FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZOTB v MINISTER FOR IMMIGRATION & ANOR *[2011] FMCA 156*

MIGRATION – Review of decision of Refugee Review Tribunal – whether the Tribunal misinterpreted and misapplied the relevant law in requiring a Convention nexus in relation to the withholding of state protection – whether the Tribunal misinterpreted and misapplied the relevant law in relation to what constitutes "serious harm" – whether the Tribunal's decision was illogical or irrational – jurisdictional error – application allowed.

Migration Act 1958 (Cth), ss.91R, 476

Minister for Immigration and Multicultural Affairs v Respondents S152/2003 [2004] HCA 18; (2004) 222 CLR 1; (2004) 78 ALJR 678; (2004) 205 ALR 487
Minister for Immigration and Multicultural Affairs v Khawar [2002] HCA 14; (2002) 210 CLR 1; (2002) 76 ALJR 667; (2002) 187 ALR 574
Osman v United Kingdom (1998) 29 EHRR 245
MZ RAJ v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1261
SZBBE v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 264
Applicant A99 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 773; (2004) 83 ALD 529
SZDWR v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 36; (2006) 149 FCR 550
Minister for Immigration & Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259; (1996) 70 ALJR 568; (1996) 136 ALR 481; (1996) 41 ALD 1
SZCBT v Minister for Immigration and Multicultural Affairs [2007] FCA 9
SZMFA v Minister for Immigration and Citizenship [2009] FCA 958
Hope v Bathurst City Council [1980] HCA 16; (1980) 144 CLR 1; (1980) 54 ALJR 345; (1980) 29 ALR 577
Vetter *v Lake Macquarie City Council* [2001] HCA 12; (2001) 202 CLR 439; (2001) 75 ALJR 578; (2001) 178 ALR 1
Chan Yee Kin v Minister for Immigration & Ethnic Affairs [1989] HCA 62; (1989) 169 CLR 379; (1989) 63 ALJR 561; (1989) 87 ALR 412
Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; (2010) 240 CLR 611; (2010) 84 ALJR 369; (2010) 266 ALR 367
SZGVB v Minister for Immigration and Citizenship [2007] FCA 720

Applicant:	SZOTB
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 2384 of 2010
Judgment of:	Nicholls FM
Hearing date:	1 March 2011
Date of Last Submission:	1 March 2011
Delivered at:	Sydney
Delivered on:	23 March 2011

REPRESENTATION

Appearing for the Applicant:	Mr N Dobbie
Solicitors for the Applicant:	Dobbie & Devine Immigration Lawyers
Counsel for the Respondents:	Mr J Smith
Solicitors for the Respondents:	DLA Phillips Fox

ORDERS

(1) An order in the nature of a writ of certiorari issue directed to the second respondent quashing the decision made on 8 October 2010.

(2) An order in the nature of a writ of mandamus directing the second respondent to hear and determine the application for review according to law.

(3) The first respondent pay the applicant's costs set in the amount of $5,500.

FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY

SYG 2384 of 2010

SZOTB
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This application was made under s.476 of the *Migration Act 1958* (Cth) ("the Act") on 3 November 2010 and seeks review of the decision of the Refugee Review Tribunal ("the Tribunal") made on 8 October 2010 which affirmed the decision of a delegate of the first respondent to refuse a protection visa to the applicant.

Background

2. The applicant is a citizen of Zimbabwe. He came to Australia in December 2009 to visit his siblings. He applied for a protection visa on 13 January 2010 (Court Book – "CB" – CB 9 to CB 35).

Claims to Protection

3. The applicant's claims to protection were that he feared harm in Zimbabwe because he would be abducted and coerced into joining the

"Green Bomber" militia. He claimed that being a "coloured" person made his "situation worse".

4. It appears the Green Bombers are a youth militia associated in some way with the ruling ZANU-PF party. The applicant also stated he feared harm from the "Zimbabwe National Youth Service" ("ZNYS").

5. The applicant claimed that he had been approached by members of the militia on three occasions and on the third occasion he narrowly escaped being forcibly abducted. He claimed that when he reported this to police they told him they were not interested and his story was not true.

6. In a further statement to the delegate the applicant made reference to the "MDC" (Movement for Democratic Change), a party in opposition to the ZANU-PF, and that police had disrupted one of their meetings.

The Delegate

7. The delegate refused the application. Given the nature of the claims made by the applicant and what must be said to be the confused reasoning by the delegate, it is difficult to understand the delegate's reasons for the refusal. (The paragraph at CB 90.7 for example exemplifies this difficulty.)

The Tribunal

8. However the Court does not have to concern itself with the decision of the delegate as the applicant applied for review to the Tribunal on 13 May 2010 (CB 97 to CB 100 see also s.476(2) and s.476(4)(a)). He provided letters in support of his application (CB 112 to CB 115).

9. In a letter to the Tribunal the applicant also claimed that he had been threatened by some youths because of his being "coloured", and had been refused employment for that reason.

10. The applicant attended a hearing before the Tribunal on 28 July 2010. Following the hearing the Tribunal wrote to the applicant inviting his comment on certain information (CB 139 to CB 140). This included

information contained in the applicant's application for a tourist visa to come to Australia (CB 1 to CB 8).

11. The Tribunal affirmed the delegate's decision on 8 October 2010. While the Tribunal did make some clear findings of fact, the need to read the Tribunal's analysis fairly, rather than plainly, means a succinct and accurate presentation of its findings is difficult. What the Tribunal actually found and how it dealt with the claims before it is therefore best left to be expressed with reference to the applicant's grounds.

Before the Court

12. Before the Court the applicant was represented by Mr N Dobbie. The respondent by Mr J Smith of counsel.

Ground 1(i)

13. The applicant complains that the Tribunal misinterpreted and misapplied the relevant law in requiring a Convention nexus in relation to the withholding of state protection.

14. In short the applicant's argument is that the Tribunal accepted the claims of attempts at forcible recruitment to the Green Bombers, and that he sought police protection. While the applicant was required to show a Convention nexus between the harm feared and one of the relevant grounds contained in Article 1A(2) of the Convention, he was not required to show such a nexus in relation to whether state protection would be withheld by the police. That is, that state protection would be withheld by the police on a discriminatory basis for a Convention reason. The Tribunal found that there was no Convention nexus in this regard and therefore found adversely to the applicant.

15. Mr Dobbie's submission was that the correct test in determining whether effective state protection is available is that enunciated in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1; (2004) 78 ALJR 678; (2004) 205 ALR 487 ("*Respondents S152/2003*") at [23], [26]-[27] per Gleeson CJ, Hayne and Heydon JJ.

16. Yet in its analysis (in particular see the two paragraphs below), the Tribunal departed from this test (at CB 173 to CB 174 and CB 175):

> *"[104] The Tribunal accepts that some of the country information suggests that there has been limited change for the better in such things as the economy and social conditions in Zimbabwe despite the Government of National Unity, however, the information also indicates that the ZANU-PF attacks that occur are directed more towards the active MDC opposition members and high profile individuals and not necessarily persons who are not supporters of the opposition party. The applicant told the Tribunal that he reported his experience in the third incident to the police but that the police dismissed his complaint. The country information in respect to police activity and attitude suggests that some police may be politically in support of the ZANU PF,* ***however, the Tribunal is not satisfied that the evidence before the Tribunal indicates that police protection was denied the applicant on the basis of his political opinion or imputed political opinion or for some other Convention ground****. The Tribunal accepts that the political situation in Zimbabwe is unstable and that human rights abuses are rife. The Tribunal accepts that the applicant has legitimate concerns about returning to Zimbabwe. However it does not find that his fears for Convention reasons are well-founded for reasons outlined in this decision.*
>
> …
>
> *[110] The Tribunal has considered the applicant's claims that he would not be afforded adequate state protection based on his experience of being fobbed off when he reported the third incident he described to the Tribunal. The applicant's submission is that the police are largely influenced by ZANU-PF values. Country information indicates that ZANU-PF demands strong allegiance from the judiciary and security apparatus. However, given that the Tribunal does not accept that the applicant is connected to the MDC, the Tribunal does not accept the applicant's claim that he would not be afforded adequate state protection, which is largely controlled by ZANU-PF."*
>
> [Emphasis added.]

17. For the reasons that follow, I agree with Mr Dobbie that the Tribunal fell into jurisdictional error in this regard. It misstated the correct test and therefore either can be said to have applied the wrong test to the circumstances of this case or to have failed to apply the correct test.

The Tribunal misunderstood the test in requiring that the protection be withheld for a Convention reason.

18. There was no apparent dispute between the parties that *Respondents S152/2003* set out the relevant correct test.

19. While there appeared to be some division in the High Court as to the exact relationship between the concepts of "persecution" and "state protection" in circumstances where the persecutor was a non-state agent (see *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14; (2002) 210 CLR 1; (2002) 76 ALJR 667; (2002) 187 ALR 574 at [66] per McHugh and Gummow JJ, and *Respondent S152/2003* at [21] to [22] and [29] per Gleeson CJ, Hayne and Heydon JJ), what is clear is that the relevant test is directed to the adequacy of protection.

20. In the joint judgment in *Respondents S152/2003* their Honours stated that (at [26]): "… no country can guarantee that its citizens will at all times and in all circumstances, be safe from violence." Justice Kirby in the same case said that the Refugees Convention ([117]): "… posits a reasonable level of protection, not a perfect one."

21. What is relevantly required therefore in determining whether an applicant meets the definition of "refugee" set out in Article 1A(2) of the Convention includes:

    1) The obligation of the relevant state to take "reasonable measures" in the protection of its citizens. This includes "an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system." (*Respondents S152/2003* at [26].)

    2) A "… reasonably effective police force and a reasonably impartial system of justice." (*Respondents S152/2003* at [28].)

    3) The appropriate level of protection is to be determined by reference to "international standards". (*Respondents S152/2003* at [27] and *Osman v United Kingdom* (1998) 29 EHRR 245.)

    4) Therefore where the state does not meet the level of protection to which its citizens are entitled according to these standards, the

unwillingness to seek protection contemplated by Article 1A(2) will be justified. (*Respondents S152/2003* at [27] to [29].)

5) This does not mean, however, that the Tribunal is required to specify these standards. (*MZ RAJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1261 at [26] per Heerey J, and *SZBBE v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 264 at [46] per Jacobson J. But see also *Applicant A99 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 773; (2004) 83 ALD 529 per Mansfield J.)

22. In short therefore the relevant test is that what is required is an adequate, not ideal, level of protection by the state. It does not require a guarantee of safety. (See also *SZDWR v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 36; (2006) 149 FCR 550 at [22] per Heerey, Kiefel and Bennett JJ.)

23. I agree with Mr Dobbie that the Tribunal's relevant statement at [104] (see [16] above) offends the current understanding as to the relevant test to determine the availability of state protection. The Tribunal found that it was not satisfied that protection was denied to the applicant on any of the Convention grounds. The issue of state protection should have been resolved with consideration of its adequacy in the applicant's circumstances, not to whether it was denied for any Convention reason.

24. Mr Smith's submission was that the Tribunal's decision record should be read as a whole and that what the Tribunal said at [104], when read in this way, does not reveal jurisdictional error in this regard. The Tribunal's analysis should not be read by isolating one part from the balance of its findings.

25. The difficulty is, however, that this is not an easy decision record to read. I say this with reference to the analytical flow presented by the Tribunal and the failure to make certain clear findings of fact such as to provide a clear probative basis for its various conclusions. Further, and with respect to the Tribunal, this difficulty is compounded by the lack of clarity in what is said at [104] and [110].

26. The Tribunal makes a number of what can be described as "umbrella" findings or general conclusions throughout its analysis, interspersed with attempts to deal with matters of specificity, which however do not necessarily lead to the next "umbrella" finding. Even Mr Smith conceded that its "conclusions" were disjointed.

27. The issue of state protection is one area where the failure to make relevant clear findings is evident. The applicant claimed to fear persecutory harm and was forced to leave Zimbabwe because "… he was threatened to join the Green Bombers." The Tribunal recorded this in its decision record at [22] (CB 150).

28. This was repeated at the hearing with the Tribunal ([41] at CB 154).

29. The applicant appeared to refer to the Green Bombers militia and the ZNYS as interchangeable terms. The Tribunal recorded his claims in these terms ([25] at CB 150).

30. At least implicitly, if not explicitly, the applicant appeared to link the Green Bombers, the ZNYS and the ZANU-PF political party though the exact relationship was left unclear (CB 27 to CB 29). However the applicant explicitly stated that the police in Zimbabwe were: "… still connected to the ZANU-PF." (CB 30.)

31. The delegate's decision does little to assist in this regard. At one point there appears to be an inference that there is a difference between being "recruited by the ZNYS" and being "officially conscripted by the Zimbabwean authorities" (CB 90.7). Although this is said under a heading referring to "ZANU-PF Youth" (CB 90.6).

32. At best, the "unifying" element between all these appears to be the Zimbabwean President. This was reported by the Tribunal at [29] (CB 151).

33. At the hearing before the Tribunal the discussion seemed, at least in part, to assume a relationship. For example the applicant claimed the Green Bombers approached him and others on one occasion and gave him a ZANU-PF tee-shirt to wear ([43] at CB 154).

34. The Tribunal had ample country information before it to draw on in establishing the relationship between all these parties (CB 158 to

CB 171). It can be noted that at one point this information appeared to suggest that the Green Bombers and the ZNYS were not one and the same, but were associated ([71] at CB 163). The importance of this becomes clear when regard is had to the Tribunal analysis, in which it stated (at [104]) that police protection was not denied for any Convention reason.

35. Later (at [110]) (again illustrative of the disjointed nature of the Tribunal's analysis) the Tribunal said:

> *"The Tribunal has considered the applicant's claims that he would not be afforded adequate state protection based on his experience of being fobbed off when he reported the third incident he described to the Tribunal. The applicant's submission is that the police are largely influenced by ZANU-PF values. Country information indicates that ZANU-PF demands strong allegiance from the judiciary and security apparatus. However, given that the Tribunal does not accept that the applicant is connected to the MDC, the Tribunal does not accept the applicant's claim that he would not be afforded adequate state protection, which is largely controlled by ZANU-PF."*

36. The Tribunal has clearly confused, or not clearly addressed, a number of elements:

1) The applicant's claim that he would not receive adequate state protection because he was "fobbed off" by police when he sought their assistance.

2) The applicant's submission that the police are at least influenced by ZANU-PF.

3) Country information that ZANU-PF demands strong allegiance from the judiciary and security apparatus.

4) A finding that the applicant was not connected to the MDC (the applicant never claimed that he was).

5) The applicant's claim that he would not be afforded adequate protection.

6) The reference (at [110]) to "largely controlled by ZANU-PF" was left unexplained. It could be this was a reference to the police, or to the state apparatus as a whole.

37. Relevantly, implicit in the Tribunal's reasoning is its reference made elsewhere in its analysis to country information that:

1) At [101] (at CB 172 to CB 173):

> *"… However, country information available to the Tribunal does suggest that active, high profile members of the MDC are at risk of being targeted for violence or persecution as compared to non members of the MDC or non active members of the MDC…".*

2) At [104] (at CB 173):

> *"The Tribunal accepts that some of the country information suggests that there has been limited change for the better in such things as the economy and social conditions in Zimbabwe despite the Government of National Unity, however, the information also indicates that the ZANU-PF attacks that occur are directed more towards the active MDC opposition members and high profile individuals and not necessarily persons who are not supporters of the opposition party…".*

38. However nowhere in the analysis is any of this made clear. It may be, therefore, that the Tribunal found that as the applicant was not a high profile member of the MDC, he was not at risk from the ZANU-PF (however the reference to country information at [104] does not amount to a clear finding), and therefore that the police would not deny him protection on a Convention ground, including political opinion ([104]).

39. Even standing back and trying to understand the Tribunal's analysis in a holistic way, I am still left with the issue that, when the Tribunal came to deal with the applicant's claim, his report of the third incident of harm was dismissed by police. The Tribunal's analysis, at best, can be understood as saying that this was not done for any Convention reason.

40. Was the harm feared from the Green Bombers, the MDC or the ZANU-PF? Are they in effect the same? In focussing on ZANU-PF attacks (at [104]), was the Tribunal seeking to subsume the third incident occasioned by the Green Bombers as being an "attack" by ZANU-PF? Were the Green Bombers some third party agents of persecution? Were the police a part of the government apparatus controlled by ZANU-PF such that the harm feared from the Green Bombers was not adequately protected by the police, or the State?

41. The import of these questions is that if the persecutory harm feared was well-founded (putting to one side the debate as to whether the concept of state protection is part of the definition of "persecution"), if the Green Bombers were seen as separate agents of persecution, the question for the Tribunal then would have been whether the State apparatus, including the police, was able to provide an adequate level of protection to the applicant.

42. Conversely, if the Green Bombers were, in practical terms, to have been found to be indistinguishable from ZANU-PF, that is a part of the ruling party apparatus, then the question of adequate protection by the police, which in the Tribunal's analysis appear implicitly to have been under ZANU-PF's influence, becomes one of persecution by the State, and not one by third party agents.

43. I note as another example of the failure by the Tribunal to make clear findings of fact that the relationship between ZANU-PF and the police is inadequately dealt with by reference to country information which "indicates that ZANU-PF demands strong allegiance from the judiciary and security apparatus" (at [110]).

44. Even allowing that the police may be included in the "security" apparatus, and that is by no means made clear in the Zimbabwean context as to whether "security" apparatus may include police, there is no clear finding by the Tribunal as to the exact nature of this relationship, such as to give meaning or even context to its statement at [104].

45. It is the case that Tribunal decisions should not be read over zealously with an eye finely attuned to error (*Minister for Immigration & Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259; (1996)

70 ALJR 568; (1996) 136 ALR 481; (1996) 41 ALD 1 ("*Wu Shan Liang*")). The standard to be applied is a fair reading.

46. But as Stone J explained in *SZCBT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9 at [26], the direction in *Wu Shan Liang* is no licence to excuse ambiguity, or for that matter lack of comprehension, in a Tribunal decision.

47. The vice in this Tribunal decision, its failure to make clear findings of fact on relevant issues leaves its misstatement of relevant law at [104], and even when read with [110] and on a holistic basis, without meaningful context and thus unexplained.

48. It is in this context that I agree with Mr Dobbie that the misstatement at [104] reveals jurisdictional error. The Tribunal, as Mr Dobbie submitted, even on a fair reading of its decision record, has "conflated" two tests.

49. Plainly for a protection visa to be granted to an applicant the Tribunal needs to be satisfied that the applicant has a well-founded fear of persecution based on one of the grounds set out in Article 1A(2) of the Convention. The expectation that the applicant must also be denied protection for a Convention reason does not reflect the current test of adequacy of protection to be afforded to its citizens by the state on a non discriminatory basis.

50. Mr Smith is correct to submit that the consideration of the reason for which state protection is said to be unavailable does not reveal any misunderstanding of the definition of "refugee". But the imposition of an additional factor (the need for a "second Convention nexus") does.

51. Mr Smith submitted that what the Tribunal set out at [104] was an attempt by the Tribunal to deal with an aspect of the applicant's claims as made by the applicant.

52. The Court was taken to the application for a protection visa where the applicant said (CB 30):

> *"… DESPITE THE FORMATION OF THE POWER SHARING GOVERNMENT, VERY LITTLE HAS CHANGED AND I FEEL THE ZIMBABWE REPUBLIC POLICE ARE STILL CONNECTED TO ZANU-PF, AS IN OCTOBER AFTER MY*

> *INCIDENT WITH THE MEN IN THE TRUCK. I WENT TO CENTRAL POLICE STATION ON LEOPOLD TAKAWIRA RD, AND REPORTED WHAT HAD JUST HAPPENED.*
>
> *THE OFFICER ON DUTY WAS NOT INTERESTED IN MY STORY AND BRUSHED ME ASIDE, AS HE CLIAMED MY STORY WAS NOT TRUE."*
>
> [Errors in original.]

53. The applicant told the Tribunal at the hearing that when he reported one of the incidents of harm to the police, they did not believe that it had occurred ([45] at CB 155). There is nothing in this to show that the applicant claimed that he was denied protection by the police for a Convention reason such as to explain the Tribunal's statement at [104] (CB 173 to CB 174). He claimed to have been denied protection by the police because they were variously controlled, connected to, or linked to ZANU-PF.

54. The Minister also submitted that, even if some misstatement had occurred, given the Tribunal's finding as it related to the applicant's central claim that he feared that he would be forcibly recruited into the Green Bombers, there was no need for the Tribunal to consider the question of state protection. The Tribunal found that such a fear was not well-founded.

55. Here, again, the vice in the Tribunal's analysis as referred to above does not provide a reasonable basis for the Minister to answer the charge put against the Tribunal by ground one.

56. First, the argument was that [104] and [110] were focussed on different issues.

57. At [104] the Tribunal was focussed on the applicant's claim that in the past the police withheld protection because of their political opinion. This was said to be focussed on what the applicant had submitted to the Tribunal. The applicant stated (CB 72):

> *"- THIS MONTH POLICE DISRUPTED A MDC ORGANISED MEETING AND BEAT THEM UP. THATS WHY I BELIEVE THE AUTHORITIES BEING THE POLICE ARE STILL CONNECTED TO ZANU-PF AND IF YOU DO NOT SUPPORT THE RULING PARTY THEY DO NOT OFFER HELP*

- THE AUTHORITIES CAN NOT PROTECT ME AS I FEEL THEY ARE LINKED TO ZANU-PF 'THE CRIMES WERE REPORTED' BUT HAVE BEEN IGNORED BY POLICE."

[Errors in original.]

58. What the applicant claimed was that he was denied protection by the police because they were connected, or linked, to the ZANU-PF. The findings that were required by the Tribunal were whether the protection available to the applicant by the police was adequate in the circumstances, or had in fact been denied to him.

59. To say that protection was not denied for a Convention reason does not deal with the applicant's claim. The applicant said the police were "connected" to or "linked" to ZANU-PF. The element of "political" support was introduced by the Tribunal itself, which then led it into the subsequent misstatement of the relevant test by requiring a Convention nexus.

60. The submission was that at [110] the Tribunal was focussed on the future. Here the Tribunal did refer to "adequate state protection". Its reasoning appears to be that, given that the applicant was not connected to the MDC, his claim that he would not be afforded adequate state protection was not accepted.

61. The difficulty for the Minister is that, given the disjointed "flow" of the Tribunal's reasoning, it is not clear whether what was said at [110] is severable from what was said at [104].

62. While allowance can be made for a different temporal focus in the aspect of the applicant's claim under consideration (that he was "fobbed off" by police), ZANU-PF and the police are common features of both paragraphs such that, on balance, the two must be read together as dealing with the same issue, such that the misstatement at [104] contaminates the reasoning at [110].

63. Second, the submission was also that, whatever the situation above, the Tribunal found that the applicant's fear was not well-founded, and therefore the Tribunal was not required to consider the question of state protection.

64. This submission immediately begs the question: if that was the case, why did the Tribunal proceed to consider the issue of state protection? The fact that it did, and in the way that it did, gives rise to the inference that the Tribunal felt it needed to do so because of the nature of its antecedent findings.

65. That it did so because it felt the need to deal with an aspect of the applicant's claims has already been addressed above. In any event, if that is also the case, then the misstatement at [104] remains.

66. Here again the disjointed nature of the Tribunal's analysis is of such character that it does not provide a basis for understanding exactly what the Tribunal has reasoned.

67. Mr Smith argued that, "standing back" from the decision record, what can be seen is that the Tribunal was not satisfied on any basis that the applicant had a well-founded fear of persecution. This was based on dealing with the applicant's claims as put, and making findings of fact.

68. The difficulty for the Minister is that in the various and disjointed mixture of the specific and the general, the unexplained switches from one to the other resulting in a lack of "flow" in the analysis, and with the lack of clear findings, the Court is satisfied on balance that the Tribunal misstated the relevant test as pleaded by the applicant, and that this infected its entire reasoning.

69. It did so to such an extent that even in that part where the Tribunal appears to accept that the applicant's claimed incidents of harm did occur, but did not rise to the applicant being "seriously harmed" (at [102]) this appears to be contradicted in the next paragraph with the Tribunal accepting the applicant's conclusion that at least on one occasion: "… the individuals may have posed a threat to him" (at [103] at CB 173).

Conclusion

70. In all therefore, ground 1(i) is made out. The Tribunal's misstatement of the relevant test as to the issue of state protection does reveal jurisdictional error on its part. I cannot see any reason to deny the applicant the relief he seeks.

71. I should just note that in these circumstances, while it is not strictly necessary to consider grounds 1(ii) and 2, I was not persuaded that either reveals jurisdictional error on the part of the Tribunal. That consideration is as follows.

Ground 1(ii)

72. Ground 1(ii) asserts that the Tribunal misinterpreted and misapplied the law in relation to what constitutes "serious harm". The ground is given specificity with reference to the Tribunal's finding that the attempted abduction of the applicant did not amount to "serious harm".

73. The applicant's submissions were that the Tribunal accepted the applicant's claims relating to the three incidents involving "individuals" from the Green Bombers and/or ZANU-PF (see [102] at CB 173). For that matter, we can add that the Tribunal accepted the applicant's evidence, and that of his two witnesses, as being "generally credible" (whatever that qualification may mean). (See [98] at CB 172.)

74. At its highest, the applicant's attack was that, as against this background of the acceptance of the credibility of the applicant's claims and the specific acceptance of the three incidents, the Tribunal should have found that the harm suffered was "serious harm" for the purposes of ss.91R(1) and (2).

75. This is said to be particularly so as these involved claims of assault and abduction in circumstances where there was an escalation of the action to recruit him to the Green Bombers.

76. Even allowing for the description now that being "grabbed" on the arm by one of the men who approached him on the third occasion as properly being said to be an abduction, what remains is that, as Mr Smith correctly submitted, what happened at these events and the characterisation of these events (see in particular [102]) for the purposes of ss.91R(1) and (2) is a question of fact and degree for the Tribunal and not for the Court. (See *SZMFA v Minister for Immigration and Citizenship* [2009] FCA 958 at [34] per Bennett J.)

77. The situation in the current case is that, on this issue, it is tolerably clear that the Tribunal made findings that the three incidents occurred ([102] and [103] at CB 173), however the applicant was not "seriously harmed".

78. Again the disjointed nature of the Tribunal's analysis is a cause for concern. The Tribunal makes no mention of s.91R at [102] or [103]. It does however make reference to s.91R(2) later at [106] (at CB 174). But even here the Tribunal is dealing with the applicant's claim that he experienced difficulty in finding work, not the three incidents where he was approached by the Green Bombers. The Tribunal found, with regard to s.91R(2), that the applicant had not suffered "serious harm" in relation to the capacity to earn a living in terms of a threat to the capacity to subsist.

79. Nonetheless on balance I am satisfied that at [102] the Tribunal's reference to "seriously harmed" can reasonably be said to refer to s.91R(2). As such, as Mr Smith submits, the question for the Tribunal was whether these incidents fell within the ordinary meaning of the statute, and where the material reasonably admits of a different conclusion then the question is one of fact and not susceptible on this basis to intervention by this Court (*Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1; (1980) 54 ALJR 345; (1980) 29 ALR 577 and Vetter *v Lake Macquarie City Council* [2001] HCA 12; (2001) 202 CLR 439; (2001) 75 ALJR 578; (2001) 178 ALR 1).

80. The applicant's reliance on *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379; (1989) 63 ALJR 561; (1989) 87 ALR 412 ("*Chan*") does not assist him as the Tribunal was not required, given the above, to ask the question as to whether there had been a change in the relevant circumstances in Zimbabwe (with reference to *Chan* at [14] to [15] per Mason CJ, and at [23] per Dawson J).

81. In all, the applicant seeks impermissible merits review.

Ground 2

82. In ground two the applicant complains that the Tribunal's decision was irrational or illogical. This is said to be because the evidence as to the

circumstances in Zimbabwe was "all one way", yet the Tribunal found against the applicant.

83. The evidence was that the applicant feared forced recruitment into the Green Bombers, a militia associated with the ZANU-PF. The Tribunal accepted this and further found the applicant fell within the age group of those targeted for such recruitment ([111] at CB 175).

84. Further, there was evidence before the Tribunal that the police were not impartial (both the applicant's evidence which was found to be "generally credible" and independent country information), there was evidence of forced recruitment of youths, and that at least 6000 young Zimbabweans undergo annual training.

85. Even further the Tribunal's finding that the ZNYS operations had been scaled back substantially and that many locations had been closed down due to financial problems ([112] at CB 175), was not supported by the evidence. The submission was that the information relied on by the Tribunal (at [112]) was that there was a recommendation made in 2007 that they be scaled back, not that they actually were by 2010 (see [73] at CB 165]). This predated the time relevant to the applicant's claims.

86. In addition that there was in fact evidence to the contrary in support of the applicant's position (see [71] at CB 163). Even further, that the information before the Tribunal was that there was significant Green Bomber activity at the relevant times and a prediction of further activity in the build up to elections in 2010 (CB 75).

87. In all this, the applicant says the Tribunal found that the applicant did not have a real chance of being targeted for recruitment. Having regard to "either test" set out in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611; (2010) 84 ALJR 369; (2010) 266 ALR 367 ("*SZMDS*") at [51] to [53] per Gummow ACJ and Kiefel J or at [130] to [131] per Crennan and Bell JJ) the Tribunal's finding was illogical or irrational on the evidence and therefore reveals jurisdictional error.

88. First, it is clear that the High Court set out two different tests in this regard. I agree with Mr Smith that when regard is had to the joint

judgment of Crennan and Bell JJ and the judgment of Heydon J, the test for this Court to apply is whether the relevant and probative evidence before the Tribunal was such that it could give rise to different reasoning processes and if logical or reasonable minds may differ on the conclusions to be so drawn from such evidence. On judicial review any such decision containing these characteristics cannot be irrational or illogical, or for that matter unreasonable. (See [131] per Crennan and Bell JJ and at [78] per Heydon J.)

89. The Tribunal's relevant reasoning is set out at [111] to [112] of its decision record (at CB 175):

> *"[111] The applicant claims that he is within the prime age group for recruitment by the ZANU-PF and that he fears that if he refuses he will be harmed. As indicated above, available information on the prime age for targeted recruitment to the ZANU-PF is limited, but indicates that young men in the 17-25 age group fall within the age parameters for recruitment… While the applicant might be within the general age group for recruitment by the ZANU-PF, however the Tribunal is not satisfied on the evidence before it that this means the applicant will be targeted in particular for recruitment. The Tribunal therefore finds that the applicant's claim that he may be within the target group for recruitment does result in the applicant having a well founded fear of persecution for one of the Convention reasons.*
>
> *[112] The applicant claims that he does not want to join the National Youth Service because he does not believe in its methods and he indeed objects to its activities. Based on the country information extracted above, the Tribunal finds that the extent and scope of the National Youth Service operations have been scaled back substantially, and many have been closed down, due to financial troubles. The Tribunal finds that there is not a real or substantial chance of the applicant being targeted for recruitment to the National Youth Service."*

90. Mr Smith says that, contrary to the applicant's submissions now, there was evidence before the Tribunal such that would allow minds to differ in the way contemplated in *SZMDS*.

91. That evidence generally was that there were troubled times in Zimbabwe, there were ongoing serious threats in rural areas, but that it

was rare for political violence to be found in Harare or Bulawayo (the applicant's home town) (CB 116 to CB 136).

92. In relation to the recruitment to national service there was evidence that it had not reached its expected potential in terms of capacity ("hit its straps"). The numbers of youths actually undergoing training was only 2% of the available pool. While there was some evidence that in some parts of the country recruitment was not voluntary, there was no evidence that this was so throughout Zimbabwe, and no evidence of this in Bulawayo (the applicant's home town). There was also the evidence of the recommendation of the Parliamentary Committee that the scheme be terminated because of financial and economic difficulties (CB 116 to CB 136).

93. I agree with Mr Smith that the onus for establishing illogical or irrational reasoning (as explained in *SZMDS*) rests with the applicant (*SZGVB v Minister for Immigration and Citizenship* [2007] FCA 720).

94. In this regard Mr Dobbie not unreasonably pointed to these parts of the Tribunal's analysis that related to this question:

> *"[111] … As indicated above, available information on the prime age for targeted recruitment to the ZANU-PF is limited, but indicates that young men in the 17-25 age group fall within the age parameters for recruitment 'Over 3,000 Attend Zanu-PF Youth Conference' 2009… While the applicant might be within the general age group for recruitment by the ZANU-PF, however the Tribunal is not satisfied on the evidence before it that this means the applicant will be targeted in particular for recruitment…*
>
> *[112] The applicant claims that he does not want to join the National Youth Service because he does not believe in its methods and he indeed objects to its activities. Based on the country information extracted above, the Tribunal finds that the extent and scope of the National Youth Service operations have been scaled back substantially…".*

95. It is the case, in my view, that the specific information referred to by the Tribunal at these paragraphs does have an air of selectivity about it. There is no real analysis in the sense of displaying the balance and the assigning of weight to all parts of the country information.

96. Having said that, this may simply be a result of the disjointed, conflated and haphazard approach taken by the Tribunal in the presentation of its reasoning. On its own, this does not reveal error as against the relevant test.

97. Further, it is not for this Court to look at the country information to weigh and balance this information and come to its own conclusion. Such action would fall over the line into merits review.

98. In addition, the test for illogically or irrationality is not what this Court would consider as being the rational or logical outcome of any such analysis, in the sense of the preferable outcome.

99. The test is one of whether there is probative evidence such that could give rise to different reasoning. If reasonable minds may differ on the evidence then the decision cannot be said to be illogical or irrational, or for that matter unreasonable.

100. In this regard, even though the Tribunal actually referred to a small part of the country information in its analysis in these paragraphs, it can be at least fairly inferred that it did have regard to all of the country information. At least as it said: "… As indicated above, available information …" ([111] at CB 175) and: "… Based on the country information extracted above …" ([112] at CB 175).

101. This information, in a lengthy extracted form, was in the Tribunal's decision record under the heading "Independent Country Information" ([62] at CB 158 to [81] at CB 167).

102. On the basis that it can at least be fairly inferred that there was country information before the Tribunal to which it said it had regard, then this information, when looked at as a whole, does provide the probative basis, or evidence, upon which it could be said that it does give rise to differing processes of reasoning.

103. That the Court, or even if it could be said many other Tribunal members, may have come to a different view is not the issue. Minds may indeed differ on this material. With reference to the relevant test, the Tribunal's decision in this sense cannot be said to be irrational or illogical, as explained in *SZMDS*.

104. Ground 2 is not made out.

Conclusion

105. Nonetheless, having found jurisdictional error in relation to one of the applicant's grounds, and there being no reason that I can see to act otherwise, I will grant the relief sought by the applicant.

I certify that the preceding !Syntax Error, **and** !Syntax Error, **(105) paragraphs are a true copy of the reasons for judgment of Nicholls FM**

Date: 23 March 2011