FEDERAL CIRCUIT COURT OF AUSTRALIA

WZAQH v MINISTER FOR IMMIGRATION & ANOR *[2013] FCCA 182*

Catchwords:
MIGRATION – Judicial review – independent merits review decision – whether error of law in finding of Iranian nationality – whether unreasonableness in finding that the applicant not a Faili Kurd – whether error of law in finding concerning well founded fear of persecution – whether error of law by taking into account irrelevant considerations concerning person allegedly owed protection obligations – whether denial of procedural fairness concerning reasons for leaving Iran – whether jurisdictional error or error of law by failure to take into account relevant considerations concerning person allegedly owed protection obligations.

MIGRATION – Definition of "refugee" – two limbs – whether well-founded fear of persecution required under both limbs.

PRACTICE AND PROCEDURE – Precedent – binding authority – judgments of the Federal Court of Australia.

Legislation:
Constitution (Cth), s.75(v)
Migration Act 1958 (Cth), ss.36(2), (3) and (6), 91R, 189(3), 414, 420, 424, 476

Cases cited:
Darabi v Minister for Immigration & Citizenship & Anor (2011) 250 FLR 301; [2011] FMCA 371
Minister for Aboriginal Affairs & Anor v Peko-Wallsend Limited & Ors (1986) 162 CLR 24
Minister for Immigration & Citizenship v SZMDS & Anor (2010) 240 CLR 611; [2010] HCA 16
Minister for Immigration & Ethnic Affairs v Guo & Anor (1997) 191 CLR 559
Minister for Immigration & Ethnic Affairs v Wu Shan Liang & Ors (1996) 185 CLR 259
Minister for Immigration & Multicultural Affairs v Savvin & Ors (2000) 98 FCR 168; [2000] FCA 478
Minister for Immigration & Multicultural Affairs v Yusuf & Anor (2001) 206 CLR 323; [2001] HCA 30
Minister for Immigration & Multicultural & Indigenous Affairs v SGLB (2004) 78 ALJR 992; [2004] HCA 32
MZXAN v Minister for Immigration & Multicultural Affairs & Anor [2006]

FMCA 847
Plaintiff M61/2010E & Anor v The Commonwealth of Australia & Ors (2010) 243 CLR 391; [2010] HCA 41
Suh & Ors v Minister for Immigration & Citizenship & Anor (2009) 175 FCR 515; [2009] FCAFC 42
SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs & Anor (2006) 228 CLR 152; [2006] HCA 63
SZOOR v Minister for Immigration & Citizenship & Anor (2012) 202 FCR 1; [2012] FCAFC 58
Tontegode v Minister for Immigration & Multicultural Affairs [2002] FCAFC 131
VSAB & Anor v Minister for Immigration & Multicultural & Indigenous Affairs & Anor [2006] FCA 239

Citizenship Law of Iran, articles 976 and 979
1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees, article 1A(2)

Applicant:	WZAQH
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	JANET DUCKMANTON IN HER CAPACITY AS INDEPENDENT MERITS REVIEWER
File Number:	PEG 16 of 2012
Judgment of:	Judge Lucev
Hearing date:	16 August 2012
Date of Last Submission:	16 August 2012
Delivered at:	Perth
Delivered on:	9 May 2013

REPRESENTATION

Counsel for the Applicant:	Mr PCS van Hattem SC
Solicitors for the Applicant:	CASE for Refugees
Counsel for the Respondents:	Mr R Hooker
Solicitors for the Respondents:	Australian Government Solicitor

DECLARATION AND ORDER

(1) The Court declares that the second respondent, in her capacity as Independent Merits Reviewer, did not make her recommendation of 8 December 2011 according to law, in that she:

(a) failed to have regard to relevant considerations in determining the issue of the applicant's nationality;

(b) made a determination that the applicant had not himself claimed to be a Faili Kurd in a manner which was unreasonable;

(c) failed to take into account a relevant consideration, namely that the applicant claimed to be a Faili Kurd; and

(d) denied the applicant procedural fairness with respect to the question of whether or not the applicant left Iran to avoid military service.

(2) The Court orders that the first respondent, whether by himself or by his servants, officers, delegates or agents, be restrained from relying upon the second respondent's recommendation of 8 December 2011.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT PERTH

PEG 16 of 2012

WZAQH
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

JANET DUCKMANTON IN HER CAPACITY AS INDEPENDENT MERITS REVIEWER
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. Amended on 23 May 2012, and again at hearing, this is an application, under s.476 of the *Migration Act 1958* (Cth),[1] for a declaration and injunction in relation to a decision[2] of Janet Duckmanton in her capacity as Independent Merits Reviewer,[3] finding that the applicant does not meet the criterion for a protection visa set out in s.36(2) of the *Migration Act*, and recommending that the applicant not be recognised as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees.[4]

[1] "*Migration Act*".
[2] "IMR Recommendation". The IMR Recommendation is at Court Book ("CB") 139-161.
[3] "IMR".
[4] Collectively the "Convention".

Relief sought

2. The applicant seeks relief in the following terms:

> *(a) It is declared that the recommendation of the second respondent in review case number WIT 077, dated 8 December 2011, that the Applicant not be recognised as a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees, was not made according to law.*
>
> *(b) The first respondent be and is hereby restrained from relying on the said recommendation or taking it into account.*

Jurisdiction

3. The application, which seeks injunctive relief in this Court in relation to the still to be completed decision-making process by the Minister in relation to the IMR Recommendation, is within this Court's jurisdiction for relief in relation to a migration decision.[5]

The grounds of the application

4. There are six grounds of the application which allege that the IMR made an error of law in relation to the following broad issues:

> a) with respect to the applicant having Iranian nationality, when that was not the case;
>
> b) in finding that the applicant was not a Faili Kurd, a finding which was unreasonable, or otherwise contrary to law;
>
> c) in finding that the applicant did not have a well-founded fear of persecution in Iran, that finding being based on a misconstruction of the definition of "refugee", and which was also unreasonable;

[5] *Migration Act*, s.476(1); *Plaintiff M61/2010E & Anor v The Commonwealth of Australia & Ors* (2010) 243 CLR 319 at 334, 344-345 and 358-360 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; [2010] HCA 41 at paras.8, 50-52 and 99-103 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ ("*Plaintiff M61*"); *Darabi v Minister for Immigration & Citizenship & Anor* (2011) 250 FLR 301 at 308 per Nicholls FM; [2011] FMCA 371 at para.31 per Nicholls FM.

d) in taking into account irrelevant considerations in determining that the applicant was not a person to whom Australia owed protection obligations, and in particular matters related to the applicant's reasons for leaving Iran, and the applicant and the applicant's mother's experiences in Iran during the applicant's childhood;

e) in failing to take into account relevant considerations when determining that the applicant was not a person to whom Australia owed protection obligations, particularly that the applicant was a Faili Kurd, and perceived to be stateless or as having Iraqi nationality and anti-regime political opinions, and whether the applicant was able to return to Iran, and, if not, whether that unwillingness was owing to a well-founded fear of persecution in Iran at the time the recommendation was made; and

f) denying the applicant procedural fairness in relation to the reasons the applicant allegedly left Iran, and specifically whether it was to avoid his military service obligations.

5. Each ground is set out in full below together with the parties' submissions and the Court's consideration in relation to each ground.

Preliminary submissions – first limb or second limb or both limbs

6. The applicant raised a preliminary issue related to the definition of "refugee" under article 1A(2) of the Convention, which has two limbs, and whether a well-founded fear of persecution was required under both limbs.

7. Under the Convention, the term "refugee" applies to any person who:

> *... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.*

Applicant's submissions

8. The applicant submitted:

a) the definition of refugee has two limbs which, together, relate to all people – those with a nationality, and those without;

b) the first limb relates to any person with a nationality. Such a person comes within the definition if the person:

i) has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion;

ii) is outside the country of his nationality owing to that fear; and

iii) is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;

c) the second limb relates to any person not having a nationality. Such a person comes within the definition if the person:

i) is outside the country of his former habitual residence, and

ii) is either:

(A) unable to return to it, or,

(B) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, unwilling to return to it;

d) under the second limb, a stateless person who is unable to return to the country of his former habitual residence falls within the definition, whether or not he has a fear of persecution;

e) despite the clear language of the definition, the Full Court of the Federal Court decided in *Minister for Immigration &*

Multicultural Affairs v Savvin & Ors[6] that a person must have a well-founded fear of persecution to come within either limb; and

f) although the language of the definition suggests that it is sufficient, under the second limb, that the applicant is a stateless person with nowhere to go, it is acknowledged that, unless *Savvin* is overruled, the Court is bound by *Savvin*, and the applicant must be found to have a well-founded fear of persecution to be a person to whom Australia owes the relevant protection obligations.

9. Although questioning the correctness of the judgment in *Savvin*, the applicant, quite properly, observed that it was not a matter for this Court to determine, and simply reserved its position in relation to the point.

Minister's submissions

10. The Minister made no specific submissions directed to this issue, doubtless because the applicant had accepted that the decision in *Savvin* was binding upon this Court.

Consideration – preliminary submissions

11. The Federal Court is a court superior to this Court in the hierarchy of Australian federal courts, and its judgments, whether by a single Judge or by the Full Court, are binding on this Court where the same point is in issue, and, accordingly, are to be followed by this Court.[7]

12. The applicant accepts that in *Savvin* the Full Court of the Federal Court decided that a person must have a well-founded fear of persecution to come within either limb of the definition of "refugee". *Savvin* is directly on point in relation to the issue raised by the applicant, as is apparent from the first paragraph of the first of the judgments in the Full Court in *Savvin*:

[6] (2000) 98 FCR 168; [2000] FCA 478 ("*Savvin*").
[7] *Suh & Ors v Minister for Immigration & Citizenship & Anor* (2009) 175 FCR 515 at 522 per Spender, Buchanan and Perram JJ; [2009] FCAFC 42 at para.29 per Spender, Buchanan and Perram JJ.

> *This appeal raises the question of whether a stateless person presently unable to return to that person's country of former habitual residence is entitled to the status of refugee, or whether there is an additional requirement that the person have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a political social group or political opinion. That question depends on the proper construction of Art 1A(2) of the Convention Relating to the Status of Refugees 1951 done at Geneva on 28 July 1951 (the Convention).*[8]

13. Each Judge of the Full Court of the Federal Court in *Savvin* held that the definition of "refugee" in article 1A(2) of the Convention was to be construed as including the requirement that a stateless person, being outside the country of their former habitual residence, has a well-founded fear of being persecuted for a Convention reason.[9] *Savvin* was accepted as correct and was followed by another Full Court of the Federal Court in *Tontegode v Minister for Immigration & Multicultural Affairs.*[10]

14. In the above circumstances, the Court is bound to apply the construction of the definition of "refugee" in article 1A(2) of the Convention adopted by the Full Court of the Federal Court in *Savvin*, and followed by another Full Court in *Tontegode*, and will do so. For that reason it is unnecessary to address any further submissions made by the applicant in relation to the distinction between the first limb and second limb of the definition of "refugee".

Ground 1

15. Ground 1 is as follows:

> *1. The Second Respondent made an error of law in that her recommendation that the Applicant was not a person to whom Australian [sic] has protection obligations under the 1951 Convention [in] relation to the Status of Refugees and 1967*

[8] *Savvin* FCR at 169 per Spender J; FCAFC at para.1 per Spender J.
[9] *Savvin* FCR at 170 per Spender J, 173 per Drummond J and 175-176, 196 and 203 per Katz J; FCAFC at para.8 per Spender J, para.23 per Drummond J and paras.35, 131 and 163 per Katz J.
[10] [2002] FCAFC 131 at para.5 per Beaumont, Carr and Sackville (a case concerning a person who travelled on an alien's passport issued by the Republic of Latvia, and who was accepted as a stateless person by the Tribunal, but whose country of former habitual residence was for the purposes of the Convention found to be Latvia) ("*Tontegode*"). See too *MZXAN v Minister for Immigration & Multicultural Affairs & Anor* [2006] FMCA 847 where *Savvin* was cited without disapproval at para.27 per Riethmuller FM.

Protocol relating to the Status of Refugees (the Refugees Convention) was based on the Applicant having Iranian nationality, when this was not the case.

Particulars

1.1 In finding that the Applicant had Iranian nationality, the Second Respondent applied the wrong test, namely, that there was a presumption that the Applicant had Iranian nationality and the onus was on the Applicant to rebut it;

1.2 The Second Respondent's finding that the Applicant had Iranian nationality was contrary to law, namely s 36(6) of the Migration Act 1958 (Cth):

1.3 For the purpose of applying Article 1A(2) of the Refugees Convention to s 36(2) of the Migration Act, the Second Respondent should have found, having regard to s 36(6) of the Migration Act and Articles 976 and 979 of the Citizenship Law of Iran, that the Applicant was a person not having a nationality.

Applicant's submissions

16. In relation to ground 1 the applicant submits that:

a) the question of nationality is critical;

b) if the applicant is to be treated as having a particular nationality, it must be because he has that nationality within the meaning of article 1A(2) of the Convention;

c) nationality must be determined under the domestic law of the country of putative nationality;[11]

d) the IMR stated that she was not satisfied that the applicant was not an Iranian citizen.[12] Eliminating the double negative, the IMR must be taken to have found that the applicant had Iranian nationality;

e) in doing so the IMR fell into error in two respects:

[11] Citing *VSAB & Anor v Minister for Immigration & Multicultural & Indigenous Affair & Anor* [2006] FCA 239 at paras.48-53 per Weinberg J ("*VSAB*"); *Migration Act* s.36(6).
[12] CB 158-159 at paras.49 and 52.

i) firstly, the IMR approached the issue as if there were a presumption that the applicant had Iranian nationality, and the onus was on him to rebut that presumption by adducing evidence to prove that he did not. The correct test is whether the evidence established, on the balance of probabilities, that the applicable criteria for having a particular nationality were satisfied in relation to the applicant. The IMR applied the wrong test and thereby made an error of law; and

ii) secondly, the IMR, having identified the criteria she considered to be applicable, misapplied those criteria to the evidence;

f) the only criteria of nationality referred to by the IMR were those contained in articles 976 and 979 of the *Citizenship Law of Iran*;[13]

g) Iranian nationality is apparently acquired by a person, under articles 976 and 979 of the *Citizenship Law of Iran*, if three criteria are satisfied:

i) the person was born in Iran;

ii) the person was born to a father of foreign nationality who has lived in Iran for over 5 years; and

iii) the person has resided for one year in Iran immediately after turning 18;

h) the IMR did not consider any other basis on which the applicant might be found to have Iranian nationality. By confining her consideration to the stated effect of articles 976 and 979 of the *Citizenship Law of Iran*, the IMR must be taken to have considered that to be the only applicable basis for determining the applicant's nationality;

i) it is not controversial that the applicant was born in Iran. The first criterion was therefore satisfied;

j) the applicant's father was born in Iran. The applicant's paternal grandfather was born in Iraq, but there is no evidence about his

[13] CB 148 at para.32.

nationality (if any), or whether he ever lived in Iran. The applicant claims that his father was a Faili Kurd without nationality, who applied unsuccessfully for Iranian citizenship before his death in or about 2001;

k) it appears that the applicant's father probably lived in Iran for over 5 years after the applicant was born. There is no evidence as to how long he lived in Iran before the applicant was born. Arguably, the period of residence before the birth is the relevant period. If that is correct, there is no evidentiary basis for finding that the second criterion was satisfied;

l) the applicant attained the age of 18 on 22 February 2010, left Iran in October 2010, and was detained at Christmas Island under s.189(3) of the *Migration Act* on 21 October 2010. The applicant therefore did not reside for one year in Iran immediately after turning 18. The third criterion, which was not expressly considered by the IMR, was not satisfied;

m) it follows that if the applicant's nationality is to be determined by reference to the criteria in articles 976 and 979 of the *Citizenship Law of Iran*, the IMR was mistaken in her finding that the applicant has Iranian nationality, because there was no evidentiary basis to satisfy one, and arguably two, of the three criteria;

n) in this respect the IMR asked herself the wrong question – whether the applicant could obtain Iranian nationality by remaining in Iran, rather than whether the applicant had obtained Iranian nationality before he arrived at Christmas Island. This error is also apparent,[14] where the IMR shows her interest in the possibility of the applicant becoming, rather than being, an Iranian citizen, and, where the reference is to "whether he could obtain" particular citizenship;[15]

o) in addition, the IMR devoted considerable attention to the nationality of the applicant's mother, her brothers and her parents,[16] which are all irrelevant to the applicable criteria;

[14] CB 146 at para.23.
[15] CB 147 at para.27.
[16] CB 157-158 and 160 at paras.47, 48 and 55.

p) further, the IMR treated the circumstances of the applicant's childhood and positive childhood experiences as incompatible with his claim to have no nationality.[17] This was irrelevant to the applicable criteria, and was consistent with the applicant's mother having Iranian nationality;

q) if the IMR considered that the applicant's father was not Iranian, she should have addressed both of the further criteria, namely, how long the father had lived in Iran before the applicant's birth, and how long the applicant had resided in Iran immediately after his 18th birthday. She addressed neither and thereby failed to take relevant considerations into account;

r) if the IMR considered the applicant's father had Iranian nationality, she should have identified the criteria to be applied in determining the applicant's nationality, and applied them to the evidence. She omitted to do so and thereby failed to take relevant considerations into account;

s) the IMR Recommendation was, for that reason alone, not made according to law; and

t) having found that the applicant had Iranian nationality, the IMR should have addressed the issues which arose under the first limb of the definition, namely, whether the applicant:

    i) had a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and

    ii) was outside the country of his nationality owing to that fear; and

    iii) was unable or, owing to such fear, was unwilling to avail himself of the protection of that country.

Minister's submissions

17. The Minister submits that:

[17] CB 158-159 at para.49.

a) the analysis of relevant materials concerning citizenship in Iran was one that was fairly open to the IMR. Just as the Refugee Review Tribunal,[18] where it is seized of jurisdiction to review a RRT-reviewable decision under s.414 of the *Migration Act* is not bound by technicalities, legal forms or the rules of evidence and may get any information that it considers relevant,[19] an IMR acting on an engagement on behalf of the Minister, is likewise not bound and is constrained only by the principles of law enunciated in *Plaintiff M61*; and

b) the IMR's conclusion on the applicant's Iranian nationality was fairly based on the entirety of information before the IMR, assessed in light of the applicant's unsatisfactory credibility. Contrary to ground 1, the IMR did not apply an incorrect test or misapply s.36(6) of the *Migration Act* and, even if she did, such an error does not justify interference on judicial review.

Consideration

18. Section 36(2), (3) and (6) of the *Migration Act* provide as follows:

> *(2) A criterion for a protection visa is that the applicant for the visa is:*
>
> *(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or*
>
> *(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or*
>
> *(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:*
>
> *(i) is mentioned in paragraph (a); and*

[18] "RRT".
[19] *Migration Act*, ss.420, 424.

(ii) holds a protection visa; or

(c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa); and

(ii) holds a protection visa.

(3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

19. The reliance on s.36(6) of the *Migration Act* by the applicant is misplaced. Section 36(6) of the *Migration Act* has a limited field of operation, operating only in the circumstances prescribed by s.36(3) of the *Migration Act*, which has no application to these proceedings. In any event, s.36(6) of the *Migration Act* does not necessarily assist the applicant because the necessity to specify that in the circumstances prescribed by s.36(3) of the *Migration Act* the question of nationality "*must be determined solely by reference to the law*" of the particular country concerned implies that in other circumstances where nationality needs to be determined under the *Migration Act* nationality might be determined by reference to matters other than the law of the particular country solely. It does not, however, mean that otherwise under the *Migration Act* the citizenship law of a particular country would not be a relevant consideration.

20. In *VSAB* the Federal Court dealt with the determination of the derivative nationality of a person who had been born in one country, but was living in another country, the Former Yugoslav Republic of Macedonia[20] in which the person had obtained a passport, ostensibly by bribery. The RRT had determined that the person was a national of FYROM, and had done so on a number of bases, including Department

[20] "FYROM".

of Foreign Affairs and Trade[21] information as to the requirements for the acquisition of FYROM citizenship, but also on the basis of a number of factors related to the applicant personally. In particular, the RRT set out advice from DFAT which indicated that in order to acquire FYROM citizenship a person was required to have 15 years residence or three years marriage, and must provide a medical certificate, a certificate of fluency in the Macedonian language, confirmation of no criminal record, and proof of residence. The RRT noted that the applicant had been married for seven years, spoke Macedonian and that his application form stated that he had no criminal record. The applicant also had children who were Macedonian nationals, owned and operated his business from FYROM without difficulty, and had been issued with an FYROM passport, which he had used without hindrance to frequently depart and re-enter FYROM, using that passport.[22]

21. In *VSAB* it was submitted that the RRT was "*required, as a matter of law, and as a matter of irreducible evidentiary standards, to acquaint itself with the domestic law of FYROM regarding acquisition of nationality, whether through the test of the relevant statute, expert evidence, or scholarly works.*"[23] The RRT had not done so, but insofar as it had had regard to the domestic law of FYROM had relied upon DFAT's exposition of that law. The applicant argued that in a case of derivative acquisition of nationality, which *VSAB* was because the applicant was a national of another country, by original acquisition, that is by birth, it was necessary to have regard to the domestic law of the country in question governing nationality or citizenship.[24] The Federal Court observed that:

a) questions of nationality are generally determined in accordance with the municipal laws of the State concerned;[25] and

b) the question whether the person was a national of FYROM was effectively answered by asking whether he was a citizen of

[21] "DFAT".
[22] *VSAB* at paras.8 and 11 per Weinberg J.
[23] *VSAB* at para.18 per Weinberg J.
[24] *VSAB* at paras.25-26 per Weinberg J.
[25] *VSAB* at para.49 per Weinberg J.

FYROM, which had to be determined in accordance with the domestic law of FYROM regarding such matters.[26]

22. The Federal Court did not agree with the suggestion that the RRT could only act upon direct evidence of the relevant law of a foreign country, and noted that:

> *Evidence which bears rationally upon the issue in question, in this case the domestic law of FYROM regarding acquisition of nationality, whether it be based on the text of a FYROM statute, the views of an expert in FYROM law, scholarly works upon the subject, or whether it be based on a series of primary facts that lead to an inference as to the requirements of that domestic law, is nonetheless still evidence. If there is a question of fact to be resolved, such as whether a particular person is a national of a particular State, there is no reason, from the point of view of judicial review, why one type of evidence should be preferred to another.*[27]

23. The Federal Court went on to find that the RRT was entitled to determine derivative acquisition of nationality by having regard to the DFAT information referred to in the RRT's reasons for decision,[28] and finally observed that:

> *If it cannot be said that there was "no evidence" to support the Tribunal's finding that the husband was a FYROM national, the challenge to the sufficiency of that evidence goes nowhere. The fact that others might not have come to the same conclusion as the Tribunal did regarding this issue, equally does not demonstrate jurisdictional error.*[29]

24. The applicant asserts that because the IMR has only referred to articles 976 and 979 of the Citizenship Law of Iran, the IMR must be taken to have considered that to be the only applicable basis for determining the applicant's nationality. The reference to articles 976 and 979 of the Citizenship Law of Iran appeared in the first paragraph of the country information cited by the IMR.

25. What is in dispute in this case is the effect of articles 976 and 979 of the Citizenship Law of Iran. It is relevant to note that at the time the

[26] *VSAB* at para.53 per Weinberg J.
[27] *VSAB* at para.57 per Weinberg J.
[28] *VSAB* at para.57 per Weinberg J.
[29] *VSAB* at para.60 per Weinberg J.

country information was set out in the IMR Recommendation the IMR had not made any factual conclusions as to the nationality or statelessness of the applicant's father, it being alleged by the applicant that his father was also stateless, even though the father, like his three brothers and five sisters, had been born in Iran.[30] The applicant claimed that his father was not an Iranian citizen, but the applicant also claimed that his father was never an Iraqi citizen.[31] The IMR was therefore dealing with a situation where, at least, the applicant claimed the father was stateless, was not an Iranian citizen, but there was some possibility that he was a foreign citizen, although, at least insofar as Iraq was concerned, this was disclaimed by the applicant.

26. Articles 976 and 979 of the Citizenship Law of Iran only apply where a person is born in Iran, as the applicant was, "*to a father of foreign nationality*". There was a finding of fact by the IMR that he was not satisfied that the applicant's father was stateless. There was no finding that the father, born in Iran, was a national of a country other than Iran. In those circumstances it cannot be that the IMR considered the issue of the applicant's citizenship against articles 976 and 979 because there was no conclusion that the applicant's father was "*of foreign nationality*", that is, of a nationality other than Iranian. It is fair to observe that the IMR Recommendation is in this regard very awkwardly expressed, but read as a whole and having regard to the usual invocations derived from the judgment of the High Court in *Minister for Immigration & Ethnic Affairs v Wu Shan Liang & Ors*[32] the only reasonable conclusion available on a proper reading of the IMR Recommendation is that the IMR considered that the applicant's father was not stateless, and not "*of foreign nationality*". In those circumstances, articles 976 and 979 of the Citizenship Law of Iran did not apply, and there was, therefore, no reason for the IMR to further consider articles 976 and 979 of the Citizenship Law of Iran because the applicant's father was not a foreign national. Consistent with that, articles 976 and 979 of the Citizenship Law of Iran were not further considered by the IMR in the IMR Recommendation's findings and reasons.[33]

[30] CB 145-146 at para.19.
[31] CB 146 at para.23.
[32] (1996) 185 CLR 259 ("*Wu Shan Liang*").
[33] CB 157-161 at paras.43-61.

27. Having regard to the fact that articles 976 and 979 of the Citizenship Law of Iran did not apply was there adequate evidence to enable the IMR to conclude that the applicant was an Iranian citizen? The IMR had regard to the applicant's birthplace in Iran, and the place of birth of his father, and his father's eight siblings, all born in the same place in Iran, and the place of birth of his maternal family, again who all appear to have been born in Iran, although having lived at some time in Iraq, before returning to Iran. That, combined with the circumstances of the applicant's birth (in an Iranian hospital), his twelve years of schooling, and what was described as "*his unproblematic residence in the same house in Ilam for all of his life in Iran*" and the "*unproblematic residence of his paternal relatives in a village close to … [the village where his father was born] (to which his mother has recently located),*[34] also assisted in satisfying the IMR that the applicant was an Iranian citizen. That was further assisted by the fact that the applicant had not had any problems with the Basij, that apart from working with his Iranian citizen uncle he had never otherwise attempted to find work, and that the time had arrived at which he would be expected to complete two years compulsory military service if he was an Iranian citizen.[35] In the Court's view, these might all be relevant considerations in determining citizenship, subject to the relevant terms of the municipal laws of Iran.

28. The applicant specifically submits that the IMR ought to have determined what criteria under the municipal law of Iran might have applied to the applicant, and applied those criteria, and that the failure to do so is a failure to have regard to a relevant consideration.

29. The evidence establishes that there is a municipal law of Iran, namely the Citizenship Law of Iran, which deals with citizenship. Further, there is country information cited by the IMR[36] which indicates that 760 persons from the province from which the applicant (and his father) were from, and were indeed born in, "*were able to obtain Iranian citizenship after a complicated process*".[37] Whether or not that process was under the Citizenship Law of Iran, or some other legislative or quasi-legislative process, is not explored further in the

[34] CB 158-159 at para.49.
[35] CB 159 at paras.50-52.
[36] CB 151 at para.38.
[37] CB 151 at para.38.

country information, or otherwise, in the IMR Recommendation. Rather than determining whether the municipal law dealing with citizenship applied to the applicant's circumstances, or not, or whether there was some other form of legislative or quasi-legislative process which might apply to enable the applicant to be eligible to be, or be, an Iranian citizen, the IMR moved straight to a consideration of information personal to the applicant in order to determine Iranian nationality, without any regard to the relevant municipal law, or any other legislative or quasi-legislative process. Any such municipal law or legislative or quasi-legislative process, was a relevant consideration in assisting the IMR to determine whether the applicant was, or equally important in the circumstances, was not, either an Iranian citizen, or eligible to be an Iranian citizen. Was, for example, the applicant eligible for Iranian citizenship under the "*complicated process*" by which 760 people from the applicant's province had been granted citizenship? Given the country information which is set out in the IMR Recommendation, the mere fact that a person (and particularly someone claiming to be a Faili Kurd) is born in Iran, and their relatives are born in Iran, and that they went to school and have obtained employment in Iran, are not factors which preclude the necessity to have regard to the most relevant consideration, namely the municipal law or any applicable legislative or quasi-legislative process, for the purpose of determining, whether under the applicable Iranian law, the applicant might, or might not, be, or might, or might, or might not, be eligible to be, an Iranian citizen.

30. In the circumstances, the Court is of the view that the IMR failed to have regard to a relevant consideration or considerations, namely the totality of the Citizenship Law of Iran, and the legislative or quasi-legislative process by which some persons from Ilam Province had obtained Iranian citizenship. The failure to have regard to a relevant consideration or considerations is a jurisdictional or legal error giving rise to a right to relief of the type sought by the applicant in these proceedings.

31. Ground 1 is therefore made out.

Ground 2

32. Ground 2 is as follows:

> *2. The Second Respondent made an error of law in that her finding that the Applicant was not a Faili Kurd was so unreasonable that no reasonable person could have made that finding, or it was otherwise contrary to law.*

Applicant's submissions

33. The applicant submitted as follows:

a) the IMR's approach to the question of race is intertwined, and confused, with the issue of nationality. They are separate issues;

b) the IMR accepted that the applicant is of Kurdish ethnicity and is a Muslim, but did not accept that he is a Faili Kurd.[38] The IMR appears to have found that stating his religion as "Islam" was incompatible or inconsistent with being a Faili Kurd. The IMR does not give any other basis for refusing to accept the evidence that the applicant is a Faili Kurd. The stated reason is incomprehensible. The finding was so unreasonable that no reasonable person could have made it;

c) it is noted that Faili Kurds are Shiite Muslims, not Sunni Muslims,[39] but there is no evidentiary basis for treating "Islam" other than as synonymous with "Muslim"; and

d) further, the RSA Record notes,[40] that the applicant claims "that his religion is Shia Muslim and his ethnicity is Kurdish Faili". The IMR was under the erroneous impression that the applicant had not claimed to be a Faili Kurd.

Minister's submissions

34. The Minister submits that:

[38] CB 157 at para.45.
[39] CB 151 at para.38.
[40] CB 84 at para.2

a) the IMR did not err in reaching her conclusion that the applicant was not a Faili Kurd; and

b) the doctrine of *Wednesbury* unreasonableness does not assist the applicant and the conclusion is not in any way "*otherwise contrary to law*".

Consideration – ground 2

35. In order to properly consider this ground it is necessary to review some of the factual material related to the applicant's claims in more detail.

36. On the applicant's arrival on 21 October 2010 the bio-data taken by an officer of the Department indicated that the applicant gave his religion as Islam and his ethnic group as "*Kurd Faili*".[41]

37. In the entry interview on 31 October 2010 the applicant is recorded as giving his religion as Islam and his ethnic group as "*Kurd*".[42]

38. In a document headed "IAAAS Interview Cover Sheet", dated 5 January 2010, but obviously intended to be 2011, the applicant's ethnicity is said to be "*Faili Kurd*" and his religion is listed as "*Shia*".[43]

39. The Applicants Statutory Declaration of 6 January 2011[44] expressly states that the applicant is "*a faili Kurd*".[45]

40. The Refugee Status Assessment Record[46]:

a) notes that the applicant "*claims to be a stateless Faili Kurd*";[47]

b) notes that the applicant "*claims that his ethnic group is 'Faili Kurd' and his religion is Shia Muslim*";[48]

c) repeats the applicant's claim to be Shia Muslim and of Kurdish Faili ethnicity under the applicant's history;[49]

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[41] CB 2.
[42] CB 56.
[43] CB 13.
[44] CB 14-17 ("January 2011 Statutory Declaration").
[45] CB 16 at para.20.
[46] "RSA Record". The RSA Record is at CB 83-96.
[47] CB 83.
[48] CB 83.
[49] CB 84.

d) notes that the applicant spoke Kurdish Faili;[50]

e) in considering the harm feared for a Convention reason, notes that the applicant asserted that he would face discrimination and denial of civil rights services "*because he is a Faili Kurd*";

f) finds that the "*ground of race is the essential and significant reason for the harm feared*";[51] and

g) notes that the applicant claimed to be stateless and that the RSA officer considered that stateless Faili Kurds could constitute a particular social group, and that that was an essential and significant reason for the harm feared in the applicant's claim.[52]

41. The applicant's written submissions to the IMR[53] are replete with references to the applicant being a Faili Kurd, and the nature of discrimination or harm alleged to be rendered to Faili Kurds in Iran. In relation to the applicant's claims the Applicant's Written IMR Submissions asserted that:

a) the applicant was "*a stateless Faili Kurd, previously resident in Iran*";[54]

b) that he feared "*ongoing persecution in the form of severe discrimination on the basis of his race (Faili Kurd)*";[55] and

c) it is arguable that he did not have a "White Card" (a form of identity documentation) "*because he is from the particular social group of stateless Faili Kurds*", a matter which is relevant to whether or not he may suffer future harm or punishment from the para-military Basij.[56]

42. The Applicant's Written IMR Submissions set out considerable independent country information related to the persecution of Kurds in Iran, as it was asserted that the persecution which Faili Kurds are subject to must also be considered within the broader context of

[50] CB 88.
[51] CB 89.
[52] CB 89.
[53] CB 107-135 ("Applicant's Written IMR Submissions").
[54] CB 108.
[55] CB 108.
[56] CB 109.

persecution of Iranian Kurds.[57] In any event, however, the independent country information cited by the applicant expressly dealt with the alleged persecution of Faili Kurds in Iran, in the following contexts:

a) because Faili Kurds had become increasingly vocal participants in Iraqi politics, arguing for an autonomous Kurdish region within Iraq, thereby giving rise to a suspicion on the part of the Iranian regime that Faili Kurds had a desire for political autonomy in Iran;[58]

b) that the Basij persecuted Faili Kurds for reason of their nationality regardless of State policy because the Basij were decentralised, undisciplined and organisationally independent from Iranian State institutions;[59] and

c) Iranian authorities were easily able to identify stateless Faili Kurds due to their lack of any official documentation, and Faili Kurds were subject to violent persecution due to their imputed support for Kurdish nationalism, imputed to them by reason of their Kurdish identity.[60]

43. The Applicant's Written IMR Submissions went on to set out specific information concerning the persecution of Faili Kurds in Iran, including alleged discriminatory practices in relation to education, health care, employment, and movement within Iran.[61] The Applicant's Written IMR Submissions also dealt with the inability of Faili Kurds to actually apply for Iranian citizenship, even when their mothers were born in Iran.[62]

44. In addressing the criteria in the Convention and s.36(2) of the *Migration Act* the applicant asserted that:

a) he was a stateless Faili Kurd;[63]

b) the Iranian authorities engaged in abuse and discrimination against Faili Kurds;

[57] CB 109.
[58] CB 113-114.
[59] CB 115.
[60] CB 116.
[61] CB 116-120.
[62] CB 120-121.
[63] CB 125.

c) he was at serious risk of harm;[64] and

d) the Iranian authorities generally targeted ethnic minorities, including Faili Kurds, and that that occurred throughout the country and, therefore, relocation within Iran was not possible.[65]

45. Against the above background the IMR conducted the IMR Interview and wrote the IMR Recommendation. In conducting the review the IMR noted that:

> *This independent review will consider afresh all claims for protection as they relate to the Refugees Convention, taking into account all available information, including information available to the Refugee Status Assessment officer in reaching the unfavourable Refugee Status Assessment, information provided by or on behalf of the claimant and any additional information the independent reviewer may consider relevant.*[66]

46. The claims from the Applicant's Written IMR Submissions were set out in part in the IMR Recommendation, including the applicant's claim to be a stateless Faili Kurd who feared ongoing persecution in the form of severe discrimination on the basis of his race, and the fact that it was arguable that he had no documentation because he was a Faili Kurd.[67]

47. The IMR also noted:

a) the entry interview where the applicant "*is reported as stating that … he is of Kurdish ethnicity; his religion is Islam*";[68] and

b) the January 2011 Statutory Declaration, but does not specifically note the statement that the applicant made in writing that he is "*a faili Kurd*".[69]

48. The country information set out in the IMR Recommendation deals at great length with the position of Faili Kurds in both Iraq and Iran. Numerous reports by reputable international organisations are cited, as well as DFAT information in relation to the position of Faili Kurds, and:

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[64] CB 132-133.
[65] CB 134.
[66] CB 140 at para.4.
[67] CB 141-142 at para.10.
[68] CB 142 at para.10.
[69] CB 16 at para.20.

a) their treatment in both Iraq and Iran;

b) their treatment in Iran by the Basij; and

c) the fact that some Faili Kurds of Iraqi origin living in Iran do not have documentation and are not registered with the Iranian authorities.[70]

49. It is against the above background that the IMR in the first paragraph of the IMR Recommendation under the heading "Findings And Reasons" says that:

> *The essence of the claimant's claim for refugee status is that he has a well-founded fear of persecution in Iran because he is a Stateless Kurd.*[71]

50. Two paragraphs further on the following paragraph, critical to the applicant's argument, appears:

> *I accept that the claimant was born in Ilam, Iran, 22/02/1999 [sic – 1992]; is of Kurdish ethnicity; and is a Muslim. I also accept that Iran in his country of former habitual residence and that he has no lawful right to reside in any other country. However, as the claimant has not himself claimed to be a* Faili *Kurd (and in his* Entry Interview*, he stated his religion to be "Islam") I am not satisfied that he is a* Faili *Kurd.*[72]

51. In *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB*[73] it was said that:

> *... the critical question is whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds. If the decision did display these defects, it will be no answer that the determination was reached in good faith.*[74]

52. In the High Court in *Minister for Immigration & Citizenship v SZMDS & Anor*[75] the plurality majority Justices accepted a submission that:

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[70] CB 148-153 at paras.33-39 and CB 154-156 at para.41.
[71] CB 147 at para.43.
[72] CB 157 at para.45.
[73] (2004) 78 ALJR 992; [2004] HCA 32 ("*SGLB*").
[74] *SGLB* ALJR at 998 per Gummow and Hayne JJ; HCA at para.38 per Gummow and Hayne JJ.
[75] (2010) 240 CLR 611; [2010] HCA 16 ("*SZMDS*").

> *…not every instance of illogicality or irrationality in reasoning could give rise to jurisdictional error, … if illogicality or irrationality occurs at the point of satisfaction (for the purposes of s 65 of the [Migration] Act) then this is a jurisdictional fact and a jurisdictional error is established.*[76]

53. Those plurality Justices went on to say that:

> *…illogicality" or "irrationality" sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence.*[77]

54. Importantly, the above observations were caveated by the following observation of the same plurality Justices:

> *…a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision-maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision-maker does not come to that conclusion, or if the decision to which the decision-maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn.*[78]

55. The High Court's decision in *SZMDS* establishes that illogicality or irrationality in the reasoning of a tribunal may constitute a basis for judicial review, however, this ground may only succeed in a limited range of cases.

56. In *SZOOR v Minister for Immigration & Citizenship & Anor*[79] it was observed that:

> *The approach to irrationality or illogicality dictated by the authorities in the High Court appears to be that even if the decision-maker's articulation of how and why he or she went from the facts to the decision is not rational or logical, if someone else could have done so on the evidence, the decision is not one that will be set aside. It is only if no decision-maker could have followed that path, and despite the reasons given by the actual*

[76] *SZMDS* CLR at 643 per Crennan and Bell JJ; HCA at para.119 per Crennan and Bell JJ.
[77] *SZMDS* CLR at 647-648 per Crennan and Bell JJ; HCA at para.130 per Crennan and Bell JJ.
[78] *SZMDS* CLR at 649-650 per Crennan and Bell JJ; HCA at para.135 per Crennan and Bell JJ.
[79] (2012) 202 FCR 1; [2012] FCAFC 58 ("*SZOOR*").

> *decision-maker, that the decision will be found to have been made by reason of a jurisdictional error.*[80]

and further that:

> *… Illogicality such as to amount to jurisdictional error will not be shown where the point is merely one upon which reasonable minds may differ or where it cannot be said that there is no evidence before the Tribunal upon which the decision could be based. Illogicality will not amount to jurisdictional error in every case. It must be such as to affect the decision….*[81]

57. The IMR, having concluded that the applicant had not claimed to be a Faili Kurd, assessed the applicant's claim on the basis that he was not a Faili Kurd. When regard is had to all of the material that was before the IMR it can be seen that on every occasion, bar one, the applicant asserted that he was a Faili Kurd, and that his fear of persecution arose from his being a Faili Kurd. The only occasion on which the applicant did not claim to be a "*Faili Kurd*", but is recorded as describing his ethnic group as "*Kurd*", is in the entry interview conducted ten days after his arrival on Christmas Island in October 2010, but at a time when he had already, upon entry, claimed to be a Faili Kurd. Post the entry interview recording of the applicant as being a "*Kurd*" there is no instance of the applicant claiming to be a "*Kurd*", and on every instance since 31 October 2010 he has claimed to be a "*Faili Kurd*". In any event, describing oneself as a Kurd does not necessarily preclude one from being a Faili Kurd, and the recording of what was said to be stated at the entry interview does not amount to a claim not to be a Faili Kurd. The claim of a well-founded fear of persecution for a Convention reason is based on the applicant's ethnicity, that is, that he is a Faili Kurd. That is clear from the overwhelming preponderance of the materials.

58. The IMR's conclusion that the applicant "*has not himself claimed to be a Faili Kurd*" is a conclusion reached in circumstances where there is no evidence at all to support the assertion that the applicant had not claimed to be a Faili Kurd. On every occasion but one he had claimed to be a Faili Kurd, and on that other occasion he had claimed to be a Kurd, a claim not necessarily inconsistent with being a Faili Kurd. The

[80] *SZOOR* FCR at 7 per Rares J; FCAFC at para.15 per Rares J.
[81] *SZOOR* FCR at 23 per McKerracher J; FCAFC at para.85 per McKerracher J.

applicant had never not claimed to be a Faili Kurd. At the point of satisfaction in relation to this finding of ethnicity, which was a central integer of the applicant's claims, the Court is of the view that the IMR acted irrationally or illogically, because there is no fact which supports the IMR's conclusion that the applicant has not claimed to be a Faili Kurd. Moreover, because those are the circumstances, no other decision-maker acting logically or rationally could possibly have arrived at the same conclusion as the IMR did in this case. Given the centrality of the applicant's claim to be a Faili Kurd to his claim of persecution on the basis of ethnicity as a Faili Kurd, the error is a jurisdictional or legal error of a kind warranting the relief sought by the applicant in this case.

59. Ground 2 is therefore made out.

Ground 3

60. Ground 3 is as follows:

> *3. The Second Respondent made an error of law in her finding that the Applicant did not have a well-founded fear of persecution in Iran.*
>
> *Particulars*
>
> *3.1 The Second Respondent's finding that the Applicant did not have a well-founded fear of persecution in Iran was based on a misconstruction of the definition of "refugee" in the Refugees Convention and was contrary to law;*
>
> *3.2 The Second Respondent's finding that the Applicant did not have a well-founded fear of persecution in Iran was so unreasonable that no reasonable person could have made that finding.*

Applicant's submissions

61. The applicant submits as follows:

a) the applicant claims to have a fear of persecution on the basis of race (Faili Kurd), perceived nationality (Iraqi), social group

(stateless persons in Iran) and imputed political opinion (opposition to the Iranian regime);

b) the IMR did not expressly consider whether there was an identifiable social group comprising stateless persons in Iran, or whether the applicant was (rightly or wrongly) perceived in Iran to be a member of such a group. The IMR did conclude that the applicant had Iranian nationality and for that reason was not a stateless person, but that is not the same issue. In any event, for the reasons given above, that finding involved an error of law;

c) section 91R(1) of the *Migration Act* provides that the definition of "refugee" does not apply in relation to persecution for a specified reason unless that reason is the essential and significant reason for the persecution, the persecution involves serious harm to the person, and the persecution involves systematic and discriminatory conduct;

d) the applicant claims that the persecution in Iran involves systematic and discriminatory conduct. There was evidence before the IMR to support that claim.[82] The IMR did not address that evidence, or give reasons for rejecting it. The failure to do so gave rise to an error of law;

e) instances of serious harm are given in s.91R(2) of the *Migration Act*. They include a threat to the person's life or liberty, or significant physical harassment or ill-treatment. They also include significant economic hardship, denial of access to basic services, and denial of capacity to earn a livelihood, in each case threatening the person's capacity to subsist;

f) there was evidence before the IMR that Faili Kurds in Iran were the objects of persecution within the meaning of the Convention;[83]

g) the IMR found that the applicant had not personally suffered persecution;[84]

[82] CB 151-153 154-156 at paras.39 and 41, and the January 2011 Statutory Declaration, CB 15-16 at paras.15-20.
[83] CB 148-156 at paras.33-41.
[84] CB 159 and 160 at paras.50 and 56.

h) the IMR did not address the applicant's explanation, to the effect that this was because, as a stateless Faili Kurd, he had been very careful and had hidden from the Basij and the police;[85]

i) the IMR found that the applicant had been employed by his uncle, but had not sought other employment;[86]

j) the IMR did not address the applicant's explanation,[87] to the effect that it would have been futile to do so because, as a stateless Faili Kurd, he did not have the requisite identity documents;

k) the IMR approached the issue on the basis that a person cannot have a well-founded fear of persecution unless the person has already experienced actual persecution, amounting to serious harm; and that a person who leaves a country before experiencing actual persecution in that country is not capable of having a well-founded fear of being persecuted in that country. A fear of persecution can not be well-founded, on this approach, unless the persecution has eventuated in fact, not merely in apprehension;

l) such an approach is not supported by the *Migration Act*, the Convention, or logic. It would be absurd in the case of persecution by deprivation of life or liberty. It is an approach that is so unreasonable that no reasonable person could have applied it;

m) further or alternatively, the IMR did not consider whether, or make a finding as to whether, the applicant had a fear of persecution. This necessarily precluded a finding as to whether such a fear was well founded;

n) by confining her consideration to the applicant's absence of personal persecution experiences, the IMR did not address the relevant criteria in the definition; and

o) the IMR Recommendation was, for that further reason, not made according to law.

[85] CB 147 at para.26.
[86] CB 182 at para.51.
[87] CB 169 at para.21.

Minister's submissions

62. The Minister submits that:

a) nothing in ground 3 as pleaded and developed discloses an error of law or unreasonableness at all, let alone of a character or kind sufficient to justify judicial review;

b) the IMR's conclusion as to the absence of any physical harm, harassment or threatening by the Basij or the police in Iran was entirely open on the totality of the narrative account that had been given by the applicant. The substance of that account focused substantially on the detail of the applicant's claims concerning his limited opportunities and capacity to access employment and other services in Iran. This meant that the IMR was entitled to view the applicant's overall claim for a protection visa as being substantially one of persecution that fell short of physical harm or detriment but was rather concerned with economic or social disadvantage or limitation in opportunity; and

c) save for the limited reliance by the applicant on fears of being arrested or killed were he to return to Iran, (which the IMR correctly noted were not supported with any evidentiary content) the burden of the claim for a protection visa was one sourced in, essentially, economic and social discrimination. The IMR was entitled to find that the extent of the detriment experienced by the applicant did not amount to "serious harm" for the purposes of s.91R of *Migration Act*.

Consideration – ground 3

63. The assertion that the IMR's finding that the applicant did not have a well-founded fear of persecution in Iran was based on a misconstruction of the definition of "refugee" in the Convention and was contrary to law cannot be made out for reasons set out above.[88]

64. In relation to the finding of a well-founded fear of persecution otherwise, it is once again based on the specific ground of

[88] See paras.12-15 above.

unreasonableness, and that no reasonable person could have made the finding that the IMR made.

65. Assuming, for present purposes, that the IMR was properly considering a relevant claim by the applicant, it must be said that the IMR was entitled to consider past persecution in order to determine whether there was possible future persecution. In *Minister for Immigration & Ethnic Affairs v Guo & Anor*[89] the High Court observed that in relation to the predictability of future events which might give rise to a real chance of serious harm, there would be cases where "… *the probability that an event will occur may be so low that, for practicable purposes, it can be safely disregarded.*"[90] That determination requires an estimation of the likelihood that an event will give rise to the occurrence of conduct causing serious harm, and in that respect, regard must be had to what has occurred in the past as a guide to what might happen in the future.[91] In *Guo*, the High Court observed that a well-founded fear is one with a "*real substantial basis for it*", which "*may exist even though there is far less than a 50 per cent chance that the object of the fear will eventuate*"[92] and then, critically, went on to say as follows:

> *But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution.*[93]

Thus, it was open for the IMR to make findings concerning the applicant's past life and treatment within Iran, particularly in relation to his schooling and employment, as the basis for a conclusion that economic imperatives formed the basis of the applicant's decision to leave Iran.[94] It is also relevant to note that it is not necessarily an error of law, or a consideration giving rise to judicial review, that an administrative decision-maker has not addressed every aspect of the material and evidence put before the decision-maker.

66. In this case, there is, in any event, consideration of the likelihood of serious harm being suffered by the applicant in the future if he were to

[89] (1997) 191 CLR 559 ("*Guo*").
[90] *Guo* at 575 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.
[91] *Guo* at 575 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.
[92] *Guo* at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.
[93] *Guo* at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.
[94] CB 159-160 at paras.53-54.

return to Iran. That occurs in relation to, specifically, his departure on a false Iranian passport, and whether he would be punished for that on his return to Iran, and whether he would be punished as a failed asylum seeker. In relation to the former, the IMR concluded that he would only be punished under laws and rules of general application (that is non-Convention related laws) or that the punishment would not be unduly harsh or severe in any event. There was, therefore, no Convention nexus nor Convention related persecution. In relation to the latter the IMR concluded that the applicant did not have a political profile which would see him face serious harm on account of his being a returned failed asylum seeker, notwithstanding his "Kurdish ethnicity".[95] More generally, the IMR indicates that she has carefully examined all of the evidence before her, and found that the applicant has never suffered persecution in Iran, and that he does not have a well-founded fear of suffering persecution for a Convention related reason in the reasonably foreseeable future.[96] There is, thus, an express statement by the IMR that all of the evidence has been examined and that having examined that evidence there is no well-founded fear of persecution in the reasonably foreseeable future. Thus, the IMR looked both backwards and forwards in assessing whether or not the applicant had a well-founded fear of persecution. There is no error in such an approach.[97]

67. Ordinarily, therefore, the Court would conclude that this ground has not been made out. The difficulty, however, is that notwithstanding the reference to a careful examination of all of the evidence before the IMR (which, at least theoretically, would include the independent country information which referred extensively to issues associated with Faili Kurds) the IMR has made it clear that in her view the applicant has not claimed to be a Faili Kurd, and she has assessed his claim as against his Kurdish ethnicity generally, and not his specific Faili Kurdish ethnicity. That approach is confirmed by an ordinary and plain reading of the IMR's findings and reasons, which after finding that the applicant did not claim to be a Faili Kurd, does not make reference to his claim as a Faili Kurd thereafter.[98]

[95] CB 160 at paras.57-58.
[96] CB 160 at para.59.
[97] *Guo* at 572 and 575 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.
[98] CB 157-161 at paras.43-61.

68. It is unnecessary to ultimately determine whether this ground is, or could be, made out. In order to do so the Court would have to make factual findings as to the fear of persecution held by the applicant as a Faili Kurd, and that is not the Court's role on judicial review. And, although the position of Faili Kurds might, on one view, not be seen to be markedly different to that of Kurds, the factual material is not so clear-cut as to make that finding inevitable, particularly in circumstances where there have been no findings of fact by the IMR as to the applicant's claim on the basis that he is a Faili Kurd. In the circumstances, and given that the Court has already found that the applicant is entitled to relief on grounds 1 and 2, it is unnecessary to determine this ground.

Ground 4

69. Ground 4 is as follows;

> *4. The Second Respondent made an error of law in that she took into account irrelevant considerations in making her recommendation that the Applicant is not a person to whom Australia has protection obligations under the Refugees Convention.*
>
> *Particulars*
>
> *4.1 Before making the recommendation, the Second Respondent took irrelevant considerations into account including:*
>
> *4.1.1 The reasons for the Applicant leaving Iran;*
>
> *4.1.2 The positive experiences of the Applicant in Iran during his childhood;*
>
> *4.1.3 The positive experiences of the Applicant's mother in Iran during the Applicant's childhood.*

Applicant's submissions

70. The applicant submits that:

a) despite the apparent finding that the applicant left Iran to avoid his military service obligation, the IMR separately found that the applicant left Iran on the basis of economic imperatives;[99]

b) this finding is not inconsistent with a fear of persecution. Persecution can involve significant economic hardship that threatens a person's capacity to subsist;[100] and

c) the considerations set out in the particulars above are wholly irrelevant to the decision that had to be made by the IMR.

Minister's submissions

71. The Minister submits that the alternative grounds put as to taking into account irrelevant considerations, or failure to take into account relevant considerations, (grounds 4 and 5) do not justify relief under the doctrine as explained in *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Limited & Ors*[101] and *Minister for Immigration & Multicultural Affairs v Yusuf & Anor*.[102] The particulars provided in support of each of those two grounds represent parts of the accounts provided by the applicant, which the IMR was entitled to have regard to (in the case of ground 4) or decline to make findings about in favour of the applicant (in the case of ground 5).

Consideration – ground 4

72. Assuming for present purposes that the particulars specify considerations, as opposed to the recitation of specific aspects of the evidence, none of those considerations is irrelevant to the question of whether or not the applicant was a person to whom Australia has protection obligations under the Convention. Each of the matters was a matter relevant to a determination by the IMR as to whether or not the applicant had a well-founded fear of persecution in Iran in the future. As indicated above, *Guo* is authority for the proposition that in determining whether or not there is a risk of future persecution, past events are relevant. A person's reasons for leaving a country will

[99] CB 182-183 at para.54.
[100] *Migration Act*, s.91R(2)(d)-(f).
[101] (1986) 162 CLR 24.
[102] (2001) 206 CLR 323; [2001] HCA 30.

almost always be relevant to whether there is a well-founded fear of persecution, and particularly so here where the reasons include a range of economic and social discrimination and disadvantage as alleged by the applicant, including discrimination and disadvantage arising from his ethnicity. Likewise, the possibility that the applicant left to avoid military service might be relevant to whether he has a well-founded fear of persecution in the future, both as an indicator of a lack of any other reason for leaving Iran (that is a lack of any other reason for a fear of persecution), but also a possible well-founded fear of future persecution if avoidance of military service might result in harm for a Convention reason. Alternatively, it might constitute a lack of a basis for a well-founded fear of persecution on the basis of a Convention reason if any harm arose out of the application of laws of merely general application.

73. The childhood experiences of the applicant, and the applicant's mother's experiences during the applicant's childhood, might also be relevant to whether or not the applicant has a well-founded fear of persecution in the future. Stability in residence, education and employment might all be factors which suggest that the applicant has had a life untroubled by persecution because of his ethnicity (or any other Convention reason). Conversely, where, for example, a young man and his parents have lived an itinerant agricultural or building labourers life, shifting from one place to another, working or not, without documentation, usually underpaid when working or not paid at all, and frequently moving on as a consequence of the activities of an opposing ethnic or religious majority, those factors, equally, might be relevant to whether or not there was a well-founded fear of future persecution based on the person's, or the person's parents, experience during a person's childhood. These are factual matters routinely considered by independent merits reviewers (and the RRT) when dealing with allegations of a well-founded fear of persecution.

74. For the above reasons the considerations set out in ground 4 were relevant considerations, and ground 4 is not made out.

Ground 5

75. Ground 5 is as follows:

5. The Second Respondent made an error of law in that she failed to take into account relevant considerations in making her recommendation that the Applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

Particulars

5.1 Before making the recommendation, the Second Respondent failed to take relevant considerations into account including:

5.1.1 That the Applicant is of the race of Faili Kurd;

5.1.2 That the Applicant is, or is perceived in Iran to be, a member of a social group comprising stateless persons in Iran;

5.1.3 That the Applicant is perceived by the authorities and other[s] in Iran as having Iraqi nationality;

5.1.4 That the Applicant is, or will be, perceived by the authorities and others in Iran as having anti-regime political opinions;

5.1.5 Whether the Applicant is able to return to Iran;

5.1.6 Whether the Applicant is willing to return to Iran and, if not, whether he was unwilling owing to a well-founded fear of persecution in Iran at the time that the recommendation was made.

Applicant's submissions

76. The applicant submits that:

a) the IMR did not address the issue of whether the applicant was able to avail himself of the protection of Iran, and did not make a finding in that regard;

b) the IMR did not address the issue of whether the applicant was willing to avail himself of the protection of Iran, and if not why not, and did not make a finding in that regard;

c) the IMR Recommendation was, for that further reason, not made according to law; and

d) the IMR did not address the applicant's claims that he was perceived in Iran to be an Iraqi, or that as a consequence of the

circumstances of his departure from Iran, he would be imputed to have anti-regime political opinions. Failure to address those matters arguably amounts to a failure to take relevant considerations into account, which gives rise to an error of law.

Minister's submissions

77. The Minister submitted as follows:

a) some general observations may be made about the legitimacy with which the IMR approached her task. The observations that she made concerning inconsistencies and uncertainties in the applicant's evidence, particularly concerning matters going to his claimed nationality and citizenship, were all within the province of the IMR as a finder of fact, *par excellence*. Thus the conclusions as to the applicant's credibility and the resulting finding that he is not stateless and not an Iranian citizen were fairly open to the IMR;

b) accordingly, the application for judicial review must fail because the rejection of the applicant's credibility was open on all of the evidence. Even if there were any error of law on matters ancillary to those two core conclusions (which is denied) such an error of law necessarily does not go to jurisdiction, nor is it one of a kind that would justify relief under s.75(v) of the *Constitution*, as applied by s.476 of the *Migration Act*; and

c) repeats the submissions set out at para.72 above.

Consideration – ground 5

78. The essence of the applicant's claim was that he would be persecuted in the future on the basis of his race, as a Faili Kurd, as was found by the RSA officer. There was a clear and palpable claim of a well-founded fear of persecution on the basis that the applicant was a Faili Kurd. The IMR did not consider this claim, considering only the claim based on Kurdish ethnicity, and not Faili Kurdish ethnicity, because the

IMR, wrongly and unreasonably, said that the applicant had not himself claimed to be a Faili Kurd.[103]

79. The country information set out in the IMR Recommendation by the IMR demonstrates that there is an issue, or a possible basis for claiming, a well-founded fear of persecution on the basis of the treatment of Faili Kurds in Iran, whether because of their ethnicity alone, or whether because of imputed political opinion in relation to considerations associated with the possibility of Kurdish autonomy, or imputed anti-Iranian regime political opinions arising from issues associated with Kurdish autonomy or the perception that Faili Kurds are Iraqis who are opposed to the Iranian regime. Whether or not the IMR might have arrived at the same conclusion having considered the country information is not presently material, because the IMR failed to consider the applicant's claims on the basis that he was a Faili Kurd, because it concluded, wrongly and unreasonably, that no such claim was made.

80. That the applicant was a Faili Kurd, and made claims on that basis, was therefore a relevant consideration to which the IMR ought to have had regard, and failure to do so gives rise to jurisdictional error, or at least an error of law, sufficient to warrant relief in the terms sought by the applicant. Although the claim was not put on this basis it might have been said, in the alternative, that the IMR failed to have regard to an essential integer of the applicant's claim.

81. As to the claim that the IMR failed to have regard to the fact that the applicant might have been perceived in Iran to be a member of a social group comprising stateless persons in Iran, the Court (giving the findings and reasons in the IMR Recommendation a proper reading in accordance with the High Court's reasoning in *Wu Shan Liang*) considers that the IMR did have regard to the fact that the applicant alleged that he was "*stateless*", and that he was a member of a particular social group, namely stateless persons in Iran, those claims being set out at the very beginning of the findings and reasons. Moreover, the IMR went on to consider whether or not the applicant was in fact stateless, and concluded that he was not, but rather that he was of Iranian nationality, a finding about which the IMR considered

[103] See paras.36-60 above.

there was no doubt, and, in those circumstances, no requirement arose to consider, any further, the possibility of the applicant being persecuted on the basis that he was a member of a social group comprising stateless persons in Iran. Likewise, with respect to the applicant's perceived Iraqi nationality, that issue was subsumed by the finding of Iranian nationality. The strength of the finding of Iranian nationality is such that it overcomes the perception issues which might otherwise, in the event that the IMR had some doubt about the nationality issue, have required further consideration of the stateless person and perceived Iraqi nationality claims. Those claims, however, have not been made out for reasons set out immediately above.

82. As for the claims that the applicant will be perceived by the authorities as having anti-regime political opinions, and whether he is able to return to Iran, or whether the applicant is willing to return to Iran, and if not whether he was unwilling owing to a well-founded fear of persecution in Iran at the time that the IMR Recommendation was made, those issues are (again on a proper reading in accordance with the *Wu Shan Liang* principles) adequately dealt with by the IMR. In particular, the IMR finds that the applicant is "*devoid of a political profile*"[104] and would be able to return to Iran, even though he risks some punishment by reason of the application of laws of general application for departing with a false Iranian passport,[105] and likewise that he would have no basis for a well-founded fear of persecution as a failed asylum seeker because of his lack of a political profile and because he had never suffered persecution in the past in Iran.[106]

83. In the circumstances, therefore, the applicant has made out that part of ground 5 founded in the alleged failure of the IMR to take into account a relevant consideration, namely the applicant's race as a Faili Kurd (ground 5.1.1), but otherwise ground 5 has not been made out. The extent to which ground 5 has been made out does however justify the relief sought by the applicant.

[104] CB 160 at para.58.
[105] CB 160 at para.57.
[106] CB 160 at paras.57 and 58.

Ground 6

84. Ground 6, which was added at hearing, is as follows:

> *The applicant was denied procedural fairness in relation to the finding by the second respondent that he had left Iran to avoid his military service obligations.*

Applicant's submissions

85. The applicant submits that:

a) the IMR said that she was not "*satisfied that [the applicant] did not leave Iran in October 2010 in order to avoid his military service obligations*";[107]

b) if this be a finding it is vitiated by two errors:

i) firstly, the IMR approached the issue as if there were a presumption that the applicant had left Iran for that reason, and the onus was on him to rebut that presumption by adducing evidence to prove that he did not; and

ii) secondly, although the topic of military service was mentioned,[108] this suggestion was not put to the applicant, and he was not given an opportunity to respond to it, although other matters were put to him,[109] and it was put to him that his only reason for leaving Iran was for economic opportunities and a better life;[110]

c) the IMR therefore made a finding as to the applicant's reason for leaving Iran which was not put to him, and imposed a burden of disproof on the applicant. The unfairness in doing so was compounded by the IMR putting to the applicant a different reason for leaving as the sole reason. This was procedurally unfair to the applicant;[111]

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[107] CB 182 at para.52.
[108] CB 169 at para.22.
[109] CB 170 at para.27.
[110] CB 170-171 at para.28.
[111] Citing *Plaintiff M61* CLR at 353-354, 355 and 356-357 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; HCA at paras.77-78, 85-86 and 91.

d) the IMR Recommendation was, for that further reason, not made according to law;

e) despite the apparent finding that the applicant left Iran to avoid his military service obligation, the IMR separately found that the applicant left Iran on the basis of economic imperatives;[112] and

f) this finding is not inconsistent with a fear of persecution. Persecution can involve significant economic hardship that threatens a person's capacity to subsist.[113]

Minister's submissions

86. The Minister submits that:

a) the finding of a lack of satisfaction that the applicant did not leave Iran to avoid compulsory military service,[114] did not manifest any legal error. The finding is somewhat inelegantly expressed by reason of the use of a double negative, but fairly construed, consistent with the *Wu Shan Liang* principle, it reflects the IMR's application of her level of "satisfaction". Nothing in the surrounding language employed by the IMR invites the formation of a presumption on this, or any other factual issue;

b) nor was there any breach of procedural fairness in the process that preceded this finding. The applicant himself had raised before the RSA officer his own claim that he could not obtain a genuine passport as he had no birth certificate and did not do military service.[115] The applicant himself had acknowledged to the IMR that if he had been an Iranian citizen he would have commenced his military service after leaving school.[116] The issue arose after the more general, but related, subject had been canvassed about whether members of the applicant's family had birth certificates issued in Iraq or Iran;[117] and

[112] CB 182-183 at para.54.
[113] *Migration Act*, s.91R(2)(d)-(f).
[114] CB 182 at para.52.
[115] CB 84.
[116] CB 169 at para.22.
[117] CB 169 at para.20.

c) the answers given by the applicant on the subject were found by the IMR to be inconsistent and formed part of the basis for the IMR's rejection of the overall credibility of the applicant.[118] The IMR was entitled to make such adverse findings on the general issue of citizenship and on means of its manifestation (namely possession of a birth certificate) and the more specific issue of leaving Iran in order to avoid military service obligations. The issue was not a new or fresh one on which it could be said the applicant had no prior notice that it may be partly dispositive of his claim. In any event, the specific finding about leaving to avoid military service obligations was effectively subsumed by the even more important finding about the "crux" of the applicant's decision to leave Iran to obtain more economic opportunities and to have a better life.[119]

Consideration – ground 6

87. In relation to the issue of military service the IMR Recommendation records that at the IMR Interview the IMR:

> *… asked the claimant to tell me at what age men in Iraq [sic – Iran] commenced their compulsory military service in Iran. He answered: "Eighteen". I asked him how old he is now, and he answered: "Nineteen", and he agreed that he was eighteen at the time he left school. He then acknowledged that if he had been an Iranian citizen, he would have commenced his military service after leaving school.*[120]

88. When the IMR put to the applicant what her current thinking was (something that she was not obliged to do) the IMR did not mention that the IMR was considering making a determination, in the context of whether the applicant had a well-founded fear of persecution, as to whether or not the applicant left Iran in order to avoid military service.[121]

89. In the IMR Recommendation's findings and reasons the IMR found as follows:

[118] CB 169 and 180-182 at paras.20 and 47-50.
[119] CB 182 at paras.52-54.
[120] CB 146 at para.22.
[121] CB 147 at para.27-28.

> *At his* Refugee Status Assessment Interview*, it is recorded that the claimant told the Refugee Status Assessment Officer that he departed from Iran on a false Iranian passport in his own name which contained his correct birth date and his photograph. He claimed that he could not obtain a genuine passport because he had no birth certificate and did not do military service. At his* Independent Merits Review *Interview, the claimant acknowledged that male Iranian citizens are compelled to do military service at eighteen years of age, and that if he had been an Iranian citizen, he would have commenced his military service soon after completing his twelve years of schooling in May/June 2010. However, as noted above, the claimant departed from Iran in October 2010, which is about the time he would have been expected to commence his two-year compulsory military service if he was an Iranian citizen. As I am not satisfied that the claimant is not an Iranian citizen, neither I am satisfied that he did not leave Iran in October 2010 in order to avoid his military service obligations[.]*[122]

90. It is further relevant to note that the RSA Record goes no further than indicating that at the RSA stage the issue of military service only arose on the applicant's own initiative in the context of his claim that he was a stateless person, and that if he was not a stateless person, but an Iranian citizen, then he would have done military service.[123]

91. There is no evidence that either at the RSA stage, or relevantly for these purposes, the independent merits review stage, that the question of the applicant leaving Iran to avoid military service was put, squarely or otherwise, to the applicant. There was an obligation to put the matter to the applicant in such a way as to give him a sufficient opportunity to give evidence or make submissions about an issue in respect of which the IMR reached an adverse conclusion which was in part determinative of the question as to whether or not the applicant held a well-founded fear of persecution if returned to Iran.[124] It is not correct, as was asserted by the Minister, that the military service issue was subsumed in the finding that the applicant left Iran to pursue a better life and better economic opportunities outside Iran. A proper reading of the findings and reasons shows that the IMR dealt discretely with the

[122] CB 159 at para.52.
[123] CB 84.
[124] *SZBEL v Minister for Immigration & Multicultural & Indigenous Affairs & Anor* (2006) 228 CLR 152 at 165 per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ; [2006] HCA 63 at para.44 per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ.

issue of military service and the issue of economic opportunity and a better life, and reached separate conclusions with respect to each of those matters, albeit that the conclusions were to the same effect in terms of whether or not the discrete issues gave rise to a well-founded fear of persecution on the part of the applicant.[125]

92. In the circumstances, the applicant was not given an opportunity, or any sufficient opportunity, to deal with the allegation that he left Iran in order to avoid his military service obligations, and that that was in part determinative of whether or not he had a well-founded fear of persecution if returned to Iran.

Conclusions

93. For the reasons set out above the Court has concluded that:

a) grounds 1, 2, 5.1.1 and 6 of the application have been made out;

b) grounds 4 and the remainder of ground 5 of the application have not been made out; and

c) it is unnecessary to determine whether ground 3 has been made out.

Relief

94. In circumstances where the Court has concluded that grounds 1, 2, 5.1.1 and 6 of the application have been made out, and as a consequence the IMR Recommendation was not made in accordance with the law in that:

a) the IMR failed to have regard to relevant considerations in determining the issue of the applicant's nationality;

b) the IMR made a determination that the applicant had not himself claimed to be a Faili Kurd in a manner which was unreasonable;

c) the IMR failed to take into account a relevant consideration, namely that the applicant claimed to be a Faili Kurd; and

[125] CB 159-160 at paras.52 (military service) and 53-54 (economic opportunity).

d) the IMR denied the applicant procedural fairness with respect to the question of whether or not the applicant left Iran to avoid military service,

it is appropriate to grant declaratory and injunctive relief to the applicant, broadly in the terms sought in the amended application.

Costs

95. The Court will hear the parties as to costs.

I certify that the preceding ninety-five (95) paragraphs are a true copy of the reasons for judgment of Judge Lucev

Date: 9 May 2013