor activity such as partaking in protests or distributing leaflets can be severely punished. The kinds of dissident activities that are likely to be punished range from political demonstrations outside Myanmarese diplomatic mission, to the distribution or writing of dissident literature, and involvement in the Myanmarese community radio station."*

10. It should also be noted that the Applicant's representatives had provided to the Tribunal a letter dated 10 November 2005 which again set out in some detail the submissions relied upon by the Applicant together with further supporting material, including correspondence from a relative of the Applicant and active member of the Australia Coalition for Democracy in Burma and an official of that organisation together with a copy of the Applicant's political diary from May 2004. The letter sets out a list of references, some of which included specific country reports, and others listed relevant court decisions and other Tribunal decisions.

The Tribunal's Decision

11. In its "Findings and Reasons," the Tribunal accepted that the Applicant is a national of Burma. It did not accept on the evidence before it that the Applicant was involved, or assumed by the Burmese authorities to be involved, in pro-democracy activities in Burma. It was not satisfied the Applicant faces a real chance of convention-related persecution in Burma. It further found that the claimed fear of persecution was not well-founded and the Applicant is "not a refugee".

12. It is useful to set out in some detail the relevant passages from the Tribunal's findings as follows:

"The Tribunal does not accept on the evidence before it that the Applicant was involved, or assumed by the Burmese authorities to be involved, in pro-democracy activities in Burma. The Tribunal does not accept on the Applicant's vague and evasive evidence that he was ever interned in lnsein prison, whether for two days or four months or whatever. The Applicant's position in response to questions at the RRT hearing altered in the face of concerns raised by the Tribunal about detail. His ultimate position about having been held in solitary confinement and then just let go is dismissed by the Tribunal as an implausible one. The independent evidence about Insein prison 1eaves the Tribunal all the more confident in its findings, but the significant factor in the Tribunal's conclusions here was the Applicant's own performance as a witness.

The Tribunal has taken into account all the evidence about certain political dissidents being able to leave Burma without significant difficulty, but it also takes note of the Applicant's claim about the authorities seeking to arrest him. The Tribunal finds that the claimed circumstances are not consistent with the ease with which the Applicant was able to depart Burma. Furthermore, the Tribunal does not accept on the evidence before it that the Applicant became a seaman in order to remain outside of Burma. On the contrary, he voluntarily returned to Burma several times, either on his seaman's papers or on his passport, in circumstances where he was supposed to have been traumatised by torture at the hands of the authorities.

The Tribunal finds that the Applicant was allowed to depart Burma on his seaman's papers and on his passport because the authorities had no relevant interest in him at all. The evidence of the Applicant being able to depart Burma on his passport at a time when the authorities were trying to arrest him undermines the claim that his seaman's papers afforded him privileges that his passport did not. The fact that the Applicant gave up those privileges whilst still in Burma also undermines his overall position about why he became a seaman.

The Tribunal does not accept on the evidence before it that the Applicant was able to avoid arrest by going into hiding. The Tribunal does not accept on the evidence before it that he ever hid from the authorities.

The Tribunal does not accept on the evidence before it that the scar on the Applicant's forehead has anything to do with being harassed or tortured for a Convention-related reason, let alone by personnel at Insein prison.

The Tribunal does not accept on the evidence before it that the Applicant is or has been suffering from post traumatic stress disorder. The letter provided for the Applicant could be said to attest adequately to a desire on his to put his claimed condition on the record, say, for the purposes of the present application, but in reporting that the Applicant had his own condition managed within a month it fails to attest to serious, ongoing trauma. The Tribunal has made its own examination of the facts that supposedly caused the trauma and finds that they lack credibility.

The Tribunal does not accept the Applicant's explanations for not having applied for asylum or protection during earlier visits to Convention signatory states like Australia and the USA.

The Tribunal dismisses as concoctions his claims about liaison with pro-democracy organisations in these two countries during earlier visits. His present application is generally built on the claim that such affiliations easily become known to Burmese spies and lead to trouble upon return to Burma, and yet he voluntarily returned there alternately on his seaman's papers and on his passport.

The Tribunal accepts that the Applicant has participated in some demonstrations in Australia and that his identity is probably known to the Burmese authorities. However, noting that the Applicant is not a leader, let alone a high-profile one, and does not claim to have been a formal member, let alone office-holder, of any specific organisation in Australia, the Tribunal finds that his description of some of the activities he claims to have undertaken (such as advising organisations of dates, locations and venues) to be exaggerated, just as his claims about activities in Burma have been found to be unreliable.

The Tribunal places weight on the fact that the Applicant does not have a high-profile in the pro-democracy movement in Australia and on the fact that he is not formally affiliated with any specific organisation in Australia. The Tribunal assumes that the Applicant might be questioned and cautioned in the event of return to Burma. However, the Tribunal does not accept on the evidence before it that he would face such attention or treatment as would amount (even cumulatively) to persecution, notwithstanding his acquaintance with the Secretary of the ASDB."

13. To understand the conclusion of the Tribunal it is also relevant to note that it made reference to the submissions from the Applicant made

before, at and after the hearing. Reference was made to relevant statutory declarations and material produced by the Applicant.

14. In relation to country information, the Tribunal referred to a country report dated 28 January 2000 in the following terms:

> *"The Tribunal drew the Applicant's attention to independent country information cited in the delegate's decision (DFAT Country Information Report 55/00 dated 28 January 2000, located on DIMIA CISNET at CX39784):*
>
> *ACTIVISTS FROM THE PERIOD OF THE 1988 PRO-DEMOCRACY UPRISING WOULD BE TREATED NO DIFFERENTLY FROM THE BROADER POPULATION NOR FACE PERSECUTION OR DISCRIMINATION TODAY UNLESS (ÜNDERLINE ONE) THEY HAVE CONTINUED TO BE AND ARE KNOWN TO BE STILL ACTIVELY WORKING IN OPPOSITION TO THE GOVERNMENT. EVEN THEN, THE LEVEL OF ACTIVITY WOULD BE TAKEN INTO ACCOUNT. REGISTERED POLITICAL PARTY MEMBERS WILL FACE GREATER SURVEILLANCE THAN THE GENERAL POPULATION. HO WE VER, SHORT OF BEING MEMBERS OF PARLIAMENT; RINGLEADERS OF ATTEMPTED DEMONSTRATIONS OR INVOLVED IN THE PUBLICATION AND/OR DISTRIBUTION OF ANTI-GOVERNMENT MATERIALS THEY ARE UNLIKELY TO FACE ANY GREATER HARASSMENT OR DISCRIMINATION THAN THE GENERAL PUBLIC. IN THE LAST TWO YEARS FOR EXAMPLE, POLITICAL DETENTIONS AND IMPRISONMENTS HAVE FOR THE MOST PART BEEN LIMITED TO PARLIAMENTARIANS-ELECT ASSOCIATED WITH CALLS BY THE NLD FOR THE ESTABLISHMENT OFTHE COMMITTEE REPRESENTING THE PARLIAMENT; RINGLEADERS AND ACTIVISTS OF STUDENT DEMONSTRATIONS IN AUGUST 1998; RINGLEADERS CALLING FOR DEMONSTRATIONS N SEPTEMBER 1999 AND SOME PUBLISHERS OF ANTI-GOVERNMENT MATERIALS…*
>
> *BURMESE INVOLVED IN DEMONSTRATIONS IN AUSTRALIA, WHILST OFTEN KNOWN TO THE AUTHORITIES ARE GENERALLY OF LITTLE CONCERN, EVEN IF THEY RETURN TO BURMA. THERE WOULD BE A COUPLE OF EXCEPTIONS: THOSE WHO ARE REPETITIVE DEMONSTRATORS; ACTIVE AND HIGH PROFILE MEMBERS OF THE ABSDF OR THE NCGUB AND THOSE RINGLEADERS OF THE MORE VIOLENT ATTACK ON THE EMBASSY IN CANBERRA IN SEPTEMBER 1999. OTHER THAN THESE*

EXCEPTIONS, ANY BURMESE RETURNING TO BURMA AFTER A LENGTHY PERIOD IN AUSTRALIA (OR ELSEWHERE FOR THAT MATTER) WOULD COME TO THE ATTENTION OF THEIR LOCAL TOWNSHIP AUTHORITIES AND THEIR MOVEMENTS MAY BE MONITORED FOR AN INITIAL PERIOD. ESCORTED DEPORTATIONS FROM AUSTRALIA WILL RESULT IN THE RETURNEE BEING

DETAINED FOR QUESTIONING BUT UNLESS THEY DEPARTED BURMA ILLEGALLY, HAVE A RECENT 'ROFILE' IN BURMA OR HAVE BEEN ACTIVE WITH THE ABSDF OR NCGUB THEY ARE UNLIKELY TO FACE ANY PROBLEMS."

15. Significantly, the Tribunal then refers in general terms to what it describes as "other RRT cases where Burmese Applicants were granted protection". It does so in the following paragraph:

> *"The Applicant's various submissions cite independent reports of mistreatment of certain expatriate dissidents upon return to Burma and draw the Tribunal's attention to other RRT cases where Burmese applicants were granted protection. The Tribunal has examined those cases and notes that they all turn on their own individual facts and merits."*

16. It is clear in that reference that the Tribunal, whilst referring to the other "RRT cases", did not specifically refer to the extract from the country report entitled, "The Treatment of Political Dissidents in Myanmar, number CX77468," an extract of which was set out earlier in this judgment. That report was published in July 2002 and had material "added" on 5 May 2003. It will be noted that the Tribunal in its decision specifically referred to a DFAT country information report 55-100 dated 28 January 2000 (CX39784) which was published on 28 January 2000 and had material added on 8 February 2000.

17. It will be noted that the report referred to by the Tribunal set out earlier in this judgment specifically refers to Burmese involved in demonstrations in Australia and relevantly states -

> *"…WHILST OFTEN KNOWN TO THE AUTHORITIES, ARE GENERALLY OF LITTLE CONCERN, EVEN IF THEY RETURN TO BURMA."*

18. The same report further states:

> *" … THERE WOULD BE A COUPLE OF EXCEPTIONS: THOSE WHO ARE REPETITIVE DEMONSTRATORS, ACTIVE AND **HIGH-PROFILE MEMBERS** OF THE ABSDF OR THE NCGUB. (Emphasis added)*

19. It will be noted that the report referred to by the Applicant and the extract set out earlier in this judgment that is, CX77468 refers to an Amnesty International report and states in part:

> *"Even low profile dissidents who do not hold office within a political organisation and who have engaged in minor activity such as partaking in protests or distributing leaflets can be severely punished."*

20. The report goes on to describe the punishment set out in the extract above. During the course of the hearing before the court, the court was also referred to other passages in report CX77468 including the following:

> *"The authorities have jailed people for having contact with foreigners, for taking part in demonstrations, and for writing or publishing anything critical of the government. Leaders of political parties or members of the parliament elected in 1990 are likely to incur long sentences. In 2000 the regime arrested Saw Naing Naing, an NLD candidate who was elected in 1990. Saw Naing Naing was sentenced to 21 years' imprisonment in connection with an NLD statement calling for the lifting of restrictions on the party.*
>
> *Worker rights to associate and bargain collectively are stifled in Myanmar, and forced labour is common outside major urban centres. Citizen movements are strictly monitored and harsh penalties may apply when authorities are not advised in advance of movements within the country. All residents in Myanmar are required to carry identity cards but there is no system of internal passports or visas, such as existed in the former Soviet Union.*
>
> *In 2001 the press was largely State run and strictly censored. The government severely restricts freedom of speech, press, assembly and association.*
>
> *See Annex C for an Expanded Account of Human Rights Issues in Myanmar*

TREATMENT IN MYANMAR OF MYANMARESE WHO HAVE EXPRESSED POLITICAL OPPOSITION TO THE REGIME WHILST OUTSIDE OF MYANMAR

According to Amnesty International, Myanmarese authorities pay considerable interest to overseas dissident activities. Amnesty International is aware of cases of returnee who have engaged in peaceful political activity abroad, who have been tortured, detained or even executed. Even low profile dissidents who do not hold office within a political organisation and who have engaged in minor activity such as partaking in protests or distributing leaflets, can be severely punished. The kinds of dissident activities that are likely to be punished range from political demonstrations outside the Myanmarese diplomatic mission, to the distribution or writing of dissident literature, and involvement in the Myanmarese community radio station.

Information about returnees who have been politically active abroad was not available from published and internet sources. Moreover it is difficult for foreigners to collect such information in Myanmar without the likelihood of endangering sources. Some general information appears in CISNET document CX65492, although this mainly refers to violent political opposition to the regime.

Dissidents in Australia:

Amnesty International's mandate only allows it to assist in the cases of dissidents who carry out their political activities by peaceful means. Amnesty International stated that Myanmarese known to have conducted political activities in Australia are liable to be punished. It is difficult to know what level of punishment is likely to be applied to particular cases because of the arbitrary way in which the regime applies the law. Such returnees would be intensively interrogated at the very least. They may be detained, tortured, sentenced to imprisonment or even executed."

21. That report also referred to other country information reports from Amnesty International including one for the year ending 2001 and another dated July 2002.

22. It is noted that the decision record of the delegate in this matter, unlike the Tribunal decision, specifically referred to a later DFAT report of 19 June 2002, CX65492, and referred to the following extract from that report:

"AS TO THE LIKELY TREATMENT ON RETURN TO BURMA OF THOSE WHO HAVE BEEN ACTIVE MEMBERS OF ANTI-BURMESE GOVERNMENT ORGANISATIONS IN AUSTRALIA, IT WOULD DEPEND ON THE NATURE OF THE ORGANISATION TO WHICH AN INDIVIDUAL BELONGED, THE NATURE OF THE INDIVIDUAL'S ACTIVITIES AND THE PROMINENCE THEY HAVE ASSUMED WITHIN THOSE ORGANISATIONS. FOR EXAMPLE, THOSE INVOLVED IN PEACEFUL DEMONSTRATIONS MAY BE SUBJECTED TO SOME QUESTIONING UPON RETURN BUT NOT LONG TERM HARRASSMENT. HOWEVER, THOSE PROMINENTLY INVOLVED IN ORGANISATIONS WHICH HAVE ACTIVELY PURSED VIOLENT METHODS OF DEMONSTRATION, AND WHO WOULD THEN BE LIKELY TO BE KNOWN TO THE BURMESE AUTHORITIES, MAY FACE MORE SERIOUS INTERROGATION AND HARRASSMENT, IF INDEED THEY HAD A VALID MEANS TO RETURN TO BURMA '(DIMIA COUNTRY INFORMATION SERVICE 2002, COUNTRY INFORMATION REPORT NO. 194/02 – INFORMATION ON THE CURRENT SITUATION OF GROUPS ACTIVELY OPPOSING THE GOVERNMENT IN BURMA, (SOURCED FROM DFAT ADVICE OF 19 JUNE 2002, CX65492)."

The Amended Application

23. In the amended application the Applicant set out five grounds, however only grounds 1, 2, 3 and 5 were pursued before the court. Those grounds provide as follows:

> *"1. The Tribunal acted without or in excess of jurisdiction.*
>
> *Particulars*
>
> *The Tribunal ignored relevant material and relied on irrelevant and outdated material.*
>
> *(a) The Tribunal failed to have regard to CIS On-Line Country Report CX77468, RRT Reference V02/14489 (16 July 2003), which stated that even 'low profile dissidents who do not hold office within a political organisation and who have engaged in minor activity such as partaking in protests or distributing leaflets can be severely punished' on their return to Burma."*

(b) The Tribunal assessed the applicant's claim by reference to outdated country information contained in DFAT Country Information Report 55/00 dated 28 January 2000.

2. The Tribunal acted without or in excess of jurisdiction by failing to accord the applicant procedural fairness.

Particulars

The Tribunal ignored relevant material before it.

(a) The Tribunal had before it relevant and highly probative material before it relating to the country situation in Burma.

(i) independent reports of mistreatment of expatriate dissidents upon return to Burma; and

(ii) previous decisions of the Tribunal and the Federal Court indicating the treatment to which previous political dissidents had been subjected.

(b) The Tribunal did not have regard to that material in assessing the country situation in Burma, and therefore the applicant's claim because the Tribunal found that those cases turned on their individual facts and merits.

(c) The Tribunal's failure to have regard to that material in assessing the applicant's claims constituted a breach of s.424(1) of the Migration Act 1958 (Cth).

(d) In failing to comply with s.424(1) of the Migration Act 1958 (Cth) the Tribunal failed to accord the applicant procedural fairness, and therefore acted in excess of, or without jurisdiction.

3. The Tribunal acted without or in excess of jurisdiction.

Particulars

The Tribunal failed to make findings in relation to one of the applicant's claims or a claim raised on the material before the Tribunal.

(a) It was one of the applicant's claims or a claim based on the material before the Tribunal that the applicant had a well-founded fear of persecution if returned to Burma by reason of having been a repetitive demonstrator in Australia.

(b) The country information relied on by the Tribunal at page 14 of the Decision provided that the following categories of Burmese Nationals would be of concern to the Burmese government if they returned to Burma;

1. *those who are repetitive demonstrators;*

2. *active and high profile members of the ABSDF or the NCBUG; or*

3. *those ringleaders of the more violent attack on the embassy in Canberra in September 1999.*

(c) In order to assess whether the applicant faxed a real chance of persecution in Burma, the Tribunal needed to make a finding in relation to each of the three categories of persons in paragraph (b).

(d) The Tribunal did not make a finding as to whether the applicant was a repetitive demonstrator in Australia.

(e) Without making a finding as to whether the applicant was a repetitive demonstrator in Australia the Tribunal could not assess the applicant's claim (or the claim raised on the material before the Tribunal).

(f) The Tribunal's failure to consider the applicant's claim (or the claim raised on the material before the Tribunal) amounted to a constructive failure by the Tribunal to exercise its jurisdiction.

…

5. The Tribunal acted without or in excess of jurisdiction, by failing to make findings in relation to one of the applicant's claim or a claim raised on the material before the Tribunal.

Particulars

(a) The Tribunal made an assumption but did not make a finding that the applicant would be questioned and cautioned in the event of return to Burma.

(b) In order to be questioned and cautioned, the applicant would necessarily be detained by the authorities in Burma.

(c) The Tribunal did not make a finding about the reason for the detention or the nature, duration, consequences of the

detention or whether there was a real chance that such detention would amount to persecution.

(d) Without making the findings referred to in sub-paragraph 5(a), (b) and (c) above the Tribunal was unable to satisfy itself of whether the applicant was a person to whom Australia owes protection obligations."

The Applicant's Submissions

24. It was submitted on behalf of the Applicant that the Tribunal is bound to take into account and consider all relevant material before it up to the date when it handed down its decision; namely, 15 December 2005 (see *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 18 at [27]). It was submitted that the post Tribunal hearing submissions dated 24 November 2005 were submitted before the Tribunal handed down its decision on 15 December 2005. Accordingly, the Tribunal in reaching its decision was obliged to have regard to those submissions which included reference to the country report CX77468.

25. It was submitted that the Tribunal failed to consider that country report in particular and either had not considered it at all or dealt with it in a cursory way and had not given it proper consideration. Reference was made to the Tribunal decision and an extract of that decision set out earlier in this judgment where the Tribunal refers to the "various submissions" of the Applicant which "cite independent reports of mistreatment of certain expatriate dissidents upon return to Burma ... ".

26. It was submitted that that extract demonstrates that the Tribunal wholly failed to consider or take into account the relevant country information. In the alternative, it was submitted that if it did consider the country information set out in the post-hearing submissions but preferred to rely upon earlier country information which it quoted to the Applicant at the hearing, then it committed jurisdictional error of the kind identified by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (Peko-Wallsend).

Ground 1: Failure to take into account relevant material before the Tribunal and/or relying on irrelevant and outdated material

27. Reference was made to the country report CX77468 and, as indicated, it was submitted that the failure to refer specifically to that report constituted a failure to take into account a relevant consideration prior to the handing down of the decision. It was submitted that in order to determine whether the Applicant's fear of persecution was well-founded, the task of the Tribunal was to determine whether the Applicant faced a real chance of persecution. That determination requires the Tribunal to consider past events in determining the likelihood that they will occur in the future. Reference was made to the decision of the High Court in *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559 and *Abebe v Commonwealth of Australia* (1999) 197 CLR 510.

28. It was submitted that any evidence relevant to how others may have been treated on their return to Burma was not only relevant to the proper determination of the application but of extremely high probative value which the Tribunal was bound to consider.

29. By summarily dismissing evidence of past persecution of political activists returning to Burma purportedly on the basis of those examples, "all turned on their own facts and merits", it was submitted the Tribunal failed to take into account and give proper consideration to that relevant and probative evidence. It was submitted this is a jurisdictional error.

Ground 2: Reliance on outdated evidence

30. Reference was made to the High Court decision in *Peko-Wallsend* and it was submitted that the Tribunal erred by intending to, and in fact relying upon, the report dated January 2000 (CX39784). This had generated a response from the Applicant which included a reference to a later report; namely, report CX77468. The later report portrayed a much bleaker picture for the fate of pro-democracy demonstrators returning to Burma. Accordingly, it was submitted that the Tribunal's findings were inconsistent with the most recent evidence available to

the Tribunal which the Tribunal was bound to take into account. That failure constituted jurisdictional error.

Ground 3: Failure to consider and determine a claim raised by the Applicant

31. It was noted that the reference by the Tribunal to the DFAT country report dated 28 January 2000 (CX39784) included only part of the report. The report itself continued with the following passage not quoted by the Tribunal:

> *"14. That Report continued (but the Tribunal did not quote) as follows:*
>
> > *'Other than these exceptions, any Burmese returning to Burma after a lengthy period in Australia (or elsewhere for that matter) would come to the attention of their local township authorities and their movements may be nominated for an initial period. Escorted deportations from Australia will result in the returnee being detained for questioning but unless they departed Burma illegally, have a recent 'profile' in Burma or have been active with the ABSDF or NCGUB they are unlikely to face any problems'."*

32. It was noted that that report did not go as far as the later report relied upon by the Applicant that is, CX77468 and reference was made to the extract from that report set out earlier in this judgment (see paragraph [20]).

33. The earlier country information report relied upon by the Tribunal raised categories of Burmese nationals who would be of concern to the Burmese government including those who are repetitive demonstrators, those active and high-profile members of ABSDF and NCGUB or ring leaders of the more violent attack on the embassy in Canberra in September 1999.

34. The later report relied upon by the Applicant in post-hearing submissions provided additional categories including escorted returnees from Australia who departed Burma illegally, have a recent "profile" in Burma or have been active with ABSDF or NCGUB. It was argued that the categories arising from the first report were independent from the categories which arose in the second report.

Claims were raised by the Applicant, or alternatively on the material before the Tribunal, that the Applicant had a well-founded fear of persecution because he had been a "repetitive demonstrator" against the Burmese government while he had been in Australia and he had a recent "profile" in Burma.

35. It was noted that the Tribunal in its reasons accepted that *"the Applicant has participated in some demonstrations in Australia and that his identity is probably known to the Burmese authorities."*

36. The evidence before the Tribunal constituted the political diary of the Applicant and statements in support of the application which indicated the Applicant had been active with the ACDB and participated in many demonstrations. It was submitted the Tribunal did not make findings on the Applicant's claims (or alternatively, the claims raised on the material before the Tribunal) and the Applicant faced a real chance of persecution because he had a recent "profile" in Burma or had been a repetitive demonstrator in Australia.

37. Reference was made to the reasons for decision of the Tribunal (Court Book page 298) where it stated that it -

> *" … places weight on the fact that the Applicant does not have a* ***high-profile*** *in the pro-democracy movement in Australia and on the fact that he is not formally affiliated with any specific organisation in Australia." (Emphasis added)*

38. It was submitted that conclusion demonstrated the Tribunal's conflation of the tests in relation to the claims of the Applicant. It should have asked whether the Applicant had a recent "profile" in Burma or was a repetitive demonstrator in addition to satisfying itself that the Applicant was not an active high-profile member of an organisation. The Tribunal's failure to consider the Applicant's claims or claims raised on the material before the Tribunal, it was submitted, amounted to constructive failure to exercise its jurisdiction (see *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244, *Chen v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 157 at 180).

39. It was submitted that by asking the question that it did ask and not asking questions that it should have asked, the Tribunal's decision is

vitiated by jurisdictional error. The conclusion of the Tribunal, as a result of its finding that it did not accept on the evidence before it that the Applicant faced such attention or treatment as would amount (even cumulatively) to persecution, confirmed the Tribunal's errors in asking the wrong questions and failing to consider the claims raised by the Applicant or claims which were on the material before the Tribunal and demonstrated that material was crucial to the reasoning process leading the Tribunal to affirm the delegate's decision.

Ground 5: Failure to consider and determine a claim raised by the Applicant

40. It was submitted the Applicant claimed that if he returned to Burma, he would be detained and persecuted. It was noted the Tribunal accepted the Applicant would be questioned on his return which by necessity, it was submitted, must include detention of the Applicant. It was submitted that the questioning which the Tribunal found the Applicant would be subjected to then required it to make factual findings as to whether or not the Applicant would be detained and, if he was found, there was a real chance the Applicant would be detained and determine the reasons for detention, what treatment the Applicant might be subjected to while being detained and whether there was a real chance of such treatment amounting to persecution.

41. It was argued that the Tribunal made no findings in relation to any of those further questions. Its reasons for decision disclose what was described as an assumption on the Tribunal's behalf but not a finding that the Applicant would be questioned and cautioned in the event of a return to Burma. A fair reading of the Tribunal's decision, it was submitted, equate to a finding that there is a real chance that the Applicant would be questioned.

42. Reference was made to the High Court decision in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 where in that case the court stated the following:

> *"But unless a person or tribunal attempts to determine what is likely to occur in the future in relation to a relevant field of inquiry, that person or tribunal has no rational basis for*

determining the chance of an event in that field occurring in the future."

43. It was submitted the Tribunal made no such attempts in relation to the detention and questioning of the Applicant. Without undertaking that exercise, the Tribunal was unable to discharge its duty to determine whether the Applicant faced a real chance of persecution on return to Burma and accordingly committed jurisdictional error by failing to discharge its statutory function.

44. In supplementary contentions which the Applicant was permitted to rely upon as an aide memoire to the oral submissions, it was argued that for the application to succeed he need only establish the following:

- First, that the Tribunal was bound to take the country information into account, or in other words, that it was relevant and that a failure to consider it would result in the Tribunal exceeding or acting without jurisdiction; and
- Second, the Tribunal did fail to take into account the relevant consideration.

45. In the further submissions before the court, the Applicant accepted that the Full Court of the Federal Court decision in *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 (WAEE) is an accurate statement of law but submitted the application of the decision to the facts of the present case brings about a significantly different result to that contended by the First Respondent.

46. It was argued that *WAEE* is clear authority for the principle that if the content of the Tribunal's obligations under s.430, as set out in its findings, and the evidence on which those findings are based when the Tribunal fails to expressly deal with an issue in its published reasons, "may raise a strong inference that it has been overlooked". It was noted that the same conclusion was drawn by Madgwick J in *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 134 at [212] where the court stated:

> *"… A decision-maker cannot be said to 'have regard' to all of the information to hand, when he or she is under a statutory obligation to do so, without at least really and genuinely giving it consideration. As Sackville J noticed in* Singh v Minister for

> Immigration & Multicultural Affairs *[2001] FCA 389; 109 FCR 152 at [58], a 'decision-maker may be aware of information without paying any attention to it or giving it any consideration'. In my opinion, it would be very surprising if the delegate had genuinely paid attention to the letter and given it genuine consideration – had in Black CJ's phrase in* Tickner v Chapman *(1995) 57 FCR 451 at 462 engaged in 'an active intellectual process' in relation to the letter – yet remained silent about such consideration in the reasons he gave. I am satisfied he did not do so."*

47. It was submitted in the present case the country information report CX77468 was a good example of more favourable information for the Applicant which had noted that returnees could be severely punished for such activities as distributing leaflets and participating in demonstrations. Having found the Applicant participated in demonstrations and that his identity was known to Burmese authorities, it was submitted that the inescapable consequence is that if the Tribunal had accepted country information report CX77468, it would have made a finding that the Applicant faced a real chance of persecution for a convention reason. The later country report, it was argued, would have been dispositive of the Applicant's claim. The court should conclude that the Tribunal simply overlooked that country information.

First Respondent's Submissions

Ground 1: Failure to take into account relevant material before the Tribunal

48. The First Respondent submitted the Tribunal did not fail to consider the evidence before it. It was submitted the Tribunal is not bound to take a particular matter into account unless it can be implied from the subject matter, scope and purpose of the Act or the regulations that it was bound to do so (see *Peko-Wallsend* at [40]).

49. Reference was made to *WAEE* where at [46] the Full Court states:

> *"It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a*

distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 at [87] – [97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised 'with an eye keenly attuned to error'. Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law."

50. It was submitted that neither the Act nor the regulations stipulated the Tribunal was obliged to take into account the later country report. In any event, it was submitted, the Applicant has failed to demonstrate the Tribunal did not have regard to the evidence. It was argued that on a fair reading of the decision it cannot be concluded the Tribunal failed to consider the evidence before it, and in particular the extract from the later report referred to in post-hearing submissions.

51. During the course of submissions, counsel for the First Respondent noted that there are a number of references in the Tribunal's decision to "post-hearing submissions" and to the documents attached to those submissions, and accordingly the court should conclude, having referred to those submissions, the Tribunal had taken into account the content of those submissions. It is not required to refer to every piece of evidence or to give a line-by-line refutation of the evidence which was contrary to its findings of material fact. It was argued that effectively the Applicant's complaint concerns the weight that the Tribunal afforded the evidentiary material submitted and that this was entirely a matter for the Tribunal, free of jurisdictional error.

Ground 2: Reliance on outdated evidence

52. It was submitted that in this instance the Tribunal's decision rested on an adverse assessment of the credibility of the Applicant's claims and evidence. This was a matter for the Tribunal and was open to it on the

basis of the Applicant's performance as a witness. Although a reference was made to the earlier country report, it was submitted by the First Respondent that even if the Tribunal's findings were inconsistent with the later report, it would not follow that the Tribunal had failed to consider that information. In the alternative, it was submitted that the accuracy of country information and its relevance to a person in the position of the Applicant is a matter for the Tribunal and not the court.

53. The First Respondent did not accept the Applicant's submission that the "only available explanation" is that the Tribunal failed to take into account the recent report. It was argued it was taken into account but not relied upon in the Tribunal's reasons for its decision. Reference was made to the decision of the Full Federal Court in *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [11] where the court states:

> *"… There can be no objection in principle to the Tribunal relying on 'country information'. The weight that it gives to such information is a matter for the Tribunal itself, as part of its fact-finding function. Such information as the Tribunal obtains for itself is not restricted to 'guidance', as the appellants submitted. It may be used to assess the credibility of a claim of a well-founded fear of persecution. It is not, as the first appellant submitted, an error of law, or a jurisdictional error, for the Tribunal to base a decision on 'country information' that is not true. The question of the accuracy of the 'country information' is one for the Tribunal, not for the Court. If the Court were to make its own assessment of the truth of 'country information', it would be engaging in merits review. The Court does not have power to do that."*

54. Any weight to be attached to a particular piece of country information, it was submitted, is a matter for the Tribunal alone.

55. In the course of submissions, counsel for the First Respondent referred to a decision of *VQAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 where the court relevantly stated at [26], [31] and [32] that:

> *"26 The second ground dealt with by the primary judge complained that the Tribunal took into account irrelevant material by relying upon outdated country information to reject*

> *the appellant's fears of persecution as a Kurd. This was said to constitute jurisdictional error. In substance, the complaint was that the Tribunal should not have accepted the 1994 report when it had been superseded by later material. His Honour rejected that contention. He concluded that the later material had not superseded the 1994 information. The two reports dealt with different matters, the earlier report being concerned with the distribution of Kurds throughout Iranian society, and the later material being directed to a specific part of Iran, namely Iranian Kurdistan. In addition, there were numerous cases that held that a Tribunal does not commit jurisdictional error when it prefers one body of country information over another. See for example* NAHI v Minister for Immigration and Multicultural and Indigenous Affairs *[2004] FCAFC 10 at [13]*.
>
> *31 The first ground is singularly uninformative. The primary judge dealt with the complaint that the Tribunal had not addressed the passport claim correctly, and to the extent that this ground seeks to agitate that point, it is without merit. In addition to* Paul, *and the cases cited therein, regard should be had to* Htun v Minister for Immigration and Multicultural Affairs *(2001) 194 ALR 244*, Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs *(2003) 75 ALD 630 at [46]-[47]*, VTAG v Minister for Immigration and Multicultural and Indigenous Affairs *[2004] FCA 447*, Tran v Minister for Immigration and Multicultural and Indigenous Affairs *[2004] FCA 509, and* Applicant M31 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs *[2004] FCA 533.*
>
> *32 The second ground is equally without merit. It was dealt with correctly by his Honour. We can discern no error in the Tribunal's reasons, still less any error that might be described as jurisdictional. It follows that the appeal must be dismissed. The appellant must pay the respondent's costs."*

56. It was submitted that there is no proper basis for judicial review in relation to this ground.

Ground 3: Failure to consider and determine a claim raised

57. The First Respondent submitted that a fair reading of the Tribunal's decision as a whole reveals that the Tribunal made findings which on the evidence were open to it and free of jurisdictional error. Reference was made to claims which the Applicant referred to as being claims implicitly raised, and it was submitted as to whether or not they were

implicitly raised, that is, the Applicant being a "repetitive demonstrator" or having a "recent profile" in Burma were in any event considered by the Tribunal when it dealt with the likelihood of the Applicant suffering persecution upon return to Burma as a result of activities in Australia. That finding dealt with the Applicant's claims, and it was submitted again that the Tribunal was not required to refer to "every piece of the Applicant's evidence or to give a line-by-line refutation of the evidence which may be contrary to the Tribunal's findings of material facts".

58. The First Respondent relied upon the decision of the Federal Court in *WAEE* at [47] as follows:

> *"[47] The inference that the tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where, however, there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the tribunal's view of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked."*

59. It was further submitted that the Tribunal did not concede that the assumption that a person is questioned will mean the person is detained. It was submitted that "being questioned does not necessarily entail detention".

60. During the course of submissions by the First Respondent, the court noted that the Tribunal reference included a finding not just in relation to the Applicant being questioned but also referred to the Applicant being "cautioned". Nevertheless, the First Respondent maintained the submission that this would not necessarily entail detention. The Tribunal was not required to make the Applicant's case for him and there was no general duty on the Tribunal, it was submitted, to seek additional material from the Applicant to remedy deficiencies in the Applicant's case.

61. It was submitted the Tribunal considered the Applicant's claims at a higher level of generality and it was entitled to do so according to the authorities cited by the First Respondent. It found on the evidence before it that the Applicant would not suffer persecution upon any return to Burma, notwithstanding its findings that he would be questioned and cautioned.

Reasoning

62. In my view, the Applicant's submissions in relation to grounds 1 and 2 are correct. A simple comparison between the earlier country report relied upon by the Tribunal and the later country report relied upon by the Applicant indicates that the second report is not simply a matter of one report referring to a different issue from an earlier report, as appeared to be the case in *VQAB*. In this case, both reports to the same risk but characterise the risk in significantly different terms. One refers to a high profile whilst the other refers to a low profile, and indeed the second report simply refers to persons having *"contact with foreigners, for taking part in demonstrations and for writing or publishing anything critical of the government."*

63. In the extracts from the second report, reference is made to:

> *"Even low-profile dissidents who do not hold office within a political organisation and who have engaged in minor activities such as partaking in protests or distributing leaflets, can be severely punished."*

64. The report goes on to refer to the punishment ranging from intensive interrogation "at the very least", but they may "detained, tortured, sentenced to imprisonment or even executed". In my view, it is incumbent upon the Tribunal to at least refer to the second country report and to attempt to reconcile that report with the earlier report given that both reports refer to similar matters and that the later report at least deserves careful and specific attention.

65. I am not satisfied on the material before me that the reference in the Tribunal's report to the "various submissions" of the Applicant which cite "independent reports of mistreatment of certain expatriate dissidents" is sufficient.

66. In my view, the Tribunal at the very least, having found that the Applicant faces a likelihood of questioning and cautioning, should have explored the prospect clearly and directly raised in the second report relied upon by the Applicant that there was a risk of interrogation and detention. Whilst the court accepts that detention may not necessarily follow from being questioned and cautioned, it is difficult to conceive that questioning and cautioning would occur in the absence of detention or in a place other than premises under the control of the relevant authorities.

67. At the very least the Tribunal, having regard to the second report, ought to have considered the prospect of interrogation and detention with the possibility of the punishment of the kind referred to, albeit for returnees with a low profile who may only have participated in demonstrations or handed out pamphlets.

68. In my view, ground 1 therefore should succeed, as the Tribunal has failed to take into account relevant material; namely, report CX77468, being the later report, an extract of which was set out in the post-hearing submissions and the full reference to which appears in a footnote to those submissions and which was presumably also part of another Tribunal decision referred to by the Applicant.

69. Likewise, the failure to refer to the second report, in my view, is sufficient to constitute a denial of procedural fairness on the basis that the Tribunal has taken into account the earlier report and failed to take into account the later report. Having regard to the content of the later report, I am satisfied the Tribunal was bound to take into account in the *Peko-Wallsend* sense. The differences in the report, evident from the extracts referred to earlier in this judgment, clearly in my view provide a basis upon which the court can conclude that the later evidence was evidence which the Tribunal was bound to take into account.

70. By implication, I am satisfied that the later report raised different categories of Burmese nationals who would be of concern to the Burmese government upon return to Burma, as submitted by the Applicant in support of the third ground.

71. Those categories expanded by the second report are clearly different and indeed less onerous than the categories revealed by the earlier

report. The most obvious example is high-profile compared with low-profile persons. By directing its attention to the categories which are raised from the first report, I accept, as submitted by the Applicant, that the Tribunal has erred by effectively asking itself the wrong question.

72. Likewise, I accept that by failing to refer to the later report, the Tribunal has denied itself the opportunity of properly considering what might occur in the future in relation to the Applicant, which include consideration of those issues identified by the Applicant such as whether the Applicant would be detained, whether there was a real chance he would be detained and the reasons for detention, and the treatment which he might suffer whilst being detained and whether there was a real chance that that treatment might amount to persecution.

73. The reference to the Applicant's various submissions citing independent reports by the Tribunal, in my view, could only amount to a cursory reference to that material. The mere fact that during the course of its decision the Tribunal has referred to "post-hearing submissions" does not of itself provide any or any sufficient basis upon which the court can conclude that the Tribunal properly took into account a specific and later country report, which in my view was clearly relevant to the determination of the issue before the Tribunal. To that extent, the Tribunal has failed to discharge its duty and, based upon my earlier findings, I am satisfied has committed jurisdictional error.

74. The decision of the court in this instance should not be taken as an attempt to analyse "line-by-line" the Tribunal's decision. In this instance, rather than a line-by-line analysis, the court is concerned to instead consider a specific and significant later document providing country information clearly relevant to the Applicant's claim which the Tribunal ought to have specifically addressed.

75. The grounds which I have found to be upheld and relied upon by the Applicant are not grounds which can be dismissed as being an attempt to reagitate the facts or involve simply a failure to expressly mention a particular issue raised by the Applicant, but rather go to the heart of the Applicant's case and deal significantly with country information

which at the very least ought to have been identified and rejected by the Tribunal if it preferred the earlier information.

76. The Tribunal then could have indicated the basis upon which it rejected the later report and proceeded to make its findings based upon those matters set out in the earlier report or the categories of risk revealed in those earlier reports. Its failure to do so, in my view, meant that it failed to take into account a relevant consideration and/or otherwise acted in a way which constitutes jurisdictional error for the reasons advanced for and on behalf of the Applicant in the grounds relied upon in the amended application.

77. I should add that I am strengthened in my conclusion regarding the manner in which the Tribunal dealt with the later report referred to in the post-hearing submissions by reference to the transcript where the Tribunal at page 13 line 36 states the following:

> *"… I shall continue to review your written submissions and independent country information about Burma, particularly because you and your witness have referred to current situations and individuals and their circumstances.*

78. Having been invited to provide further written submissions, it would reasonably be expected that the Tribunal would review those submissions "and independent country information about Burma" referring to "current situations". I am satisfied the Tribunal failed to consider the later independent country information which at least came closer to revealing the "current situations".

79. It follows for those reasons that the application should be allowed and appropriate orders made as sought by the Applicant.

I certify that the preceding seventy-nine (79) paragraphs are a true copy of the reasons for judgment of McInnis FM

Associate:

Date: 10 October 2006