FEDERAL COURT OF AUSTRALIA

MZWDG v Minister for Immigration and Multicultural and Indigenous Affairs

[2006] FCA 497

MIGRATION – appeal from decision of Federal Magistrate – applicant for protection visa – behaviour modification claim – whether claim put to Tribunal – whether jurisdictional error – whether privative clause decision – whether prerogative writs appropriate in circumstances

Craig v South Australia (1995) 184 CLR 163 cited
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 cited
Plaintiff S157 of 2002 v Commonwealth of Australia (2003) 211 CLR 476 cited
Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2004) 216 CLR 473 applied
Minister for Immigration and Multicultural and Indigenous Affairs v VWBA [2005] FCAFC 175 cited
WAKZ v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1065 cited
Abebe v Minister for Immigration and Multicultural Affairs (1999) 197 CLR 510 cited
Paramananthan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28 cited
Minister for Immigration and Multicultural and Indigenous Affairs v VFAY [2003] FCAFC 191 cited
Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 cited
Abeyesinghe v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1558 cited
Low v Commonwealth [2001] FCA 702 cited
Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194 cited
Htun v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 244 cited
Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379 cited
NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 216 ALR 1 cited
Sellamuthu v Minister for Immigration and Multicultural Affairs (1999) 90 FCR 287 cited
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597 cited
Hicks v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 757 cited

MZWDG v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS AND REFUGEE REVIEW TRIBUNAL
VID 1351 of 2005

YOUNG J
5 MAY 2006
MELBOURNE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 1351 OF 2005**

BETWEEN:	**MZWDG** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**
JUDGE:	**YOUNG J**
DATE OF ORDER:	**5 MAY 2006**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The Refugee Review Tribunal be added as the second respondent to the proceedings.
2. The appeal be allowed.
3. The decision of Phipps FM made on 7 October 2005 be set aside.
4. The decision of the second respondent made on 5 January 2004, upholding the decision of the delegate of the first respondent made on 10 January 2002 to refuse the appellant the grant of a protection visa, be set aside.
5. An order in the nature of a writ of mandamus issue remitting the matter to the second respondent and requiring that the second respondent hear and determine the matter according to law.
6. The first respondent pay the appellant's costs of the appeal and the costs of the proceeding before Phipps FM.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 1351 OF 2005**

BETWEEN:	**MZWDG** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**
JUDGE:	**YOUNG J**
DATE:	**5 MAY 2006**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

BACKGROUND

1 This is an appeal from a judgment of Phipps FM, given on 7 October 2005. His Honour dismissed the appellant's application pursuant to s 75(v) of the Constitution for prerogative writs in relation to a decision of the second respondent, the Refugee Review Tribunal ('the Tribunal'), and upheld the decision of a delegate of the first respondent, the Minister for Immigration and Multicultural and Indigenous Affairs ('the Minister'), to refuse the appellant the grant of a protection visa.

2 The appellant is a national of Burma (also known as Myanmar). According to his protection visa application, he is a member of the Mon ethnic group and a Buddhist monk. He arrived in Australia on 16 May 2001 on a visitor visa granted to him in Rangoon (also know as Yangon) on 20 February 2001.

3 The appellant lodged an application for a protection visa on 7 September 2001. He claims to have a well-founded fear of persecution in Burma because of his political opinions and his Mon ethnicity. The appellant made a statutory declaration on 14 November 2001 which more fully sets out his claims to refugee status ('the first statutory declaration').

4 In the first statutory declaration, the appellant says that in January 1990 he joined the Mon National Democratic Front ('the MNDF'), a newly-formed organisation which had been registered as a political party and which campaigned for the liberation of Mon people, their general welfare, and the regeneration of Mon culture. MNDF fielded two candidates for election in May 1990, one of whom was successful. Not long after the election, the MNDF had its registration cancelled and its legal status revoked by the Burmese government, together with a number of other political organisations.

5 In addition to his involvement with the MNDF, the appellant says that the Burmese government found out that he was involved in secretly distributing magazines produced by the Young Mon Party, which is based in Thailand, and the Mon New State Party, which is based in Burma. He did this on three or four separate occasions. As a result, early in 1993, the appellant received notification to report to the Military Intelligence Office in Burma. There he was interrogated about his activities, but was discharged after a few hours. On leaving, the officers warned him that if he was caught distributing anti-government political material in the future, he would be prosecuted.

6 The appellant joined the Pha Ya Ghi Monastery in Rangoon ('the Monastery') on 5 May 1993. He studied Buddhist teachings at the associated Mon Pali University. He says that he joined the Monastery because of his religious convictions, but he also saw it as a place of sanctuary given the anxiety that he felt as a result of his interrogation. Within the Monastery, the appellant remained concerned about the welfare of Mon people.

7 On 23 April 1999, in the context of his teachings on Mon literature, the appellant says that he made a speech at the Monastery to a group of approximately 230 students, who were mostly Mon people, but who came from various colleges and campuses. In the speech, he strongly criticised the treatment of Mon people by the Burmese government. Later that evening, the appellant was informed by a friend that a group of soldiers had come to the Monastery looking for him. The appellant immediately left the Monastery and fled to Thailand. However, because of the pressure on Burmese 'refugees' living in Thailand, the appellant made arrangements to leave Thailand for Australia.

THE TRIBUNAL'S DECISION

8 A delegate of the Minister refused the appellant's protection visa application on 10 January

2002. An application for review of that decision was lodged on 7 February 2002 with the Tribunal. The Tribunal invited the appellant to give oral evidence and present arguments at a hearing on 26 November 2003.

9 The appellant provided the Tribunal with a further statutory declaration made on 13 November 2003 ('the second statutory declaration'). In the second statutory declaration, the appellant says that in Burma he had very little opportunity to express his political beliefs, and the statements that he had made, including the speech at the Monastery on 23 April 1999, had got him into serious trouble. The appellant says that in Australia he has been able to express his beliefs openly, and is able to work with groups committed to the struggle for democracy in Burma.

10 The appellant's political activities in Australia included the following matters. In May 2002, he took part in the fundraising activities of the National League for Democracy (Liberated Area) ('NLD (LA)'), including attendance at church hall meetings in Springvale and Mulgrave in May and October 2002. In February 2003, the appellant became a member of the Mon New State Party. On 31 May 2003, he attended a meeting of a group called Australia Karen Organisation. On 12 June 2003, he participated in a prayer ceremony at a Buddhist Monastery in Noble Park which was held to commemorate an incident in Burma on 30 May 2003 when 70 members of the National League for Democracy were killed and Aung San Suu Kyi and 35 others were taken into detention. On 19 June 2003, he participated in a demonstration involving about 150 to 200 people outside the Burmese Embassy in Canberra. The demonstration was organised by several Burmese organisations in Australia, including NLD (LA), the all Burma Student Democratic Front, the People's Defense Forum (Burma) and the Australian Mon Association ('the AMA'). On 8 August 2003, he participated in a second demonstration involving 190 to 220 demonstrators outside the Burmese Embassy in Canberra. The demonstrators marched as a group from the Burmese Embassy to Parliament House. In connection with this demonstration, the appellant was part of a smaller group of eight individuals which approached the Embassies of Singapore, Philippines, Indonesia, Malaysia and Thailand to deliver a letter to them. Between 1 and 3 November 2003, the appellant attended a reconciliation conference in Thornbury, Victoria, which was organised by the Australian Karen Youth Project. The aim of the conference was to promote reconciliation between different ethnic groups in Burma. These activities are described in somewhat greater detail in the second statutory declaration.

11 The Tribunal found the appellant to be a direct witness and accepted his evidence about his experiences in Burma. But it did not accept that the evidence established the appellant's claim that he was persecuted by the Burmese military because of his political opinions and his Mon ethnicity. The Tribunal held that the appellant had no profile with the Burmese authorities, and he had given them no reason to be interested in him. In relation to the appellant's claim that he will be persecuted on his return to Burma because of his activities in Australia, the Tribunal accepted that the appellant may be questioned about his activities in Australia and monitored by the government if he returns to Burma, but said that does not amount to persecution. The Tribunal noted that the country information report of the Department of Foreign Affairs and Trade ('DFAT') advises that 'active and high-profile' people would be targeted and perhaps persecuted on their return to Burma, but the Tribunal was not satisfied that the appellant would be regarded by the Burmese government as an active and high-profile demonstrator, or that the AMA is of particular concern to the Burmese authorities.

12 The Tribunal concluded that the appellant does not face a real chance of persecution on return to Burma as a failed asylum-seeker whose presence might or might not have been noted by the Burmese government at the political and social gatherings he has attended in Australia.

13 In a crucial passage of its reasons for decision, the Tribunal said:

> *'In all, the Tribunal is not satisfied that the [appellant's] activities in Australia would cause him to be persecuted on return to Burma. Nor is it satisfied that the [appellant] had a profile in Burma which brought him to the adverse interest of officials in Burma. Even considered cumulatively, the Tribunal is not satisfied that the [appellant] will have an adverse profile with Burmese authorities. If he returns to Burma, the Tribunal is satisfied that the [appellant], who knows and understands the political situation there and who does not have a record of consistent political activity in Burma, will not act in such a way as to bring himself to the adverse attention of those authorities.'*

14 The Tribunal affirmed the delegate's decision on 5 January 2004.

THE FEDERAL MAGISTRATE'S DECISION

15 The appellant filed an amended application for review of the Tribunal's decision with the Federal Magistrates Court on 15 June 2004. On 7 October 2005, that application was dismissed by Phipps FM.

16 Before Phipps FM, the appellant argued that the Tribunal decided that he would not face persecution if he returned to Burma because he would not act in such a way as to bring himself to the Burmese government's attention. The appellant said that the Tribunal asked itself the wrong question – it should have considered whether he acted in that way in the past and would act that way if he returned to Burma in the future because he feared persecution ('the behaviour modification claim').

17 Phipps FM found that the behaviour modification claim was not considered by the Tribunal. In his Honour's opinion, therefore, the issue was whether it should have been considered by the Tribunal having regard to the appellant's claims and evidence before the Tribunal. Phipps FM referred to the second statutory declaration but concluded that '[t]here is nothing in this evidence to suggest that the [appellant] modified his behaviour because he feared persecution.' His Honour considered that in Burma the appellant had little opportunity to express his beliefs because of his 'living conditions'. His Honour also said:

> *'A fair reading of the Tribunal's finding that the [appellant], if he returns to Burma, will not act in such a way as to bring himself to the adverse attention of the authorities, is that it is a finding that he would continue to live in the way he had in the past. The Tribunal found that his past activities did not make him of adverse interest to the authorities. It is not a finding that the [appellant] will modify his behaviour because of fear of persecution. It is a finding based on what has occurred in the past.*
>
> *A claim by the [appellant] that he had modified his behaviour because of fear of persecution was not apparent in the evidence for the Tribunal to consider. It did not ask the wrong question. There is no jurisdictional error.'*

APPEAL TO THIS COURT

18 The appellant filed a notice of appeal on 28 October 2005 setting out three grounds of appeal:

> *'1. His Honour erred in finding that the evidence before the [Tribunal] did not give rise to a modified behaviour claim.*
>
> *2. His Honour should have held that the evidence before the Tribunal did give rise to such a claim and the Tribunal's failure to consider this claim constituted a failure to consider the persecution claim and therefore constituted a jurisdictional error.*
>
> *3. His Honour should have held that the Tribunal was required to ask whether the appellant's modified behaviour was influenced by the threat of serious harm. The failure of the Tribunal to ask such a question constituted jurisdictional error.'*

APPELLANT'S CONTENTIONS

19 The appellant contended that, by virtue of the way it dealt with the behaviour modification claim, the Tribunal's decision is marred by jurisdictional error: the Tribunal asked itself the wrong question, and as a result it failed to consider the appellant's claim properly: see generally *Craig v South Australia* (1995) 184 CLR 163; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 ('*Plaintiff S157*'); and *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2004) 216 CLR 473 ('*Appellant S395/2002*'). For similar reasons, the appellant contended that Phipps FM erred in law. The appellant seeks orders that the Tribunal's decision be quashed and that the Tribunal be directed to decide the appellant's application for a protection visa according to law.

20 The appellant focused on the Tribunal's finding that the appellant knows and understands the situation in Burma, and not having a record of consistent political activity in Burma, the appellant would not act in such a way as to bring himself to the adverse attention of the authorities. The appellant contended that this finding impliedly recognises that he modified his behaviour in the past because of his knowledge of the Burmese political climate, and would do so in future if returned to Burma. The appellant submitted that Phipps FM erred when he concluded that the Tribunal's finding was merely a finding based on what had occurred in the past and a finding that the appellant would continue to act in the same way in the future if he returned to Burma.

21 The appellant submitted that the Tribunal made jurisdictional errors of the kind described in *Appellant S395/2002*. His counsel submitted that the applicable principles were summarised by the Full Court (Sundberg, Marshall and North JJ) in *Minister for Immigration and Multicultural and Indigenous Affairs v VWBA* [2005] FCAFC 175 ('*VWBA*'), where Sundberg and North JJ said at [6] that *Appellant S395/2002* stands for three propositions (references omitted):

> '*(a) The Tribunal will err if it assesses a claim on the basis that an applicant is expected to take reasonable steps to avoid persecution if returned to his or her country of origin. The Tribunal's task is to assess what the applicant will do, not what he or she* should *do.*
> *(b) If the Tribunal finds that a person will act in a way that will reduce a risk of persecution that would otherwise have been well-founded, the*

Tribunal must consider why *the person will act in that way. If it fails to do so, it commits a jurisdictional error.*

(c) The Tribunal will err if, having found that a person will act in a way that will reduce a risk of persecution, it does not go on to consider whether the person nevertheless has a well-founded fear of persecution because, despite the conduct that reduces the risk, there is still a real risk that the person will be persecuted.'

22 The appellant also relied on the decision of French J in *WAKZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1065. His Honour said at [57]-[58]:

> *'Where a tribunal considers, by reference to the previous activities of a person in the country which they have left, that the person was not a political dissenter at a level likely to attract persecution and that the person is unlikely to become a political dissenter upon return to the home country, it engages in an entirely legitimate exercise. Otherwise every applicant for a protection visa, however bland their history of activity in the country from which they have come, would have to be considered for a protection visa on the hypothesis that upon return such a person could become a political activist of a kind likely to be persecuted by the authorities of the home country.*
>
> *If the Tribunal had simply approached its consideration of the applicant's likely conduct on return by a process of extrapolation based on her pre-departure history in Burma and her subsequent history in Australia, it would not have erred. In this case, however, in the passage to which counsel has drawn attention, it seems to have gone further. The Tribunal accepted that the applicant's brief record of anti-government activity while in Burma was one for which she paid dearly. Its satisfaction that she would not be "motivated to be involved in anti-government activities in Burma in such a way as to put herself at risk with Burmese authorities" implied a finding that fear of persecution would prevent her from being involved in such activities. If that is so, then the Tribunal appears to have overlooked a subjectively and objectively based fear of persecution on the part of the applicant for a Convention ground.'*

RESPONDENTS' CONTENTIONS

23 The Minister contended that the Tribunal is only obliged to consider the evidence that is put to it by the appellant. It is up to the Tribunal, as an inquisitorial body, to deal only with the appellant's material and evidence before it: see *Abebe v Minister for Immigration and Multicultural Affairs* (1999) 197 CLR 510 ('*Abebe*'), per Gummow and Hayne JJ at 576 [187].

24 This contention was pressed at two levels. At the higher level, the Minister contended that as the behaviour modification claim was not raised by the appellant before the Tribunal, there

was no error in the way that the Tribunal dealt with the appellant's claim. Phipps FM was correct, so the Minister said, in finding that the Tribunal was not obliged to inquire into the behaviour modification claim because it was not explicitly raised by the appellant at the hearing or in the second statutory declaration.

25 In oral submissions, the Minister also put the argument at an alternative and lower level. This argument accepted that the Tribunal may be required in particular circumstances to investigate beyond the limits of the claim expressly made by the appellant, but it maintained that there is nothing in the present case to indicate that it was bound to do so because the behaviour modification claim was not explicitly or implicitly raised by the appellant: see *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28 ('*Paramananthan*') per Merkel J at 62-63; *Minister for Immigration and Multicultural and Indigenous Affairs v VFAY* [2003] FCAFC 191 ('*VFAY')*, per French, Sackville and Hely JJ at [97].

26 The Minister submitted that on a fair reading of the Tribunal's decision in its entirety, the Tribunal based its decision on the appellant's past activities in Burma and also his activities in Australia. According to counsel for the Minister, the activities in which the appellant engaged in Australia were such that the appellant would not have a high profile – he was merely a 'noisy face in a crowd'. The Minister submitted that the Tribunal had not erred in the way in which it looked at the appellant's past behaviour and transposed it into the future, citing *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559. The Minister also submitted that it can be inferred that as the appellant had the unrestricted right to engage in political activity in Australia, but did not join a political party for two years, he would not engage in activities on return to Burma that would bring him to the adverse attention of the authorities.

27 The Minister contended that the Tribunal's consideration of the behaviour modification claim does not reveal any error, let alone jurisdictional error. In the Minister's submission, it is apparent from the Tribunal's reasons that it looked at the claims presented by the appellant and determined that it was not satisfied that he has a well-founded fear of persecution. In doing so, the Tribunal did not fail to ask the correct question.

ISSUES ON APPEAL

28 As Phipps FM identified, the Tribunal did not consider the behaviour modification claim. Accordingly the issues to be determined in this appeal are whether that claim arose from the evidence before the Tribunal and, if so, whether the Tribunal's failure to consider it amounts to jurisdictional error.

29 An appeal from a judgment from the Federal Magistrates Court is an appeal by way of re-hearing: see *Abeyesinghe v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1558 at [4] (*'Abeyesinghe'*); *Low v Commonwealth* [2001] FCA 702 at [3]. The right of appeal exists for the correction of error: see *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203-204 [14]. Thus, this Court's appellate powers are only exercisable if the appellant can demonstrate that the orders under appeal are the result of some legal, factual or discretionary error: see *Abeyesinghe* at [4]. In my view, a legal error by the Federal Magistrates Court will be demonstrated if a behaviour modification claim did in fact arise on the evidence before the Tribunal, and the Tribunal failed to consider it.

A BEHAVIOUR MODIFICATION CLAIM DID ARISE

30 A behaviour modification claim was not explicitly formulated in those terms before the Tribunal. In these circumstances, the respondents rely on the statement by Gummow and Hayne JJ in *Abebe* at 576 [187], to assert that the Tribunal was not required to consider such a claim:

> *'Framed in this way, the submission may, perhaps, assume that proceedings before the Tribunal are adversarial rather than inquisitorial or that in some way the Tribunal is in the position of a contradictor of a case being made by the applicant. Such assumptions, if made, would be wrong. The proceedings before the Tribunal are inquisitorial and the Tribunal is not in the position of a contradictor. It is for the applicant to advance whatever evidence or argument she wishes to advance in support of her contention that she has a well-founded fear of persecution for a Convention reason. The Tribunal must then decide whether that claim is made out.'*

31 In the course of the hearing, a question arose as to how the Minister's argument, founded on *Abebe*, can be reconciled with the comments of Merkel J in *Paramananthan* at 63. His Honour's view, confirmed by the Full Court in *VFAY* at [97], was that:

'In general, an administrative tribunal is entitled to be guided by the issues that the parties choose to put before it for its consideration (see Sullivan v Department of Transport *(1978) 20 ALR 323 at 342,* Repatriation Commission v Hughes *(1991) 23 ALD 270 at 274 and* Tuite v Administrative Appeals Tribunal *(1993) 40 FCR 483 at 487-489) and is entitled to have regard to the case put:* Noble v Repatriation Commission *(unreported, Federal Court, Full Court, No VG 308 of 1997, 3 November 1997) at p 16. However, ultimately the [Tribunal] is under a duty to fulfil its statutory obligation to "review the decision" before it and to do so according to s 420(2), which requires it to act according to the "merits of the case". Unlike an adversarial proceeding, parties do not appear and put a case, as such, to the [Tribunal]. As stated above, the [Tribunal] is required to determine whether it is "satisfied" that the applicant is a person to whom Australia has protection obligations under the Convention.*

Material and evidence, as well as arguments, may be presented to the [Tribunal] but its inquisitorial procedures or enquiries are not limited to or by the materials, evidence, or arguments presented to it. In an appropriate case the [Tribunal] may undertake its own enquiries and, in some instances, may be obliged to do so: see Prasad v Minister for Immigration and Ethnic Affairs *(1985) 6 FCR 155 at 170 per Wilcox J;* Luu v Renevier *(1989) 91 ALR 39 at 49-50 per Davies, Wilcox and Pincus JJ; and* Sun v Minister for Immigration and Ethnic Affairs *(1997) 81 FCR 71 at 118-119; 151 ALR 505 at 547-548 per Wilcox J. Similarly, the [Tribunal] is not to limit its determination to the "case" articulated by an applicant if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the applicant. That obligation arises by reason of the nature of the inquisitorial process and is not dependent upon whether the applicant is or is not represented: cf* Bouianov v Minister for Immigration and Multicultural Affairs *(unreported, Federal Court, Branson J, No NG 134 of 1998, 26 October 1998) at p 2 and* Saliba v Minister for Immigration and Ethnic Affairs *(1998) 89 FCR 38 at 49-50. Representation can be relevant to the content of a duty to act according to "substantial justice" or fairly in a particular case, but cannot affect the fundamental duty of the [Tribunal], acting inquisitorially, to review the decision before it according to the "merits of the case".*

In my view the inquisitorial function of the [Tribunal] and the combined effect of the provisions to which I have referred, is such that the [Tribunal] is required to determine the substantive issues raised by the material and evidence before it. *That duty… is a fundamental incident of the inquisitorial function of an administrative tribunal such as the [Tribunal].'*

32 In *Appellant S395/2002,* the High Court considered the obligation of the Tribunal to consider a behaviour modification claim that had not been specifically articulated by the applicant. McHugh and Kirby JJ said at 488-489 [39]:

'On a number of occasions this Court has said that proceedings before the

> *Tribunal are inquisitorial in nature. The arguments and evidence of applicants or the Minister cannot narrow the Tribunal's jurisdiction to investigate the generality of a claim for a protection visa. Whatever the arguments or evidence of an applicant, the Tribunal is entitled, but not bound, to look at the issue generally. If the Tribunal elects to exercise its jurisdiction more widely than the applicant or the Minister has asked, however, it must do so in accordance with law. Given that the appellants claimed that Bangladesh was "not a safe place for [them] at all" and that they had a "real fear of persecution", the Tribunal was entitled to go beyond examining whether the appellants faced persecution because of their personal history. Notwithstanding that it rejected the particular claims of the appellants, it was entitled to investigate the matter more fully and determine whether the appellants' more general fear of persecution was well-founded. Rejection of an applicant's specific claims of persecution and the failure to identify other forms of harm provide a reason for holding that the applicant had no fear of persecution. But that is all. In the present case, for example, although the appellants did not raise any issue of modifying their behaviour because they feared persecution, it seems highly likely that they acted discreetly in the past because they feared they would suffer harm unless they did. If it is an error of law to reject a Convention claim because the applicant can avoid harm by acting discreetly, the Tribunal not only erred in law but has failed to consider the real question that it had to decide – whether the appellants had a well-founded fear of persecution.'*

33 It is clear from a reading of the judgment in *Appellant S395/2002* that a behaviour modification claim had not been expressly raised before the Tribunal in that case. Nonetheless, the majority held that the Tribunal had fallen into jurisdictional error by not properly considering a behaviour modification claim that emerged from the evidence or the Tribunal's evaluation of that evidence. McHugh and Kirby JJ held that the Tribunal itself had opened up the issue by its examination of the general issue of homosexuality and persecution in Bangladesh, and by its specific finding that the appellants would not be persecuted if they acted discreetly in the future: at 488-489 [38]-[39] and at 493 [53].

34 The analysis of this issue by Gummow and Hayne JJ proceeds on the footing that the Tribunal is not confined by the way in which an applicant formulates his or her claims: the central question whether there is a well-founded fear of persecution must in their view be examined in the light of all the evidence before the Tribunal and the Tribunal's findings of fact. In the case before them, this question had to be addressed in the light of the Tribunal's finding that the appellants were likely to live in a way that would not cause Bangladeshi society to confront their homosexual identity: at 502 [87]. Gummow and Hayne JJ said at 500 [80]:

> *'If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences.'*

35 A little later in their reasons for judgment, Gummow and Hayne JJ at 503 [88] identified the error made by the Tribunal:

> *'[The Tribunal] did not ask* why *the appellants would live "discreetly". It did not ask whether the appellants would live "discreetly" because that was the way in which they would hope to avoid persecution. That is, the Tribunal was diverted from addressing the fundamental question of whether there was a well-founded fear of persecution by considering whether the appellants were likely to live as a couple in a way that would not attract adverse attention. That the Tribunal was diverted in that way is revealed by considering the three statements in its reasons that are referred to earlier: first, that it is* not *possible to "live* openly *as a homosexual in Bangladesh"; secondly, that "[t]o attempt to [live openly] would mean to face problems"; and, thirdly, that "Bangladeshi men can have homosexual affairs or relationships,* provided they are discreet*". Nowhere did the Tribunal relate the first and second of these statements to the position of the appellants. It did not consider whether the adverse consequences to which it referred sufficed to make the appellants' fears well founded. All that was said was that they would live discreetly.'*

36 The dissenting judgments in *Appellant S395/2002* confirm that the appellants in that case had not expressly raised a behaviour modification claim before the Tribunal. Gleeson CJ said at 481-482 [12]:

> *'It was never part of the claim advanced by the appellants to the Tribunal that the persecution they had experienced in the past, and apprehended in future, took the form of repression of behaviour about which they desired to be more open, and that they escaped harm only by concealing their relationship. If such a claim had been made, it would have raised factual and legal questions beyond the scope of the case put to the Tribunal.'*

In his Honour's view, the appellants' argument that the Tribunal had not properly addressed the behaviour modification issue took the Tribunal's reference to discreet behaviour entirely

out of context.

37 The other dissentients, Callinan and Heydon JJ, expressed similar views in their joint judgment at 513-514 [113]:

> *'… In large measure they were not believed. If they had wished to, the appellants could have advanced a claim that their decision to live as they had been living and would live on their return to Bangladesh was influenced by a fear of harm if they did not; or that persons for whom the government of Bangladesh is responsible induce or inculcate a fear of harm in those living openly as homosexuals; or that they are at risk of suffering serious harm constituting persecution if they wished to display, or inadvertently disclosed, their sexuality or relationship to other people. They did not advance any claims of this kind beyond those connected with the factual accounts advanced by them to the Tribunal and rejected in large measure by the Tribunal. The Tribunal accordingly did not err in not dealing with them.'*

38 In my view, it is a natural consequence of the inquisitorial process, to paraphrase Merkel J, that the Tribunal must consider the case that arises from the evidence before it, regardless of how that case is specifically put by the applicant. While the authorities make it clear that the Tribunal is not required to make the applicant's case, it is bound to consider a case on a basis not articulated by the applicant if it is raised by the evidentiary material that is before the Tribunal or by the Tribunal's findings based on that evidence. It is a not an obligation that can be discharged simply by reference to the terms in which the applicant articulates his claim.

39 On the authorities, the Tribunal is obliged to consider at least three types of claim: first, those that are explicitly put by the applicant; secondly, those that are implicit in the material before the Tribunal; and thirdly, those that emerge from the Tribunal's findings or conclusions. For the purposes of this case, it is unnecessary to explore the boundaries of the Tribunal's role any further. But it is important to recognise that in each type of case, regardless of what is put by the applicant or the Minister, the Tribunal must ask itself the right question - whether the applicant has a well-founded fear of persecution for a Convention reason. Where the material before the Tribunal, or the Tribunal's own findings or reasoning process, indicates that the applicant has modified or would modify his or her behaviour if returned to the country of citizenship, the question must be asked why the applicant would do so: see *Appellant S395/2002*, esp per McHugh and Kirby JJ at 489 [39] and per Callinan and Heydon JJ at 503 [88].

40 The appellant's claim was based on evidence that he was involved in anti-government activities in Burma, albeit at a level that probably would not have generated significant government attention aside from the specific incidents mentioned. It was also based on evidence that he has been significantly involved in such activities in Australia. This evidence was accepted by the Tribunal. The Tribunal also accepted evidence to the effect that the Burmese Embassy in Canberra was interested in its citizens in Australia, and it was possible that the appellant's activities in Australia might have been recorded by Burmese officials. Further, the Tribunal accepted evidence that the appellant may be questioned about his activities in Australia on his return to Burma, and that he could be watched for a period after returning. However, it did not accept that this kind of surveillance amounted to persecution. Specifically, the Tribunal considered that the appellant's anti-government activities, both in Burma and subsequently in Australia, would not have the consequence that Burmese authorities would regard him as a significant or high profile activist. The Tribunal accepted general country advice from DFAT which it interpreted to mean that only 'active and high profile' demonstrators would be targeted, and perhaps persecuted, by the authorities on their return to Burma.

41 The Tribunal found that the appellant would not face persecution on return to Burma because it was satisfied that the appellant, who knows and understands the political situation there and who does not have a record of consistent political activity in Burma, will not act in such a way as to bring himself to the adverse attention of those authorities. In my view, as the appellant submitted, this finding recognises that the appellant had modified his behaviour in the past because of his knowledge of the Burmese political situation and was likely to do so on his return to Burma. It is difficult to reach any other conclusion when one considers the evidence before the Tribunal. The effect of that evidence, which the Tribunal accepted, was that the appellant's activities in Burma, and his activities subsequently in Australia, had brought him to the adverse attention of Burmese authorities.

42 Moreover, the appellant's second statutory declaration said that he wished to continue his activities to get rid of the dictatorship in Burma. He explained his position in relation to those activities in the following paragraphs of his second statutory declaration:

> *'3. In Burma I had very little opportunity to express my political beliefs, and what opportunity I took got me into serious trouble.*

…

> *20. I have engaged in these activities in Australia, as it has been the first time in my life I have been able to act upon my convictions safely, and has been a great opportunity for me to organize and participate in a struggle which is difficult if not impossible to engage in at home because of the repression of the military dictatorship. I hope that in the future all the efforts of Australian Burmese groups in solidarity with Burmese in other countries and in Burma itself will result in this regime being overthrown, but unfortunately I cannot see that happening very soon. I greatly fear returning at the moment owing to what occurred before I left. I believe the Burmese regime is trying to kill my people, and is committing genocide against the Mon. I know it is dangerous to speak out against the government but when I did so before I left I felt I had no choice but to do so.'*

If the appellant were to act on his return to Burma in the same manner as he acted previously in Burma, and subsequently in Australia, he would necessarily bring himself to the adverse attention of the Burmese authorities unless he modified his behaviour. It follows, in my view, that the Tribunal's satisfaction that the applicant would not so act was based upon the view that he would modify his behaviour because he knows and understands the political situation and the risks that would attend his protest activities if they were to continue unmodified.

43 In my opinion, whether or not it was explicit or implicit in the material before it, or arose from the Tribunal's findings, the Tribunal's decision clearly raises the issue of whether the appellant had modified, and would in future modify, his behaviour to avoid persecution for a Convention reason.

44 Without being overly critical of his Honour, the explanation of the Tribunal's decision given by Phipps FM is unconvincing and I cannot accept it. His Honour held that the Tribunal had simply made findings about what had occurred in the past but had not considered the behaviour modification claim because it was not required to do so. This finding is difficult to reconcile with the Tribunal's conclusion that the appellant 'knows and understands the political situation [in Burma]' and if he returns, 'will not act in such a way as to bring himself to the adverse attention of those authorities'. The Tribunal has not only made findings about what has occurred in the past – it has expressly considered how the appellant will act in the future.

45 There are other difficulties with the manner in which the Tribunal approached the appellant's claim. The Tribunal's conclusion that, even if the appellant's activities in Burma and Australia are considered cumulatively it was not satisfied that the appellant would have an adverse profile with Burmese authorities, indicates that the Tribunal approached the issue on the basis of the balance of probabilities, rather than by appropriately assessing the possibilities of future persecution: see *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244, per Merkel J at 248 [15]. The latter approach reflects the requirements of the Refugee Convention. To qualify as a refugee, an applicant must have a well-founded fear of persecution. This will be so if the applicant holds a genuine fear of persecution that is founded on a real chance that he would be persecuted for one of the reasons stipulated in the Convention if he returned to the country of his nationality: see *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

46 The Tribunal's assessment of the appellant's likely profile with the Burmese government is perhaps attended by another difficulty. The Tribunal seems to have found that the appellant should be characterised as a 'low-profile' rather than 'high-profile' anti-government protestor, notwithstanding his political activities in Australia and the fact that his activities in Burma had previously brought him to the adverse attention of the authorities. Relying heavily on this categorisation, the Tribunal accepted that 'the [appellant] may be questioned about his activities in Australia and that he could be watched for a period after returning home', but that the appellant's profile was such that he would not be persecuted if he returns to Burma. There is to my mind a degree of artificiality or stereotyping about the process of categorising an applicant as either 'high-profile' or 'low-profile'. This process carries with it a risk of obscuring the fundamental question that the Tribunal is required to consider, namely whether an applicant has a well-founded fear of persecution for a Convention reason. In *NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 216 ALR 1 at 38 [161], Hayne and Heydon JJ said that the risks of classification are acute:

> *'Putting an applicant in one class rather than in another may determine the outcomes of the inquiry; the defining characteristics of the class that is chosen may eliminate from consideration matters that bear upon the chances of the applicant being persecuted.'*

47 See also McHugh J at 8-10 [27]-[31] and 11-12 [38]-[39], and Kirby J at 16 [58]-[59]. In order to decide this appeal, however, it is not necessary for me to say anything further about this issue.

48 The conclusion I have reached is that the Tribunal raised the issue of whether the appellant had modified his behaviour to avoid persecution, and indeed implicitly recognised that he had done so. Accordingly, it was obliged to specifically address the merits of that claim in its decision. It did not do so. Indeed, the Tribunal did not address the scenario of what will happen to the appellant if he returns to Burma and engages in anti-government activity because it made the assumption that he will not act in that way.

THERE WAS A JURISDICTIONAL ERROR

49 There is clear authority that the Tribunal's failure to consider a behaviour modification claim of the kind that arose in this case amounts to jurisdictional error: see *Appellant S395/2002*, esp per McHugh and Kirby JJ at 493 [51] and 493 [53], and per Gummow and Hayne JJ at 500 [80] and 503 [88]-[89]; see also *Sellamuthu v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 287.

50 To address the behaviour modification claim properly, the Tribunal had to address a range of questions. So much is indicated by the following passage from the judgment of McHugh and Kirby JJ in *Appellant S395/2002* at 493 [53]:

> *'The Tribunal's findings on the attitude of Bangladesh society and the statements of the appellants indicate that they were discreet about their relationship only because they feared that otherwise they would be subjected to the kinds of discrimination of which Mr Khan spoke. If the Tribunal had found that this fear had caused them to be discreet in the past, it would have been necessary for the Tribunal then to consider whether their fear of harm was well-founded and amounted to persecution. That would have required the Tribunal to consider what might happen to the appellants in Bangladesh if they lived openly as a homosexual couple. Would they have suffered physical abuse, discrimination in employment, expulsion from their communities or violence or blackmail at the hands of police and others, as Mr Khan suggested were possibilities? These were the sorts of questions that the Tribunal was bound to consider if it found that the appellants' "discreet" behaviour in the past was the result of fear of what would happen to them if they lived openly as homosexuals. Because the Tribunal assumed that it is reasonable for a homosexual person in Bangladesh to conform to the laws of Bangladesh society, however, the Tribunal disqualified itself from properly considering the appellants' claims that they had a "real fear of persecution" if they were returned to Bangladesh.'*

51 The issue is why the appellant would modify his anti-government activities to avoid coming to the attention of the Burmese authorities. More specifically, the critical question is whether

the appellant, knowing and understanding the political situation in Burma, would modify his behaviour because that was seen to be a means of avoiding persecution for a Convention reason. In the present case, to borrow and adapt the language used in *Appellant S395/2002*, the Tribunal was diverted from addressing the fundamental question of whether the appellant has a well-founded fear of persecution by its conclusion that he was likely to live in Burma in a way that would not attract adverse attention. The Tribunal failed to give proper attention to what might happen to the appellant if he lived 'openly' in Burma, in accordance with his convictions and political beliefs.

52 The Tribunal accepted that the appellant's activities had brought him to the adverse attention of the authorities in the past. It did not, however, go to the next step of asking whether there was a real chance that such adverse attention would continue in future in ways that amounted to persecution, or whether the appellant would modify his behaviour to avoid persecution. Applying the second limb in *VWBA* (see par [21] above), the Tribunal, by finding that the appellant 'knows and understands the political situation', failed to properly consider why the appellant will modify his behaviour if he returns to Burma. Nowhere has the Tribunal asked itself why it has reached the conclusion that the appellant will not act in such a way in the future as to bring himself to the adverse attention of the authorities.

53 I have therefore concluded that the Tribunal failed to consider the real question it had to decide. I am also satisfied that Phipps FM erred in law in the findings he reached, and in the conclusion that there was no reviewable error in the Tribunal's decision.

THE DECISION IS NOT A PRIVATIVE CLAUSE DECISION

54 Section 474(1) of the *Migration Act 1958* (Cth) ('Migration Act') provides that a 'privative clause decision' is final and conclusive and must not be challenged, appealed against, reviewed, quashed or called into question in any court and is not subject to prerogative writs in any court on any account. Section 474(2) defines a 'privative clause decision' as a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under the Migration Act or under a regulation or other instrument made under the Migration Act (whether in the exercise of a discretion or not), and subject to the exclusions in subss (4) and (5). A reference to a 'decision' in s 474 includes the matters listed in s 474(3).

55 In *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 757 at [39], French J concluded that '[a] decision infected by jurisdictional error is not "a decision made under [the Migration Act]" and is therefore not within the definition of "privative clause decision" under s 474(2) and (3)'. In *Plaintiff S157/2002*, Gaudron, McHugh, Gummow, Kirby and Hayne JJ concluded at 506 [76], that s 474 of the Migration Act must be read 'so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the [Migration Act]' because an administrative decision which involved jurisdictional error was 'properly regarded, in law, as no decision at all': see also *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, per Gaudron and Gummow JJ at 615 [51].

56 The Tribunal's decision in this case was marred by jurisdictional error. In truth, it was not a decision under the Migration Act. It follows that it is not a 'privative clause decision' within the meaning of s 474 of the Migration Act and the appellant is entitled to relief.

ORDERS

57 On an appeal from the Federal Magistrates Court, this Court has wide powers to give such judgment, or make such order, as in all the circumstances it thinks fit: see s 28 of the *Federal Court of Australia Act 1976* (Cth). In my opinion, the appropriate orders are that the appeal be allowed, the decisions of Phipps FM and the Tribunal be set aside, and that an order in the nature of a writ of mandamus issue remitting the matter to the Tribunal and requiring the Tribunal to hear and determine the matter according to law. In addition, the first respondent should pay the costs of the appellant. There will also be an order that the Tribunal be added as the second respondent to these proceedings.

I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Young.

Associate:

Dated: 5 May 2006

Counsel for the Appellant:	A O'Donoghue (pro bono)
Solicitors for the Appellant:	Victorian Legal Aid
Counsel for the Respondent:	S Burchell
Solicitors for the Respondent:	Australian Government Solicitor
Date of Hearing:	12 April 2006
Date of Judgment:	5 May 2006