FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZGPF & ANOR v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 1719

MIGRATION – Refugee – failure to deal with a part of an express claim – jurisdictional error – application allowed.

WAIJ v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 74
NAJT v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 134
WAGO of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 437
Re The Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham [2000] HCA 1
Paul v Minister for Immigration and Multicultural Affairs [2001] FCA 1196
Htun v Minister for Immigration and Multicultural Affairs [2001] FCA 1802
MZWBW v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 94
WAEE v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 184
NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No. 2) [2004] FCAFC 263

First Applicant:	SZGPF
Second Applicant:	SZGPG
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1664 of 2005
Judgment of:	Nicholls FM
Hearing date:	25 July 2006
Date of Last Submission:	25 July 2006
Delivered at:	Sydney
Delivered on:	24 November 2006

REPRESENTATION

Counsel for the Applicant:	Mr. C. Colborne
Solicitors for the Applicant:	Nil
Counsel for the Respondents:	Mr. G. Johnson
Solicitors for the Respondents:	Australian Government Solicitor

ORDERS

(1) A writ of certiorari be issued quashing the decision of the second respondent.

(2) A writ of mandamus be issued requiring the second respondent to redetermine the matter according to law.

(3) The first respondent pay the applicant's costs set in the amount of $5,000.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1664 of 2005

SZGPF
First Applicant

SZGPG
Second Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application filed on 27 June 2005 seeking review of the decision of the Refugee Review Tribunal ("the Tribunal") signed on 20 May 2005, and handed down on 9 June 2005, which affirmed the decision of a delegate of the respondent Minister made on 28 June 2002 to refuse protection visas to the applicants.

2. The applicants are wife and husband, citizens of Sri Lanka, who arrived in Australia on 3 September 2001. It is not at issue that the applicants' claims for protection visas were based on the applicant wife's claims to be a refugee, and that her husband based his claims on his being a member of her family unit. For ease, I will refer to the applicant wife therefore as "the applicant".

3. The applicant's claims were set out in the application for protection visas reproduced at Court Book ("CB") 1 to CB 40, and in particular in

a statement made by the applicant on 16 October 2001, and reproduced at CB 32 to CB 40. Following refusal of the protection visa application, the applicant sought review by the Tribunal on 23 July 2002 (CB 167 to CB 170). The applicant's solicitors made submissions and the applicant (twice), and her husband (on the second occasion), gave evidence at two hearings (CB 205.3 and CB 215.1 to CB 219.4). On 27 June 2003 the Tribunal, differently constituted ("the earlier Tribunal"), affirmed the decision under review (CB 201 to CB 222). This decision was subsequently quashed by this Court (see Judgment and orders of Barnes FM at CB 223 to CB 237). The application for review was subsequently reconsidered by the Tribunal, which conducted a hearing with the applicant (the husband was not present) on 10 May 2005. The Tribunal's decision record is reproduced at CB 268 to CB 291.

4. The applicant's claims to refugee protection derive from the conflict between the Liberation Tigers of Tamil Eelam ("LTTE") and the Sri Lankan authorities, and claims of harm experienced by her, and various members of her family, over the last 25 years. Specifically:

    1) That in 1979 her elder brother joined the LTTE, and later it had been announced that he was killed during combat.

    2) The applicant married, and she joined her husband in Dubai where he worked. In 1984 she returned to Sri Lanka to have her first child and was in Jaffna when hostilities broke out between the LTTE and the Indian Peace Keeping Force. Her husband was unable to get her out of Jaffna between 1987 to 1990 and ultimately paid the LTTE to release her, and their son, and she again joined him in Dubai.

    3) In 1995 the applicant returned to Sri Lanka to arrange a payment to be given to the LTTE so that her sibling in Jaffna could leave and her children were able to get out of the "grip" of the LTTE.

    4) In October 1995 the applicant's two children returned to live in Jaffna as they were unable to continue to live in Dubai. This was following an increase in hostilities, and in a context where it was claimed that the LTTE recruited young Tamils, Sri Lankan authorities rounded up, tortured and killed young Tamils.

5) In 1998 the applicant travelled to Sri Lanka to “remove” her children from Jaffna. Although she engaged an agent to effect this removal, he ultimately advised that the relevant army officers to whom the applicant (through the agent) had paid money, wanted more money to release her son. Following the refusal to provide any more money she was detained by police for interrogation. Following threats she paid the money, was released and returned to Dubai.

6) In March 1999 she made another attempt to remove her children from Jaffna, and while passing through “immigration clearance” was detained and searched. When she refused to give up a particular wedding gift from her husband (a “Thali”) she was taken to a local police station, beaten and accused of having collected money from aboard for the LTTE. She was subsequently detained, sexually harassed, and then ultimately released through her husband's intervention. She returned to Dubai without her children.

7) The applicant’s claims therefore were that she could not return to Sri Lanka, given the abuse and harassment that she had suffered at the hands of the Sri Lankan security officers, and the damage to her reputation, and that she would be killed if she returned because if for no other reason her son’s claimed involvement with the LTTE was well known to the authorities. She feared she would be targeted, and feared persecution by the security officers and the LTTE.

5. The Tribunal's “Findings and Reasons” are set out in its decision record, reproduced at CB 284.3 to CB 291.4. The Tribunal:

1) Had concerns about the applicant’s answers at the hearing it conducted with her, which were “essentially vague and incoherent” (CB 285.3).

2) Expressed concern with the applicant’s “emotional state” which appeared to be “incongruent with her persistence to continue with the hearing”. It noted that while it considered adjourning the hearing, and gave the applicant the opportunity to adjourn, the applicant insisted on proceeding.

3) Ultimately, in all the relevant circumstances, it decided that an adjournment was not warranted (CB 285.4). It ultimately formed the view, in considering the evidence as a whole, that the applicant had seriously exaggerated claims, as well as her emotional response, at the hearing and was satisfied that having "considered the evidence cumulatively" that the applicant's emotional state at the hearing was not reflective of the truths of the alleged claims (CB 285.6).

4) Found the applicant's "most fundamental" claims were fear of persecution based on the following:

   a) Her brother's connection with the LTTE, and her claim that she and her husband would be taken away by the authorities because of this involvement. Further, her children would be taken away by the LTTE and would be trained as "cadres" (CB 285.8).

   b) That the applicant's son would be forced to joined the LTTE, and that if the applicants were to return to Sri Lanka they also would be forced to work for them, and that she would "lose" the children permanently to the LTTE (CB 285.9).

   c) That the applicant would not be permitted to move about freely since her reputation had already been tarnished by the LTTE, given that she had been identified as a "victim of sexual harassment" (CB 286.2).

5) While it accepted as plausible some of the harm claimed to have been suffered by the applicant, in "looking at the evidence as a whole", was not satisfied that that harm amounted to persecution within the meaning of the Refugees Convention. It was specifically satisfied that the harm suffered was as a result of general insecurity prevailing in Sri Lanka during the relevant times. The Tribunal found therefore that up until 1998 the applicant did not have a genuine fear of persecution in Sri Lanka, let alone a well founded fear (CB 286).

6) While it accepted as plausible that in April 1999 the applicant was the subject of an immigration "lady officer" wanting her jewellery, the Tribunal had difficulties with the applicant's subsequent claims that she was detained and ill treated following this incident. It found her explanations as "not entirely persuasive" and that it was "difficult to reconcile the incongruent claims made by the applicant". Ultimately, based on the evidence before it, the Tribunal was satisfied that this account was "a blatant exaggeration", and that the subsequent explanations by the applicant were "further exaggerated". Based on what the applicant said in the context of the evidence as a whole, while the Tribunal was satisfied that the applicant had to give her jewels to the "lady officer", it was not satisfied that she was detained in April 1999 and suffered the harm and ill-treatment including sexual assault. It rejected the applicant's claims that if she were to return to Sri Lanka she would be identified as a victim of sexual harassment which had tarnished her reputation. It concluded that these claims were "exaggerated" to enhance her application for a protection visa "reflecting poorly on her credibility" (CB 287).

7) In relation to claims arising from her son's situation, found that the applicant was "simply unable to provide any specific details but generalised answers" and that even when prompted ("the question was asked again" – CB 288.2) the responses were "vague" (CB 288.4). The Tribunal found that after carefully considering "the applicant's responses" it was satisfied "that the evident lack of any specific details, the vagueness of her responses indicate that the claims have been fabricated, reflecting poorly on her credibility" (CB 289.3). Ultimately the Tribunal found that it did not accept that the applicant's son had been tortured by the Sri Lankan army (CB 289.5).

8) Was also satisfied that the applicant's claims in relation to her daughter were fabricated reflecting "poorly on the applicant's credibility" (CB 289.7).

9) While it accepted the applicant's claim that her brother had joined the LTTE in 1979 as plausible, formulated the question it was required to answer as being whether there was a real chance of

the applicant suffering harm on the basis of being imputed with a political opinion as a result of her brother's political allegiance. Ultimately, the Tribunal was not satisfied that the applicant suffered any harm in this regard, and noted, in addition, that the brother's involvement occurred over 25 years ago "significantly reducing the chances of persecution on this basis" (CB 290.5).

10) Ultimately rejected the applicant's claim that if she were to return to Sri Lanka she would be forced to join the LTTE or to take up arms (CB 290.9).

11) In all therefore, was not satisfied that there was a real chance of Convention related harm occurring to the applicant in the reasonably foreseeable future on any basis, and could not see a Convention reason for the applicant's refusal to return to Sri Lanka (CB 291.3).

6. At the hearing before me the applicants were represented by Mr. C. Colborne, and the respondents by Mr. G. Johnson. Mr. Colborne sought, and was granted leave, to file an amended application in the following terms:

> "*The Grounds of the Application are:*
>
> *The Tribunal exceeding its jurisdiction and constructively failed to exercise its jurisdiction by -*
>
> *1. Overlooking and thus failed to have regard to the evidence the Second Applicant gave to the Tribunal 23 June 2003.*
>
> *2. Alternatively, giving the Second Applicant's evidence no weight because it found the First Applicant's evidence was not credible.*
>
> *3. Failing to make any finding on the First Applicant's claim that she feared the Sri Lankan authorities because, at Wellawatte police station in 1998, police told her that her son was suspected of being involved with the LTTE and threatened to detain her on the ground that her son was an LTTE collaborator."*

7. In this matter, for the reasons set out below, I find that the applicant's third ground is made out. In the absence of any factor arguing against

the making of orders as sought by the applicant, I will make those orders.

8. It is not strictly necessary therefore to set out consideration in relation to grounds one and two. Apart from doing so as a matter of courtesy to Counsel who appeared before me and put well argued submissions, there are two other reasons for doing so. First, reference to the two other grounds (particularly in their factual context) will provide a better understanding of the issue in ground three. Second, I note with some irony that a large part ground three before me now (essentially what the applicant claims she was told about suspicions of her son's involvement with the LTTE) is essentially the same ground that was before the Court on the previous occasion relating to the earlier Tribunal's decision (CB 231.9). This ground was not considered by the Court as relief was granted in relation to another ground. A more complete reference to all of the applicant's complaints before the Court now, may assist the next Tribunal in its consideration of the applicant's claims.

9. The applicant's first ground of complaint is that the Tribunal failed to consider certain evidence. In finding that the applicant was not detained or mistreated in 1999, the Tribunal made no reference to the applicant husband's evidence which he had given on 23 June 2003 to the earlier Tribunal. The submission is that the Tribunal overlooked the applicant husband's evidence, and the events that occurred at the earlier Tribunal hearing, because there is no other plausible explanation for the absence of any reference to the applicant husband's evidence in its "Findings and Reasons". This evidence, it is said, clearly provided corroboration of the applicant's claims both as to what occurred in Sri Lanka in 1999, and the applicant's emotional response to these events.

10. The applicant in particular points to the evidence of the applicant husband given to the earlier Tribunal. This included evidence:

    1) That the incident which occurred in 1999 left his wife very sad and distressed (CB 218.8 - the earlier Tribunal's decision record reproduced in the Court Book) and left her with tremors and shivering whenever she recalled the incident (CB 219.3).

2) That at the hearing before the earlier Tribunal it appeared that the distress that the applicant exhibited at that hearing was related to the discussion concerning her detention in 1999 (CB 217.1).

11. The applicant's position therefore is that the Tribunal found against the applicant on a "credibility basis" in relation to her claims of what happened to her in April 1999. That part of her set of claims was that these events, even after some years, still involved emotional distress. The evidence of the applicant husband given at the earlier Tribunal hearing supported both her claims as to what occurred in April 1999 and her subsequent continued emotional distress which was said to be an indicator that the claimed events had taken place.

12. In short, Mr. Colborne submitted that the Tribunal failed to have regard to relevant evidence and that this is jurisdictional error on the part of the Tribunal. He relied on the majority in *WAIJ v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 74 ("*WAIJ*"), the majority in *NAJT v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 134 ("*NAJT*") and *WAGO of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 437 ("*WAGO*") to support this proposition.

13. The respondents' position, as put by Mr. Johnson, is that:

1) The question as to whether the Tribunal "completely overlooked" the husband's evidence provided to the earlier Tribunal is a matter in which the applicant bears the onus, and that this "fact" has not been established. Relevantly, the Tribunal's decision record reveals that it was aware of the content of the earlier Tribunal decision which included the husband's evidence. In this regard he referred to:

a) At CB 271.8:

Where the Tribunal states that it "has before it the previous RRT file".

b) At CB 285.5:

The Tribunal stated that it had "considered the evidence as a whole" and this statement was made in the context of considering the applicant's emotional state, and that it was not satisfied that such a state was as a result of the alleged events (CB 285.6).

c) At CB 287.6:

In the course of rejecting the applicant's claim that she had been detained in April 1999, which led to its subsequent non-satisfaction that anything had happened to her in detention, the Tribunal stated that it had considered "the evidence as a whole".

d) At CB 290.3:

The Tribunal made reference to "the available information" suggesting that everything before the Tribunal had been taken into account.

2) The evidence of the husband was not put forward to the ("second") Tribunal as important or significant to the applicant's case. Mr. Johnson referred to CB 280.2 where the Tribunal records that at the hearing the applicant indicated that her husband was "aware of the hearing" but that he had sent her "because her claims are very strong". Mr. Johnson submitted that the inference may be that he could not significantly add to what she had to say. Further, that it could not be drawn from that (especially in light of all the other references in its decision record) that the Tribunal did not have regard to the ("earlier") Tribunal file which was before it, and which included the summary of what the applicant husband had said.

3) That there are "aspects" of the words used by the Tribunal in its decision record, which indicate that the approach taken by the Tribunal was that rather than "seeking to set out everything" the Tribunal sought to explain its decision by setting out, and expressly dealing with, those "things" which it found more important. That is, as set out at CB 285.7, those matters which it

considered to be "the most fundamental ones" contained in the applicant's claims.

4) That what the applicant husband said to the earlier Tribunal was evidence in support of a claim, or contention, by the applicant which the Tribunal rejected. Mr. Johnson sought to draw the distinction between evidence and a contention put forward by the applicant. The distinction was pressed as there being a difference between a failure to consider a claim, or having regard to a relevant integer, and on the other hand a "mere" failure to deal with evidence, even probative evidence.

5) The respondents' second answer to Mr. Colborne's submission was that what was said by the husband falls within the latter category, and not the former. Mr. Johnson submitted that simply because the Tribunal puts some evidence aside, rejects it, or gives it no weight, does not mean that it has not been considered. He stressed that in the case before the Court now the Tribunal clearly rejected the applicant's claim that she had been detained, that she had been ill treated (including the sexual assault), and that as a result of this mistreatment she was distressed. That is, that the claim, or contention, put forward by the applicant was considered, but that what the husband said was no more than evidence to which the Tribunal did not have to make specific reference in its "Findings and Reasons."

14. Mr. Colborne relied on three Full Federal Court decisions, *WAGO*, *NAJT* and *WAIJ* as authorities for the proposition that a failure to have regard to relevant evidence is jurisdictional error. He particularly relied on *WAIJ* and especially *NAJT*. This latter case involved what was said to be a failure by the decision maker to "have regard" to a letter put forward in support of the applicant's claims. In *NAJT* at paragraph [212] Madgwick J., with whom Conti J. "essentially" agreed ([229]), said:

> *"[212] There was no independent requirement on the delegate so to check. Nevertheless, given the potential importance of the letter and the delegate's fleeting, uncritical references to it in his reasons, in my view the inference should be drawn that the delegate did not actually consider what significance and weight it deserved. A decision-maker cannot be said to 'have regard' to all*

of the information to hand, when he or she is under a statutory obligation to do so, without at least really and genuinely giving it consideration. As Sackville J noticed in Singh v Minister for Immigration & Multicultural Affairs *[2001] FCA 389; 109 FCR 152 at [58], a 'decision-maker may be aware of information without paying any attention to it or giving it any consideration'. In my opinion, it would be very surprising if the delegate had genuinely paid attention to the letter and given it genuine consideration – had in Black CJ's phrase in* Tickner v Chapman *(1995) 57 FCR 451 at 462 engaged in 'an active intellectual process' in relation to the letter – yet remained silent about such consideration in the reasons he gave. I am satisfied he did not do so.*

[213] Plainly, to have regard to all the available information is an inviolable duty of the Minister or delegate before refusing a visa. The appellant is entitled to relief because of the delegate's failure to do so."

15. In *WAIJ* the Full Court was concerned with a situation where two documents which were attached to a submission to the Tribunal in support of the applicant's application for review (the documents were in Persian script and no translation was provided) were not discussed at the hearing that the Tribunal conducted with the applicant. The Tribunal's reasons for decision did not refer to those documents. Lee and Moore JJ. stated at [16]:

"Under ss 414 and 415 of the Act, upon a valid application for review being made the Tribunal must review the decision to which the application refers. For the purposes of that review the Tribunal may exercise all powers and discretions available to the original decision-maker and under s 424 may obtain any further information it considers to be relevant. Section 420 requires the Tribunal to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick. However that obligation arises in a statutory context where specific powers are conferred on the Tribunal. No doubt the legislature intended that those specific powers could be exercised without necessarily frustrating the statutory objective identified in s 420. The Tribunal is empowered by s 427(1)(d) to require the Secretary to the Minister's Department to make investigation and report upon that investigation to the Tribunal. Undoubtedly that would permit the Tribunal to have the Secretary cause enquiries to be made in other countries through use of official channels, if a case required it. It is a power that the Tribunal might have exercised in this case

to obtain further information concerning the authenticity of the letters. There is nothing in the papers before us which suggests it considered doing so. Whether the power should be exercised in a particular case will be a matter for the Tribunal. More generally, the Tribunal, subject to a qualification provided in s 416 that is not relevant in this case, is required to consider all relevant material and after having regard to that material make the necessary findings of fact required to support the determination made by the Tribunal."

16. In response, Mr. Johnson noted and relied on the following:

1) That with reference to evidence that was "contrary" to the Tribunal's conclusion, McHugh J., remarked in *Re The Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1 at [67] that:

> *"The Tribunal must give the reasons for its decision, not the sub-set of reasons why it accepted or rejected individual pieces of evidence."*

2) That a failure to take into account a relevant consideration is not established because some piece of evidence is not dealt with (*Paul v Minister for Immigration and Multicultural Affairs* [2001] FCA 1196 at [78]-[79] per Allsop J., with whom Heerey J. agreed).

3) Nor is the problem overcome by seeking to label the evidence as a claim, as Allsop J. explained in *Htun v Minister for Immigration and Multicultural Affairs* [2001] FCA 1802 at [42] (Spender J. agreeing at [1]).

4) *MZWBW v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 94 ("*MZWBW*"), which Mr. Johnson submitted was decided after all the authorities cited by Mr. Colborne, except for *NAJT*. This decision refers to the distinction between evidence and contentions that need to be dealt with, and stands as authority for the proposition that there is no jurisdictional error because some piece of evidence has not been discussed or weighed.

17. In *MZWBW*, the Full Court was concerned with a situation involving a claim by an applicant as to the number of days of military training that

he had received. The Court noted at [25] that while in its reasons the Tribunal did not refer to the applicant's claim that he had received "25 days" of military training, in its recitation of the "Claims and Evidence", the Tribunal did refer to training that the applicant had received. The Court found:

> *"… In those circumstances it is difficult to accept that the Tribunal did not have in mind the training he said he had received, especially when it recorded country information that members of the Guard Battalion* normally *received only five days training."*

18. Important in understanding the distinction sought to be drawn by Mr. Johnson, and in particular the line of authority that supports that distinction, is what the Full Court said at [26] and [27]:

> *"[26] In* Rezaei v Minister for Immigration and Multicultural Affairs *[2001] FCA 1294 Allsop J. said that* Minister for Immigration and Multicultural and Indigenous Affairs vYusuf *(2001) 206 CLR 231:*
>
> > *'does not stand for the proposition that a relevant consideration has not been taken into account and the decision-maker thereby has failed to embark on or complete his or her jurisdictional task merely because some piece of evidence which the court thinks is relevant in the evidential or probative sense can be seen not to have been weighed or discussed. 'Relevant' for this purpose means that the decision-maker is bound by the statute or by law to take this into account.'*
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> *This passage was approved by Cooper and Finkelstein JJ in* Thirukkumar v Minister for Immigration and Multicultural Affairs *[2002] FCAFC 268 at [29]*.
>
> *[27] In* WAEE v Minister for Immigration and Multicultural and Indigenous Affairs *[2003] FCAFC 184 at [46] a Full Court said:*
>
> > *'It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons.... Moreover, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact ... and a failure by the Tribunal to address a contention which, if accepted, might establish that*

the applicant had a well-founded fear of persecution for a Convention reason.'"

19. The Full Court's Judgement in *MZWBW* at [28] sets out how it applied these principles to the circumstances before it. For reasons which will become clear below, this is helpful in resolving the application of these principles to the circumstances before this Court now. At [28] the Full Court said:

> *"[28] The relevant contention or issue before the Tribunal concerned the integration of the Guard Battalion with the Sri Lankan Army. That matter was squarely addressed. Assuming that the Tribunal overlooked the training evidence (which, as we have said, is a large and difficult assumption to make), that was but a failure to advert to evidence which, if accepted, might have led it to make a different finding of fact: cf* WAEE *above. It is not a jurisdictional error to make a wrong finding of fact. However, as we have said, we do not accept that the Tribunal overlooked the training evidence. It may well be that it did not dwell on it because it considered it irrelevant to the question whether the Guard Battalion was integrated into the Army in the relevant sense. If that is the reason, we think it well based."*

20. In essence, Mr. Johnson's submission is that the authorities relied on by the respondent can be distinguished from *NAJT* because in that case Madgwick J. proceeded on the basis that as a matter of fact certain material (being a letter in support of the applicant's claims) was not considered. Mr. Johnson's submission was that a similar finding could not be drawn in the circumstances before the Court now. Secondly, even if the Court were to find that the material was overlooked, it was not a claim, or an integer of a claim, or a contention, but a piece of evidence which, drawing directly from the authorities quoted above, when overlooked was not jurisdictional error. Clearly, there was no submission for the respondent that a failure to deal with a claim or an integer of a claim, would not lead to a finding of jurisdictional error. I should note that clearly, both by way of what is stated in the amended application in relation to ground one, and in the submissions by Mr. Colborne, the applicant has not sought to characterise what was said to be "overlooked" (that is, the husband's evidence to the earlier Tribunal) as anything other than "evidence".

21. The first issue in any event, is whether it could be said that the Tribunal overlooked what the applicant's husband put to the earlier Tribunal (however characterised). Clearly, the Tribunal had before it the previous Tribunal file, and made specific reference to that in its decision record. In looking at the decision record alone however, I am not convinced that the reference at CB 285.5 to the evidence "as a whole" can be said to be a reference to include the applicant's husband's evidence. Nor indeed, in my view, is the subsequent reference to "having considered the evidence cumulatively". Similarly, while Mr. Colborne has not put forward anything to show that the Tribunal's reference at CB 287.6 to "on the basis of the evidence as a whole" was not a reference to include the applicant husband's evidence (as contended by the respondent) neither, with reliance only on the decision record, can it be said that the respondent has provided anything to show that in fact it did include such a reference. A similar point can be made with the Tribunal's reference at CB 290.3 to the basis for its express lack of satisfaction that there is a real chance of the applicant suffering serious harm on "the basis of the available information".

22. Mr. Johnson's further argument was that it is for the applicant to bear the onus to show that these references do not include the applicant husband's evidence. This would form the basis for accepting Mr. Johnson's submission, notwithstanding that plainly Mr. Colborne is correct when he says that there is no express reference to the applicant husband's evidence in the Tribunal's "Findings and Reasons".

23. However, in my view, there is another factor not raised in submissions, which tips the balance as to what the Tribunal was doing, and what was meant, when it made such references. The Tribunal's decision record should not be read in isolation. The applicant's application for review was subject to orders made by Barnes FM on 23 February 2005, that the application for review be reconsidered by the Tribunal. On 30 March 2005 (CB 238 to CB 239) the Tribunal wrote to the applicants (I note that the letter was addressed to the applicant and sent to both the applicant's authorised recipient, the solicitors that the couple had retained at the time to represent them, and to their home address). The letter clearly included a reference to the applicant husband.

24. The Tribunal acknowledged that the application had been returned to it for reconsideration, and proceeded to set out the procedure by which such a "second" review of the application would be conducted. Importantly, the letter notified the applicants that the Tribunal would look at the information that the applicants, and the respondent Minister's Department, had put to it and would also look at information about the applicants' country. It set out options as to how it would proceed after having looked at that information, including making a decision in the applicants' favour, or inviting the applicants to a hearing. In any event, the Tribunal set out for the applicants the importance of the hearing to the process of reconsideration, and in particular that evidence could include what the applicants told the Tribunal member at the hearing.

25. Less than a week later, on 4 April 2005, the Tribunal wrote to the applicants (CB 241 and CB 242, again it should be noted that the letter included reference to both the applicant and the applicant husband). The Tribunal's advice was that it had considered the material before it in relation to the application (consistent with what it had earlier said it would do), but was unable to make a decision in favour of the applicants on the information that had been put before it. In these circumstances, the applicants were invited to come to a hearing before the Tribunal on 10 May 2005, to "give oral evidence" and "present arguments". Lest it be said that there was any doubt about whether the applicant husband was also invited to the hearing, I note that the applicants had been through this process once before. They were represented by solicitors throughout the process before the Tribunal, and would therefore have had the opportunity to have had the process explained to them again. Even if the applicants had misunderstood that the invitation was only to the applicant wife (as I said, highly unlikely in the circumstances, and further there is no evidence before me now to indicate this), the Tribunal's letter also stated that "you can also ask the Tribunal to obtain oral evidence from another person or persons". As already set out above, only the applicant wife attended the Tribunal hearing. The applicant husband was said by the applicant to have been "aware of the hearing", but that he had sent her because her claims were very strong (CB 280.3).

26. In my view all of this contextual background cannot be ignored in seeking to derive further a better understanding of what the Tribunal was setting out in its decision record. There is no argument in light of the Tribunal's account of what occurred at the hearing with the applicant (CB 281.2 to CB 284.2) that the Tribunal conducted the hearing with the applicant in a comprehensive manner (the Tribunal's account of what occurred at the hearing has not been challenged by any other evidence put before the Court). The Tribunal's references to having before it the previous Tribunal file, that it had considered the evidence as a whole (at least on two occasions) and its reference to "the available information", when seen in context of the elements set out above, in my view, provide the plausible explanation for the absence of any specific reference in the "Findings and Reasons" to the applicant husband's evidence. On the considerable amount of information that was before it at the beginning of April 2005 (including the applicant husband's evidence) the Tribunal clearly took the view that such material was not sufficient so as to cause it to make a favourable decision for the applicants. Consistent with the process that it had outlined to the applicants in its earlier letter, this was the specific reason that caused the Tribunal to invite the applicants (both wife and husband) to a hearing before it. Having put the applicants on clear notice as to its preliminary view of what had been put before it to date, it is not surprising that the Tribunal then dealt with the applicant wife's claims at the hearing in an extensive fashion. The hearing was clearly the opportunity for the applicants to address the Tribunal's preliminary view that the information given to it to date was insufficient so as to satisfy it that protection visas should be granted. That the Tribunal was attuned to the applicant husband, and of the possibility of his attending the hearing, is clear, when it recorded that (just after the beginning of the hearing with the applicant) the applicant indicated that her husband was aware of the hearing, had chosen not to come and had sent the applicant herself because of what he is said to have thought of her claims (as being "very strong") (CB 280.3).

27. The Tribunal had before it the applicant husband's evidence to the previous Tribunal. It put to the applicants (and specifically as it relates to the applicant husband, put to him) that on what had been put before it, it was not persuaded that, in effect, protection visas should be granted. The applicant husband was clearly also invited to the hearing,

chose not to come, and instead sent his wife along on the basis that the family was relying on her claims, and that they were "very strong". In all these circumstances, it is a plausible explanation for the Tribunal's omission of any specific reference in its "Findings and Reasons" to the applicant husband's evidence, that it concentrated on what the applicant wife herself put to it. This provides the plausible explanation for any omission of any specific reference to the applicant husband's evidence in the "Findings and Reasons".

28. I am not persuaded therefore by Mr. Colborne's submission that the only plausible explanation for the absence of any reference to his evidence in the "Findings and Reasons" was simply because the Tribunal "overlooked his evidence". In all the circumstances, I am satisfied that the Tribunal knew of the husband's evidence, had formed a preliminary view about it (in context with all the other evidence before it) then proceeded to focus primarily on the "fundamental" claims as put ultimately by the applicant herself at the hearing before the Tribunal. In my view, the Tribunal dealt with the applicants' case on the basis on which the applicants themselves chose ultimately to put their claims before the Tribunal. In all therefore, I accept Mr. Johnson's submission that it is not established that the Tribunal overlooked the applicant husband's evidence such as it could be said that there was a failure to consider the evidence. In my view, ground one fails on this basis.

29. In view of the above, it is not necessary to go on and consider what Mr. Johnson described as the "stress" between the lines of authority put forward by the applicant and the respondent. I should just note however, that I was persuaded by Mr. Johnson's submission that I should follow *MZWBW, Htun* and *Paul* and in particular note what Allsop J. said in *Rezaei*, and the distinction drawn in *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184, between a failure to advert to evidence and a failure to address a contention. In my view, the circumstances in this case can be distinguished from *NAJT*. But in any event, as I have already stated, I am not persuaded that the Tribunal ignored the applicant husband's evidence given to the earlier Tribunal.

30. The applicants' second ground is that the Tribunal failed to have regard to corroborative evidence going to the applicant's credibility. This complaint is clearly linked to the complaint set out in the first ground, and in an important sense, is put as an alternative. The submission is that even if the Tribunal did not overlook the applicant husband's evidence, but chose to give it no weight because the applicant's evidence lacked credibility, then the Tribunal in these circumstances committed jurisdiction error as identified in *WAIJ*, with specific reference to paragraphs [26] and [27]. In *WAIJ* (as referred to above) the Court had before it a situation that involved two letters that were said to be evidence in support of the applicant's claims. The issue was that that Tribunal had problems with the applicant's failure to raise claims when first interviewed by the first respondent's Department. The two letters were said to be corroborating evidence that explained that failure. The Tribunal decided to place no weight on those letters and made a finding of adverse credibility in relation to the applicant. The Court (at [26] to [28]) said:

> *"[26] The Tribunal determined the matter adversely to the appellant by disregarding the documents it had been directed to consider by the order made by consent in this Court, stating that the documents "do not overcome the problems I have with the applicant's evidence".*
>
> *[27] 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]).*

[28] This appeal did not involve a case in which the credibility of the appellant had been destroyed by stark findings of untruthfulness. The Tribunal accepted that in her youth the appellant had distributed "MKO" newsletters at university and that her brother had engaged in similar activities and had been killed in unexplained circumstances. The Tribunal accepted that the appellant believed that the security forces had been responsible for the death of her brother."

31. Mr. Colborne also relied on:

"[32] It was, of course, a matter for the Tribunal to decide if the failure of the appellant to state at the "entry" interview that she feared persecution if returned to Iran, undermined the credibility of such a claim made subsequently. However, in the absence of material which impeached the appellant's claims directly, the Tribunal could not make that determination without duly considering the weight to be given to material which tended to confirm the truth of her claims. In other words, if there was some material capable of supporting the claims and an absence of cogent material showing the appellant to have been untruthful in respect of those claims, it may be unsafe to regard the failure of the appellant to disclose the claims at the "entry" interview as sufficient to establish that the claims were invented and it would follow that material corroborating the claims would have to be considered."

32. Relying on this, Mr. Colborne's submission was that the Tribunal's otherwise "comprehensive" statement of its reasons, meant that it was unlikely that the Tribunal made a decision to give the husband's evidence no weight, without actually making a reference to that evidence. Mr. Colborne's argument was that the Tribunal accepted as plausible the applicant's claims that in passing through immigration in Colombo in April 1999, a "lady officer" wanted the applicant's jewellery, which the applicant gave her apart from one item. However, the Tribunal did not accept the applicant's subsequent claims that she was then detained, and sexually assaulted.

33. Mr. Colborne's submission was that the Tribunal's findings (relevantly at CB 287) were not such as could be said to amount to a clear finding that the applicant was "lying". The further comments such as "is not

entirely persuasive", and that it was difficult to reconcile "incongruent claims", support this contention. Further, in light of *WAIJ*, it could not be said that the Tribunal had "discredited" the applicant's claims in this regard, by comprehensive findings of dishonesty or untruthfulness. Even further, that the husband's evidence was "material corroborative" of the applicant's claims, and that it was not "open to the Tribunal" it to not consider material corroborative of an applicant's claims merely because it considers it "unlikely" that the events described by an applicant occurred.

34. I should just note that the Tribunal's description of "a blatant exaggeration by the applicant" (CB 287.5), related to the applicant's claims that some women who had witnessed her ill-treatment had spread rumours, and that "everyone now knows including the LTTE" of what had occurred. This could be said to contradict what was put by Mr. Colborne. He distinguished this finding of "blatant exaggeration" from the Tribunal's other findings as they related directly to whether the detention itself took place and that the claim of harassment had taken place.

35. In all therefore, his submission was that there was nothing in what the Tribunal found that impeached the applicant's claims directly. At best, he submitted the highest point is at CB 287.7 and that "looking at the evidence as a whole the Tribunal is satisfied that the applicant has exaggerated these claims in order to enhance her application for a protection visa, reflecting poorly on her credibility". This was not, in Mr. Colborne's submission, a finding that there was "cogent material showing the applicant to have been untruthful" (from *WAIJ* at [32]). In those circumstances, the Tribunal should have had regard to the corroborating evidence on the issue of detention, and subsequent harassment, provided by the applicant husband to the earlier Tribunal. The Tribunal's failure to have regard is jurisdictional error as set out in *WAIJ*.

36. In reply, the respondents' position is:

    1) That this case can be distinguished from *WAIJ* on the basis that in that case the Tribunal found that it was "unnecessary" for it to consider material corroborative of an applicant's claims (at [27]).

2) In any event, the respondent submitted that the Tribunal did consider the husband's evidence as pressed in response to ground one above.

3) That jurisdictional error would not follow even if the Tribunal had not considered the husband's evidence. Mr. Johnson's submission was that contrary to what was put by Mr. Colborne, the Tribunal's findings against the applicant upon the relevant issues were so "strongly expressed in terms of her credibility" that it was open to the Tribunal to decline to consider any corroborative evidence. Mr. Johnson's submission was that in this case, the situation was such that it fell within the opening sentences of paragraph [27] of *WAIJ* in that this was a case where the applicant's claims (that is, the relevant claims) about her detention and harassment had been "discredited by comprehensive findings of dishonesty or truthfulness" which "necessarily are likely to negate allegedly corroborative material".

37. I have already found above that it is not established that the Tribunal overlooked the applicant husband's evidence. Further, I agree with Mr. Johnson that *WAIJ* can be distinguished from the circumstances in the case before me, in that in *WAIJ* the Court said it would not be open to the Tribunal to make a statement that it was unnecessary for it to consider the material that was corroborative of an applicant's claims "merely" because it thought it unlikely that the events described by an applicant had in fact occurred. Plainly, there is no such "positive" statement in the case before me. The Court in *WAIJ* had before it a situation that, as it said, "did not involve a case in which the credibility of the appellant had been destroyed by stark findings of untruthfulness". Mr. Colborne submitted that there was no clear finding by the Tribunal in rejecting the credibility of the applicant's claims.

38. It is clear that the Tribunal did not use "stark" language in its findings. There is no reference to the word "lies" in relation to the applicant's claims, or indeed that the applicant was "a liar". However, meaning as to what the Tribunal has actually done should not be derived from one or two words in different parts of the Tribunal's decision record. As has been often said, meaning must be discerned from reading the Tribunal

decision record as a whole. As the Tribunal's "Findings and Reasons" reveal, once the Tribunal (CB 285.3) had satisfied itself that the applicant's emotional state at the hearing was not such as to warrant an adjournment of the hearing, the Tribunal then described its view of the applicant's evidence:

> "Having explored at a hearing with the applicant her claims and having considered the evidence as a whole, the Tribunal has formed the view that the applicant has seriously exaggerated her claims as well as her emotional response at the hearing." (CB 285.4)

39. The Tribunal then identified the applicant's "fundamental" claims and found that her claims as they related to events up until 1998 were generally plausible, although it found that the claims at that time did not amount to a genuine fear of persecution, let alone a well founded fear. In relation to the events of April 1999, the Tribunal (as set out at the top of CB 287) developed its analysis from having "difficulties with the applicant's claims that she was subsequently detained and ill treated", building up through "not entirely persuasive" and to ultimately:

> "Looking at the evidence as a whole, the Tribunal is satisfied that the applicant has exaggerated these claims in order to enhance her application for a protection visa, reflecting poorly on her credibility." (CB 287.8)

40. In my view, a plain reading of the whole of the Tribunal's decision record, as it relates to the events of April 1999 (the detention and claimed sexual harassment), describes these events a serious exaggeration. There is a clear distinction between the credibility of the claims (and the applicant) relating to events up until 1998, and the events including and following the claimed detention and sexual harassment. While it is clear that the applicant's credibility was not destroyed by "stark findings of untruthfulness" in relation to everything she said, I accept Mr. Johnson's submission that the Tribunal did reject the truthfulness of the applicant's claims of subsequent detention and harassment as being, as it said at CB 285, "seriously exaggerated".

41. In all it is not made out that the Tribunal overlooked the applicant husband's evidence. But further, what is also clear is that having put to

the applicant (as at April 2005) that on all the evidence there was insufficient material before the Tribunal to be satisfied that a protection visa should be granted, the Tribunal subsequently made clear findings, expressed as exaggerations of the applicant's claims, rejecting the applicant's claims of detention and subsequent harassment, such that, in my view, it could be said that what the applicant herself put to the Tribunal was fully discredited. This was such that it was not necessary for the Tribunal, in any event, to give weight to the applicant husband's evidence. In all therefore, this ground is not made out.

42. The applicant's third ground of complaint is that the Tribunal failed to deal with an integer of the applicant's claims. Mr. Colborne made the following points:

1) In her statement accompanying her protection visa application, and in particular as reproduced at CB 35.6 to CB 35.10, the applicant stated that in 1998 the Sri Lankan police (at Wellawatte) told her that her son was suspected by the Sri Lankan army of being involved with the LTTE, and she should pay the police money and leave Sri Lanka or be taken into custody on the ground that her son was an LTTE collaborator. Further, that she was fearful of staying and offered to pay the money and left Sri Lanka with fear of "losing her children".

2) The applicant husband told the earlier Tribunal at the hearing conducted by it (see the earlier Tribunal's decision record at CB 218.4 to CB 219.4) that there would be problems for his wife because of their son's alleged connections to the LTTE and then told the Tribunal that "his agent" had told him "they" would face problems because of their son.

3) At the Tribunal hearing, conducted on 21 May 2003, that is, the first hearing before the earlier Tribunal (the applicant husband had not attended on that occasion – the applicant gave evidence to the Tribunal on 21 May 2003 and both applicants gave evidence to the earlier Tribunal on 23 June 2003) the applicant told that earlier Tribunal that the army suspected that her son belonged to the LTTE.

43. Mr. Colborne submitted that in its "Findings and Reasons" the Tribunal accepted that the applicant was detained at the Wellawatte police station in May 1998, but made no finding as to whether her son was suspected of being an LTTE collaborator. Mr. Colborne's submission was that the Tribunal dismissed this incident, that is, her detention for one night, as being consequential to the general insecurity in Sri Lanka at that time, and was not satisfied that the applicant was targeted "per se" (CB 286.2 to CB 286.10). The submission was that the Tribunal "overlooked the evidence" which was to the effect that the applicant was targeted by the police because of her son's alleged involvement with the LTTE.

44. Mr. Colborne submitted that the Tribunal referred to this aspect of the applicant's case in its decision record when setting out the applicant's "Claims and Evidence". At CB 275.5 the Tribunal, as part of its recounting of what the applicant put in her statement attached to the protection visa application, recorded that the applicant, in May 1998, met three army officers with her "agent" for the purpose of paying them money to obtain permission to bring her children out of Jaffna. When they sought more money than what had been initially agreed, she refused to pay them. They left, and "within an hour" she was taken to the police station for interrogation by the Wellawatte police. When she told them about her children the police took details and ordered her to stay overnight until they made inquiries about the children. The following morning the police told her that the army in Jaffna suspected that her son had "LTTE dealings", and that as a result he would not be permitted to come to Colombo due to security reasons. She paid them money and then left Sri Lanka in fear of losing her children.

45. Mr. Colborne's submission was that when the Tribunal came to deal with this aspect of the applicant's case in its "Findings and Reasons" it only addressed the applicant's belief that her son had been arrested and tortured by the army, and not that he was suspected of being a collaborator. Further, the Tribunal rejected her claim that this had happened because of her lack of knowledge of what had happened, and found that these claims had been fabricated (CB 298.6 to CB 289.5).

46. Mr. Colborne relied on the Full Court Judgement *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No. 2)* [2004] FCAFC 263 at [63]:

> *"[63] It is plain enough, in the light of* Dranichnikov, *that a failure by the Tribunal to deal with a claim raised by the evidence and the contentions before it which, if resolved in one way, would or could be dispositive of the review, can constitute a failure of procedural fairness or a failure to conduct the review required by the Act and thereby a jurisdictional error. It follows that if the Tribunal makes an error of fact in misunderstanding or misconstruing a claim advanced by the applicant and bases its conclusion in whole or in part upon the claim so misunderstood or misconstrued its error is tantamount to a failure to consider the claim and on that basis can constitute jurisdictional error. The same may be true if a claim is raised by the evidence, albeit not expressly by the applicant, and is misunderstood or misconstrued by the Tribunal. Every case must be considered according to its own circumstances. Error of fact, although amounting to misconstruction of an applicant's claim, may be of no consequence to the outcome. It may be 'subsumed in findings of greater generality or because there is a factual premise upon which [the] contention rests which has been rejected' – Applicant* WAEE *(at 641 [47]). But as the Full Court said in* WAEE *(at [45]):*
>
> > *'If the tribunal fails to consider a contention that the applicant fears persecution for a particular reason which, if accepted, would justify concluding that the applicant has satisfied the relevant criterion, and if that contention is supported by probative material, the tribunal will have failed in the discharge of its duty, imposed by s 414 to conduct a review of the decision. This is a matter of substance, not a matter of the form of the tribunal's published reasons for decision.'*
>
> *In that case the appellant, who was an Iranian citizen, put to the Tribunal that the marriage of his son to a Muslim woman in Iran had ramifications for him and his family. The Tribunal made no express reference in its discussion and findings to the claimed fears of persecution which arose out of the marriage by the appellant's son to a Muslim woman although it made reference to the claim in its overview of the appellant's case. The Court held that the Tribunal had failed to consider an issue going directly to the question whether the criterion under s 36 of the Act was satisfied. The Court held that the Tribunal had therefore failed to*

discharge its duty of review and had made a jurisdictional error."

47. The essence therefore of Mr. Colborne's submission was that the Tribunal made jurisdictional error by not dealing with the applicant's claim to fear persecution by the Sri Lankan authorities because they suspected her son of being involved with the LTTE. Mr. Colborne emphasised that the applicant made a specific claim that she feared harm from the authorities because of the perception that her son was involved with the LTTE, and that the Tribunal did not directly deal with this claim, but dealt generally with what had occurred in 1998 as being part of the general insecurity situation prevailing in Sri Lanka at the time. The lack of a specific finding on that specific claim shows that the Tribunal overlooked what had occurred in 1998 in that regard.

48. Mr. Johnson's submissions were:

1) That the evidence in the protection visa application (that in 1998 the police told the applicant that her son was suspected of involvement with the LTTE) was "mere evidence" contrary to the Tribunal's findings. With reference to the principles already set out in relation to grounds one and two, the Tribunal is not jurisdictionally required to expressly deal with such "mere evidence" in its reasons.

2) That in a situation, which Mr. Johnson described as being "weaker than in relation even to ground one", the Tribunal expressly noted in its decision record at CB 275 that the applicant had put in her statement [in support of her application] that the police told her, during questioning in May 1998, that the army in Jaffna suspected her son of dealing with the LTTE and further that she was threatened that she may be taken into custody on the grounds that her son was an LTTE collaborator. This "evidence" was specifically recorded by the Tribunal in its summary.

3) That in addition to specifically rejecting the applicant's allegation that her son had even been approached by the LTTE, and that he had been arrested and tortured by the Sri Lankan army (CB 289.3 where the Tribunal found those claims to be fabricated), the

Tribunal also made "the wider finding" that, as set out at CB 290.4:

> "On the basis of the available information, the Tribunal is not satisfied that there is a real chance of the applicant suffering serious harm in the reasonably foreseeable future on the basis of being imputed with a political opinion of being pro LTTE as a result of her brother's involvement with the LTTE or on the basis of being imputed with a political opinion of being pro LTTE as a result of her children's or other family member's (other than her brother) alleged association with the LTTE, or that her children would be taken away from [sic: her] to be trained as cadres. It must also be emphasised that the applicant's brother's involvement occurred over 25 years ago, significantly reducing any chance of persecution on this basis."

49. Mr. Johnson's submission therefore was that this finding by the Tribunal, and its reference on the available information, could not be said to exclude the reference to the applicant's son, given that the Tribunal had plainly stated in its decision record that it had read, amongst other things, the Department's file which contained the applicant's statement (CB 271.7), and the Tribunal's own summary of the applicant's evidence (CB 275.6) where specific reference was made to the son and what she had been told by the police at Wellawatte.

50. There can be no doubt that in the circumstances of this case, a failure to deal with a claim put forward by the applicant, or an integer of the claim, would amount to jurisdictional error. Beyond that however, the parties differ on whether to characterise the applicant's statements in relation to her son and what she was told at the Wellawatte police station in 1998 as being "mere evidence", or a part of her claim linked to why she feared harm from the Sri Lankan authorities. A further point of separation between the parties is whether this statement, irrespective of whether it is characterised as "mere" evidence or a claim (or part of a claim), was in any event adequately addressed by the Tribunal.

51. It is helpful in resolving this issue to review its development from its first appearance in the applicant's statement attached to the protection visa application through to the ultimate consideration by this Tribunal:

1) It is clear that the applicant said in her statement attached to the protection visa application that she was threatened by the police at Wellawatte police station in May 1998 and that if she did not pay them money she would be taken into custody on the grounds that her son was an "LTTE collaborator" (CB 35.9).

2) The issue was again referred to in the Minister's delegate's assessment of the applicant's claim. At CB 157.4 the delegate said:

> "The army would not allow her children to come to see her in Colombo because they suspect her son of being an LTTE member. Each time she returned to Sri Lanka the LTTE demanded money and her children could not come to Colombo to see her."

3) The earlier Tribunal reproduced the applicant's statement in full in its decision record. The relevant issue is reproduced at CB 208.5.

4) In its account of what occurred at a hearing, held on 21 May 2003, the earlier Tribunal reported as part of what the applicant had put to it that:

> "The Applicant told the Tribunal that the last time she was in Sri Lanka was in April 1999, and that her husband was also with her and that they remained in Columbo for a month. She said she did not see her children during the visit. The Tribunal asked the Applicant why her children had not come from Jaffna to visit their parents in Columbo. The Applicant said that her son could not come because the LTTE had come and forced him to join and had taken him away by force. The Tribunal then asked the Applicant (three times) if this meant her son had joined the LTTE. The Applicant eventually said that her son had *not* joined the LTTE as he doesn't "like" the LTTE. She said that the army however, *suspects* her son belongs to the LTTE." (CB 215.7)

5) In their subsequent application to the Federal Magistrates Court on 19 August 2003, following the earlier Tribunal's decision, the applicants put forward (amongst others) the following ground of complaint:

"The Tribunal exceeded its jurisdiction and constructively failed to exercise its jurisdiction by –

(1) Failing to make any findings on the first applicant's claim to have been detained and interrogated at Wellawatte Police Station in 1998 and of being told on that occasion that the police suspected her son of being involved with the LTTE." (CB 231.9)

6) The reasons for Judgement of Barnes FM, reproduced at CB 226 to CB 236, reveal that Her Honour found for the applicants, but was not required to deal with this ground as she found for the applicants on the other ground.

7) It is clear therefore that from the statement accompanying the protection visa application, the delegate's decision record, the earlier Tribunal's report of a hearing with the applicant, and from the grounds of complaint put before the Court on an earlier occasion, that amongst matters put forward by the applicants they also claimed that the applicant had been detained overnight in May 1998 at the Wellawatte police station and had been told that her son was suspected of some involvement with the LTTE.

8) The Tribunal acknowledged that this had been put forward when it recorded the applicant's claims, and relevantly in its decision record at CB 275.7:

> "They [being the officers at the police station] threatened that if she failed to pay the amount, she would be taken into custody on the grounds that her son was a LTTE collaborator. Due to fear, she offered to pay them the money and left Sri Lanka with great fear of losing my children."

9) The Tribunal also recorded, in recounting submissions of 17 June 2002 (made to the delegate), that:

> "The applicants' son has been taken by LTTE to train as a militant, probably against his will. The applicants cannot return to Sri Lanka because their son's involvement in the LTTE is well-known to the Sri-Lankan authorities." (CB 278.6)
>
> "The applicants fear arrest due to their son's involvement with the LTTE, and the applicant fears return due to the

harassment she received from the security officers." (CB 278.8)

10) I should note however that at the hearing that the Tribunal conducted with the applicant on 10 May 2005, the Tribunal's lengthy report of what occurred at the hearing, which is unchallenged by any other evidence before this Court, reveals that while the applicant repeated a number of claims, and answered a number of questions (from the Tribunal's perspective unsatisfactorily) about whether her son had actually joined or worked for the LTTE, there was nothing reported from the applicant as to the perception that her son had collaborated with the LTTE and that this made her a target of the Sri Lankan authorities. (In light of what is set out below this may be part of the explanation as to why the Tribunal overlooked this particular aspect of the applicant's claims).

52. There are a number of difficulties with the Tribunal's expression of its "Findings and Reasons". Relevant to this ground of review, it is not clear what the Tribunal meant when it said at CB 285.7:

> "The applicant has made a number of claims but the most fundamental ones are in essence her fear of persecution on the basis of the following grounds:"

53. The immediate question that arises is whether the Tribunal felt it was only required to deal with the "fundamental" claims and not all the claims. The Tribunal then proceeded, under three dot points, to refer to a number of claims made by the applicant. What is significant is that while there is reference to the claim that her son would be forced to join the LTTE, and that the applicant's children may be taken away from them to be trained as cadres, there is no reference to the applicant's fear as it was said to arise from what was stated to her at the Wellawatte police station. That is, a perception by the authorities that the son was a collaborator with the LTTE, which gave rise to a fear of harm for herself.

54. It must be said at the outset that the Tribunal's statement that the applicant had made a number of claims, but then proceeded to identify the "most fundamental ones", certainly gives rise to a concern that the Tribunal either felt that it only should focus, or would focus, on those

claims which it saw as “fundamental”, and did not have to deal with those of other than “fundamental” quality. That is, that it did not deal with some of the applicant’s claims. Clearly in properly and fully exercising its jurisdiction, the Tribunal is not only required to deal with the applicant's “fundamental” claims, but indeed all of the applicant’s claims whether made expressly, or as they are considered to impliedly arise from circumstances put forward by the applicant.

55. The matter is further complicated by the fact that having set out the three dot points the Tribunal does not appear to directly deal with each of the dot points. It then embarks on a chronological survey of the applicant’s claims which deals with the applicant’s claims in two parts: those up until 1998, and those following the applicant’s return to Columbo in April 1999. The Tribunal's analysis at CB 286 of events and findings in relation to those events up until 1998 appear to be based on general country information and material put forward by the applicant (in particular) prior to the hearing. With its analysis of events in April 1999 and following, commencing at CB 287, the Tribunal appears then to follow a sequence of issues as put and discussed with the applicant at the hearing.

56. In none of this, whether up until (and including) 1998 (the year in which she was detained at the Wellawatte police station) or April 1999 and afterwards, is there any reference to the perception by the army (as reported to her by the police at the Wellawatte police station) that her son was a LTTE collaborator. The Tribunal accepted (at CB 286.5) as being plausible that the applicant was detained for one night at Wellawatte, and was subsequently released when she paid money. However, the Tribunal was silent at this point of its analysis as reflected in its decision record, as to whether it formed any view in relation to what the applicant claimed she was told by the Wellawatte police about the perception of her son's relationship with the LTTE.

57. When the Tribunal came to deal with the son’s activities in its analysis it followed on from its analysis of the applicant’s claims of what occurred in 1999 and in particular her (second) detention in April 1999, which ultimately, in significant parts, the Tribunal found was a further “exaggeration” was made in order to enhance her application for a protection visa reflecting poorly on her credibility. It was clear (as set

out at CB 287.9), that the Tribunal was focused on the matters it discussed with the applicant at the hearing. This was whether the applicant's son had in fact been a member or worked with the LTTE. The decision record shows that the Tribunal recounted again what had occurred at the hearing, and reported that the applicant was "simply unable to provide any specific details but generalised answers" (CB 287.9). Its analysis on this issue continues at length throughout CB 288, culminating at CB 289, when the Tribunal states:

> "Having carefully considered the applicant's responses to the questions about the claim that her son had been approached by the LTTE and that he had been arrested by the Sri Lankan army, the Tribunal is satisfied that the evident lack of any specific details, the vagueness of her responses indicate that the claims have been fabricated, reflecting poorly on her credibility." (CB 289.3)

58. The Tribunal (at CB 289.5) rejected the applicant's claims that her son had been approached to join the LTTE or that he was arrested by the Sri Lankan army and did not accept that the applicant's son was tortured by the army. The Tribunal then went on to consider (CB 289.6) the applicant's claim, again discussed at the hearing, that the LTTE had also approached the applicant's daughter. It found again that this claim had been fabricated, reflecting poorly on the applicant's credibility. The Tribunal then considered the applicant's claim relating to her brother having joined the LTTE. It ultimately found at CB 290.3 that it was not satisfied that the applicant suffered any harm amounting to persecution whilst in Columbo and accordingly was not satisfied that her brother's political allegiance had caused her any difficulties.

59. In relation to the passage in the Tribunal decision record at CB 290.4, relied on by Mr. Johnson (quoted above at [48]), he submitted that the words "on the basis of the available information" could not be taken to exclude what the Tribunal had said it had read on the Department's file, or indeed its own summary of the evidence that included the evidence that the applicant now claims to have been overlooked (what she was told at the Wellawatte police station). On the basis of how the Tribunal's analysis unfolded in its decision record it is clear that its analysis (on the issue of the son and the LTTE) relied on and drew to a very large extent on what the applicant had said at the hearing.

By itself of course this is not a matter on which the Tribunal could be said to have made an error.

60. But the question remains as to whether the Tribunal focused on what was said at the hearing to such an extent that this caused it, in its analysis, to overlook what may have been put before it previously. The Tribunal's analysis beginning relevantly at CB 287.9 and dealing with the relationship between the applicant's son and the LTTE focused on whether he had in fact being approached by the LTTE, and subsequently arrested by the Sri Lankan army. Ultimately, the Tribunal came to the conclusion that it rejected the applicant's claims that her son had ever been approached to join the LTTE, or that he was ever arrested by the Sri Lankan army, or that he was tortured by the army. All of this was based on what the applicant had put to the Tribunal at the hearing. This part of the Tribunal's analysis commences at CB 287.9 with a reference to "During the hearing" and clearly proceeds to analyse the issue as to how the claim unfolded and was discussed at the hearing. The Tribunal's finding, ultimately at CB 290.4 relating to the son and the LTTE (including the references to the daughter and the brother) is clearly derived from what the applicant said at the hearing.

61. It was the lack of specificity, and the vagueness of the applicant's responses, that led the Tribunal to find that her claims had been fabricated reflecting poorly on her credibility. As indeed had been the Tribunal's approach to the applicant's claim made during the hearing that the LTTE had approached her daughter. The Tribunal compared this with the applicant's claim as it related to her brother having joined the LTTE, by describing it as evidence that was consistent and clear (CB 289.9). It accordingly accepted this evidence as being plausible. (But found that as it was not satisfied that the applicant suffered any harm amounting to persecution while she had been in Columbo on the relevant occasions when she had travelled back to Sri Lanka from Dubai that it could not therefore be satisfied that the brother's political allegiance had caused her any difficulties).

62. That part of the Tribunal's decision record (quoted above at [59]) on which Mr. Johnson seeks to rely, and particularly the words "on the basis of the available information" is in my view clearly a summation of what has preceded it in the Tribunal's analysis in its decision record.

In my view when the Tribunal makes reference to "the available information" to find that it could not be satisfied that the applicant had been, or would be, imputed with the political opinion of being pro-LTTE as a result of (reference to "children" clearly includes her son) the alleged association with the LTTE, it had formed the view, based on the applicant's evidence, that the son had not been approached by the LTTE, nor subsequently arrested and tortured by the Sri Lankan army. Therefore the applicant consequently could not have had a political opinion imputed to her, as being pro-LTTE, because of the son's claimed association with the LTTE.

63. The Tribunal's analysis of the applicant's claims that her son had been involved with the LTTE was, in my view, comprehensive in dealing with the issue of whether the son had actually been approached by the LTTE and suffered consequent harm as claimed by the applicant. In my view when read in context, the Tribunal's ultimate conclusion that the applicant herself would not be imputed with a political opinion of being pro LTTE as a result of the son's alleged association was rejected on the basis that the Tribunal found that the son was not so associated.

64. However, there is a clear and distinct difference between a finding that the applicant would not be imputed with a political opinion as a result of her son's involvement (because the son was not involved in the first place), and a situation where the applicant may be said to have had an opinion imputed to her because it was perceived (even though it was not actually so) that the son did have that involvement. In my view the Tribunal's analysis did not deal with this latter issue.

65. The question remains as to whether the applicant's claim of what she was told at the Wellawatte police station in 1998 about the perception of her son's involvement with the LTTE was merely a piece of evidence, as Mr. Johnson submits, or an integer of the applicant's claim (albeit even a small part of her claims) as Mr. Colborne submits.

66. With the relevant authorities in mind, the applicant husband's evidence on this issue at the "second" hearing of the earlier Tribunal may indeed have led this Tribunal to have made a different finding of fact, and in that sense, what the applicant husband said could be characterised as evidence. But in my view there is a consistent presentation throughout

the history of the development of this case, and as it ultimately ended up before this Tribunal, to indicate that the applicant (and her husband) contended as a separate, and distinct, part of her claim, that she herself would be imputed with a political opinion not necessarily because her son was involved with the LTTE (although this was another aspect or integer of her claim), but that the police at Wellawatte communicated to her what they said was the Sri Lankan army's belief, or perception, that her son was involved with the LTTE. A communication which ultimately led to the applicant having to pay a bribe to escape from detention and which was a part of her fear of the authorities. The claim that she had been detained and paid a bribe was accepted by the Tribunal (see CB 286.5) (she "was released when she paid the money").

67. The applicant's statement (at CB 35.7) (supported by the applicant husband's evidence to the earlier Tribunal at CB 219.3), the identification of this as a claim as put before FM Barnes (CB 231.8), and the Tribunal's own recitation of the applicant's claims in this regard, in its own decision record under the heading of "Claims and Evidence" (CB 75.5), all in my view go to show that this was a separate and distinct part of the applicant's claim to be distinguished from the actuality or reality of whether the applicant's son had been approached by the LTTE (which the Tribunal adequately and satisfactorily dealt with) such as to say that it was an integer of the applicant's claims not dealt with by the Tribunal.

68. In my view, this was a failure to deal with a part of an express claim made by the applicant such that the Tribunal has failed in the discharge of its statutory duty to conduct a review of the delegate's decision, and as such is jurisdictional error. In all the circumstances, I can see no reason to withhold the relief sought by the applicants and will make the orders sought by Mr. Colborne on their behalf.

I certify that the preceding sixty-eight (68) paragraphs are a true copy of the reasons for judgment of Nicholls FM.

Associate:

Date: 29 November 2006