FEDERAL MAGISTRATES COURT OF AUSTRALIA

MZXNR & ANOR v MINISTER FOR IMMIGRATION & ANOR *[2007] FMCA 749*

MIGRATION – Refugee Review Tribunal – whether decision supported by any probative evidence – whether decision illogical – whether irrelevant consideration taken into account – whether evidence misunderstood – whether refusal to allow spouse to give corroborative evidence- application dismissed.

Migration Act 1958, ss.36, 422B, 425, 426

Applicant A227 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 567
Minister for Aboriginal Affairs & Anor v Peko-Wallsend (1986) 162 CLR 24
Minister for Immigration and Multicultural and Indigenous Affairs v Katisat [2005] FCA 1908
Minister for Immigration and Multicultural Affairs v Lay Lat (2006) 151 FCR 224
Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin [2005] FCAFC 118
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 207 ALR 12
NAQF v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 781
Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 198 ALR 59
SZBFM & Anor v Minister for Immigration [2005] FMCA 451
SZBWJ v Minister for Immigration and Multicultural Affairs [2006] FCAFC 13
SZBXR v Minister for Immigration [2005] FMCA 1946
SZCIJ v Minister for Immigration and Multicultural Affairs [2006] FCAFC 62
VWST v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 286
WADU v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1252

First Applicant:	MZXNR
Second Applicant:	MZXNS
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent:	REFUGEE REVIEW TRIBUNAL
File number:	MLG 1545 of 2006
Judgment of:	Riley FM
Hearing date:	9 May 2007
Date of last submission:	9 May 2007
Delivered at:	Melbourne
Delivered on:	19 June 2007

REPRESENTATION

Counsel for the Applicant:	Mr Colquhoun
Solicitors for the Applicant:	Asylum Seekers Resource Centre
Counsel for the First Respondent:	Richard Knowles
Solicitors for the First Respondent:	Australian Government Solicitor

ORDERS

(1) The application filed on 7 December 2006 be dismissed.

(2) The applicants pay the first respondent's costs, fixed in the sum of $5,000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 1545 of 2006

MZXNR
First Applicant

And

MZXNS
Second Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

And

MIGRATION/REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application filed on 7 December 2006 seeking judicial review of a decision of the Refugee Review Tribunal ("the Tribunal") signed on 31 October 2006. That decision affirmed a decision of the first respondent's delegate refusing to grant a protection visa to the applicants.

2. The first applicant is a 38 year old male citizen of Sri Lanka. The second applicant is a 31 year old female citizen of Sri Lanka and is the wife of the first applicant. The second applicant relies upon the substantive claims of her husband.

3. The applicants arrived in Australia on 23 March 2006 and applied for protection visas on 5 May 2006. On 4 July 2006, a delegate of the first respondent refused the application. On 21 July 2006, the applicant applied to the Tribunal for review of the delegate's decision. On 9 November 2006, the Tribunal handed down its decision dated 31 October 2006 affirming the delegate's decision.

4. On 7 December 2006, an application for judicial review of the Tribunal's decision and a supporting affidavit were filed in this court. On 24 April 2007, the applicants filed an amended application and contentions of fact and law and on 2 May 2007, the first respondent filed contentions of fact and law. On 11 May 2007, the applicants filed a further amended application.

Initial claims

5. In a statement dated 5 May 2007 and lodged with his protection visa application, the first applicant claimed to have been an active member of the UNP since 1998. He claimed that he played a prominent role in the Presidential elections held on 17 December 1999 and in October 2000. He said in the year 2000, he was appointed as the President of the Organising Committee in the Place A Electorate and in 2001 he was appointed as the organiser of the Youth Wing of the party.

6. The first applicant claimed that because of his involvement with the UNP, he experienced death threats, acts of violence, random and unprovoked attacks and violent and aggressive harassment and intimidation at the hands of the Sri Lanka Freedom Party and later the People's Alliance Party. He described incidents that he claimed occurred in 1999, 2000, 2001, 2002 and 2004, saying that after the final incidents in 2004 in which his house was attacked, he was urged to quit politics and leave the country. The first applicant claimed that in August 2005, he decided to leave for Australia, saying that he was not protected by the authorities.

7. The first applicant also said at question 13 of his protection visa application that he would provide later further documentation in support of his application, including complaints to police, party membership card, letters from party leaders, photographs, newspaper cuttings and his marriage certificate.

Evidence before the Tribunal

8. At the Tribunal hearing on 11 September 2006, the first applicant was asked to describe the incidents of violence that occurred against him, which the Tribunal summarised in its decision record as follows:

> *He described the incidents of 21 November 1999, 28 September 2000. In the first he claims to have been injured by a supporter of the PA and in the second he had glue tipped over him. The police took down the complaint about the latter but did nothing. He moved to [Place B] (sic) 1994 [Place B is approximately 100kms from Place C]. ... He claimed he moved there because of politics and relations (his mother's house is in [Place B]). Asked how he could do political work in [Place B] when he worked in Colombo; he stated he left at 5 am and returned at 9 pm. He moved to [Place C] in 2004 and worked in Colombo.*
>
> *He described two other incidents on 9 March 2004 and 26 March 2004 when he claims to have been attacked by political opponents; he complained to the police but they did nothing about it. On 18 April 2004 his house in [Place B] was damaged and he was threatened and assaulted. About 50 people took part in this incident. At the hearing, the applicant produced a photo of the house, which he stated had been taken on 30 April 2004, where a group of two adult females and four children are posing for the photograph and another child is looking on. The corner of the house appears to be missing its walls and roof.*
>
> *The applicant stated that he was very popular and that he was responsible for bringing [X] into politics. The threats peaked in March 2006 because of his cousin's political candidature.*

9. The Tribunal also referred in its decision record to the evidence of the second applicant, saying that:

> *The Tribunal took evidence from the applicant's wife who indicated that she had married him on 27 January 2004. She stated that her husband had had threats from political opponents*

and they had had a lot of hardship because of his political work. He would get into difficulties if he returned.

10. On 29 September 2006, the Tribunal wrote to the applicants' adviser, inviting the applicants to comment on information that might be the reason, or part of the reason, for affirming the decision under review. On 12 October 2006, the applicants responded to the invitation through their adviser, also enclosing further documents about which the adviser said, among other things:

> *As requested on the day of the hearing, I requested further time to make further information available to substantiate his claims. I am happy inform (sic) you that the applicant has been able to organise some more documents such as the complaints lodged with the Police in relation to the various incidents of intimidation and acts of violence that took place within the relevant period and also the letters from the leading members of the UNP.*
>
> *I enclose herewith the following:*
>
> 1. *Extracts from the Information Book of [Place B] Police Station*
>
>   *Total number of complaints translated into English - 16*
>
>   *Total number of complaints in Sinhalese – 16*

Tribunal's reasons for decision

11. The Tribunal noted that there were a number of discrepancies in the applicants' claims which the Tribunal attributed to oversight. However, the Tribunal did not accept that the first applicant was a credible witness. The applicants argued that the Tribunal had three reasons for not accepting that the first applicant was a credible witness. The reasons identified by the applicants are indicated in the following passages from the Tribunal's reasons for decision, and the passages that received particular attention at the hearing before this court are set out in bold:

> ***[Reason 1]*** *The Tribunal accepts that the applicant was a member of the UNP and that he was a supporter of the party who was made organiser of the [Place A] electorate on 8 March 2004 and had held other offices in the same electorate since January 2000:*

these appointments have been confirmed in letters sent to the Tribunal by the applicant with the response to the 424A letter. The Tribunal notes that, on the applicant's own evidence, while he held these offices he was working full time in Colombo, and for quite a period, at the international airport, some 30 kms north of Colombo, and for quite a period, at the international airport, some 30 kms north of Colombo, living in [Place B], ... leaving home at 5 am and returning at 9 pm and being the leader of the Sri Lankan Airlines swimming team. These offices in the party were honorary and part-time. He moved to [Place C] ... in May 2004, away from [Place A] Electorate which is ... not far from [Place B], soon after being appointed as organiser of it. The applicant stated that he devoted all his spare time to these activities, including week-ends. The above evidence leads the Tribunal to conclude that, despite the impression which these titles give, the activities undertaken were modest by virtue of the time available. His decision to move away from [Place B] at this time provides a measure of the importance of his last appointment. He described the activities performed as 'coordinate the voters, the youth front and the Ladies' front; inform the voters about party policies'. From these activities, he argues, follows the harm inflicted upon him as claimed because he was honest.

[Reason 2] *The Tribunal is aware and does not dispute independent information, including that provided by the applicant in the form of newspaper articles, that political violence occurs in Sri Lanka especially during election and is perpetrated by both the main party blocs. The Tribunal does not accept that the applicant was ever harmed as a result of his political work for the reasons which follow:*

The evidence provided about the harm consisting of assaults, threats and damage to property, apart from his oral testimony, was in the form of reports to the police. These reports and translations were provide (sic) to the Tribunal with the response to the 424A letter, on 13 October 2006. There were 14 originals and 16 translations. *These documents were extracts from the police information book of the [Place B] Police Station. They are statements made by the deponent and witnessed by the police.* ***The Tribunal does not accord them any weight as they are simply statements by the applicant (which he has mostly repeated to the Tribunal orally and indicated that the police, in fact, had not taken down complaints). The fact that they appear in a police information book does not imply any endorsement by the police or any investigation and findings by the police. A***

number of these reports are headed "for future protection" which implies that they are not requests to the police to investigate the complaints contained therein. *The first of these was issued on 10 December 1999 (i.e, a copy of it was released to the person who asked for it) and the last on 2 December 2005. For the two most recent statements of this kind, relating to incidents allegedly occurring on 5 and 17 November 2005 only the translations have been provided.*

[Reason 3] *At the hearing* ***the applicant was asked the reason he had not applied for protection in Australia on his previous two trips****; he stated that even though he had received threats he did not have serious matters then. He visited Australia from 19 September 2002 to 11 October 2002 and from 4 April 2005 to 18 April 2005.* ***This answer does not sit well with the claims of harm before each of these dates.*** *According to his claims he had been assaulted nine times before his first visit and a further four times in between the first and second visit.*

Nor did the applicant take advantage of his absences from Sri Lanka when he travelled to New Zealand twice, to Singapore four times and Bangkok twice. The explanation he provided for not doing anything about his situation while overseas was that he owed allegiance to Sri Lanka Airlines for whom he was working and on whose behalf he was travelling, both as part of his job there and as part of the sports team of this company. The Tribunal does not accept these explanations. The Tribunal finds that these responses do not indicate that the applicant was fearing a return to Sri Lanka. (emphasis added)

Grounds of Review

12. In the further amended application filed with the court on 11 May 2007, the applicant set out the following grounds of review:

> *The decision of the Tribunal was made in breach of an imperative duty imposed upon it or an essential pre-condition to or an inviolable limitation or restraint upon its power and its jurisdiction necessary for the existence of the satisfaction required by s.65 of the Act to grant or refuse the application and its powers to conduct a review under s.414 of the Act. The Tribunal exceeded its jurisdiction and/or constructively failed to exercise jurisdiction in that:*
>
> *1. The Tribunal made a finding of fact, that reports of complaints made to the police were not requests to the*

police to investigate the complaints contained therein, for which there was no evidence nor any evidence on which that fact could be inferred and thereby failed to give the evidence advanced for the applicant proper, genuine and realistic consideration.

2. *The Tribunal took irrelevant considerations into account being a misapprehension of facts, mere speculation as to the meaning of the heading on documents recording reports of complaints made to police and facts not capable of giving rise to inferences that such reports were not a request for police to act and that the applicant was not a credible witness that he had suffered serious harm resulting from political activities.*

3. *The Tribunal ignored relevant material going to a criteria (sic) under s.36 of the Act being documentary evidence of complaints in the nature of "serious harm" that had been made to police.*

4. *The Tribunal exceeded its jurisdiction and/or constructively failed to exercise jurisdiction in that it did not address the criteria under s36 of the Act about which it had to be satisfied; whether at the time of the decision whether to grant a Protection Visa the applicant had an ongoing well founded and genuine fear of "serious injury" as the cumulative result of events occurring up until the time when he left Sri Lanka.*

5. *The Tribunal arbitrarily and capriciously declined to receive the evidence of the applicant wife proffered in support of her own application and in corroboration of the applicant's claim relevant to a critical element under s.36 of the Act, and supportive of the applicant's credibility in that regard; whether at the time of the decision whether to grant a Protection Visa the applicant had an ongoing well founded and genuine fear of "serious injury" as the cumulative result of events occurring up until the time when he left Sri Lanka contrary to s.425 and s.426 of the Act.*

Grounds 1 to 4

13. The applicants said at the hearing before this court that Grounds 1 to 4 were intertwined. The applicants argued that the Tribunal made a single finding of fact, namely, that the first applicant was not a credible

witness. It was said that the Tribunal had three reasons for rejecting the first applicant's credibility. They were:

a) the first applicant claimed to have been appointed as a party organiser but immediately moved away from his electorate;

b) the police reports tendered by the first applicant as evidence that he had suffered harm were accorded no weight on the basis that they were simply the first applicant's own statements; and

c) the first applicant had not applied for a protection visa when he visited Australia in September and October 2002 and in April 2005.

14. The applicants argued that the first applicant was not disbelieved for reasons of his demeanour or such like but on the basis of the material he offered in support of his claims. The applicants argued that a wrong finding of fact would not constitute jurisdictional error unless it was a critical finding not supported by evidence or, expressed differently, that there was no material from which the Tribunal could have decided as it did: *Applicant A227 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 567 at [12] and *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12. The applicants said that they took no issue with the Tribunal's first and third reasons taken in isolation but said that they were infected by the Tribunal's error in relation to the second reason.

15. The Tribunal's second reason was contained in the following passage:

> *The evidence provided about the harm consisting of assaults, threats and damage to property, apart from his oral testimony, was in the form of reports to the police. These reports and translations were provide (sic) to the Tribunal with the response to the 424A letter, on 13 October 2006. There were 14 originals and 16 translations. These documents were extracts from the police information book of the [place B] Police Station. They are statements made by the deponent and witnessed by the police. The Tribunal does not accord them any weight as they are simply statements by the applicant (which he has mostly repeated to the Tribunal orally and indicated that the police, in fact, had not taken down complaints). The fact that they appear in a police*

information book does not imply any endorsement by the police or any investigation and findings by the police. A number of these reports are headed "for future protection" which implies that they are not requests to the police to investigate the complaints contained therein. The first of these was issued on 10 December 1999 (i.e, a copy of it was released to the person who asked for it) and the last on 2 December 2005. For the two most recent statements of this kind, relating to incidents allegedly occurring on 5 and 17 November 2005 only the translations have been provided.

16. The applicants argued firstly that the Tribunal had misunderstood the first applicant's evidence when it said that the police "had not taken down complaints". I do not accept this argument. The whole paragraph was concerned with complaints taken down by the police and recorded in their information book. The Tribunal clearly accepted that some of the first applicant's statements to the police did appear in a police information book.

17. The summary of the first applicant's evidence at page 14 of the Tribunal's reasons for decision, concerning a particular incident, says in the last sentence of the last full paragraph, "He stated that the police did not take down the complaints." In the following paragraph of the Tribunal's reasons for decision, in relation to some other incidents, the Tribunal noted that the first applicant gave evidence that "The police took down the complaints about the latter [incident] but did nothing."

18. The applicants did not put into evidence the transcript of the Tribunal hearing relating to the first applicant's evidence about the taking down of his complaints or otherwise provide evidence that the Tribunal's summary of the first applicant's evidence was wrong. Accordingly, I have no reason to doubt the accuracy of the Tribunal's summary of the first applicant's evidence in relation to this matter.

19. In these circumstances, I consider that the Tribunal's reasons set out in paragraph 15 above are to be read as if the Tribunal had said that the police "had not taken down **some** complaints". This reading is consistent with the evidence recorded by the Tribunal and with the Tribunal's acceptance that some statements by the applicant appeared in a police information book. For these reasons, I do not accept that

the Tribunal misunderstood the applicant's evidence in relation to this matter.

20. The applicants pointed out that the Tribunal noted that the police reports and their translations were provided to the Tribunal with the response to the s.424A letter, on 13 October 2006. The applicants then argued that the Tribunal had overlooked the fact that the applicants had said in their protection visa application that they would forward copies of the police complaints later. The applicant's point appears to be that Tribunal implicitly considered that the applicants provided copies of the police complaints very late in the process and that therefore they were a matter of recent invention. However, the Tribunal did not say that. The Tribunal simply noted as a fact the date when the police reports were forwarded to the Tribunal. There is no reason to suppose that the Tribunal overlooked the applicants' intention stated in the protection visa application to forward the police reports later.

21. In any event, even if the Tribunal had overlooked the first applicant's stated intention to forward copies of police reports later, the Tribunal gave express reasons for giving those reports no weight which were not associated with the possibility of them being recent inventions. There is no warrant for the court to infer that the Tribunal had reasons for this aspect of its decision other than those it expressly gave.

22. The applicants then argued that the Tribunal had mistakenly concluded that there were only 14 original police reports when in fact there were 16. However, this is at most a mistake of fact within jurisdiction. Whether there were 14 or 16 original reports to the police was not a factor in the Tribunal's reasons for decision. In any event, there is no reason to suppose that the Tribunal was mistaken in counting 14 originals. The applicants' solicitor said in his covering letter that there were 16 originals but that statement cannot override the Tribunal's finding on the matter, at least in the absence of further evidence. The applicants initially sought to file on the day of the hearing an affidavit sworn by their solicitor but then withdrew the application.

23. The applicants noted that the Tribunal said that a number of the police reports are headed "for future protection" when in fact they are headed, in translation, "for future reference". The applicants conceded that nothing turned on this misdescription. However, the applicants noted

that the Tribunal said that the heading "implies that they are not requests to the police to investigate the complaints contained therein." The applicants argued that there was no evidence to support that conclusion. I do not accept that argument. The heading itself supports the implication drawn by the Tribunal. The words, "for future reference", could reasonably be regarded as implying that the police had not been asked to investigate the complaints immediately but were simply being asked to keep them for future reference.

24. The applicants submitted that the Tribunal needed evidence of the procedures of the police in Sri Lanka before it could find the implication mentioned in the last paragraph. However, the Tribunal expressly based its conclusion on the words of the heading. The implication was a natural reading of the words themselves. In such circumstances, it was open to the Tribunal to conclude as it did. There was no need for the Tribunal to have evidence about police procedures in Sri Lanka about a matter that was a natural reading of the material.

25. Based on the matters argued, the applicants submitted that the Tribunal had no basis, or no evidence, for attributing no weight to the statements made to the police. However, as indicated above, the applicants' arguments on this point have not been made out. Accordingly, the applicants' challenge to the weight given to the police reports on the no evidence ground does not succeed.

26. The applicants also argued that the Tribunal took into account an irrelevant consideration, being its speculation about the meaning of the heading. However, as stated, I consider that the meaning attributed to the heading by the Tribunal was reasonably open to it. That meaning was not speculative, but a natural reading of the words of the heading.

27. In any event, subject to manifest unreasonableness, and subject to any statutory indication to the contrary, it is "for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising statutory power": *Minister for Aboriginal Affairs & Anor v Peko-Wallsend* (1986) 162 CLR 24 at 41. The applicants did not allege manifest unreasonableness. Such an allegation, in my view, could not have been sustained in the present case. Nor did the applicants allege that there was a statutory indication that the weight to be given to the

statements made to the police should not be determined by the Tribunal. Again, such an allegation would not have been sustainable in the present case.

28. The applicants also argued that the Tribunal failed to take into account a relevant consideration, being the statements to the police. However, the Tribunal did take them into account. It considered them and decided not to attribute any weight to them for reasons which it gave. In such circumstances, it cannot be said that the Tribunal did not take into account the statements made to the police.

29. Finally, the applicants argued that the Tribunal's second reason was illogical and irrational. The applicants relied on *SGLB* at [37] to [38] which state as follows:

> *Further, s 65 of the Act provides that the minister is to grant a visa sought by valid application "if satisfied" of various matters. These include that any criteria for the visa prescribed by the Act are satisfied: s 65(1)(a)(ii). Section 65 imposes upon the minister an obligation to grant or refuse to grant a visa, rather than a power to be exercised as a discretion. The satisfaction of the minister is a condition precedent to the discharge of the obligation to grant or refuse to grant the visa, and is a "jurisdictional fact" or criterion upon which the exercise of that authority is conditioned. [Footnote:* Graham Barclay Oysters Pty Ltd v Ryan *(2002) 211 CLR 540 at 609 [183]; 194 ALR 337 at 386.] The delegate was in the same position as would have been the minister (s 496) and the tribunal exercised all the powers and discretions conferred on the decision-maker: s 415.*
>
> *The satisfaction of the criterion that the applicant is a non-citizen to whom Australia has the relevant protection obligations may include consideration of factual matters but the critical question is whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds. [Footnote:* Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 *(2003) 198 ALR 59 at 67 [37], 71 [52], 98 [173]; 73 ALD 1 at 9, 13, 40; 77 ALJR 1165 at 1172, 1175, 1194; cf at ALR 62 [9]; ALD 4; ALJR 1168.] If the decision did display these defects, it will be no answer that the determination was reached in good faith. To say that a decision-maker must have acted in good faith is to state a necessary but insufficient requirement for the attainment of satisfaction as a criterion of jurisdiction under s 65 of the Act.*

However, inadequacy of the material before the decision-maker concerning the attainment of that satisfaction is insufficient in itself to establish jurisdictional error.

30. I do not accept the applicants' argument on this point. Illogicality in itself does not amount to jurisdictional error: *VWST v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 286. For the reasons given above, there was a probative basis for the Tribunal's second reason, namely, that the police reports were merely the applicant's own statements, and, as the Tribunal reasonably understood, in a number of cases, the police were only asked to note the statements for future reference. The fact that the court might not have decided the matter in the same way is irrelevant. Grounds 1 to 4 are not made out.

Ground 5

31. The applicants' fifth ground was in summary that the Tribunal arbitrarily and capriciously refused to receive corroborating evidence from the second applicant. The second applicant had no claims of her own and rested her case on the first applicant's case. In his response to the invitation to a hearing, the first applicant said that he wanted the Tribunal to take evidence from the second applicant about "the threats to my life from my political opponents and the systematic harassment and discrimination I was subjected to."

32. Section 426 of the *Migration Act 1958* ("the Act") provides that:

> *(1) In the notice under section 425A, the Tribunal must notify the applicant:*
>
> *(a) that he or she is invited to appear before the Tribunal to give evidence; and*
>
> *(b) of the effect of subsection (2) of this section.*
>
> *(2) The applicant may, within 7 days after being notified under subsection (1), give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice.*
>
> *(3) If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the*

applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice.

33. The tape of the whole Tribunal hearing and a transcript made by the first respondent's solicitor of the second applicant's evidence to the Tribunal were put into evidence before this court. The applicant also tendered a transcript but agreed that the court could rely on the first respondent's version which is substantially the same as the applicants' in any event. Both versions of the transcript referred to indistinct or inaudible passages. I have listened to the part of the tape containing the second applicant's evidence. The first respondent's transcript is set out below. The additional matters which I was able to discern on the tape are set out in bold.

Tribunal Member (TM): Would you mind calling Mrs [applicant]

TM: [inaudible] ..... okay, just pull up another chair

Short discussion between applicant team – inaudible but appears to be about whether they should remain ….

TM: Umm....I don't expect this to take very long, I would rather you stay till we finish, than go, if that is okay. (Pause) *Mrs [applicant] thank you for waiting umm I umm all I need to do is... You were asked to give evidence to the Tribunal and I am just going to ask you, what is it that you want to say to the Tribunal?*

Applicant Spouse (AS) [through interpreter]: She is asking about what she has to tell you.

TM: Well you don't have to tell me anything, you are the one that said that you wanted to be a witness. I don't have any questions for you, I just want you to tell me what you came here to tell me.

AS: I got married to my husband on 27 January 2004...

TM: Uh huh …

AS: I know the incidents afterwards...

TM: Yes

AS: By that time my husband had lot of threats and difficulties from political opponents (pause)

TM Yes

AS: At the 2004 [inaudible] ***[…general]*** *election that night my husband was doing political work he, errh, on 9 March 2004.... [inaudible]****[place A]****... trouble* ***[he got assaulted by]****... political opponents.* (pause)

TM: Is this the same content as is in his statement?

*AS: [inaudible]****[Yes]***

TM: Yes there is no need for you to tell me the story again. I just want to know exactly what you want to bring to this hearing that is in addition to what your husband has already provided.

TM: You understand what I mean. I don't want you to tell me the story again because I have already heard it.

TM: If there is something from your particular point of view.

AS: From my own perspective your honour, we had a lot of hardships because of this political work in which my husband was involved. We had a very hard and difficult time. Yep.

AS: Because of my husband involved in politics in spite of all the threats and hardships if it happened to us to all of us to go to Sri Lanka once again but particularly my husband, myself and the children will get into very big difficulties.

TM: Yes.

AS: [inaudible] ... ***[What I have to tell your Honour is]*** *by considering all the difficulties and hardships we are undergoing in Sri Lanka to please give us a chance to safeguard our lives.* (pause)

TM: Okay. (pause) *thank you very much.*

TM: Mr [Applicant's representative] is there anything that you wish to say before we close the hearing?

Applicant's representative: Well I have included everything in my submission your honour… [Hearing continues]

34. The applicants argued that the Tribunal had dismissed out of hand the second applicant's corroborative evidence consisting of her knowledge of what had happened to her husband. The applicants argued that the Tribunal misstated the second applicant's evidence by failing to mention that it had capriciously prevented the second applicant giving

evidence. The applicants also speculated that the Tribunal had acted on a view that spousal evidence did not deserve any weight.

35. The applicants relied on the decision of the Full Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Maltsin* [2005] FCAFC 118. Kenny and Lander JJ, with whom Spender J agreed, said in *Maltsin* at [37] to [39] that:

> *[37] It is in keeping with the Tribunal's inquisitorial nature that the Tribunal does not err if it decides that, notwithstanding the applicant wants oral evidence to be obtained from persons named in a notice under s 361(2), it decides not to obtain such evidence, always providing that it acts in conformity with s 361(3) of the Act and has regard to the notice that the applicant has given. In this circumstance, there is no obligation on the Tribunal to take oral evidence from anyone other than the applicant.*
>
> *[38] It does not follow from this, however, that the appeal in this case should be upheld. By virtue of s 361(3), the Tribunal is obliged to have regard to any notice given by an applicant under sub-ss 361(2) or (2A) of the Act. This means that the Tribunal must genuinely apply its mind to the contents of the notice and, in particular, to the question whether it should take the oral evidence of the nominated individuals in accordance with the applicant's wishes. The Tribunal must not merely go through the motions of considering the applicant's wishes as expressed in the notice. As the respondents' counsel said, the authorities establish that the invitation to appear before the Tribunal must be "real and meaningful and not just an empty gesture":* NALQ *at [30];* SCAR *at [37]; and* Mazhar *at 188 [31]. It follows that the consideration that the Tribunal gives to the wishes of the applicant concerning the evidence to be taken at the hearing must also be genuine. The Tribunal must not decline to comply with the applicant's wishes capriciously, but must take account of such relevant matters as the relevance and potential importance to the outcome of the review of the evidence that could be given by a nominated witness (compare* W360/01A v Minister for Immigration and Multicultural Affairs *[2002] FCAFC 211 ("*W360/01A*") at [2] per Lee and Finkelstein JJ and [30]-[32] per Carr J)), the sufficiency of any written evidence that has already been given by a witness, and the length of time that would afford the applicant a fair opportunity to put his or her case before the Tribunal. These considerations flow from the nature of the Tribunal's overarching objective, which is to provide a review that is "fair, just, economical, informal and quick": see s 353(1).*

The Tribunal must bear in mind this statutory objective when considering the weight to be given these matters.

[39] The real question in this case is whether or not the Tribunal gave genuine consideration to the notice given by Mr Maltsin under s 361(2) of the Act. At the commencement of the hearing, the Tribunal Member specifically asked Mr Maltsin's representative "about the value of the evidence" of the prospective witnesses. This was, as the appellant said, a relevant inquiry. Even before she received an answer, however, the Tribunal Member made it plain that she did not have sufficient time on the day to hear much more than the evidence of Mr Maltsin and Ms Bogodist. …

36. The applicants also relied on the decision of Bennett J in *Minister for Immigration and Multicultural and Indigenous Affairs v Katisat* [2005] FCA 1908. At [61] to [63] of that decision, Bennett J said:

[61] The next question to be considered, as set out in Maltsin *at [38], is whether the Tribunal genuinely applied its mind to the contents of the notice and, in particular, to the question whether it should take the oral evidence of the nominated individual in accordance with the applicant's wishes. Such genuine consideration must take account of matters such as the relevance and potential importance to the outcome of the review of the evidence that could be given by that witness.*

[62] In the context of s 361, I take "have regard to" to be used in the sense of "to take into account" or "consider". The transcript of the hearing on 16 August 2004 shows that there was discussion between the Tribunal and Mr Katisat about the request for the summons. The Tribunal pointed out to Mr Katisat that he would not be able to cross-examine Ms Dimas and that it would be the Tribunal that would ask the questions. The Tribunal also said that, even if she were to say things in his favour, the Tribunal would still want documentary evidence; if she were to say things that were adverse to him, then that would not be in his favour. Mr Katisat reiterated his preference to summons Ms Dimas because he wanted 'the truth' to be before the Tribunal. The Tribunal responded that it had decided not to summons her. It gave as a reason 'I suppose part of it is I don't see that she – that having evidence from her would necessarily advance your case'. Later in the hearing, the Tribunal asked Mr Katisat what he thought Ms Dimas would say if she were summonsed. The Tribunal observed that it was 'highly unusual for an ex spouse to be summonsed because generally what they're going to say is not going to be in

> *your favour'. It was clear from the transcript that a somewhat acrimonious relationship was described between Mr Katisat and Ms Dimas, to the extent that he claimed that there was domestic violence against him.*
>
> *[63] It has not been demonstrated, in my view, that the Tribunal failed to have genuine regard or consideration to Mr Katisat's request to summons Ms Dimas. The Tribunal was not required to comply with the request and did not do so. The failure to exercise the power in the absence of a duty or obligation to do so does not go to jurisdiction. The Tribunal's decision was not arbitrary nor demonstrably unreasonable. Ms Dimas' evidence would not, in the view of the Tribunal, have overcome the absence of documentary evidence even if Ms Dimas reverted to her original statement about the genuineness of the relationship.*

37. Additionally, the applicants relied on the decision of Scarlett FM in *SZBXR v Minister for Immigration* [2005] FMCA 1946 at [59] to [61] where it is stated that:

> *[59] I am not satisfied that the evidence allows me to find that the Tribunal gave a genuine consideration to the applicant's request that his sister be called to give oral evidence. Despite the repeated advice from the applicant and his advisor that the sister's evidence would be important to support the applicant's claims about the issue of his political involvement, the Tribunal expressed a lack of interest in the ability of the applicant's sister to give meaningful evidence based apparently on the fact that it would be hearsay. There was no mention by the Tribunal during the applicant's evidence as to whether the applicant's sister would be available to throw any light on the issues of the family's involvement in politics.*
>
> *[60] The Tribunal member's announcement at the end of the hearing that he would not be calling the sister to give evidence, though not unexpected, was more in the nature of a "throwaway line" than an explanation of the reasons why the witness's evidence would not be taken.*
>
> *[61] I am satisfied that there is a lack of procedural fairness for this reason, and accordingly I find that a jurisdictional error has been made out.*

38. The applicants also argued that the Tribunal overlooked the fact that the second applicant was not merely a witness but an applicant in her own right who was entitled to a hearing pursuant to section 426(3) of

the Act. In this regard, the applicants referred to *SZBWJ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 13 at [27] to [36] where Nicholson and Emmett JJ said, in effect, that, pursuant to s.36(2)(a) and (b) of the Act, an applicant is a separate applicant from his wife, even though she may apply purely as a member of the family group of the applicant, and they are each separately owed the obligations under s.424A of the Act. This conclusion, though obviously very persuasive, was obiter, as the appeal was determined on another ground.

39. The applicants also referred to *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 781 at [85] to [87] where Lindgren J said:

> *[85] Counsel for the Minister accepted, correctly, that it was implicit in those sections that, in the circumstances of a case like the present one, there must actually be a hearing at which the applicant is entitled appear (sic) and "to give evidence and present arguments relating to the issues arising in relation to the decision under review" (and see the identical language in par 361(1)(a)): cf the accepted construction of the counterpart of s 360 in Pt 7 of the Act, namely, s 425, in* Mazhar v Minister for Immigration and Multicultural Affairs *(2000) 183 ALR 188 at [31];* Liu v Minister for Immigration and Multicultural Affairs *(2001) 113 FCR 541 at [44];* Minister for Immigration and Multicultural and Indigenous Affairs v SCAR *(2003) 198 ALR 293 at [32]-[39];* VBAB v Minister for Immigration and Multicultural and Indigenous Affairs *(2002) 121 FCR 100 at [54]-[62]*.
>
> *[86] Accordingly, one of the "matters" which Div 5 "deals with" is the opportunity to be afforded by the MRT to an applicant to address, at a hearing before the MRT, the issues arising in relation to the decision under review. If the presiding Member were to state to an applicant that he or she need not give evidence or present arguments relating to an issue, then later, forgetting this, were to give a decision adverse to the applicant turning on that very issue, the applicant's entitlement to relief would depend, not on the natural justice hearing rule, but on the question of the proper construction of subs 360(1) and succeeding provisions, because they deal with the "matter" of an applicant's right to give evidence and to present arguments on "issues arising in relation to the decision under review."*

[87] If, at an MRT hearing, the Member were to inform the applicant that it was not necessary for the applicant to give evidence or present arguments on such an issue, which, it transpired, in fact remained alive, and thereby dissuaded the applicant from exercising his or her right to give evidence or to present arguments on that issue, the MRT would have failed to comply with the obligation impliedly imposed on it by s 360 and following sections. The MRT would not, however, have failed to observe the natural justice hearing rule because that rule would have been excluded in the relevant respect by subs 357A(1).

40. The applicants also relied on the decision of Raphael FM in *SZBFM & Anor v Minister for Immigration* [2005] FMCA 451 at [7] to [9] which states as follows:

[7] I am satisfied that for reasons that I need not speculate upon and which are in all probability entirely innocent or the result of an oversight or misunderstanding, the wife, an applicant to the Tribunal, who could have given evidence which may have corroborated evidence of her husband whose credibility the Tribunal impugned, was not given an opportunity to attend a hearing.

[8] It has been said clearly that the invitation extended under s.425 of the Act must not be an empty gesture: Minister for Immigration v SCAR *[2003] FCAFC 126 at [33];* NALQ v Minister for Immigration *[2004] FCAFC 121 at [30] – [32]; STPB v Minister for Immigration [2004] FCA 818 at [27];* Appellant P119/2002 v Minister for Immigration *[2003] FCAFC 230 at [16]. The applicant must be provided a real opportunity to do that which he or she is invited to do, namely give evidence and present argument. As the full court said in* SCAR *at [33]:*

> Pursuant to s.425 of the Act the tribunal is under a statutory obligation to issue an invitation to an applicant to attend a hearing. That indicates a legislative intention that an applicant is to have an opportunity to be heard an oral hearing for the purpose of giving evidence and presenting argument. The invitation must not be a hollow shell or empty gesture: *Mazhar v MIMA* (2000) 183 ALR 188 at [31]."

An applicant who is not present in the hearing room for the whole of the hearing can not do either of those things. It has quite correctly not been suggested to me that the applicant could have hammered on the door and demanded to be let in or passed a

message through the court officer. Firstly she had been told to go away for at least an hour and secondly the duty is on the Tribunal to provide her with the opportunity and not upon her to insist upon her rights. The Tribunal process is fraught for all applicants and the situation for a Lebanese woman with little English is not likely to be any less so.

[9] I am satisfied that the actions of the Tribunal constituted a breach of s.425 of the Act which itself constitutes a jurisdictional error. I propose to remit back to the Tribunal the decision in respect of both applicants. There may well have been evidence that the wife could have given to corroborate that of her husband and he is entitled to take that opportunity, which he was not able to avail himself of whilst she was not in the room.

41. The applicants argued that neither the hearing tape nor the transcript of the Tribunal proceedings expressly or impliedly demonstrates that the Tribunal gave any consideration, much less genuine consideration, to the potential importance of the second applicant's evidence and apparently considered, capriciously, that a spouse's evidence carries no evidentiary weight.

42. The first respondent argued that the Tribunal had made an initial credibility finding based on certain discrepancies in the applicants' case and had on that basis not been required to hear the potentially corroborative evidence from the second applicant. The first respondent relied on *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [12] per Gleeson CJ and at [49] per McHugh and Gummow JJ where it was said that:

[12] It was contended that this passage shows that the tribunal member adopted a flawed approach to her evaluation of the evidence, failing to assess the evidence of the applicant/appellant in the light of the corroborating evidence, and giving no weight to the evidence of the corroborating witness for reasons that had nothing to do with the quality of that evidence. The essence of the complaint is that the tribunal failed to consider the evidence as a whole, but first considered, and disbelieved, the evidence of the applicant/appellant, without taking account of the corroboration, and then considered and rejected the corroboration because of the rejection of the evidence of the applicant/appellant. I do not accept that this is a fair criticism of the tribunal's reasons. In my view, all that the member was saying was that, for reasons already given at length, she found the applicant/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. The member could have expressed herself more clearly. 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 though there is no separate or independent ground for its rejection, apart from the reasons given for disbelieving the principal witness.

...

[49] 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.

43. The first respondent also relied on *WADU v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1252 at [45] where RD Nicholson J said:

> *There is a further reason why that should be so. It is open to a Tribunal which is convinced that a principal witness is fabricating a story to reject corroborative evidence, even though there is no separate or independent ground for its rejection, apart from the reasons given for disbelieving the principal witness:* S20/2002 *at 63, [12] per Gleeson CJ; at 70, [49] per McHugh and Gummow JJ.*

44. The first respondent noted that although the applicants were legally represented at the Tribunal hearing, they made no complaint at the time concerning the Tribunal's handling of the second applicant's evidence.

45. The first respondent argued that the Tribunal was not obliged to hear the second applicant's possibly corroborative evidence but was only obliged to consider whether it should hear that evidence. The first respondent submitted that the Tribunal had done so in this case in that the Tribunal had considered the nature of the evidence that the second applicant would give.

46. The first respondent argued that in view of s.422B of the Act, and the way in which that section was interpreted in *Minister for Immigration and Multicultural Affairs v Lay Lat* (2006) 151 FCR 224 and *SZCIJ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 62, the applicants needed to point to a particular statutory provision that the Tribunal had failed to comply with. The only possible provisions were ss.425 and 426 and, in the first respondent's submission, neither of those provisions had been breached.

47. The first respondent argued that the applicants' claims had been considered cumulatively. The first respondent said that that was apparent from the Tribunal's reasons and also from the fact that the Tribunal expressly stated that it had considered the evidence as a whole.

48. I accept that the second applicant was a separate applicant who was owed obligations by the Tribunal separately from those owed to the first applicant. However, the fact remains that the second applicant had no claims of persecution of her own. She relied entirely on her husband's claims. The Tribunal no doubt was aware of that. At most, the evidence of the second applicant could have supported the claims made by the first applicant.

49. It is clear from s.426 of the Act that the Tribunal does not have the same obligations as a court to hear corroborative evidence. The Tribunal must genuinely consider whether it will hear evidence from a witness nominated by the applicant but the Tribunal may decide, in the exercise of its discretion, that it will not. The limitations on that

discretion were set out by the Full Federal Court in *Maltsin* and are as follows:

> *The Tribunal must not decline to comply with the applicant's wishes capriciously, but must take account of such relevant matters as the relevance and potential importance to the outcome of the review of the evidence that could be given by a nominated witness …, the sufficiency of any written evidence that has already been given by a witness, and the length of time that would afford the applicant a fair opportunity to put his or her case before the Tribunal.*

50. The Tribunal in this case was requested by the first applicant to hear evidence from the second applicant about *"the threats to my life from my political opponents and the systematic harassment and discrimination I was subjected to."* The transcript set out above shows that the Tribunal began by giving the second applicant an opportunity to say whatever she wanted to say to the Tribunal. She mentioned a few matters, and, from listening to the tape, I find that the second applicant paused for two lengthy periods in the course of doing so. The second applicant sounded as though she did not know what to say next, if anything. The Tribunal then said that it did not need to hear the same story that the first applicant had told but invited the second applicant to provide any additional information from her own point of view. She apparently did so.

51. The effect of the Tribunal's invitation, in my view, was to allow the second applicant to give evidence about her own experience of the events involving her husband. For example, the second applicant could have said that she accompanied her husband to the police station on certain occasions, or he came home injured on certain occasions. The second applicant did not give that sort of evidence, but made general statements about hardship.

52. In these circumstances, the proper characterisation of the Tribunal's conduct is that it indicated that it did not need to hear the second applicant repeat the basic facts that the first applicant had included in his written statement, but invited the second applicant to give such evidence about events involving her husband as she was able to from her own point of view. The second applicant was, in effect, invited to give corroborative evidence.

53. The question then is whether the Tribunal breached any obligation in telling the second applicant that she did not need to repeat the basic facts of the first applicant's claims. Whether the second applicant was able to restate what was in the first applicant's written statement was of only marginal relevance. If she had been able to do so, it might have suggested that she remembered the events because she was actually involved in them and they were therefore true. However, the Tribunal gave the second applicant a better opportunity. The Tribunal asked the second applicant to give her perspective on the events involving her husband. That amounted to an opportunity to describe in detail what she knew about the events involving her husband. That is, she was invited to give corroborative evidence.

54. In the circumstances, I consider that the Tribunal complied with the first applicant's request to take evidence from the second applicant. The Tribunal initially gave the second applicant an opportunity to say whatever she wanted and then, when she appeared to have run out of things to say, invited the second applicant to say whatever she wanted from her own point of view. In substance, she was given the opportunity to corroborate her husband's evidence. She chose to make general statements about the hardship she and her husband had experienced. The Tribunal did not discount the second applicant's evidence because it was given by a spouse. The evidence was simply not very detailed. Ground 5 is not made out.

Conclusion

55. As none of the grounds raised by the applicants has been made out, the application must be dismissed with costs.

I certify that the preceding fifty-five (55) paragraphs are a true copy of the reasons for judgment of Riley FM

Associate: Melissa Gangemi

Date: 19 June 2007