

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*WAMK & WAML v MINISTER FOR IMMIGRATION & ANOR* [2009] FMCA 2

MIGRATION – Protection visa applications – whether well-founded fear of persecution – mother and son applicants – mother previously sexually assaulted in detention in Burma – mother’s husband allegedly detained in Burma whilst mother and son visiting Australia – alleged political activities of mother and son in Burma.

*Migration Act 1958* (Cth), ss.36, 65, 91X

*Abebe v Commonwealth of Australia* (1999) 197 CLR 510; [1999] HCA 14

*Goodall v Nationwide News Pty Ltd* [2007] FMCA 218

*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259

*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30

*Moyette Pty Limited v Foundation Healthcare Limited* [2003] FCA 116

*Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476; [2003] HCA 2

*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20 /2002* (2003) 198 ALR 59; [2003] HCA 30

*WAEJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 597

*WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 80 ALD 568; [2004] FCAFC 74

*WZANE v Minister for Immigration & Anor* [2008] FMCA 1520

Applicants:	WAMK & WAML
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	PEG 181 of 2007
Judgment of:	Lucev FM
Hearing date:	30 March 2008

Date of Last Submission: 30 March 2008  
Delivered at: Perth  
Delivered on: 16 January 2009

## **REPRESENTATION**

Counsel for the Applicant: R L Hooker  
Solicitors for the Applicant: SCALES Community Legal Centre  
Counsel for the Respondents: J D Allanson SC  
Solicitors for the Respondents: Australian Government Solicitor

## **ORDERS**

- (1) That the application be upheld.
- (2) That in relation to WAMK:
  - (a) That a Writ of Certiorari issue directing the Second Respondent to quash the decision made by it in relation to the Applicant and handed down on 9 August 2007;
  - (b) That a Writ of Mandamus issue directing the Second Respondent to determine the Applicant's application dated 11 December 2006 to the Second Respondent for review of the Delegate's decision according to law;
  - (c) That a Writ of Prohibition issue directed to the First Respondent preventing the First Respondent from acting on the Delegate's decision of 9 March 2007 to refuse a protection visa to the Applicant.
- (3) That in relation to WAML:
  - (a) That a Writ of Certiorari issue directing the Second Respondent to quash the decision made by it in relation to the Applicant and handed down on 9 August 2007;

- (b) That a Writ of Mandamus issue directing the Second Respondent to determine the Applicant's application dated 11 December 2006 to the Second Respondent for review of the Delegate's decision according to law;
- (c) That a Writ of Prohibition issue directed to the First Respondent preventing the First Respondent from acting on the Delegate's decision of 9 March 2007 to refuse a protection visa to the Applicant.

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
PERTH**

**PEG 181 of 2007**

**WAMK & WAML**  
Applicant

And

**MINISTER FOR IMMIGRATION & CITIZENSHIP**  
First Respondent

**REFUGEE REVIEW TRIBUNAL**  
Second Respondent

**REASONS FOR JUDGMENT**

**Introduction**

1. The first and second applicants (mother and adult son)<sup>1</sup> are nationals of Burma (Myanmar). They arrived in Australia on 2 November 2006 each on a visitor's visa, to see relatives in Perth. On 11 December 2006 each made a claim under the *Migration Act 1958* (Cth)<sup>2</sup> for a protection visa.
2. There is much in common in the factual background of the two applications, but it is convenient to deal first with the Mother's application.

**Grounds for the application – Mother**

3. The Mother's original grounds of application were as follows:

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<sup>1</sup> "Mother" and "Son" respectively.

<sup>2</sup> "*Migration Act*".

- a) The Second Respondent<sup>3</sup> adopted a fatally flawed approach to finding the facts necessary to determine whether it was satisfied that the prescribed criteria for the grant of a protection visa were satisfied, thereby committing jurisdictional error, in that it:
    - i) having found that the first applicant “may well have been subjected” after the 1990 elections to detention by Burmese authorities, assault, rape and the causation of a miscarriage, failed to have any or any proper regard to that conclusion in the remainder of its consideration of the the first applicant’s claims;
    - ii) despite the finding referred to at (i) above, subsequently concluded that the first applicant had not suffered any harm in the past for any Convention reason;
    - iii) failed to undertake any proper or rational assessment of the credibility of a letter from the the first applicant’s parish priest in Burma corroborating the first applicant’s claim that her husband had been detained and taken away for political reasons since 18 November 2006.
  - b) Such further or amended grounds as may be the subject of an application for leave on consideration of the transcript of the RRT hearing (the audio recording of which having been requested by the first applicant’s solicitor at the conclusion of the hearing, and subsequently on 27 August 2007, to no avail).
4. There was an application for leave to amend the grounds of the application, but it is not presently necessary to consider that application, which is further dealt with hereunder.

## **The Mother’ claims**

5. In a statement in support of her application for a protection visa<sup>4</sup> the Mother made the following claims:

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<sup>3</sup> The Refugee Review Tribunal (“Tribunal”).

<sup>4</sup> WAMK Court Book (“WAMK CB”) 19-22.

- a) after arriving in Australia she was advised in a letter from her sister<sup>5</sup> in Burma that military intelligence officers and a district committee member had taken the Mother's husband away for interrogation, and at the time of taking him, those officers had asked:
- i) where the Mother and her Son were;
  - ii) when the Mother and her Son would return; and
  - iii) if the Mother's husband knew of the Mother's involvement in politics as "an ardent and dedicated supporter" of the National League for Democracy;<sup>6</sup>
- b) the Sister's Letter also said that the Mother's husband had been taken away for interrogation because the Mother and her Son had photocopied documents for the NLD;<sup>7</sup>
- c) the Mother says that with her knowledge and permission her Son had made about 100 photocopies<sup>8</sup> of papers concerning a trip to upper Burma by members of the NLD;<sup>9</sup>
- d) the Mother feared that on return to Burma she and her Son would immediately be detained and interrogated, charged and arrested;<sup>10</sup>
- e) the Mother said that she feared that she and her Son would then be physically and mentally tortured;<sup>11</sup>
- f) the Mother also said that she was a close friend of UTO, a member of the NLD executive, and knew UAS, another NLD leader;<sup>12</sup>

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<sup>5</sup> "Sister's Letter". The Sister's Letter is at WAMK CB 40.

<sup>6</sup> "NLD". WAMK CB 19. It is important to note that this claim about the nature of the Mother's support for the NLD is attributable to the Burmese military intelligence officer, not the Mother.

<sup>7</sup> WAMK CB 19.

<sup>8</sup> "the 100 Photocopies".

<sup>9</sup> WAMK CB 20.

<sup>10</sup> WAMK CB 20.

<sup>11</sup> WAMK CB 20.

<sup>12</sup> WAMK CB 20. Abbreviations have been used for the names of the alleged NLD members as use of their full names might lead more readily to identification of the Mother and Son: cf *Migration Act*, s.91X.

- g) the Mother alleges that the 100 Photocopies were printed at her Son's photocopying and stationery shop at the direct request of UTO, made through his personal driver UZW, and that "[i]ntimate and direct association and communication with leaders of the NLD is a far more serious offence than merely printing",<sup>13</sup> and that it will mean that that the Mother and her Son will live in constant fear even if arrested and then released;<sup>14</sup>
- h) the Mother says that in Burma people "live under a highly repressive authoritarian military rule" involving structured hierarchical repression, lack of security and trust, and people living in constant fear, and that if arrested upon return to Burma, the Mother's husband, daughter and family will "also be marked as collaborators and supporters of subversive activists", and as a consequence the Mother fears that the Burmese government "will harm and mistreat not only my son and I but also ... the entire family network and clan";<sup>15</sup>
- i) the Mother claimed that after "the 1988 ordeal", in which the military government brutally suppressed (by massacre, detention and torture) the civilian population of Burma, the Mother, her Son and family became "firm believers in democratic values";<sup>16</sup>
- j) the Mother claims that during the 1990 election she and her Son:
  - i) became "strong" and "active" members and supporters of the NLD in their local township; and
  - ii) wore NLD clothes and headgear, lobbied and doorknocked on behalf of the NLD;<sup>17</sup>
- k) the Mother alleges that she was then arrested by the Burmese authorities, and was tortured and sexually assaulted whilst in detention, and then sent to hospital because she was "very ill,

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<sup>13</sup> WAMK CB 20.

<sup>14</sup> WAMK CB 21.

<sup>15</sup> WAMK CB 21.

<sup>16</sup> WAMK CB 21.

<sup>17</sup> WAMK CB 21.

suffered with bleeding” and “sent to the general women’s hospital for due to the ill treatment and torture”;<sup>18</sup>

- l) the Mother says that the Burmese military intelligence know about the printing of the 100 Photocopies, the Mother’s anti-government activities and her association with UTO, and that to be arrested this time, for a second time, will result in her treatment by the Burmese authorities being much worse;<sup>19</sup> and
- m) the Mother said she had no knowledge of what had happened to her husband and had no contact with her family after a brief telephone call from her sister and receipt of the Sister’s Letter, and that she was unable to make attempts to contact her family for fear that that contact will be monitored by the Burmese military intelligence, with adverse consequences for family members following such contact and monitoring.<sup>20</sup>

### **Delegate’s decision**

- 6. On 9 March 2007 a delegate of the Minister refused the Mother’s application for a protection visa.<sup>21</sup> The delegate did not accept the Mother’s claim of persecution because of her association with a senior NLD member. The delegate was not satisfied that the Mother had a genuine fear of harm nor that there was a real chance of persecution occurring.<sup>22</sup>

### **Review application**

- 7. On 4 April 2007 the Mother sought review in the Tribunal.<sup>23</sup>
- 8. In support of the Tribunal review application the Mother made a statutory declaration dated 20 April 2007,<sup>24</sup> in which she set out her claims in more detail. The Mother also made further claims including that:

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<sup>18</sup> WAMK CB 21.

<sup>19</sup> WAMK CB 21-22.

<sup>20</sup> WAMK CB 22.

<sup>21</sup> WAMK CB 47-61.

<sup>22</sup> WAMK CB 61.

<sup>23</sup> WAMK CB 63-67.

<sup>24</sup> WAMK CB 89-91.



- a) all of her life she and her family suffered discrimination because she was Anglo-Burmese and Catholic;<sup>25</sup>
- b) the Mother's husband and sister had also suffered discrimination, following the anti-government demonstrations in 1988;<sup>26</sup>
- c) the Mother's husband had participated in the anti-government demonstrations in 1988, and as a consequence, in 1991, he was:
  - i) dismissed from his employment with a government corporation; and
  - ii) banned from:
    - (a) government employment for five years; and
    - (b) travelling abroad,

and has been unable to obtain government employment since that time, but in 2002 obtained work in marketing with a private oil company;<sup>27</sup>

- d) the Mother's sister, who had also participated in the 1988 anti-government demonstrations, was dismissed from her employment with a Burmese government broadcasting service;<sup>28</sup>
- e) since 1988, the district authorities and police have visited the Mother's house at least four times a year, at night, before significant anniversaries, namely Independence Day, Resistance Day, Union Day and Martyr's Day, to:
  - i) check household registration to see if everyone is at home; and
  - ii) tell the Mother's husband that the family was not to travel or carry out political activities before or on the day of the significant anniversary;<sup>29</sup>
- f) she has never been a member of NLD, just a supporter;<sup>30</sup>

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<sup>25</sup> WAMK CB 89 paras.1-3.

<sup>26</sup> WAMK CB 89 para.5.

<sup>27</sup> WAMK CB 89 para.5. The Mother's husband is a geologist by profession: WAMK CB 89 para.5.

<sup>28</sup> WAMK CB 89 para.6.

<sup>29</sup> WAMK CB 89 para.7.

- g) in 1990 she was one of 40-50 NLD volunteers going from house to house (together with her Son then aged 14), dressed in NLD attire, handing out election material for four weeks prior to election day;<sup>31</sup>
- h) on election day in 1990 she was in charge of an election booth for the NLD and that her role was to collect and count votes,<sup>32</sup> and that it was while counting votes that the military authorities put her in a car, blindfolded her and took her away;<sup>33</sup>
- i) she was subsequently interrogated, for what seemed like weeks, about her NLD role and contacts, was beaten (including being hit with a stick and having her hair pulled), and that it was at that time that she was sexually assaulted, whilst already 3 months pregnant, and that as a consequence of the beating and sexual assault, she subsequently miscarried;<sup>34</sup>
- j) whilst in hospital she was kept under guard, and before being allowed to go home she had to sign a paper saying she would not participate in political activities;<sup>35</sup>
- k) from 1991 until she left Burma she and her Son had both been supporting the NLD, donating rice, oil and money and encouraging others to donate;<sup>36</sup>
- l) she distributed anti-government leaflets in 1992 and in 1993, and had participated in an anti-government demonstration in 1993;<sup>37</sup>
- m) she obtained employment with Myanmar International Airways in 1991, her employment being obtained through private companies based in Brunei and Singapore that co-own the airline with the Burmese military government;<sup>38</sup>

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<sup>30</sup> WAMK CB 89 para.9.

<sup>31</sup> WAMK CB 89 para.9.

<sup>32</sup> WAMK CB 89-90 paras.9-10.

<sup>33</sup> WAMK CB 90 para.11.

<sup>34</sup> WAMK CB 90 para.12.

<sup>35</sup> WAMK CB 90 para.15.

<sup>36</sup> WAMK CB 90 para.15.

<sup>37</sup> WAMK CB 90 para.15.

<sup>38</sup> WAMK CB 90 para.16.

- n) she was discriminated against in her employment with Myanmar International Airways, in that she was not given training abroad like other employees, and she was told that this was a consequence of the Burmese authorities having a say in her training;<sup>39</sup>
- o) she said as a result of not being given training, promotions or salary increments, she stopped working for Myanmar International Airways and got a job with Thai International Airways in 1994;<sup>40</sup>
- p) in the course of her employment with Thai International Airways she made several trips to Thailand, but always had “to bribe to get my passport and any departure forms, and ... always used contacts to obtain these documents”;<sup>41</sup>
- q) she was still employed by Thai International Airways when she left Burma in November 2006;<sup>42</sup>
- r) after her husband was “taken away” Thai International Airways rang her sister in Burma and told her sister that the Mother had been sacked because the Burmese military authorities had informed them that the Mother had been involved in political activity;<sup>43</sup> and
- s) a friend of hers had recently returned from a visit to Burma and told her that:
  - i) her husband was still in jail;
  - ii) her daughter was living with her sister; and
  - iii) her brother died in jail in February 2007, having been jailed in December 2006 or January 2007.<sup>44</sup>

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<sup>39</sup> WAMK CB 90 para.16.

<sup>40</sup> WAMK CB 90 para.17.

<sup>41</sup> WAMK CB 90 para.17.

<sup>42</sup> WAMK CB 90 para.17.

<sup>43</sup> WAMK CB 90 para.20.

<sup>44</sup> WAMK CB 91 para.24.

## Invitations to comment on information

### First invitation to comment

9. On 15 May 2007 the Tribunal sent the Mother an invitation to comment on information.<sup>45</sup> The information was specified as follows:

a) that:

- i) in her protection visa application and supporting statutory declaration the Mother had stated that she and her Son had photocopied material from the NLD on only one occasion, whereas the Son stated in his protection visa application that this occurred on many occasions; and
- ii) this information was relevant to the review because the statements were plainly inconsistent, and raised “serious doubts” as to the Mother’s veracity and credibility more generally;<sup>46</sup>

b) that:

- i) in her protection visa application and supporting statutory declaration the Mother had stated that her husband had been arrested and detained only in relation to “some photocopying for the NLD”, whereas at hearing the Mother claimed that “he had also been questioned about [the Mother’s] political activities”; and
- ii) this information was relevant to the review because the statements were obviously inconsistent, and raised “serious doubts” as to the Mother’s claims and “credibility more generally”;<sup>47</sup>

c) that:

- i) in her protection visa application, supporting statutory declaration and at hearing the Mother had stated that her

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<sup>45</sup> WAMK CB 99-101.

<sup>46</sup> WAMK CB 99.

<sup>47</sup> WAMK CB 99.

husband had been arrested and detained for questioning, whereas her Son only claimed that the husband (the Son's father) had been questioned, and that this information was relevant to the review because the statements were obviously inconsistent; and

ii) these were about matters which the Mother and her Son were unlikely to be mistaken or confused and raised "serious doubts" as to the Mother's claims and credibility more generally";<sup>48</sup>

d) that:

i) in her protection visa application and supporting statutory declaration the Mother made no mention of anyone she knew who had been arrested for photocopying documents for the NLD, but that at hearing she claimed that three friends of her Son had been arrested for this activity in 2005, and when asked about the omission at hearing claimed that she did not want to duplicate material in her Son's application, notwithstanding that much of the material is identical in any event, and then claimed that she intended to discuss this matter at hearing; and

ii) this information was relevant to the review because the Tribunal had the "utmost difficulty in accepting that, if it were true" that this information would have been omitted from the Mother's application because it was so fundamental to the basis for the fear of persecution, and that the failure to mention it raised "serious doubts ... as to the veracity of the claim, and ... [the applicant's] credibility more generally";<sup>49</sup> and

e) that:

i) in her protection visa application, supporting statutory declaration and at hearing the Mother had claimed that from 1988 onwards she had been visited four times a year by

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<sup>48</sup> WAMK CB 100.

<sup>49</sup> WAMK CB 100.

authorities, but that at hearing she had also claimed that this surveillance only began after her release from detention in 1997, and that when this was pointed she had simply claimed that the surveillance began in 1997 and not 1988, and that her earlier statements had been wrong; and

- ii) these were about matters which the Mother was unlikely to be mistaken or confused and raised “serious doubts” as to the truth of the Mother’s claims and “credibility more generally”.<sup>50</sup>

10. The Mother responded to the invitation to comment by filing a statutory declaration dated 14 June 2007, in which she alleged:

- a) in respect of the particulars in para.9(a)(i) above, she said she was only ever aware of the photocopying of the 100 Photocopies being undertaken for the NLD, and that any other photocopying referred to “he [the Son] did without my knowledge”;<sup>51</sup>
- b) in respect of the particulars in para.9(b)(i) above, she said that she did allege that her husband was questioned about her political activities, and specifically that the military intelligence officers had questioned her husband about her involvement in politics and whether she was an ardent and dedicated supporter of the NLD (and the Court notes that the Mother’s assertion is correct and the Tribunal’s assertion is wrong);<sup>52</sup>
- c) in respect of the particulars in para.9(c)(i) above, she said her Son’s knowledge of these matters came from the same sources as her knowledge, and that:
  - i) she had told him of what her sister had said in the telephone call on 19 November 2006; and
  - ii) the Sister’s Letter had been addressed to both the Mother and her Son, “so we both knew that my husband had been taken for questioning”, and went on to point out that neither she nor her Son knew what had happened to her husband

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<sup>50</sup> WAMK CB 100.

<sup>51</sup> WAMK CB 116 para.4.

<sup>52</sup> WAMK CB 116 para.5. See also para. 3(a)(iii) above.

(and the Son's father) since "he was taken by the authorities for interrogation" and that the only news out of Burma from friends travelling to Australia indicated that the husband was still in gaol and had not returned home;<sup>53</sup>

- d) in respect of the particulars in para.9(d)(i) above, the Mother said that when she filled out her protection visa application she was focussed on what had just happened to her husband and therefore did not include reference to what had happened to her Son's friends, and that she further thought it was a matter related to her Son's application and not her application;<sup>54</sup> and
- e) in respect of the particulars in para.9(e)(i) above:
  - i) admits that the reference in her 20 April 2007 statutory declaration to the visits and surveillance commencing in 1988 is wrong and that they commenced in 1990 after release from gaol; and
  - ii) that she made no reference in the hearing to 1997, but rather to 1990 (and the Court notes that the Mother was correct in this regard, and there is no basis in any of the materials for the Tribunal's attribution of a 1997 commencement date for these events).<sup>55</sup>

11. In responding to the first invitation to comment the Mother sent to the Tribunal a letter signed by Father Neri, the Parish Priest, St Theresa's Catholic Church, Yongon, dated 23 June 2007.<sup>56</sup> The letter certified that the Mother's husband "*had been detained by the Burmese authorities and taken away for political reasons*" on 18 November 2006 and that there was "*still no information of his whereabouts.*"<sup>57</sup>
12. The Court observes that the Tribunal made at least two errors when seeking particulars of information, namely:

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<sup>53</sup> WAMK CB 116 para.6. The Sister's Letter dated 19 November 2006 says that the husband "was taken by two MI's and District Committee for interrogation late last night" and "they told him to come along with them for interrogation": WAMK CB 40.

<sup>54</sup> WAMK CB 116 para.7.

<sup>55</sup> WAMK CB 116 para.8.

<sup>56</sup> WAMK CB 106 ("Parish Priest's Letter).

<sup>57</sup> WAMK CB 106.

- a) by alleging, wrongly, that the Mother had not raised her husband being questioned about her political activities until the hearing, whereas that was a matter specified in her protection visa application; and
  - b) by alleging, wrongly, that at hearing the Mother claimed that surveillance only began in 1997, whereas at hearing she in fact claimed that it began in 1990.
13. The Mother's representatives also submitted with the particulars of information a submission. It is unnecessary to go through the submission in detail, suffice to say that it makes the point that it was the arrest and detention of the husband in November 2006 which prompted the Mother's claim for protection. It is also worth quoting the conclusion from that submission which is as follows:

*It is submitted that given [the Mother]'s past experience the recent arrest of her husband (confirmed in the letter from her sister, and the letter from the priest) and the country information regarding the treatment of pro-democracy activists means that it is not a remote or far-fetched possibility that she may be questioned, and detained if she returns to Burma. The country information above that indicates that torture and ill treatment is commonplace whilst persons are detained in Burma. Therefore, it is submitted that there is a real chance that [the Mother] will be persecuted if she returns to Burma on the cumulative grounds of her race, religion, and her political opinion.<sup>58</sup>*

## **Second invitation to comment**

14. On 5 July 2007 the Tribunal sent a further invitation to comment on information.<sup>59</sup> The information specified was as follows:
- a) that:
    - i) in the submission it had been asserted that the Mother's husband participated in the 1988 demonstrations and was dismissed from his employment in 1991 as a result, and that

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<sup>58</sup> WAMK CB 124.

<sup>59</sup> WAMK CB 127-129. In her response at WAMK CB 131, the Mother refers to a long and short letter - only the long letter is included in the Court Book. The short letter, from the Mother's response, refers to the Parish Priest's Letter.



the Mother sought to portray the entire family as having a “political profile” with the Burmese authorities, and that these claims had not been made in any document provided in support of the protection claims or at hearing;

- ii) this information was relevant to the review because the Tribunal had the “utmost difficulty in accepting that, if it were true” that this information would have been omitted from the Mother’s application or supporting statutory declaration, or not mentioned at hearing, given its fundamental importance and especially when asked whether the Mother had suffered any adverse consequences, so that the failure to do so until six months after lodging the application “raises serious doubts as to the veracity of the claim and your credibility more generally”;<sup>60</sup>

b) that:

- i) in the submission the Mother had asserted that her husband had participated in the 1988 demonstrations and had been dismissed from employment as a result, and that the entire family had been portrayed as having a political profile, whereas at hearing and in the Mother’s application, the Mother and her Son clearly indicated that the Mother and the Son were the only politically active members of the family and that any ill-treatment to be suffered by the Mother’s husband and daughter would flow from the political activities of the Mother and the Son, rather than any activity by the husband and daughter;
- ii) this information was relevant to the review because the Tribunal considered the sworn statements to be “obviously inconsistent”, and to raise “serious doubts” as to the truth of the Mother’s claim and her credibility more generally;<sup>61</sup>

c) that:

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<sup>60</sup> WAMK CB127

<sup>61</sup> WAMK CB127-128.

- i) at hearing, when asked about her treatment by Burmese authorities the Mother indicated that she was not able to obtain employment with government agencies, but in her application and at hearing admitted having been employed by Myanmar Airlines for three years commencing shortly after her claimed detention following the 1990 elections when she claimed to have been subject to surveillance by the authorities, and that when queried asserted that she had been prevented from travelling overseas to attend training courses because of her alleged political views and activities, and when that claim was queried, asserted that she had been dismissed by Myanmar Airlines, a claim which had never been made before; and
  - ii) this information was relevant to the review because the Tribunal considered the sworn statements to be “obviously inconsistent” and to raise “serious doubts” as to the truth of the Mother’s claims and her credibility more generally.<sup>62</sup>
- d) that:
- i) in the protection visa application the Mother indicated that she was not able to attempt to contact her family because contact with family and friends would be monitored, but that in a later statutory declaration of 14 June 2007 she stated that she asked a relative from Australia to visit her sister specifically in order to inquire about her husband’s whereabouts and that her sister “apparently co-incidentally” had a typed letter bearing a handwritten date “purportedly issued” by the parish priest, which the sister provided to the Australian relative who “duly delivered” the letter to the Mother;
  - ii) this information was relevant to the review because the Tribunal considered that the Mother’s willingness to contact her sister albeit via an intermediary, raised serious doubts about the truth of the claims regarding the level of surveillance and danger alleged by the Mother, and by

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<sup>62</sup> WAMK CB 128.

implication, the importance of the Burmese authorities attached to her alleged political activities;<sup>63</sup> and

- e) that:
  - i) there was an inconsistency between what was alleged in the protection visa application concerning surveillance by way of four home visits per year from 1988 onwards, whereas in the hearing it was claimed that the surveillance only commenced after the Mother's release from detention in 1990, and that when queried about this the Mother simply claimed that her earlier statement had been wrong; and
  - ii) this information was relevant to the review because the Tribunal considered the sworn statements to be "obviously inconsistent" in respect of matters about which the Mother was unlikely to be mistaken or confused and as such they raised "serious doubts" as to the truth of her claims and credibility more generally.

15. The Mother responded to the invitation to comment by filing a statutory declaration dated 13 July 2007, in which she alleges:

- a) in respect of the particulars in para.14(a) above;
  - i) that she had previously stated that her husband was involved in the 1988 demonstrations and that he was dismissed from his employment as a result and referred the Tribunal to the relevant paragraph of a previous statutory declaration where that was said;<sup>64</sup>
  - ii) that saying that her family has a political profile with the authorities was stating what was obvious given the evidence that she had put forward concerning herself, her husband and her Son, both in her statutory declarations and at hearing;<sup>65</sup> and

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<sup>63</sup> WAMK CB 128

<sup>64</sup> WAMK CB 131; see para.5 of statutory declaration of 20 April 2007.

<sup>65</sup> WAMK CB 131.

- iii) that she did provide details of adverse consequences in terms of her imprisonment and hospitalisation in 1990, and to the extent that she had not previously provided these details, she pointed out that she did not previously have the benefit of legal advice and was of the understanding that she would be granted an interview with the Department and would be able to raise those matters at interview;<sup>66</sup>
- b) in respect of the particulars in para.14(b) above she said that it was her claim that any ill-treatment suffered by her husband now was a result of the activities of her and her Son, as that was what was recounted to her sister by her daughter as the reason for her husband being taken away; and that she did not see it as inconsistent with the fact that as a family there was obviously a profile with the authorities given what they had done;<sup>67</sup>
- c) in respect of the particulars in para.14(c) above she says that she said in an earlier statutory declaration of 20 April 2007 that Myanmar International Airlines was jointly owned by the government and private companies and that she did not say at hearing that she was dismissed from employment;<sup>68</sup>
- d) in respect of the particulars in para.14(d) above, she says that “face to face contact” between people is not monitored and is not a problem, and that it is only communications such as are in writing, or over the phone, that are problematic because there is a risk of them being monitored by the authorities;<sup>69</sup>
- e) in respect of the particulars in para.14(e) above, she says that she has nothing to add to what was stated in para.8 of her statutory declaration of 14 June 2007, which was that the visits commenced in 1990.<sup>70</sup>

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<sup>66</sup> WAMK CB 131.

<sup>67</sup> WAMK CB 131-132.

<sup>68</sup> WAMK CB 132.

<sup>69</sup> WAMK CB 132.

<sup>70</sup> See para.10(e) above.

## Tribunal decision

16. On 9 August 2007 the Tribunal handed down its decision.<sup>71</sup>
17. The Court is cognisant that fact finding is the province of the Tribunal, and that the Tribunal Decision ought not to be read with an eye finely attuned to error.<sup>72</sup> That said, if error exists it can not simply be ignored or shied away from, particularly if it is error of a kind which might give rise to jurisdictional error.

## 1988 Activities

18. The Tribunal did not accept that the Mother became a person of interest to the Burmese authorities as a result of her alleged involvement in the protests in 1988. It described her account of her activities as “strikingly vague”, and referred to her continued employment in a multi-national corporation and the absence of any harassment or other official mistreatment in the immediate aftermath of 1988 as evidence of the Mother’s claims being false, or, at best, that her activities were so inconsequential as to be of no concern to the Burmese authorities.<sup>73</sup>
19. The Tribunal was no doubt correct in not accepting that the Mother became a person of interest to the Burmese authorities as a result of her alleged involvement in the protests in 1988. However, in the Court’s view, the Mother did not claim that as a consequence of her activities in 1988 she became a person of interest to the Burmese authorities, at least not at that time. She asserted no more than that:
  - a) a significant proportion of the Burmese population participated in anti-Government demonstrations in 1988, and she along with the other housewives in her district assisted in distributing leaflets and helping students;<sup>74</sup>
  - b) it was after what occurred in 1988 that she came to believe in democratic values and determined to support the NLD;<sup>75</sup> and

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<sup>71</sup> “Tribunal Decision”

<sup>72</sup> *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

<sup>73</sup> WAMK CB 166.

<sup>74</sup> WAMK CB 21 and 89.

<sup>75</sup> WAMK CB 21.

- c) although she originally said that the authorities commenced visits to her house four times a year in 1988, she later corrected this to 1990.
20. In the circumstances, the Mother's account of these events might equally have been considered to be that of a participant whose participation forged a subsequent view as to democratic values, and for the Tribunal to describe that as pointing to her account as being false and being "strikingly vague" seems unwarranted.

### **Claims regarding husband and relatives**

21. The Tribunal did not accept the Mother's claims that:
- a) her husband had also been involved in the 1988 uprising and in 1991 had been dismissed from his employment with a Burmese government company as a result;
  - b) her sister had lost her job with the Burmese government broadcasting service as a result of the sister's involvement in the 1988 uprising; and
  - c) her brother had died in jail in February 2007.<sup>76</sup>
22. The Tribunal referred to the absence of objective or independent evidence to support the above claims and did not accept them as truthful. The Minister accepts that these findings appear primarily to have been made because the claims were not made in the Mother's protection visa application or at the Tribunal hearing.<sup>77</sup> In reaching the conclusion that the claims were untruthful the Tribunal does not appear to have considered the following relevant facts:
- a) that each of the claims were made by the Mother in her 20 April 2007 statutory declaration,<sup>78</sup> that is prior to the Tribunal hearing;
  - b) that on the Mother's account she could not have made the claim about her brother's death in gaol at the time of her protection visa

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<sup>76</sup> WAMK CB 167.

<sup>77</sup> Respondent's Outline of Submissions, para.12(b); WAMK CB 167 – "[w]hile making no such claim in her application or at the hearing..."

<sup>78</sup> WAMK CB 89-91 at CB 89 para.5 (husband and sister's dismissal from employment claims) and CB 91 para.24 (brother's death in gaol claim).

application because it did not occur until 14 February 2007, more than two months after the protection visa claim was made, and she was not told about it until 24 March 2007,<sup>79</sup> more than three months after the protection visa claim was made and 15 days after the delegate's decision,<sup>80</sup>

- c) that very shortly after the commencement of the Tribunal hearing the Mother was told that:

*Yes, I mean you would be aware of course, Mrs [Mother], I have both your original application here and your submissions since, so I'm familiar with this, so we don't need to go into great detail, but as long as you guide me along that path and obviously if you have anything to add to those comments you do that, okay*<sup>81</sup>

in circumstances where English is the Mother's second language, and the hearing is being conducted by video between the Tribunal sitting in Melbourne and the Mother located in Perth, with an interpreter, on the phone, in Sydney, which gave rise to problems as acknowledged by the Tribunal when it said:

*I'm sorry, I didn't mean to cut across you there the problem with the technology is that I will often think you've finished when in fact you haven't.*<sup>82</sup>

23. The problems with assessing demeanour and credibility by video where, as appears to be the case here, there are technological difficulties, are well known.<sup>83</sup> In this case those problems are compounded by the use of an interpreter,<sup>84</sup> and especially an interpreter connected by different technology to a Tribunal and a party each in a different location to the interpreter and each other. The Tribunal's

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<sup>79</sup> WAMK CB 91 at para.24.

<sup>80</sup> WAMK CB 45-62.

<sup>81</sup> Tribunal Hearing Transcript at 4. The Tribunal Hearing Transcript is Annexure "ANG 1" to the affidavit of Arran Niall Gerrard, sworn 14 March 2008. See also Tribunal Hearing Transcript at 13 where the Tribunal twice tells the Mother to tell it something again "briefly", and all of this in the context of a Tribunal Hearing Transcript where the questions are, almost without exception in the 24 pages of Tribunal Hearing Transcript related to the Mother's application, longer than the answers.

<sup>82</sup> Tribunal Hearing Transcript at 4.

<sup>83</sup> See, for example, *WAEJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 597 at 601-602 per Lee, Hill and Marshall JJ; [2003] FCA 188 at paras.17-18 per Lee, Hill and Marshall JJ ("*WAEJ*"); *Moyette Pty Limited v Foundation Healthcare Limited* [2003] FCA 116 at paras.10-12 per Conti J; *Goodall v Nationwide News Pty Ltd* [2007] FMCA 218 at paras.23-29 and 31-34 per Lucev FM.

<sup>84</sup> *WAEJ* ALD at 602 per Lee, Hill and Marshall JJ; FCA at para.17 per Lee, Hill and Marshall JJ

mainly unequivocal assessments of the Mother's truthfulness, so far as they relate to what was said at the Tribunal hearing, appear to involve no consideration of these problems.

### **Detention, beating and sexual assault - 1990**

24. The Tribunal did accept that the Mother may have been subjected to detention, beating and sexual assault following the election in 1990. Curiously, given its other findings on other issues concerning the Mother's truthfulness, its acceptance was based on the Mother's demeanour, but also independent country information.<sup>85</sup> The Tribunal commented that independent country information meant that ill-treatment by the authorities did not necessarily indicate that a person was of real or continuing interest to them, or serve as a prelude to a life of persecution and surveillance, because sometimes being caught was a random act.<sup>86</sup> That comment is not balanced by a consideration of the circumstances in which the Mother was taken into detention, beaten and sexually assaulted, namely that "that on election day in 1990 she was in charge of an election booth for the NLD and that her role was to collect and count votes, and that it was while counting votes that the military authorities put her in a car, blindfolded her and took her away".<sup>87</sup> Those facts were not challenged and were not the subject of any contrary finding by the Tribunal, but the Tribunal failed to consider them (as opposed to the fact and consequences of the detention) in its assessment of the Mother's claims. Indeed, the Tribunal mischaracterised this evidence as a claim that the Mother "was rounded up and detained by Burmese authorities after the election".<sup>88</sup> Then, based on a "Burma seminar at the Refugee Review Tribunal" given in 2006 by Professor Ball in which he said that "sometimes it is so, sort of, random that many people are caught in this dragnet, taken in for interrogation, put into prison, tortured and then found that what they did was either nothing or they had been confused with someone else and they are let go",<sup>89</sup> the Tribunal having accepted that the Mother was detained, assaulted and raped, says it is "of the view" that "these

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<sup>85</sup> WAMK CB 167.

<sup>86</sup> WAMK CB 167.5.

<sup>87</sup> See para. 8(h) above.

<sup>88</sup> WAMK CB 167.

<sup>89</sup> WAMK CB 163 and 167.



events...occurred in the context of an indiscriminate post-election attack on civil society, and did not signify that the applicant and other victims were regarded as being of particular significance to the regime”.<sup>90</sup>

25. No-where does the Tribunal consider and weigh the unchallenged evidence of the Mother that she was detained and taken away on the day of the election in 1990, not after the election, and that she was taken away from an election booth which she was in charge for the NLD and had the role of collecting and counting votes, and whether this constitutes an affiliation with the NLD.<sup>91</sup> The Tribunal has simply failed to take into account a relevant consideration, namely unchallenged evidence that the Mother was detained on election day, in the course of assisting the NLD in the counting of votes in the election.

### **Association with NLD and UTO**

26. The Tribunal rejected the Mother’s claims to have continued her association with NLD and UTO following the events of 1990, saying that they were “vaguely drawn and unsupported by independent evidence”.<sup>92</sup>
27. In relation to the Mother’s association with NLD it is fair to observe that that appears to have been limited after 1990. On her account it was limited to participation in the distribution of leaflets and a demonstration in 1992 and 1993, visits (until 2006) to the NLD head office with donations of rice, oil and money,<sup>93</sup> and her alleged involvement in the making of the 100 Photocopies.<sup>94</sup> It is difficult to envisage what greater detail might be included of these fairly limited activities. As for independent evidence the Tribunal does not appear to have considered the difficulties in obtaining independent evidence of:
- a) what occurred Burma in 1992 and 1993; and
  - b) donations to the NLD (it, for example, being possibly unlikely that in Burma the NLD issues receipts for donations).

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<sup>90</sup> WAMK CB 170.

<sup>91</sup> WAMK CB 167 – where the Tribunal finds the Mother was an “unaffiliated supporter”.

<sup>92</sup> WAMK CB 167.

<sup>93</sup> WAMK CB 90 para.15.

<sup>94</sup> WAMK CB 90 para.15.

28. In relation to UTO there was evidence that UTO knew the family, and was a friend of the Mother's father-in-law sometimes seen by the Mother because he was often at the father-in-law's house in the evenings, prior to UTO being put under house arrest, and that the request to do the 100 Photocopies was delivered by his personal driver UZW.<sup>95</sup> This level of detail might not be what is required in a final trial affidavit in complex adversarial litigation, but is hardly fair in the Court's view to describe it as "vaguely drawn". The Tribunal again does not appear to have considered the difficulties in obtaining independent evidence out of Burma as to the relationship, particularly when it appears that, both on the account of the Mother and the independent country information UTO was under house arrest by the time the Mother arrived in Australia.<sup>96</sup>

### **The 100 Photocopies**

29. The Tribunal did not accept that the applicant account "photocopied, or permitted or caused to be photocopied, documents for the NLD".<sup>97</sup> The Tribunal further said as follows:

*The Tribunal does not accept that such a fundamentally important and relevant claim, if true, would not have been mentioned by the applicant in her Protection Visa application, and finds her explanation of her failure to mention such a matter until April 2007, some four months after lodging the application and one month after having it refused, both implausible and disingenuous.*<sup>98</sup>

30. The Court notes that despite aspects of the issue of photocopying being raised in the first invitation to comment it was not put to the Mother by way of invitation to comment that she had not mentioned the photocopying claim in her protection visa application. Nor was such a proposition put to her at the Tribunal hearing. The Tribunal said to the Mother at the hearing that it was "familiar" with her "original application" so she need not "go into great detail".<sup>99</sup> Had such a proposition been put to her at the Tribunal hearing she would have had

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<sup>95</sup> WAMK CB 20 and 90 para.21.

<sup>96</sup> WAMK CB 90 para.21 and 154-155.

<sup>97</sup> WAMK CB 167.

<sup>98</sup> WAMK CB 168.

<sup>99</sup> Tribunal Hearing Transcript at 4. The full quote is at para.22(c) above.

the opportunity to point out to the Tribunal the following passages in her protection visa application:

*According to the letter from my sister, my husband was taken away for interrogation because my Son and I made photocopies for the [NLD]. These relate to NLD's scheduled trips to upper Burma. My Son, with my knowledge and permission did ma[k]e about one hundred (100) copies of the scheduled trips.*<sup>100</sup>

*... we made photocopies for the National League for Democracy.*<sup>101</sup>

*My Son managed a photocopying and stationery shop and the said documents were printed at this shop. We made copies at the direct request of [UTO]. This request was delivered by [UTO's] personal driver [UZW]. Intimate and direct association and communication with leaders of the NLD is a far more serious offence than merely printing.*<sup>102</sup>

*The military intelligence knows about the printing (activity) ...*<sup>103</sup>

*If my husband had admitted to the knowledge of our activities (printing for the NLD business schedules) he will also be arrested and tortured for supporting NLD.*<sup>104</sup>

31. There was therefore no failure to mention the photocopying of the documents in the Mother's protection visa application, and therefore there can have been no explanation of a "failure to mention such a matter" until April 2007, let alone an explanation of the "failure to mention" which was implausible and disingenuous.
32. The Tribunal also described the Mother's evidence about the photocopying as follows:

*Her oral and written evidence in relation to this central claim was confused and inconsistent in material respects, and the Tribunal's attempts to clarify precisely who had done what and how often elicited an unsatisfactory response.*<sup>105</sup>

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<sup>100</sup> WAMK CB 20.

<sup>101</sup> WAMK CB 20.

<sup>102</sup> WAMK CB 20.

<sup>103</sup> WAMK CB 23.

<sup>104</sup> WAMK CB 24.

<sup>105</sup> WAMK CB 167-168. According to the Tribunal the central claim was "that the applicant photocopied, or permitted or caused to be photocopied, documents for the NLD": WAMK CB 167.

33. The Tribunal does not say what it is that was confused or inconsistent in the oral and written evidence. Nor does the Tribunal say what it is about the Mother's responses at hearing that was unsatisfactory. The Mother has never claimed to be involved in any photocopying other than of the 100 Photocopies.<sup>106</sup>
34. An examination of the written evidence about the Mother's involvement in the photocopying does not in the Court's view indicate confusion or inconsistency. The matter is first raised by the Sister's Letter, addressed to both the Mother and her Son, where it is written that Burmese military intelligence had asked the husband "if ... you were both supporting NLD making photocopies in your store."<sup>107</sup> The substance of the Mother's claim about her involvement in the photocopying remained the same throughout, namely that it was:
- a) done in 2003 for the NLD and UTO pursuant to a request from UTO's driver;<sup>108</sup>
  - b) done in her Son's photocopy shop which was located in their house;<sup>109</sup>
  - c) done with her knowledge, permission, and assistance;<sup>110</sup> and
  - d) related to a trip to upper Burma by the NLD.<sup>111</sup>
35. The Mother's oral evidence about her involvement in the photocopying is contained in less than two and one half pages of the Tribunal Hearing Transcript.<sup>112</sup> She confirms that "[m]y son and I" did the photocopying, in that "[my] son copied 100 copies of the papers, I was there helping him..."<sup>113</sup> The Tribunal wanted to know how the Mother had helped, admitting to be a "little perplexed" and "quite mystified" about the complexity of the task.<sup>114</sup> There is then the following exchange:

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<sup>106</sup> WAMK CB 116 at para.4.

<sup>107</sup> WAMK CB 40.

<sup>108</sup> WAMK CB 20, 90 at para.21

<sup>109</sup> WAMK CB 20, 90 at para.21

<sup>110</sup> WAMK CB 20 ("[w]e made copies"), 90 at para.21 ("my son and I made")

<sup>111</sup> WAMK CB 20, 90 at para.21

<sup>112</sup> Tribunal Hearing Transcript at 4-6.

<sup>113</sup> Tribunal Hearing Transcript at 4.

<sup>114</sup> Tribunal Hearing Transcript at 4.

*Mr Young: On the photocopiers I'm familiar with you put it in you press 100 and you hit the button and it comes out. I'm not sure what role you played.*

*[Mother] Because an...in our country is not stable, we have to do whole pages at a time and then someone must be there beside to get the paper and then must take out the paper.*

*Mr Young: Someone to put in the paper and someone pulls it out?*

*[Mother] Yes.*

...

*Mr Young: Right, okay. So this happened, as I understand it, in 2003, yes?*

*The Interpreter: Yes.*

*[Mother]: Yes, sir.*

*Mr Young: Right, so in 2003 you claim that you and your Son did some photocopying, produced 100 copies of a one page document, you claim for the NLD, showing an itinerary and three years later the authorities became aware of this.<sup>115</sup>*

36. The Mother goes on to confirm that:
- a) it was only on the one occasion that she and her Son photocopied material; and
  - b) the stationery business is located inside the family home.<sup>116</sup>
37. The Mother's oral evidence is internally consistent, and consistent with the Mother's written evidence. It is difficult to see how the responses are unsatisfactory. The only confusion is that of the Tribunal, caused by its inability to understand how in this photocopying business run from inside a Burmese home it was not possible to print the 100 Photocopies at the press of a single button.
38. The Tribunal also asserted at one point that the Mother had said that she had done the photocopying (impliedly alone),<sup>117</sup> but there is, in the

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<sup>115</sup> Tribunal Hearing Transcript at 5.

<sup>116</sup> Tribunal Hearing Transcript at 6.

<sup>117</sup> Tribunal Hearing Transcript at 5.

Court's view, no evidence that that is the case, and the Tribunal erred in making such an assertion.

39. In the Court's views the Tribunal's conclusions about the Mother's involvement in the making of the 100 Photocopies are:
- a) premised on a false premise, namely that the Mother did not make a claim about her involvement in the making of the 100 Photocopies in her protection visa application, when in fact she did; and
  - b) a mischaracterisation of her written and oral evidence as confused, inconsistent and unsatisfactory, when, viewed objectively, that evidence is capable of being characterised as clear, consistent and satisfactory.
40. The Tribunal goes on to observe that there is no independent country information indicating that photocopying for the NLD is:
- a) an offence; or
  - b) an activity likely to raise the ire of the Burmese authorities.<sup>118</sup>

## **Surveillance**

41. The Tribunal found that the Mother's claim that she was subject to surveillance and periodic visits by the Burmese authorities was not truthful. The Tribunal did so on the basis that:
- a) "the applicant stated in her application and at the hearing that this surveillance began in 1988. However, later in the hearing and in her first post-hearing statutory declaration, she stated that the surveillance began after her release from detention in 1990."<sup>119</sup> and
  - b) the Tribunal observed that no explanation for this inconsistency was provided and that it did not accept that this was a matter about which the applicant was likely to be merely confused or mistaken.

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<sup>118</sup> WAMK CB 168.

<sup>119</sup> WAMK CB 168.

42. An examination of the Mother’s application indicates that she made no claim with respect to surveillance by the Burmese authorities, whether beginning in 1988 or otherwise. Rather, she first raised the matter in her pre-hearing 20 April 2007 statutory declaration when she asserted that:
- a) since “our [her and her husband’s] involvement in the 1988 demonstrations the district authorities and the police would visit our house at least four times a year;”<sup>120</sup> and
  - b) following her release from gaol in 1990 the military authorities continued with their visits four times a year to the house.<sup>121</sup>
43. The Mother was questioned about this matter by the Tribunal at the hearing when she was asked when the four times a year checks started and responded that it was following her discharge from “the hospital and detention”.<sup>122</sup> Further on, the Tribunal asked again about the discrepancy between 1988 and 1990 in the following exchange:

*MR YOUNG: Yes, can you explain to me why you stated earlier in an earlier document that you – it is – these four times yearly visits have been going on since 1988? You’re now telling me they only happened in 1990 from then on?*

*THE INTERPRETER: Only after I come out of gaol that happened.*

*MR YOUNG: And then why would you have said earlier that in fact it was from – four times a year since 1988?*

*THE INTERPRETER: I...it was in 1988 and these things happen after 1990.*<sup>123</sup>

44. It appears tolerably clear from the transcript that the Mother ultimately claimed that the surveillance was four times a year after 1990. The Tribunal appeared to accept this at the hearing when immediately after the passage quoted above it said as follows:

*Ok, so after 1990 were there any other – apart from these four times yearly visits by the authorities, were there any other*

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<sup>120</sup> WAMK CB 89 at para.7.

<sup>121</sup> WAMK CB 90 at para.14.

<sup>122</sup> Tribunal Hearing Transcript at 16.

<sup>123</sup> Tribunal Hearing Transcript at 17.

*contacts between you and the – and the government or the authorities over your political involvement?*<sup>124</sup>

45. The only issue identified by the Tribunal was the date from which the surveillance commenced. It was never put to the Mother that there was no surveillance at all, and that her evidence with respect to the surveillance (or more correctly the four visits per year by the military authorities) was untruthful. It might be argued that this was a factual error within jurisdiction, but it appears to the Court that the Tribunal has identified a wrong issue, namely whether the Mother has been truthful about the four visits per year, as opposed to whether the visits began in 1988 or 1990, and has utilised the conclusion based upon the identification of a wrong issue to doubt the totality of the Mother's claims as to the visits when it was only the commencement dates of those visits that was put in issue. In that regard it can also be said that the Tribunal has ignored relevant material in that it has not otherwise dealt with the unchallenged evidence that the visits occurred between 1990 and 2006.
46. The Tribunal has simply equated inconsistency in respect of part of an issue with untruthfulness in relation to the whole of the issue, without necessarily identifying the correct issue, and in the process, ignoring relevant material which might have assisted with identification and resolution of the correct issue.

### **Tribunal's conclusions regarding political activities**

47. The Tribunal's finding in relation to the Mother's factual claims concerning her political activities in Burma, led it to conclude that those claims were "without foundation" and that she was a person of no continuing interest to the Burmese regime and its security organs.<sup>125</sup> In making those findings the Tribunal characterised the Mother's claim as being that she was "a member of a politically active and high profile family, well-connected to senior NLD figures and subject to close surveillance by the Burmese authorities since 1988 (or 1990, in other accounts)".<sup>126</sup> The Tribunal characterisation of the Mother's claim is in the Court's view wrong. The Mother did not claim to be a member of a

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<sup>124</sup> Tribunal Hearing Transcript at 17.

<sup>125</sup> WAMK CB 168.

<sup>126</sup> WAMK CB 168.



politically active and high profile family. Rather, she claimed that from time to time she engaged in political activities, and that in that respect she had not engaged in any distribution of political material or political demonstrations since 1993 and her political activities had been limited to donations of rice, money and oil to the NLD, and the making of the 100 Photocopies. Further, she did not claim to be a member of a “high profile family”, but rather to be a person who was a member of a family that had a profile with the authorities that had continued to build over the years. The Mother also never claimed to be the subject of “close” surveillance by the Burmese authorities. What she did claim was that, whether from 1988 or 1990, the Burmese authorities came to her house four times a year before significant anniversaries, and spoke to her husband (not her) to warn him that the family ought not to engage in any political activities on the four significant anniversary days referred to. The applicant did give some other evidence about certain checks and restrictions, but there is nothing in the evidence which constitutes a proper basis for a conclusion that this constituted “close” surveillance.

### **Personal circumstances including employment**

48. The Tribunal found that the Mother was not a person of continuing interest to the regime by reference to her personal circumstances including her employment. In that regard, the Tribunal found that the Mother had obtained employment with Myanmar International Airways in 1994, and that it was a government entity.<sup>127</sup> The Tribunal had noted the Mother’s claim to have been excluded from employment with government entities, and described this as vague and uncorroborated. The Tribunal noted that when it was put to the Mother that Myanmar International Airways was a government entity she claimed that it was a joint public/private sector business enterprise. The Tribunal found, for reasons which it does not explain, that response to be “disingenuous and irrelevant”.<sup>128</sup> The only evidence about Myanmar International Airways is evidence given by the Mother. She asserted that Myanmar International Airways was “jointly owned by the government and private companies from Singapore and Brunei. I got my job there

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<sup>127</sup> WAMK CB 169.

<sup>128</sup> WAMK CB 169.

through the private companies, which also appointed staff from Singapore and Brunei.”<sup>129</sup> The Tribunal sought no further particulars of information in relation to the Mother’s claim as to how she came to be employed by Myanmar International Airways, and in particular whether she was employed through the private sector entities, or as to the nature of Myanmar International Airways as a corporate entity. At hearing the Tribunal questioned her about her employment with Myanmar International Airways, but on the basis that she was not prevented from being employed or making a living, not that her employment was as a consequence of her engagement through the private sector partners and certainly not as to the corporate structure or ownership of the business.<sup>130</sup>

49. The Tribunal obviously considered the Mother’s responses as to her employment with Myanmar International Airways, and its ownership or corporate structure, as relevant to an assessment of her credibility. The only evidence before the Tribunal related to that issue was the Mother’s evidence of it being a joint government/private sector enterprise. There was no evidence that Myanmar International Airways was a solely government entity, yet it is a finding to this effect that the Tribunal uses to disparage as “disingenuous and irrelevant” the Mother’s claim of a joint government/private sector enterprise.

### **Danger of persecution prior to arrival in Australia**

50. The Tribunal goes on to observe that the Mother did not consider that she was in danger of persecution or other harm prior to her arrival in Australia, and that her activities in Burma prior to her arrival in Australia played no role whatsoever in her decision to travel from Burma to Australia,<sup>131</sup> and further, she had never sought asylum in any country she had visited in the past.<sup>132</sup> What the Mother did claim was that her discovery subsequent to arriving in Australia that the Burmese authorities had arrested her husband and questioned him in relation to the 100 Photocopies had resulted in her having a well-founded fear of

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<sup>129</sup> WAMK CB 90 para.16.

<sup>130</sup> Tribunal hearing transcript at 18.

<sup>131</sup> WAMK CB 169.

<sup>132</sup> WAMK CB 169.

persecution if she was to return to Burma. That fear was said to be based upon the fact that:

- a) her husband had been questioned and arrested by the Burmese authorities; and
- b) he had been questioned in relation to the 100 Photocopies.

51. The Tribunal did not independently address the genuineness of the two letters upon which these fears were based, namely the Sister's Letter and the Parish Priest's Letter. There was no finding, for example, of forgery or fabrication of either letter (and for the purposes of the grounds of the application, particularly the Parish Priest's Letter). The Tribunal simply noted the contents of each letter, and on the basis of the factual conclusions that it had previously reached about the Mother's claims, and which have been examined above, found that the Mother's claims were "implausible, opportunistic and inconsistent in important respects, and does not accept them as truthful or accurate."<sup>133</sup>

## Legal principles

### What constitutes jurisdictional error

52. The Tribunal Decision is only liable to be set aside upon review if it involves jurisdictional error.<sup>134</sup> An error by the Tribunal will only constitute jurisdictional error if the Tribunal:
- a) identifies a wrong issue;
  - b) asks the wrong question;
  - c) ignores relevant material; or
  - d) relies on irrelevant material,

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<sup>133</sup> WAMK CB 169, see also WAMK CB 170.

<sup>134</sup> *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 506 per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ; [2003] HCA 2 at para.76 per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ.

in such a way that the Tribunal's exercise or purported exercise of power is thereby affected resulting in a decision exceeding or failing to exercise the authority or powers given under the relevant statute.<sup>135</sup>

### Relevant cases

53. In *Abebe v Commonwealth of Australia*<sup>136</sup> two members of the High Court observed as follows:

*Once the Tribunal was unable to find that she had been arrested as claimed, her further claims of detention and rape became logically irrelevant. The Tribunal, having found that it could not rely on her evidence of arrest, was not then required to act on her allegations of detention and rape, allegations which were dependent on her claim of being arrested and taken into custody for reasons of political opinion. The Tribunal was not bound therefore to make any express finding as to whether she had been raped. Nor given the nature of her claim and the Tribunal's finding that she was not a credible witness was it required, as it might have been in other circumstances, to determine whether there was a real chance that she had been arrested as she claimed.*<sup>137</sup>

54. In *WAIJ v Minister for Immigration and Multicultural and Indigenous Affairs*<sup>138</sup> the Tribunal had disregarded documents which it considered did not overcome problems that it had with the applicant's evidence.<sup>139</sup> In *WAIJ* the Full Court of the Federal Court observed as follows:

*A determination based on illogical or irrational findings or inferences of fact will be shown to be a decision not supported by reason and to have no better foundation than an arbitrary selection of a result. It is because it is based upon such findings that the determination is an unreasoned decision. Such findings or inferences of fact become part of, and are not distinguishable from, the decision subject to judicial review: See S20/2002 at [54]*

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<sup>135</sup> *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 per McHugh, Gummow and Hayne JJ; [2001] HCA 30 at para.82 per McHugh, Gummow and Hayne JJ; *WZANE v Minister for Immigration & Anor* [2008] FMCA 1520 at para.32 per Lucev FM.

<sup>136</sup> (1999) 197 CLR 510; [1999] HCA 14 (“*Abebe*”).

<sup>137</sup> *Abebe* CLR at 545 per Gleeson CJ and McHugh J; HCA at para.85 per Gleeson CJ and McHugh J.

<sup>138</sup> (2004) 80 ALD 568; [2004] FCAFC 74 (“*WAIJ*”).

<sup>139</sup> *WAIJ* ALD at 574 per Lee, Moore and RD Nichol JJ; FCAFC at para.26 per Lee, Moore and RD Nichol JJ.

*per McHugh and Gummow JJ; Bond at 338, 359-360 per MaSon CJ.*<sup>140</sup>

55. In *WAIJ* the Full Court went on to observe that:

*Such a circumstance may arise where an applicant's claims have been discredited by comprehensive findings of dishonesty or untruthfulness. Necessarily, such findings are likely to negate allegedly corroborative material. (See: S20/2002 per McHugh, Gummow JJ at [49]). Obviously to come within that exception there will need to be cogent material to support a conclusion that the appellant has lied. Alternatively, if the purportedly corroborative material itself is found, on probative grounds, to be worthless it will be excluded from consideration by the Tribunal in assessing the credibility of an applicant's claims. However, it will not be open to the Tribunal to state that it is unnecessary for it to consider material corroborative of an applicant's claims merely because it considers it unlikely that the events described by an applicant occurred. In such a circumstance the Tribunal would be bound to have regard to the corroborative material before attempting to reach a conclusion on the applicant's credibility. Failure to do so would provide a determination not carried out according to law and the decision would be affected by jurisdictional error. (See: Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323 per McHugh, Gummow, Hayne JJ at [82]-[85]).*<sup>141</sup>

56. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*<sup>142</sup> the Chief Justice of the High Court said that:

*In my view, all that the member was saying was that, for reasons already given at length, she found the applicant's/appellant's story implausible, and in some important respects unbelievable, and that she also rejected the evidence of the corroborating witness, even though she had no separate reason to doubt his credibility other than the reasons that she had already given for rejecting the claim she was considering. ... It is not necessarily irrational, or illogical, for a finder of fact, who is convinced that a principal witness is fabricating a story, which is considered to be inherently implausible, to reject corroborative evidence, even*

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<sup>140</sup> *WAIJ* ALD at 574 per Lee, Moore and RD Nichol JJ; FCAFC at para.22 per Lee, Moore and RD Nichol JJ.

<sup>141</sup> *WAIJ* ALD at 574-575 per Lee, Moore and RD Nichol JJ; FCAFC at para.27 per Lee, Moore and RD Nichol JJ.

<sup>142</sup> (2003) 198 ALR 59; [2003] HCA 30 (“*Applicant S20/2002*”).

*though there is no separate or independent ground for its rejection, apart from the reasons given for disbelieving the principal witness.*<sup>143</sup>

57. In *Applicant S20 /2002* two other members of the High Court observed as follows:

*In a dispute adjudicated by adversarial procedures, it is not unknown for a party's credibility to have been so weakened in cross-examination that the tribunal of fact may well treat what is proffered as corroborative evidence as of no weight because the well has been poisoned beyond redemption. It cannot be irrational for a decision-maker, enjoined by statute to apply inquisitorial processes (as here), to proceed on the footing that no corroboration can undo the consequences for a case put by a party of a conclusion that that case comprises lies by that party. If the critical passage in the reasons of the Tribunal be read as indicated above, the Tribunal is reasoning that, because the appellant cannot be believed, it cannot be satisfied with the alleged corroboration. The appellant's argument in this Court then has to be that it was irrational for the Tribunal to decide that the appellant had lied without, at that earlier stage, weighing the alleged corroborative evidence by the witness in question. That may be a preferable method of going about the task presented by s 430 of the Act. But it is not irrational to focus first upon the case as it was put by the appellant.*<sup>144</sup>

### **Whether jurisdictional error in this case**

58. The extract from *Abebe* cited above is distinguishable from this case on the facts. The applicant in *Abebe* admitted lies in her various accounts, most critically in a statement to South African authorities saying that she had never been arrested or detained.<sup>145</sup> In the Mother's case the Tribunal has been prepared to accept her claims of detention and sexual assault. However, in finding that they are not a basis for a well-founded fear of persecution because the detention and sexual assault were a random event, the Tribunal failed to take into account a relevant consideration, namely, the unchallenged evidence that the Mother was detained, not as part of a random sweep after the 1990 election, but

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<sup>143</sup> *Applicant S20/2002* ALR at 63 per Gleeson CJ; HCA at para.12 per Gleeson CJ.

<sup>144</sup> *Applicant S20/2002* ALR at 70 per Gummow and McHugh JJ; HCA at para.49 per Gummow and McHugh JJ.

<sup>145</sup> *Abebe* CLR at 545 per Gleeson CJ and McHugh J; HCA at para.84 per Gleeson CJ and McHugh J

whilst counting votes on the day of the election, at the election booth which she was in charge of for the NLD. Had the Tribunal taken into account that relevant consideration it may have affected the Tribunal's approach to its entire chain of reasoning (including as to credibility), and it would, at least, have been open to it to arrive at a different conclusion with respect to the basis upon which the Mother was arrested in 1990, and it would therefore also have been open to it to find that there was now a well-founded fear of persecution based on the alternative reason for arrest in 1990. It may not have done so, but its failure to take into account a relevant consideration, constitutes jurisdictional error sufficient to make out ground (a)(i) and (ii) of the Mother's application.

59. Failure to consider corroborative documentary evidence can be justified where a tribunal makes findings that evidence given is untrue or inherently implausible, provided those findings are based upon cogent material or are not illogical or irrational findings. In this case the Tribunal made findings about the Mother's involvement in making the 100 Photocopies, and consequently her credibility, based on an entirely false premise, namely that the Mother did not make a claim about her involvement in the making of the 100 Photocopies in her protection visa application, when in fact she did. Had the Tribunal had regard to the correct premise it would have been open to it to conclude that the Mother was involved in the photocopying and to make different findings as to her credibility. With those considerations open it would have been appropriate then for the Tribunal to consider the Parish Priest's Letter and whether it might, or might not have, corroborated the Mother's claims. The Tribunal's failure to have regard to the correct premise, and consequently to have regard to the Parish Priest's Letter, is a failure to have regard to a relevant consideration, and constitutes jurisdictional error sufficient to make out ground (a)(iii) of the Mother's application.
60. The mischaracterisation of the Mother's evidence as to her involvement in the making of the 100 Photocopies has the same effect in relation to the Tribunal's consideration as that outlined in the previous paragraph, and in this instance the mischaracterisation is of such significance to make the findings of fact based upon so lacking in

cogency that they also constitute jurisdictional error sufficient to make out ground (a)(iii) of the Mother's application.

## **WAMK - conclusion and orders**

61. The Court has concluded that the Tribunal decision is affected by jurisdictional error for reasons set out above. It follows that there will be orders granting prerogative relief.

## **Proposed amended grounds**

62. In the circumstances, it is unnecessary for the Court to consider the Mother's application to amend the grounds of the application.

## **Grounds for application – Son**

63. The Son's original grounds were as follows:

- a) The Second Respondent committed jurisdictional error in that it failed to properly apprehend the nature of the Second Applicant's claim, and thereby properly address the statutory questions under sections 36 and 65 of the *Migration Act* 1958 in that it:
  - i) failed to understand that the Second Applicant was pursuing a claim for a protection visa as a member of a family unit; further or alternatively;
  - ii) failed to understand and address the nature of the Second Applicant's claim as being intimately connected with the Second Applicant's mother's claim (the determination of which was itself infected with jurisdictional error).
- b) The Second Respondent adopted a fatally flawed approach to finding the facts necessary to determine whether it was satisfied that the prescribed criteria for the grant of a protection visa were satisfied, thereby committing jurisdictional error, in that it failed to undertake any proper or rational assessment of the credibility of a letter from the Second Applicant's parish priest in Burma corroborating the Second Applicant's claim that his father had



been detained and taken away for political reasons since 18 November 2006.

- c) Such further or amended grounds as may be the subject of an application for leave on consideration of the transcript of the RRT hearing (the audio recording of which having been requested by the Second Applicant's solicitor at the conclusion of the hearing, and subsequently on 27 August 2007, to no avail).

64. There was an application for leave to amend the grounds of the application, but it is not presently necessary to consider that application, which is further dealt with hereunder.

### **The decision of the Tribunal**

65. On 9 August 2007 the Tribunal handed down its decision refusing the Son's application for review.<sup>146</sup> In refusing the application the Tribunal:

- a) did not accept that the Son had photocopied documents for the NLD, describing his evidence as confused and inconsistent in material respects;<sup>147</sup> and
- b) made no specific finding regarding the letter from Father Neri, and disposed of it in the same terms as in the Tribunal decision on the Mother's application for review.<sup>148</sup>

### **Consideration of grounds of application – whether jurisdictional error**

66. It is unnecessary to deal at any length with the grounds of the Son's application in relation to the Second Tribunal Decision.

67. The applications of the Mother and the Son are largely based on common factual material, particularly as to their involvement in the making of the 100 Photocopies. Because of the jurisdictional errors in relation to the Mother's application, the Tribunal did not properly consider the Mother's involvement in the making of the 100

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<sup>146</sup> "Second Tribunal Decision". WAML CB 142-166.

<sup>147</sup> WAML CB 162- 163.

<sup>148</sup> WAML CB 164.

Photocopies. Had the Tribunal done so it may have had to deal differently with the Son's application, particularly if consideration of the Mother's involvement resulted in consideration of the Parish Priest's Letter and the claim of the Son's father's alleged questioning, arrest and detention, which might then have impacted, in any event, upon the Son's claim of a well-founded fear of persecution. In the circumstances that is sufficient to constitute jurisdictional error sufficient to make out each of ground (a)(ii) and (b) of the Son's application.

### **WAML - conclusion and orders**

68. The Court has concluded that the Second Tribunal Decision is affected by jurisdictional error for reasons set out above. It follows that there will be orders granting prerogative relief.

### **Proposed amended grounds**

69. In the circumstances, it is unnecessary for the Court to consider the Son's application to amend the grounds of the application.

### **Costs**

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

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**I certify that the preceding seventy (70) paragraphs are a true copy of the reasons for judgment of Lucev FM**

Acting Associate: Michele Lord

Date: 16 January 2009