FEDERAL COURT OF AUSTRALIA

SZGKX v Minister for Immigration & Citizenship [2007] FCA 461

MIGRATION – appeal from a decision of the Federal Magistrates Court – application for a protection visa – serious personal assault – whether Tribunal failed to comply with s 430 of the Migration Act – whether Tribunal failed to take adequately into account relevant material – whether Tribunal failed adequately to take into account integer of appellant husband's claims – reviewable error established

Migration Act 1958 (Cth) s 430(1)

Minister for Immigration and Ethnic Affairs v Singh (1997) 72 FCR 288 referred to
NABE v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 144 FCR 1 referred to
WAEE v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 75 ALD 630 referred to
Iyer v Minister for Immigration and Multicultural Affairs [2000] FCA 52 referred to
Addo v Minister for Immigration and Multicultural Affairs [1999] FCA 940 referred to
Re Minister for Immigration and Multicultural Affairs; ex parte Durairajasingham (2000) 168 ALR 407 considered
NAJT v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 147 FCR 51 referred to

SZGKX AND SZGKY v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL
NSD 1015 OF 2006

CONTI J
29 MARCH 2007
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1015 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZGKX** **First Appellant**
	SZGKY **Second Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**CONTI J**
DATE OF ORDER:	**29 MARCH 2007**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the Federal Magistrate on 5 May 2006 be set aside.

3. In lieu thereof it be ordered that the following writs issue:

    (a) a writ of certiorari issued to the second respondent quashing its decision made on 11 April 2005;

    (b) a writ of prohibition directed to the first respondent prohibiting the first respondent from acting upon or giving effect to or proceeding further upon the decision of the second respondent; and

    (c) a writ of mandamus to compel the second respondent, differently constituted, to reconsider the application made on 21 September 2004 according to law.

4. The first respondent pay the appellants' costs of the appeal.

5. The appellants pay the costs (if any) thrown away by the respondent consistently with the reasons for judgment.

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

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	SZGKY **Second Appellant**
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	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGE:	**CONTI J**
DATE:	**29 MARCH 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

Introduction

1 This is an appeal against the judgment of Federal Magistrate Lloyd-Jones delivered on 5 May 2006, whereby his Honour dismissed the appellants' application for judicial review of the decision of the Refugee Review Tribunal ('the Tribunal') made on 11 April 2005 and handed down on 4 May 2005. The Tribunal had earlier affirmed the decision of a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs (as the Minister was then designated) made on 25 August 2004 to refuse the grant of protection visas to the appellants.

2 Both the appellant husband and wife are citizens of Sri Lanka. The appellant husband had previously journeyed overseas from Sri Lanka and back on at least several occasions. The appellant husband was engaged as a 'media secretary', having previously been a drama producer in Sri Lanka. He had enjoyed an association with the leadership of the United National Party ('UNP') in Sri Lanka, being an association which had largely formed the

political context to the present claims to refugee status of the appellants. The second appellant is the wife of the first appellant's second marriage which took place in 1988, and both of the appellants are of Sinhalese ethnicity. They arrived in Australia from Colombo on 30 June 2004 on the authority of a one-month temporary business visa. They made application for protection visas on 29 July 2004, which, as foreshadowed, was refused by the Minister on 25 August 2004.

The Tribunal's decision

3 The appellant husband provided to the Tribunal a comprehensive statutory declaration of 69 paragraphs assembled on 27 October 2004, which set out in considerable detail his extensive career as a producer of drama and his active engagement in the somewhat unstable political life of Colombo. He presented a scenario of political violence which permeated his involvement with the UNP. He testified as to an unprovoked violent incident in 1997 allegedly having political implications, which led to his admission to the Colombo General Hospital. Though he did not seek to present himself as having a status of political leadership, the detail of his evidentiary material disclosed nevertheless an experience of significant involvement in a political context which tended to reflect a measure of authenticity in its descriptions of the events with which he had been actively associated or connected.

4 The appellant husband's central claim in the context of the Tribunal proceedings related to the April 1999 election during which he videotaped a gang (who he identified as comprising government politicians from the Peoples Alliance) committing assaults upon people from the opposing Janatha Vimukthi Perumana ('JVP'). The appellant husband claimed that during the course of videotaping the incident the gang snatched his camera and then assaulted him. He complained to the police, the camera was found and the gang members were placed on trial. However, the exhibits and evidence apparently vanished on the day of the trial. The appellant husband further testified that subsequently on 25 March 2004, he was assaulted in Sri Lanka by an unidentified gang whilst on his way to visit a friend.

5 The appellant husband also testified that on his return from a political study tour of the United States he received 'serious death threats', which were conveyed by way of his mobile phone. The appellant husband observed in his statutory declaration of 27 October

2004, that:

> *'[a]fter finishing my study tour I returned to Sri Lanka at the end of May 2004. Same day when I switched on my mobile phone, I received several death threatening anonymous phone calls reminding me of the incident which took place at Gonakovila...'*

It was his claim that '[d]ue to serious death threats we had to leave my country leaving my properties, reputation and political career… [and] because of my political opinion and party politics I was involved with'. He further claimed that he had 'no active protection in Sri Lanka'. He spoke also of death threats to the daughter of the appellant wife, that stepdaughter being engaged in the production of Ceylon television. He spoke also of information from his father as to threats from an unidentified armed gang looking purportedly for the appellant husband after his departure to Australia.

6 In the Tribunal's reasons for judgment, the Tribunal member observed that the appellant had described himself in his statutory declaration as 'a strong politician' and that when the Tribunal asked the appellant husband about his political involvement with the UNP he acknowledged that he had never been elected to political office, albeit that he stood unsuccessfully as a candidate for the UNP for the municipal council elections. However, the appellant husband maintained that he had been involved politically for 24 years and that he had been a political organiser for the UNP.

7 The Tribunal's reasons for decision for dismissing the appellants' application for judicial review were in broad summary as follows:

(i) there was no credible evidence to support the appellant husband's claim that the assault made on him in 1997, or the assault and theft which he sustained in 1999, or the abuse whereof he specifically testified as having occurred in March 2004 (*post*), were politically rather than criminally motivated; similarly his family's subjection to anonymous death threats at various times in Sri Lanka in 2004 were found not to have been politically motivated;

(ii) despite the appellant husband's claim that he was a 'strong politician', he had never held political office;

(iii) the appellant husband travelled worldwide until 2004, yet had returned on each

occasion to Sri Lanka to reside there, and moreover at the time of his particular claim to experiencing what he described as the greatest fears for his life, he held a valid visa to the United States, though he has not since returned to that country; he had planned in March 2004 to visit Australia with his wife and stepdaughter after returning from the United States, essentially because Australia was a country to which he had not previously travelled; and

(iv) in at least those circumstances there could not be sufficiently imputed to the appellant husband, and accordingly to his wife, a genuine fear of persecution in Sri Lanka or a well-founded fear of suffering persecution in the reasonably foreseeable future because of their respective political opinions.

The proceedings in the Federal Magistrates Court below

8 On 30 May 2005 the appellants sought judicial review of the Tribunal's decision from the Federal Magistrates Court. The appellants filed an amended application on 27 September 2005, which contained the following grounds:

> *'1. The Tribunal found that the applicant's "claimed fear of persecution arising from his political opinions [does not have] any foundation". The Tribunal fell into jurisdictional error in making this finding.*
>
> …
>
> *2. The Tribunal found that "at the time of his departure from Sri Lanka in June 2004…the applicant did not hold a genuine fear of persecution in Sri Lanka because of his political opinions". If this was meant to be a finding that the applicant did not have a genuine fear of persecution, the Tribunal fell into jurisdictional error in making this finding.*
>
> …'

9 In relation to the first ground, counsel for the appellants submitted that the Tribunal had accepted that the appellant husband had been a witness to that gang assault that occurred in 1999, which I have earlier outlined, and that this circumstance gave rise to a material issue of whether the threats and assault occasioned by the physical attackers of the appellant husband were politically motivated. It was emphasised that the appellant husband had raised that issue with the Tribunal, and that the Tribunal's failure to address that issue, to the comprehensive extent reasonably required, constituted a jurisdictional error. Counsel for the appellants further submitted that the Tribunal also failed to make findings regarding the

appellant husband's claim that his stepdaughter (being the daughter of his present wife) had received threats from unknown people due to his political opinion and connections and had instead wrongly held that his claims regarding those threats were '*unsupported and, significantly, in vague terms*'. Lloyd-Jones FM observed that the Tribunal was not satisfied that the threats to the appellant husband were made for political reasons, and that it was open to the Tribunal to adopt that finding in relation to the alleged threats communicated to his stepdaughter.

10 Counsel for the appellants further submitted that jurisdictional error arose due to the Tribunal's narrow interpretation of the judicial test as to persecution in a refugee context, in that it should have considered the nature of the political opinion of his alleged persecutors. Lloyd-Jones FM found, however, that there was a lack of sufficient evidence placed before the Tribunal to enable a finding to be made on the motivation of the gang members who had assaulted him.

11 Additionally, counsel for the appellants submitted that the Tribunal erred in relation to its assessment of the appellant husband's subjective fear. It was said in that context that the Tribunal failed to consider the significance additionally of threats made to the appellant husband's father (and apparently also to his stepdaughter) after the appellant had left Sri Lanka and was present in Australia, and that the Tribunal misconstrued the test of persecution by considering the nature of the alleged fear only as at the time the appellants left their country of nationality, rather than any continuing well-founded fear extant at the time of the Tribunal proceedings.

12 Lloyd-Jones FM accepted the essence of the Minister's submissions advanced regarding the lack of viability of the appellants' claims as putative refugees. The Minister submitted that the Tribunal correctly determined their application adversely to them as at the date of the determination. In purportedly applying *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288 at 294 (Black CJ, Lee, von Doussa, Sundberg and Mansfield JJ), the Tribunal was evidently of the view that the appellant husband's circumstances the subject of his claims had not changed sufficiently since leaving Sir Lanka, and that the claimed threats were no more than further instances of circumstances which the Tribunal considered to have been evident at the time of the appellant husband's departure for

Australia.

13 In relation to the case that the Tribunal's obligation to consider the appellant husband's claim was not limited to what he put forward in his application, counsel for the appellants referred his Honour to *NABE v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 144 FCR 1 (Black CJ, French and Selway JJ) at [55]-[63]. However, Lloyd-Jones FM distinguished *NABE* 144 FCR 1, observing that '*the present case does not fall into that category.*…[f]*or this argument to succeed, the Tribunal would have to be satisfied that the actions of the "gang" was* [sic] *motivated by political opinion and were not criminally based*'. In his Honour's view the Tribunal did not find that the unidentified gang members involved in the assault had '*political motivation nor that their activities were not entirely criminal in nature*'. His Honour was satisfied that the Tribunal dealt with the material correctly.

14 On the basis of those findings which I have sought to summarise, the Federal Magistrate dismissed the appellants' application for curial review of the Tribunal's decision. I have difficulty with the proposition that the appellant husband's fear of persecution could not have arisen in the evidentiary context he postulated, notwithstanding the confinement of his political exposure to that of a media advisor to a politician, but seemingly that measure of concern on my part is not strictly necessary or essential to my decision-making.

The appeal to the Federal Court

15 On 25 May 2006 the appellants filed a notice of appeal to the Federal Court which framed three grounds of asserted error on the part of the Federal Magistrate, the same being supported by particulars. During the hearing of the appeal to this Court on 9 November 2006, the appellants sought to rely on an amended notice of appeal. That comprehensively amended notice of appeal contained the following grounds and particulars thereto:

> '*1. His Honour committed an error of law in dismissing the appeal from a decision of the Second Respondent in circumstances where the Second Respondent failed to comply with section 430(1)(c) of the* Migration Act 1958, *thereby committing jurisdictional error by not having regard to probative material.*
>
> *Particulars:*

(a) The Tribunal found "there is no credible evidence to support the Applicant's claim that either the assault on him in 1997, or the assault and theft in 1999, or the alleged assault in March 2004, was politically (rather than criminally) motivated".

(b) The Second Respondent had regard to the "Department's file…, which includes the protection visa application and… other material, including that supplied by the Applicant".

(c) The Applicant supplied "various media reports" including a newspaper article in The Island *entitled "Stage director assaulted by gang", in which it was reported that the Appellant "had been mercilessly assaulted by an armed gang alleged to be supporters of an organiser of the people's alliance" who allegedly said to the Appellant "… what was done to Laxshr* (sic) *would be done to you".*

(d) In making a finding that there is no credible evidence to support the allegation of "politically motivated" attack on the Appellant the Tribunal either failed to have regard to such information and/or, if it did, it did not give reasons why that particular piece [of] *critical corroborative evidence was not credible (cf section 430(1)(c) of the Act).*

2. His Honour further erred in upholding the Second Respondent's decision in circumstances where the Second Respondent constructively failed to exercise jurisdiction and act judicially when making a critical finding as to the nature of persecution faced by the Appellant.

Particulars:

(a) The Appellant repeats particulars to Ground 1.

(b) By its failure to take into account relevant material corroborating the Appellant's claim of a politically motivated attack on him in 1999 the Second Respondent constructively failed to consider the Appellant's claim.

(c) The Second Respondent also failed to act judicially by interpreting the proper test of what amounts to persecution too narrowly by limiting its assessment of the nature of the 1999 assault on the Appellant by reference to the Appellant's political opinion as opposed to whether the attack on the Appellant was politically motivated.

3. His Honour further erred in upholding the Second Respondent's decision in circumstances where the Second Respondent failed to consider an integer of the appellants' claim.'

Particulars:

(a) *At the hearing before the Tribunal the appellant said that "the real death threats took place after the former Foreign Minister changed political parties. The Applicant said that he was seen on television on 1 May 2004, and from that moment he received "real threats".*

(b) *The Tribunal then reminded the Appellant that "the only matter raised by him in the complaints he had lodged with the police, related to the threats arising from the 1999 videotaping incident… and that his claimed fear of persecution arising from his political opinion was difficult to accept".*

(c) *However, in his Statutory Declaration dated 27 January 2005 sent to the Tribunal after the hearing, the appellant referred to his evidence at the hearing and reiterated that the alleged death threat he received was "not a criminal act, because I received threats since I* [changed] *my parties and political opinion".*

(d) *In the preceding circumstances it was incumbent on the Tribunal to consider the claim that arose from the evidence, whether or not explicitly pleaded.*

(e) *It appears the Tribunal considered the claim as articulated in the police complaints report in relation to the 1999 videotaping incident.*

(f) *The Tribunal therefore constructively failed to consider an integer of the appellant's claim.'*

16 In the context of the grounds the subject of that amended notice of appeal, counsel for the Minister submitted that the 'Minister does not consent to the appellant lodging an amended notice of appeal but accepts that the prejudice [the Minister] has suffered could be remedied by a costs order'. The Minister therefore requested that leave to amend be subject to an order that the appellants pay the Minister's costs thrown away. Counsel for the Minister further submitted that s 430 of the *Migration Act 1958* (Cth) ('the Act') was now being relied upon in substitution for the s 424A ground contained in the original notice of appeal, and 'that being so, all I'm asking for...is that having put in their submission late we did the reasonable thing to make our submission to be prepared on time; they changed the case and we should get costs thrown away'. That submission is correct in principle, but whether or not any significant amount of legal costs were in effect 'thrown away' may well be in reality

debateable, and would be a matter for the Court's assessment officer who undertakes the taxation process. In the somewhat complex circumstances of this case, the submission would not be a necessary 'given'.

17 Counsel for the Minister emphasised further complaint in particular in relation to the third ground the subject of the amended notice of appeal, which the Minister contended to be a new ground, and submitted that leave should be refused as it 'was not run below' and was a 'weak ground'. However both parties addressed the Court on the merits or lack of merit thereof. In any event the view I have reached is not anchored to that third ground.

18 In relation to the first ground of appeal, the appellants submitted that the Tribunal did not pay 'realistic regard' to the relevant newspaper article, 'in that [the Tribunal failed to] give reasons why it did not find material contained in that article to be of probative value to the appellant's claim'. The newspaper article, which appeared in the Sri Lankan newspaper *The Island*, is reproduced, in part, below:

> *'Stage director assault by gang*
>
> *A prominent stage play producer and director…had been mercilessly assaulted by an armed gang alleged to be supporters of an organiser of the Peoples Alliance at Galle Road close to Waldya road junction in Dehiwela at about 11.55 pm, when the play director was engaged in pasting posters with two of his assistants of the stage play "Prana appakaruwa".*
>
> …
>
> *Speaking to "The Island"* [he] *said that the gang had with them firearms: "The persons who assaulted me shouted out loudly saying what was done to Laxshr would be done to you".*
>
> *Dehiwela police sources, in this connection, said investigations were being pursued to take suspects into custody.'*

19 The appellants further submitted that 'it may strongly be inferred that the Tribunal failed to consider an issue and overlooked the material in the newspaper article', the appellants relying on the following *dicta* of the Full Court decision (French, Sackville and Hely JJ) in *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at [47], in principled support of that proposition:

> *'[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 review 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.'*

20 Though I am not required to make any observation upon the extent of the potential persuasiveness of any segment of the evidence adduced to the Tribunal, I would observe nevertheless that the evident nature and implications of that assault upon a person having a public and at least quasi-political profile would have had inherent potential to be as unforgettable as they would allegedly have been significantly intimidating.

21 Counsel for the Minister drew attention to *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 52 at [36] (O'Connor J), *Addo v Minister for Immigration and Multicultural Affairs* [1999] FCA 940 at [24] (Spender, O'Connor and Emmett JJ), and *Re Minister for Immigration and Multicultural Affairs; ex parte Durairajasingham* (2000) 168 ALR 407 at [64]-[66] (McHugh J sitting as a single justice of the High Court), in support of the contention that s 430 of the Act does not impose any duty to deal with adverse material. Counsel submitted in that regard that '[t]he significance of these authorities is that it is not open to a court to infer from the fact that evidence adverse to the findings made by a Tribunal has not been mentioned that it has not been properly considered'.

22 In *Durairajasingham* 168 ALR 407 at [64]-[66], McHugh J observed as follows:

> *'[64] There is some authority in the Full Court of the Federal Court for the proposition that s 430(1) requires the reasons of the tribunal to refer to evidence contrary to findings of the tribunal. However, the contrary view was taken by differently constituted Full Courts in* Ahmed v Minister for Immigration and Multicultural Affairs, Addo v Minister for Immigration and Multicultural Affairs and Sivaram v Minister for Immigration and Multicultural Affairs. *In* Addo, *the court said*:
>
> > *Section 430 (1) does not impose an obligation to do anything more than to refer to the evidence on which the findings of fact*

> *are based. Section 430 does not require a decision-maker to give reasons for rejecting evidence inconsistent with the findings made. Accordingly, there was no failure to comply with s 430(1) of the Act.*
>
> …
>
> *It is not necessary, in order to comply with s 430(1), for the tribunal to give reasons for rejecting, or attaching no weight to, evidence or other material which would tend to undermine any finding which it made.*

[65] In my opinion, this passage correctly sets out the effect of s 430(1)(c) and (d). However, the obligation to set out "the reasons for the decision" (s 430(1)(b)) will often require the tribunal to state whether it has rejected or failed to accept evidence going to a material issue in the proceedings. Whenever rejection of evidence is one of the reasons for the decision, the tribunal must set that out as one of its reasons. But that said, it is not necessary for the tribunal to give a line-by-line refutation of the evidence for the claimant either generally or in those respects where there is evidence that is contrary to findings of material fact made by the tribunal… .

[66] In this case, the tribunal made an express finding that it did not accept the prosecutor's wife's evidence. That was sufficient to comply with the requirements of s 430(1).'

23 His Honour's qualifications the subject of para [65] above have a material bearing upon the somewhat unusual circumstances of this case, 'unusual' in the sense of the extent of public profile of the putative refugee and of the evidentiary basis for his fear of persecution. His Honour's observations do not provide sufficient support for the Minister's submission. As I would read the thrust of the foregoing *dictum* of McHugh J in *Durairajasingham*, his Honour's emphasis appears to be on the need for the Tribunal to make clear the nature and extent of its reasons for rejection of evidence placed before it going to material issues in the proceedings, which, if accepted, would be susceptible to producing an ultimate outcome different to that which was reached. Counsel for the Minister further submitted in any event that the Tribunal did have 'regard to the "material supplied by the appellant" and specifically referred to "various media reports from Sri Lanka" submitted by the appellant', and reliance was placed in that regard by the Minister upon page seven of the Tribunal member's reasons for decision, which included the following observations:

> *'[t]he applicant also submitted other documents to the delegate, including:*

…

4. Various media reports from Sri Lanka

…

The delegate found that the threats that the Applicant alleged he had received were not politically-motivated and therefore not Convention related.'

However, the issue remains as to adequacy or otherwise of the consideration afforded to the specific evidentiary material.

24 Counsel for the appellants referred me to *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51 at [212], where Madgwick J found as follows, and with which I expressed substantial agreement:

'There was no independent requirement on the delegate so to check. Nevertheless, given the potential importance of the letter and the delegate's fleeting, uncritical references to it in his reasons, in my view the inference should be drawn that the delegate did not actually consider what significance and weight it deserved. 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 and Multicultural Affairs *(2001) 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.'*

Upon the footing of that *dictum*, counsel for the appellants contended that whenever the Tribunal states that it will have regard to something of significance, it must engage in an '… active intellectual process… you can't make a fleeting reference'. It was further submitted that the Tribunal erred by not considering the particular social group to which the appellant husband belonged in order to be able to properly assess the nature and extent of the appellant husband's subjective fear of persecution. That particular social group was said on behalf of the appellants to include 'a person who is professionally and visibly associated with a prominent politician who had changed parties'.

25 In relation to the appellant's reliance on *NAJT* 147 FCR 51, counsel for the Minister submitted that unlike the circumstances of the present proceedings, the Court in *NAJT* was there addressing a situation where the Tribunal 'was asserting in effect that [the applicant had] given nothing in support of [his] claim when in fact he had put something in support of his claim…[and] not surprisingly it was open to the Court to say…where there is a [matter] directly relevant to a critical issue of your claim, then the failure to deal with it was a jurisdictional error'.

26 For reasons apparent from what I have already pointed out or else determined, I have reached the view, after giving the issues arising at the instance of the appellants and the Minister much thought, that there is sufficient basis for the operation here of those principles adversely to the Minister's case, in the sense of failure to deal with a matter of relevance sufficiently or adequately in the particular circumstances of this case. The appellants' case the subject of par 1(c) of the appellants' amended notice of appeal above, does not appear to have been sufficiently addressed in the presentation of the Minister's case, at least largely for the reasons the subject of par 1(d) above.

27 The Minister's submissions upon the first and second grounds raised in the appellants' amended notice of appeal seem to me to have been somewhat too clinical in approach, and to fall short of coming adequately to issue with the nature and contextual significance of the events purportedly addressed by the Minister in that regard, being events, viewed in terms of their physical occurrence, the credibility whereof was not to my understanding the subject of dispute.

28 In relation to the third ground of appeal raised in the amended notice of appeal, counsel for the appellants submitted that the Tribunal's finding, to the effect that the threats the appellant husband received were not attributable to political reasons, was made 'in relation to the threats arising from [the] 1999 videotaping incident and not from the fact that, after appearing at the media conference on 1 May 2004… the appellant received "real threats"'. Counsel for the appellants further submitted that 'it was incumbent on the Tribunal to consider whether the appellant had a well-founded fear of persecution by reason of the 1 May 2004 media conference and after which the appellant claimed that is when the "real death threats took place" by reason of the fact that he was perceived as changing parties in

concert with…the former Foreign Minister of Sri Lanka'. It was contended that jurisdictional error arose out of the Tribunal's failure to consider whether there was a real chance the appellant would be persecuted by reason of his affiliation and association with the former Foreign Minister.

29 Summarising the significance of the findings of the Tribunal, counsel for the Minister submitted that the Tribunal found the 1999 incident to have been criminally rather than politically motivated. Counsel further submitted that the 'Tribunal asked the appellant husband to elaborate on the threats he had received in 2004 and, in relation to the threat received on 1 May 2004, it transpired that what was said could not be characterised as a threat'; and that the 'Tribunal indicated that even if it accepted that he had received the death threats as he claimed, they referred back to the 1999 incident and did not have a political motive'. I have encountered considerable difficulty as to the viability of that indication on the Tribunal's part, for reasons I have already foreshadowed.

30 Counsel for the Minister proceeded in any event to contend that the appellant husband had asked the 'Tribunal to believe that the threats occurred for reasons of his changing political parties', an emphasis of his case said to have occurred after his original claims were found to be wanting a Convention nexus. However, so the Minister's contention continued, none of the threats supported this allegation and the Tribunal impliedly rejected that claim in observing that the evidence did not support it.

Conclusions

31 The appellant husband may be reasonably described on the evidence as having a widely acknowledged and reputable standing as a citizen of Sri Lanka. The present claim to refugee status bears a somewhat contextual uniqueness. The appellant husband's unfortunate experience of serious physical assaults upon his person the subject of media publicity, which occurred in the temporal context of his public profile, and the implications of the then prevailing political climate to which he was subjected, *albeit* not as an elected politician, provided a potentially viable basis for his case of causation relevantly to his political profile. Although the wife of the appellant husband had a prominent acting career that may well have been removed from her husband's asserted political profile, a further reality open to be reasonably inferred is that in her capacity as his wife, she may well have conceivably shared

his apprehensions as to their physical safety. However, as observed by the Tribunal member, there was no specific Convention claim made by or on behalf of the appellant wife before the Tribunal, and accordingly the fate of her application is dependent on the outcome of the appellant husband's application.

32 It can scarcely be gainsaid that both the Tribunal member and the Federal Magistrate below did give close consideration to the significance or otherwise to be accorded to the facts and circumstances of the case. In my opinion, however, the omission to take into account relevant material corroborating the appellant's claims of politically motivated attacks reflected an extent of confinement in the requisite width of approach required in the light of those facts and circumstances, such as to evince constructive error. Put another way, the Tribunal was not entitled in the circumstances to withhold from closer consideration and evaluation material which may well have given rise to conclusions favourable to the appellant husband's claim.

33 I have therefore reached the conclusion that the appeal should be allowed. Accordingly, the decision of the Tribunal will be quashed and the matter remitted for further consideration by a reconstituted Tribunal.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Conti.

Associate:

Dated: 29 March 2007

Counsel for the Appellants:	Dr John Azzi
Counsel for the First Respondent:	Mr S Lloyd
Solicitor for the First Respondent:	DLA Phillips Fox Lawyers
Date of Hearing:	9 November 2006
Date of Judgment:	29 March 2007