FEDERAL COURT OF AUSTRALIA

NAZH v Minister for Immigration & Multicultural Affairs [2007] FCA 5

CORRIGENDUM

NAZH v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS AND REFUGEE REVIEW TRIBUNAL
NSD 1313 OF 2005

MADGWICK J
11 JANUARY 2007 (CORRIGENDUM 19 FEBRUARY 2007)
SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1313 OF 2005**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**NAZH** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**
JUDGE:	**MADGWICK J**
DATE OF ORDER:	**11 JANUARY 2007**
WHERE MADE:	**SYDNEY**

CORRIGENDUM

1. On page 2 in Order 3(a) delete the words "2 December 2004" and insert "5 November 2003".

I certify that the one (1) paragraph is a true copy of the Corrigendum to the Reasons for Judgment of his Honour Justice Madgwick.

Associate:

Dated: 19 February 2007

FEDERAL COURT OF AUSTRALIA

NAZH v Minister for Immigration & Multicultural Affairs [2007] FCA 5

CITIZENSHIP AND MIGRATION – migration – review of decisions – judicial review – grounds of review – jurisdictional errors – whether Refugee Review Tribunal constructively failed to exercise jurisdiction – whether Refugee Review Tribunal failed to consider integer of claim

Held: The Refugee Review Tribunal constructively failed to exercise its jurisdiction

SZAIX v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 448 followed

NAZH v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS AND REFUGEE REVIEW TRIBUNAL
NSD 1313 OF 2005

MADGWICK J
11 JANUARY 2007
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1313 OF 2005**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**NAZH** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**
JUDGE:	**MADGWICK J**
DATE OF ORDER:	**11 JANUARY 2007**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by the Federal Magistrates Court on 15 July 2005 be set aside.

3. In lieu thereof it be ordered that the following writs issue:
   (a) a writ of certiorari to quash the decision of the second respondent of 2 December 2004;
   (b) a writ of prohibition directed to the first respondent prohibiting the first respondent from acting upon or giving effect to or proceeding further upon the decision of the second respondent; and
   (c) a writ of mandamus to compel the second respondent to reconsider the application according to law.

4. The first respondent is to pay the appellant's costs of the appeal and of the proceedings before the Federal Magistrate.

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

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 1313 OF 2005**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**NAZH** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS** **FIRST RESPONDENT**
	REFUGEE REVIEW TRIBUNAL **SECOND RESPONDENT**
JUDGE:	**MADGWICK J**
DATE:	**11 JANUARY 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

HIS HONOUR:

1 This is an appeal from a decision of a Federal Magistrate, delivered on 15 July 2005. That judgment dismissed an application for review of a decision by the Refugee Review Tribunal ('Tribunal') refusing to grant the appellant a protection visa.

BACKGROUND

2 The appellant is a small child, born in Australia on 10 November 2002 to parents who arrived in Australia as citizens of another country in October 1997. His father brings the proceedings on his behalf.

3 His parents soon after their arrival here lodged applications for protection visas. A delegate of the Minister refused those applications and his parents sought review of that decision before the Tribunal. The Tribunal affirmed the delegate's decision to refuse the parents' protection visas. An application to this Court for judicial review was dismissed by a judge of the Court. An appeal to the Full Court was subsequently dismissed. The High Court later allowed an appeal from the Full Court and issued prerogative writs to the Tribunal on the

basis that its decision had been affected by apprehended bias. In late 2001, the Tribunal (differently constituted) affirmed the delegate's decision to refuse the appellant's parents' protection visas. In early 2003, the then Minister decided not to exercise his power under s 48B of the *Migration Act 1958* (Cth) ('the Act') to allow the appellant's parents to lodge a further application for a protection visa, or his public interest power (under s 417 of the Act) to substitute a more favourable decision to the appellant's parents than that made by the Tribunal.

4 During this time, the appellant was born. However, he could not be included in his parents' protection visa application, so an application was lodged on his behalf and in his own name in early 2003. A delegate of the Minister refused the appellant's protection visa application, and the appellant applied to the Tribunal for review. Subsequently the delegate's decision was affirmed by a differently constituted Tribunal. An application was filed in this Court on the appellant's behalf, seeking review of that decision, was transferred to the Federal Magistrates Court, and was ultimately dismissed there.

The appellant's case before the Tribunal

5 Before the Tribunal, the appellant's parents lodged submissions on his behalf which repeated their own claims for protection. However, they also claimed that a further risk to the appellant had been generated by the publication on the internet of the earlier Federal Court decision which exposed the identities of the appellant's parents and the father's name (rather than using a pseudonym) so that, according to them, their claims for protection were broadcast to the world at large, and to their country of origin in particular. They said that the father's name was unusual in their country of origin. In consequence, members of the father's ethnic community in their country of origin would become aware of the claims made by the appellant's parents, and would conclude that his parents were traitors.

The parents' claims and their second hearing

6 The parents claimed to fear persecution on the grounds of race and/or political opinion. The claim on racial grounds stemmed from the appellant's father's ethnicity, and his mother's mixed ethnicity. It was claimed that the mother's mixed ethnicity led to a general perception that both parents were supporters of an ethnically based anti-government dissident group, which in turn, also provided the basis for their fear of persecution on grounds of political

opinion.

7 As a result of their perceived support for the dissident group, they claimed that they had been subjected to verbal abuse, that their house had been stoned and pasted with vindictive posters which alluded to their purported association with the dissident group, and that they had had other harassment from their neighbours. When they complained to police, they were initially told that the police could not provide them with individual attention. When the police were approached a second time, an officer informed the appellant's father (in unpleasant terms) that he ought to have anticipated the possibility of such community hostility before becoming connected with a family from the ethnic group associated with the dissident organisation.

8 The parents also claimed that the appellant's father had been questioned, detained, verbally abused and physically assaulted by police after a theft at his workplace. Two or three days after this incident the parents' home was searched by five people in civilian dress who the parents suspected were members of the police. There was another untoward workplace incident. The father was again questioned by police, verbally abused and physically assaulted. The assault took the form of several cigarette burns to his thigh. The police informed the father that they had received many petitions from members of the community complaining that he had helped the dissident group. The father believed he had been brought in for questioning on that basis.

9 Following their departure for Australia, the local police broke into the appellant's parents' house in their country of origin and destroyed its contents.

10 The parents claimed that their fear of persecution on political grounds also stemmed from their having in fact assisted the dissident group. On two occasions in 1997 the appellant's mother provided information to her relatives about consignments of military goods for the country's army that were being handled by the firm for which she worked. The appellant's mother claimed to have received payment for this information. The appellant's father also claimed that a dissident group operative had asked him for his work access permit which enabled the holder access to a major transport facility.

11 In support of their claims, the parents also relied upon the testimony of a male witness. This witness stated that a rumour was circulating in the parents' home town that the appellant's

parents had left their country of origin because the help rendered to the dissident group had resulted in their pursuit by the local authorities.

12 The attitude of the parents' neighbours and the suspicions surrounding the father's workplace incidents were said to provide the context in which the parents feared persecution on political grounds. They claimed that, if returned to their country of origin, they would suffer at the hands of the local authorities because they either knew or believed that the parents had assisted the dissident group. The parents also feared the capture of certain dissident group operatives who could potentially reveal the help the appellant's mother had given the dissident group in exchange for money. They would also be implicated in the dissident group's activities.

13 The parents also claimed that a return to their country of origin would see them forced by the dissident group to assist it in the future.

The Tribunal's decision in the parents' second case

14 The Tribunal Member accepted most of the parents' claims about their experiences in their country of origin. For present purposes, it is relevant that the Tribunal Member found:

> *'In particular I accept their evidence regarding the harassment and hostility they suffered from their neighbours and people at their workplaces because the Applicant's wife* [is of mixed ethnicity] *and because her … relatives used to visit their home …. I accept that within about a year after their marriage stones were thrown at their house after midnight on two occasions and on one of those occasions and another occasion posters were pasted on the walls of their house saying* [the dissident group's name] *and using bad language. I also accept that when the Applicant went to the police to complain he was told that the police could not give him individual attention and on the second occasion a police officer said to him, using unpleasant language, that he should have thought about these things before he got connected with a … family* [of the ethnicity associated with the dissident group]*.'*

As to possible relocation to avoid community-based discrimination, the Tribunal Member said:

> *'As I put to the Applicant and his wife, this suggests to me that, to the extent that they had problems living in a particular neighbourhood, they could have avoided those problems by moving to another neighbourhood. The Applicant argued it was difficult to compare his situation with a normal mixed marriage because the rumour had gone around* [the country of origin], *around his community, that he had helped the* [dissident group] *and had taken off. He*

> *said that in* [the country of origin] *everyone was connected. There was always someone who knew you. However while I accept the evidence of the witness, Mr _____, that it has been rumoured amongst the local community in* [the parents' home town] *that the Applicant and his wife had been helping the* [dissident group]*, I do not accept on the evidence before me that this rumour has gone around* [their country of origin]. *It is not unnatural that rumours would circulate in* [the parents' home town]*, since that was the home town of both the Applicant and his wife and their parents continued to live there. Moreover, as referred to above, there was a family from* [the home town] *living in the housing scheme near the* [transport facility] *where the Applicant and his wife also lived. However, I do not accept that the fact that rumours were circulating in their home town … means that rumours about them were circulating elsewhere in* [the country of origin]. *I do not accept that there is a real chance that, wherever the Applicant moves in* [the capital city]*, for example, he will be identified as a person who was taken in for questioning over four years ago on suspicion of having assisted the* [dissident group].'

Further, it seems that the Tribunal Member implicitly accepted that local people had petitioned the police complaining that the father was helping the dissident group.

15 Only two claims were rejected outright. Firstly, the Tribunal Member did not accept the claim that the parents had been paid a sum of money in return for the assistance the appellant's mother had given to her relatives. Secondly, the Tribunal Member did not accept that the appellant's father had been approached by a dissident group operative for access to his work access permit. These claims were doubted due to independent information that the methods used by the dissident group would not have included using 'amateurs'. However, the Tribunal Member formed a favourable impression of the parents' credibility overall. He therefore assessed their case on the basis that 'it is possible, although not certain, that the events which they have described did occur as they have said'. Nevertheless, he found that, even viewing these claims in a positive light, they did not assist the parents as there was no evidence that the authorities in the country of origin had ever believed that the parents had helped the dissident group.

16 While a number of factors and possible scenarios were raised in relation to the potential outcomes of a return to the country of origin, the Tribunal Member concluded that the release of the father following each period of detention indicated that he was not seriously suspected of having helped the dissident group. Similarly, the Tribunal Member considered that the search of the parents' house had to be viewed in the context of the father's immediate past employment with a transport company in the capital city, the proximity of the parents' home

to a major transport facility, and the fact that the police had informed the father of the numerous petitions that had been received about the help he had purportedly given the dissident group.

17 The Tribunal Member found that, although the parents had experienced harassment and hostility from their neighbours and in their respective workplaces, those problems could be circumvented by relocation. In particular, the Member found that the appellant's parents could relocate elsewhere in the capital city, characterised by its substantial community of people with the ethnicity associated with the dissident group, ethnically mixed neighbourhoods, and tolerance of ethnically mixed couples. In summary, the Tribunal Member said:

> *'I do not accept that there is a real chance, as distinct from a remote chance, that the* [appellant's parents] *will encounter the same harassment and hostility which they experienced living near, and working at,* [a major transport facility in the capital city]*, if they move elsewhere within the Greater* [capital city] *area and if they take up employment not connected with a secure location like the* [transport facility]. *I consider that this will be so even if the* [appellant's mother's] … *relatives continue to visit the* [appellant's parents] *since I consider that such visits must be routine in the sort of ethnically mixed neighbourhoods which, as I have noted above, exist in* [the capital city]. *I do not accept, in particular, that there is a real chance, as distinct from a remote chance, that the* [appellant's father] *will be the subject of petitions complaining that he is helping the* [dissident group] *if he returns to* [his country of origin] *now or in the reasonably foreseeable future and resumes his previous employment as a clerk or sales representative rather than working at* [a major transport facility]*.'*

18 The Tribunal Member also found that, because there was no evidence to suggest that the appellant's parents were seriously suspected by the authorities of having assisted the dissident group, there would not be a real chance that the appellant's parents' departure from their country of origin would cause any political opinion to be attributed to them – anti-Government, pro-dissident group or otherwise.

19 Thus, the Tribunal Member was not satisfied that the appellant's parents had a well-founded fear of persecution for a Convention reason.

The publication of the judgment

20 The judgment published on the internet showed the father's full name in the heading as that

of the applicant and the judgment itself refers to him by name. The only paragraphs of the judgment presently relevant were in the following terms:

> *'1. The applicant, who is a citizen of* [another country], *arrived in Australia with his wife* [in] *1997. They travelled on … passports issued* [by their country of origin] *in their own names. The applicant's wife was included in the application for a protection visa. The applicant husband is* [of one ethnicity]. *The applicant wife was born of a … father and a … mother* [of different ethnicities]. *The applicants claimed that they were at risk of harm in* [their country of origin] *because they were suspected of having assisted* [ethnically based] *terrorists, and because the applicant wife* [shares the ethnicity of the dissidents].
>
> …
>
> *14. The applicant husband claimed that he was suspected of poisoning the … water supply* [of the company he worked for], *and of stealing a … computer* [from his workplace]. *Yet he was provided with a reference from* [this former employer] *which stated that he was a person who bore an excellent moral character; he was a disciplined, honest and dedicated employee who could be considered a "gain" to any organisation which wished to employ him. Viewed in that context, it is perhaps not surprising that the presiding member expressed disbelief in relation to the male applicant's claims as to the theft of the … computer. Reaction of disbelief to a claim which is made is not sufficient of itself to establish a case of prejudgment when viewed in the context of the decision making process as a whole. That is particularly so when the member indicates that he proposes to suspend final judgment on the issue until after the wife's evidence has been heard.'*

The claims about publication of the judgment

21 In a summary of their 'claims' put before the second Tribunal, the appellant's parents said:

> *'When we seeked judicial review at one stage, at the Federal Court of Australia, the decision was published on the internet with our real names and work places and the name of the* [dissident group] *supporter who worked at* [the company]. *The information I supplied to the government of Australia for the purpose of protection visa application, was provided in the strictest confidence. … My name appears not only in the title of the proceedings, but throughout the text of the judgment. This has done significant damage to my reputation if I were to go back would have significant effect on me and my family. Especially the* [theft] *… was … newsworthy … and this was on* [the Judge's] *decision with my name on it. … Whilst the police and … authorities have a legitimate right to investigate criminal acts and to detain and question suspects, we fear that we will be targeted for continuing harassment and we fear we will face a real prospect of being persecuted whilst in detention.*

…

If we have in fact been imputed with an association to the [dissident group] *or if there is a real chance that this might occur in future (even because of our past actions), the material in the US state department report supports a finding that there is a real chance that may be persecuted if detained again in the future. Such persecution would not be part of legitimate criminal investigations and would be for a convention reason, namely imputed political opinion. This is sufficient to bring us within article 1 of the refugee convention.*

…

We also fear persecution from the local community in [the capital city], *who harassed us in the past and whom we believe will continue to harass us. … The reason for the past harassment and our fear of future harassment is because of the fact that we are in a mixed marriage in that of … ethnicity* [of the dissident group]. *If such persecution were to occur, it would be (at least in part), for reasons of my wife's race. Also, we believe that the community believes that we helped the* [dissident group] *for money and this is also a part of the reasons for persecuting us. This is persecution for (imputed) political opinion.'*

The Tribunal's decision in the appellant's own case

22 Before the Tribunal, his parents submitted two written statements on the appellant's behalf: one in support of his protection visa application and another in support of the review application. The Tribunal Member summarised the content of those statements in the following manner:

'Neither statement makes any claims to refugee status other than to rely on the claims advanced by his parents in their own unsuccessful protection visa and review applications. The [appellant's] *parents assert only that the* [appellant] *is at risk of persecution by reason of their own experiences prior to leaving* [their country of origin], *and on the basis of the publication of the decisions of the Tribunal and the Federal and High Courts in relation to their protection visa and review applications.'*

23 During the course of giving oral evidence at the hearing, the appellant's father again said that the appellant was at risk of persecution in the country of origin because the Tribunal decision regarding the parents' application 'had been published on the internet and had identified him, and because his name is an unusual one in [the country of origin], people in [the country of origin] would conclude that both he and the [appellant] were traitors'. The Tribunal then put to the father the fact that independent evidence indicated that unsuccessful refugee applicants

who return to his country of origin do not suffer mistreatment on that basis alone. In response, the father said that his reputation in his country of origin would be damaged, his ability to obtain employment would be very poor, and that as a result, he would be unable to support his son.

24 In determining the matter, the Tribunal Member said

> *'This matter is simply resolved. The* [appellant] *advances no claims to refugee status on the basis of his own circumstances or experiences, other than that he is an unsuccessful applicant for refugee status in Australia. His claims* ***rest entirely*** *on the claims of his parents, both of whom have been determined by this Tribunal, differently constituted, not to have a well-founded fear of persecution for a Convention reason.*' (Emphasis added).

Accordingly, the Tribunal Member considered all of the material submitted by the parents in support of their claims to refugee status, a substantial portion of which was also submitted in support of the appellant's application. No new material relating to the parents' circumstances was provided.

25 The Tribunal Member said that she had read the earlier Tribunal decision in the parents' case and concluded that '[l]ike my Tribunal colleague, I am not satisfied, **for the same reasons**, that the [appellant's] parents have a well-founded fear of persecution in [their country of origin] for a Convention reason' (emphasis added).

26 She continued:

> *'I am satisfied on the basis of the independent country information … that the fact of having unsuccessfully sought refugee status in Australia will not result in the* [appellant], *or his parents, being targeted for harm for that reason alone if it were to become known to the … authorities* [in the country of origin].'

27 Accordingly, the Tribunal Member found that the appellant did not have a well-founded fear of persecution for a Convention reason.

The Federal Magistrate's decision

28 His Honour accepted (at [23]) that the appellant's claim was not frivolous:

> *'the* sur place *claim made on behalf of the* [appellant] *could not have been dismissed as trivial. The publication of the details of applicants for protection*

> *visas can have serious consequences, which was the reason for the enactment of s.91X of the Migration Act.'*

29 His Honour was unable to accept that there had been a constructive failure by the Tribunal to deal with the appellant's *sur place* claim. His Honour reached that conclusion by reference to the passages in the Tribunal's reasons set out above at [23] and [27]. His Honour took the view that there was a clear indication that the publication of the parents' case on the internet had been considered at the hearing.

30 His Honour held that no error attended the Tribunal's finding that the appellant's *sur place* claim was insufficient to establish a well-founded fear of persecution. His Honour noted that, in reaching that conclusion, the Tribunal placed reliance on country information which addressed the fate of failed asylum seekers on their return to the parents' country of origin. His Honour observed that it was not 'as clear as it might be, in that it does not make clear whether failed asylum seekers who shared ethnicity with the dissident group returning to the parents' country of origin had had their details publicised prior to their return'. However, His Honour considered that, regardless of the detail of that country information and the degree of reliance placed upon it, it was nevertheless 'clear that the applicant's *sur place* claim was considered and dealt with by the presiding member by reference to that information'. Accordingly, his Honour held that: '[t]he *sur place* claim was neither ignored nor dismissed simply on the basis of the dismissal of the [appellant's] parents' claims by the Second Tribunal'. His Honour concluded that the Tribunal Member had legitimately found that the appellant lacked a well-founded fear of persecution in his parents' country of origin by reference to his parents' claims, or by reason of the publication of the appellant's father's details, or both. Accordingly, there was no jurisdictional error in the Tribunal Member's decision.

ISSUES

31 At a general level, the question is whether the Tribunal had properly exercised its jurisdiction in determining whether the appellant had a well-founded fear of persecution for a Convention reason. More specifically, the issue is whether the Tribunal had in fact considered the totality of the appellant's circumstances, had in Allsop J's phrase in *Paul v Minister for Immigration & Multicultural Affairs* (2001) 64 ALD 289 at [79], considered all the 'integers of the claim'. That question might also involve whether the issue complained of by the appellant as not

having been addressed was sufficiently clearly raised before the Tribunal.

SUBMISSIONS

Appellant's submissions

32 Counsel for the appellant argued that the Tribunal 'had not completed the exercise of its jurisdiction'. This error was said to arise from the Tribunal Member's failure to address the totality of the appellant's circumstances in determining whether his fears were well founded. The appellant relied upon the decisions in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 294-295 per Kirby J (concurring); *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 577-578 (majority judgment); *Sellamuthu v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 287 at 292-293 per Wilcox and Madgwick JJ; and *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 per Black CJ, French and Selway JJ at [63].

33 It was submitted that, although a separate finding was made to the effect that the appellant would not face a risk of persecution based solely upon his and his parents' status as failed asylum seekers, the Tribunal had not addressed the claim that the combination of his parents' experiences and the effect of the internet publication of information concerning those experiences would expose the appellant (and his family) to persecution for a Convention reason should he travel to his parents' country of origin.

34 The appellant submitted that the learned Federal Magistrate erred in finding no jurisdictional error in the Tribunal's decision. In reference to his Honour's reasons for dismissing the claim of jurisdictional error, the appellant submitted that:

> '[*s*]*imply because the fact of the publication on the internet was raised at the* [Tribunal] *hearing and recorded in the reasons of the* [Tribunal] *does not mean that the* [Tribunal] *considered the effect of that publication when it adopted the earlier* [Tribunal's] *reasoning. If that information was in fact considered in this context by the* [Tribunal] *then* [at] *least some findings would be expected in respect of the likelihood that the information on the internet had come to the attention of the … community in* [the capital city] *or the wider … community* [in the country of origin]'.

35 In this regard, the appellant argued that the structure of the Tribunal's reasons indicated that it had not in fact considered the likely effect of the internet publication on the substance of the

parents' claims. The Tribunal made separate findings on the *sur place* claim and yet adopted the conclusion of the earlier Tribunal 'for the same reasons' in relation to the parents' claims. It was submitted that the Tribunal's treatment of the issue was insufficient. That the decision of the Federal Court Judge was in the public domain was a fact to be regarded as having been before the Tribunal. Nevertheless, the only basis upon which the Tribunal addressed the *sur place* claim, in response to the issue of the internet publication being raised by the appellant's father, was that independent information was available that unsuccessful refugee applicants who return to the parents' country of origin were not subjected to adverse attention or persecution **for that reason alone**. The appellant submitted that this exchange did not constitute a proper consideration of the effect of the internet publication on the substance of the parents' claims.

36 Further, the appellant argued that the content and structure of the written statements provided by the parents to the Tribunal demonstrated that the matter had been sufficiently articulated before the Tribunal in the parents' case. Whether the matter had been **fully** articulated is not determinative: rather, because the matter was sufficiently significant the Tribunal in the present case was required to make a finding on it having regard to the material before it. The decision in *NABE* mandated such a response, and contrary to that authority, the Tribunal Member had failed to make findings as to the content of the Federal Court Judge's decision, what relevant material had appeared on the internet, how long it had been on the internet, and who might have accessed it. As a matter of logic, and as a matter of necessary fact finding, the implications of the publication on the internet had a very significant role to play in determining whether the rumour about the parents could have gone further than their home neighbourhood, a suburb of the capital city, and therefore whether relocation by the parents was a viable option. In light of the failure to do so, the Tribunal had not considered the totality of the appellant's circumstances as it was required to do by the decisions in *Guo* (per the joint judgment of the High Court at 577-578) and *Wu Shan Liang* (at 294 per Kirby J, concurring).

37 The appellant also pointed to an issue of an admitted factual error that his parents had made in their claims to the Tribunal. In their written statement to the Tribunal, the appellant's parents said:

> *'When we seeked judicial review at one stage, at the Federal Court of Australia, the decision was published on the internet with our real names and*

> *work places* ***and the name of the*** **[dissident group]** ***supporter who worked at*** **[the company]**.*'* (Emphasis added.)

While that name did not actually appear in the Federal Court Judge's decision, it remained significant that the parents had claimed the contrary. The significance arose from the Tribunal's conclusion in the parents' case that the nature of their contact with the dissident group supporter – who was in fact named by the Tribunal – had not been brought to the attention of the authorities in the country of origin. In the light of the parents' (mistaken) claim that that dissident group supporter's name had appeared in the Federal Court judgment, it was submitted that the Tribunal Member was required to determine whether that person had in fact been so named, and if so, whether the earlier Tribunal's reasoning (in the parents' case) in relation to that person remained valid. The Tribunal Member's failure to identify the mistaken claim, despite the extensive consideration that was given to the dissident group supporter's role in the earlier Tribunal decision, was said to show the lack of consideration that the Tribunal Member gave to the substance of the appellant's claims.

38 Whether the publication on the internet was likely to have been accessed by the father's ethnic community in the capital city was not a matter with which the Court should be concerned. The appellant argued that the majority decision in *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 215 ALR 162 held that, once a jurisdictional error has been established, there is no requirement that the error be shown to have caused actual unfairness or otherwise be material: per McHugh J at [82]-[84]; Kirby J at [175]-[176] and Hayne J at [211].

Respondent's submissions

39 The respondent submitted that it was misleading to contend, without qualification, that the appellant's parents' case had in fact been published on the internet. The only publication capable of identifying the appellant's parents, the Federal Court judgment, simply recorded the Tribunal's reasons for not accepting one of the claims made by the appellant's father.

40 Nevertheless, the respondent rejected the argument that the Tribunal failed to address the substance of the appellant's claim about the publication of his parents' case on the internet. It was questioning by the Tribunal Member that prompted the appellant's father to raise the claim about the internet publication. Furthermore, during the course of the hearing the Tribunal Member responded to the internet publication claim by referring to the independent

information available to the Tribunal, and it was this independent information that formed the basis of the Tribunal Member's rejection of the claim. It was unnecessary to make a finding on the internet publication issue, because the independent information and the Tribunal's findings were to the effect that there would be no persecution even if the published information became known in the country of origin.

41 The respondent further submitted that the internet matter was not sufficiently raised, and similarly, rejected the assertion that the Tribunal did not consider the effect of the internet publication on the parents' claims. Relying on *NABE*, the respondent claimed that a considerable amount of constructive or creative insight would be required on the part of the Tribunal to isolate these matters. The basis for this assertion arose from the absence of any indicia in the materials that this claim was put to the Tribunal, or that there was ever a suggestion that the effect on the parents' claims required separate or specific attention by the Tribunal. Instead, the claim put on the appellant's behalf had simply been that the publication would come to the attention of the father's ethnic community who would conclude that the appellant's father and the appellant were both traitors.

42 In this regard, the respondent submitted that all of the material that was before the Tribunal in the parents' case should not be treated as having also been before the Tribunal in the present case. However, it was argued that even if all of the material had been before the present Tribunal, there was still no suggestion from that material that the publication on the internet would result in exacerbation of the problems the parents had faced as a result of, among other things, the mixed marriage.

43 The respondent also argued that the internet publication has nothing to do with the parents' claims of **community** persecution. Indeed, the claims of community persecution were precisely made and deliberately distinguished from claims of feared **official** persecution which were in part based on the internet publication. In this context, it was submitted that the parents' mixed marriage was obvious to their neighbours without the aid of the internet. As such, there was no basis for the Tribunal to understand that the internet was a factor in the claim of feared community persecution. In other words, the specific reference to the internet claim was made in the context of fear of persecution by the authorities and the appellant's father had failed to link the internet publication to community attitudes. The Tribunal dealt with the claim in that way.

CONSIDERATION

44 At first sight, given the seemingly innocuous nature of what the Judge wrote and which was published on the internet, there is much to be said for the view taken by the learned Federal Magistrate. However, in my opinion, the appellant's father sufficiently clearly asserted a claim that:

- the appellant would suffer harm at the hands of members of the community in his parents' country of origin (through harm that the parents would suffer); and

- by reason of his father acquiring a reputation as a traitor from what had appeared on the internet.

45 This was materially different from a mere possibility that the fact of their unsuccessful application for refugee status here would alone cause the parents difficulties.

46 It was that latter possibility alone that the Tribunal Member negatived. He negatived it by reference to 'independent' materials (actually from the Australian government itself). The information cited was, so far as relevant, as follows:

> *'**QUESTIONS: [25/06/03]***
>
> *Q.5 Does the … Government* [in the country of origin] *adequately protect …* [those who share ethnicity with the dissident group]*?*
>
> ***ANSWERS: [09/07/03]***
>
> *The response to this request for information on the current treatment of* [those who share ethnicity with the dissident group] *in* [the country of origin] *should be read in conjunction with CX… which addresses in some detail the current treatment of* [various ethnic and religious groups] *in* [the country of origin]. *In preparing this response we sought information from … police* [in the country of origin] *and a reliable senior … journalist* [who shares ethnicity with the dissident group]. [Those who share ethnicity with the dissident group] *who return to* [the country of origin] *are not usually persecuted by the … Government or its agents. There are no restrictions prohibiting* [those who share ethnicity with the dissident group] *from resettling in the … of the Country. Many* [of such ethnicity] *(and Muslims) living in the … are subject to extortion and forcible recruitment by the* [dissident group].
>
> *A.1 Since the signing of* [a] *ceasefire agreement …, the incidence of human rights abuses against* [those who share ethnicity with the dissident group] *by the … Government has decreased dramatically (refer CX…). …* [R]*eturnees*

> [who share ethnicity with the dissident group] *are unlikely to be persecuted by the Government. We have no information indicating ill treatment of failed asylum seekers by government authorities on their return to* [the country of origin] *(refer CX…).'*

47 This entirely deals with unsuccessful claims for refugee status by returnees who share ethnicity with the dissident group **in general**. There was no consideration of the **particular** claims made by the appellant's father on his behalf. It is to be assumed (and hoped) that there were very few other cases of publication of the details of applicants who share ethnicity with the dissident group that identified them and linked them with allegedly well-known incidents, such as the theft of a computer from a major transport facility.

48 Even exercising due charity towards the Tribunal Member's stated reasons, it is not, it seems to me, reasonable to read them as including a consideration of the actual and specific claims made as part of the consideration of the less specific kind of claim that the Tribunal did deal with. Rather, the impression is that the Tribunal missed the potential force of what the father was saying, and the separate and distinct way he was putting the *sur place* claim.

49 Nor was that specific claim so manifestly hopeless or ridiculous that no reasonable criticism could be made of the Tribunal Member for not dignifying it with a few specific words. In saying that I express no further view on what may ultimately be adjudged to be the merits of the claim.

50 It appears to me that the Tribunal indeed did not deal with the matter.

51 As such it appears that what may fairly be regarded as an integer of the claim was not considered. That, it is well established, amounts to a constructive failure to exercise jurisdiction. Whatever its strengths or weaknesses, the appellant was entitled to have his claim fully considered. I adhere to what I said about *NABE* and other cases in *SZAIX v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 448 at [50]-[52]. The considerations discussed there are generally relevant here.

52 Accordingly, the decision of the Tribunal will be quashed and the matter remitted for further consideration according to law.

53 I add that, given what has been made of the publication of the earlier judgment of this Court,

I have taken reasonable steps to speak in generalities.

I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Madgwick.

Associate:

Dated: 29 January 2007

Counsel for the Appellant:	D Godwin
Counsel for the Respondents:	M Wigney
Solicitor for the Respondents:	Australian Government Solicitor
Date of Hearing:	6 December 2005
Date of Judgment:	11 January 2007