FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZIYX v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 308

MIGRATION – Application to review decision of Refugee Review Tribunal – whether Tribunal overlooked or ignored evidence – whether findings irrational or illogical – whether Tribunal failed to have regard to corroborative evidence.

Migration Act 1958 (Cth), ss.91R, 422B
Administrative Decisions (Judicial Review) Act 1977 (Cth)
Commonwealth of Australia Constitution Act 1901 (Cth) s.75(v)

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100
Avon Downes Pty Ltd v FCT (1949) 78 CLR 353
M153 of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FMCA 42
Minister for Immigration & Multicultural Affairs v Eshetu (1991) 197 CLR 611
Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323
Minister for Immigration & Multicultural & Indigenous Affairs v SGLB (2004) 207 ALR 12
NACB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 235
NACT v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 52
NADH of 2001 v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 214 ALR 264
NAJT v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 147 FCR 51
NATC v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 52
NAXR v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FMCA 413
NBKT v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FMCA 6
QAAI v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FCA 4
Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 77 ALJR 1165
Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham (2000) 168 ALR 407
S635 of 2002 v Minister for Immigration & Multicultural Affairs [2004] FCA

1162
Sharp v Wakefield [1891] AC 173
Singh v Minister for Immigration & Multicultural Affairs [2001] FCA 389
SZAPC v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 995
SZCUU v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FMCA 775
SZDVC v Minister for Immigration & Multicultural & Indigenous Affairs [2006] FMCA 40
Tickner v Chapman (1995) 57 FCR 451
Tran v Minister for Immigration & Multicultural Affairs [2006] FCA 1229
VWST v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 286
W404/01A of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 255
WAIJ v Minister for Immigration & Multicultural & Indigenous Affairs (2004) 80 ALD 568
WAJQ v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 79
WAJW v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 330

Applicant:	SZIYX
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG1787 of 2006
Judgment of:	Barnes FM
Hearing date:	16 January 2007
Date of Last Submission:	6 February 2007
Delivered at:	Sydney
Delivered on:	27 March 2007

REPRESENTATION

Counsel for the Applicant:	Mr B. Zipser
Counsel for the Respondents:	Nil
Solicitors for the Respondents:	Clayton Utz

ORDERS

(1) That a writ of certiorari issue quashing the decision of the Refugee Review Tribunal made on 13 June 2006.

(2) That a writ of mandamus issue requiring the Refugee Review Tribunal to redetermine the applicant's application according to law.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG1787 of 2006

SZIYX
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for review of a decision of the Refugee Review Tribunal (the Tribunal) handed down on 13 June 2006 affirming a decision of a delegate of the first respondent not to grant the applicant a protection visa. The applicant, a citizen of the People's Republic of China (the PRC) arrived in Australia on 6 February 2001. Her first application for a protection visa was refused. That decision was affirmed by the Tribunal. However the Minister exercised power under s.48B of the *Migration Act 1958* (Cth) to enable the applicant to lodge a second protection visa application. That application was lodged on 13 January 2006. The application was refused by a delegate of the first respondent and the applicant sought review by the Tribunal. It is the decision of the second Tribunal that is in issue in these proceedings.

2. In her protection visa application of 13 January 2006 the applicant claimed to fear persecution by reason of her practice of Falun Gong. In a statement provided in support of her application she claimed that she had begun practising Falun Gong in China in 1997 with named associates in a park and studying it at her coach's home. She claimed that after the crackdown on Falun Gong in mid-1999 the person who had coached her in Falun Gong had been arrested and that she and three named fellow Falun Gong practitioners were *"put into the brainwashed class and were forced to give up our belief of Falun Gong"*. She claimed they were threatened with labour camp and hence had to write a "guarantee statement" that they would give up their beliefs and stop practising Falun Gong. She explained that she planned with three other named Falun Gong practitioners to leave China for Australia in order to freely practise Falun Gong and that she obtained her passport without great difficulty. She claimed that the migration agent who had represented her in relation to the first protection visa application had deceived her. She claimed that her three named friends also came to Australia and they gathered together practising Falun Gong and studying once a month at one of their homes.

3. The application was refused and the applicant sought review by the Tribunal. In response to the hearing invitation from the Tribunal the applicant provided a letter of support from the Falun Dafa Association of NSW which stated that she had practised Falun Dafa in Chatswood "since October 2005" and had been involved in other Falun Dafa activities since that time and that it was understood that she had participated in the Falun Dafa practice group in the Villawood Detention Centre. She also provided photographs of Falun Gong practice and a statutory declaration from the co-ordinator of the Chatswood Falun Gong practice site about her practise of Falun Gong in Australia from October 2005.

4. In an accompanying written statement the applicant stated that while she was *"only a common Falun Gong practitioner"* she was *"a sturdy believer"*. She stated that the majority of practitioners who were detained and persecuted in China were common practitioners. The applicant explained that while she had obtained her a passport in her own name, she had done so through payment of RMB120,000 yuan for the passport and visa, part of which payment *"could be for bribery"*.

The applicant also claimed that she had continued to practise Falun Gong in Australia and that she had attended protest activities. She claimed that together with her previous record in China this would lead to her arrest and persecution were she to return to China.

5. The applicant and two witnesses attended a Tribunal hearing and gave evidence. The witnesses were two of the persons named in the application as fellow Falun Gong practitioners in China. The Tribunal recorded that they were also protection visa applicants, that they claimed they started practising Falun Gong in China with the applicant in 1997, that they were detained in 1999 for a week, but that they had no further difficulty with the authorities and were able to leave China without any problems from the authorities. The applicant is recorded as having told the Tribunal that after she and her three co-practitioners signed the guarantee document that they would not practise Falun Gong in August 1999 they were released and thereafter continued to practise Falun Gong in each other's homes.

6. The Tribunal recorded that the witnesses were detained at the same time and place as the applicant and claimed that they practised Falun Gong in the Villawood Detention Centre. They confirmed that they joined the Falun Dafa organisation in October 2005. When asked why they waited so long before joining the organisation, one of the witnesses is said to have stated *"that they did not know about it as they just practised for health reasons, but once they got to Villawood they were told that they could join the organisation and take a step further by studying Falun Dafa"*.

The Tribunal decision

7. In its reasons for decision the Tribunal outlined the claims and evidence before it, including the evidence at the Tribunal hearing of the applicant and her witnesses. In its findings and reasons the Tribunal accepted that the applicant was a citizen of the PRC but found:

> *The Tribunal does not accept that the applicant was a Falun Gong practitioner in China from 1997 until she left China in 2001. The applicant by her own admission during her evidence before the Tribunal stated that she obtained a passport in her own name, travelled to and from Vietnam in 2000, and departed China*

> *in 2001 unhindered by the authorities. This does not suggest that the applicant was of any adverse interest to the Chinese authorities upon her departure from China in 2001. As the Tribunal does not accept that the applicant was practising Falun Gong in China prior to her departure from China, the Tribunal is not satisfied that she was detained for a week by the authorities and released after she signed a guarantee letter stating that she would not recommence her practice of Falun Gong.*

8. The Tribunal then addressed the applicant's claims about her practice of Falun Gong in Australia and involvement in the Falun Dafa organisation.

9. It referred to the applicant's evidence (which it said was confirmed by the witnesses) that she was detained at Villawood Detention Centre for three months from March 2005 and became involved in the practice of Falun Gong and the study of Falun Gong teachings at the detention centre and her evidence (confirmed by the witnesses) that she did not join in any Falun Gong activities other than private practice until October 2005, some four years and eight months after she had arrived in Australia. The Tribunal did not accept that the applicant had been involved in the practice of Falun Gong since her arrival in Australia (in 2001), but was of the view that after she spent time in the detention centre she had decided to become involved with the Falun Dafa organisation at a time when she was allowed to lodge a second protection visa application. The Tribunal had regard to the fact that the applicant had stated at the hearing that she had been advised that it would advance her status to become involved with the Falun Dafa association.

10. The Tribunal accepted that the applicant had attended practice sessions relating to Falun Gong since October 2005 and had been involved in Falun Gong activities since that time. It referred to the evidence from Falun Dafa in relation to her participation in those activities. It also accepted that the applicant had been involved in the practice of Falun Gong during the three months she was detained at Villawood. However it did not accept that prior to her detention at Villawood and in the period between her release from Villawood in June 2005 and October 2005 she was involved in the practice of Falun Gong.

11. The Tribunal continued:

> *In respect to the applicant's involvement in Falun Gong activities and attendance and (sic) Chatswood, Parramatta and Villawood, the Tribunal disregards this conduct as the Tribunal is not satisfied that the applicant has engaged in this conduct otherwise than for the purpose of strengthening her claim to be a refugee (see s.91R(3) Migration Act). The Tribunal is not convinced that the applicant is a genuine Falun Gong practitioner. The applicant's evidence before the Tribunal left the Tribunal with the firm impression that the applicant did not have any commitment to the Falun Gong movement until recently at a time when she was seeking to apply for a protection visa. Given the evidence that the applicant only became actively involved with Falun Gong activities from October 2005, over four years after arriving in Australia, this leads the Tribunal to conclude that she has engaged in Falun Gong activities in Australia for the purpose of enhancing her claim to be a refugee. Given that the Tribunal does not accept that the applicant was involved in Falun Gong in China or in Australia prior to October 2005, the Tribunal does not accept that the applicant has a well-founded fear of persecution by reason of her association with Falun Gong on her return to China.*

12. The applicant sought review of the Tribunal decision by application filed in this Court on 26 June 2006. She relies on an amended application filed in Court on 16 January 2007. There are two grounds in the amended application.

'Practice in China' issue

13. The first ground in the amended application is that the Tribunal fell into error in making the finding that it did not accept that the applicant was a Falun Gong practitioner in China from 1997 until she left China in 2001, in overlooking or ignoring some evidence given by the applicant, that the finding was irrational, illogical or not based on findings or inferences of fact supported by logical grounds and/or on the basis that the Tribunal failed to consider or have regard to corroborative evidence of the two witnesses who gave evidence for the applicant at the Tribunal hearing.

14. It was submitted that in reaching the conclusion in issue the Tribunal had referred to three matters, as set out at [7] above. First, that in September 2000 the applicant had "*obtained a passport in her own*

name" and travelled to and from Vietnam in 2000 and departed China in 2001 unhindered by the authorities. It was conceded that this was a correct summary of the evidence given by the applicant. The second aspect of the Tribunal reasoning was said to be the statement that this did not suggest that the applicant was of any adverse interest to the Chinese authorities upon her departure from China in 2001. It was accepted for the applicant that this was an inference that it was open for the Tribunal to draw based on the evidence given by the applicant and the country information about strict passport control in China.

15. However counsel for the applicant took issue in a number of respects with the Tribunal's reasoning from a finding that the applicant was not of adverse interest to the authorities upon her departure from China in 2001 to a conclusion that therefore the applicant was not practising Falun Gong prior to her departure. It was submitted that there appeared to be no other reason in the Tribunal's findings and reasons in relation to this conclusion.

16. Attention was drawn to the fact that the applicant had claimed at the Tribunal hearing that following her detention in August 1999 *"they were released after they agreed to sign a guarantee document stating that they would not practise Falun Gong in the future"*. It was contended that the applicant's evidence was to the effect that from the perspective of the Chinese authorities she had renounced Falun Gong in August 1999, following which she was no longer of interest to the authorities. It was submitted that the Tribunal overlooked or ignored this evidence in reaching the conclusion in issue giving rise to jurisdictional error. It was pointed out that there was no country information cited in the Tribunal reasons to support a conclusion that in such circumstances those known to be former Falun Gong practitioners would nonetheless continue to be of interest to the authorities.

17. It was also said that the Tribunal had failed to consider whether a person arrested for Falun Gong activities in August 1999 who then signed a guarantee document stating he or she would not practise Falun Gong in the future would be permitted by the authorities to depart China. It was contended that in the circumstances the review procedure conducted by the Tribunal had miscarried in a fundamental respect resulting in a decision flawed by jurisdictional error.

18. It was argued that the Tribunal had failed to consider an obvious question and that this could be distinguished from a failure to have regard to a particular piece of evidence. It was clarified by counsel for the applicant that the argument in this respect was that as the applicant claimed that she had been detained in August 1999 for practising Falun Gong and that she was then released on giving an undertaking, the question of whether a person who was detained and released on giving an undertaking was or was not of continuing interest to the authorities thereafter, was a question that the Tribunal had to consider or ask but that it failed to do so. In other words it was said that the Tribunal should have addressed the applicant's claim about having been detained, given an undertaking in relation to the practice of Falun Gong and then released, before making the finding that it did not accept that she was practising Falun Gong prior to her departure from China.

19. The applicant submitted that the issues the Tribunal needed to deal with in any particular case would depend on how the Tribunal reasoned the particular conclusion. In this instance, in light of the way the Tribunal engaged in its reasoning, it was said that an obvious issue it had to deal with to support its reasoning process was the question of whether, if a person was arrested for Falun Gong activities in August 1999 and gave an undertaking not to practise Falun Gong and was then released, that person would continue to be of interest to the authorities and whether he or she would be allowed to leave China in the not too distant future. It was acknowledged that the issue arose only because of the way the Tribunal reasoned, but submitted that in the circumstances the Tribunal failure to address that issue was a jurisdictional error.

20. It was submitted that the finding in issue was *"irrational, illogical and not based on findings or inferences of fact supported by logical grounds"* (see *MIMIA v SGLB* (2004) 207 ALR 12 at [38] per Gummow and Hayne JJ and also see *NADH of 2001 v MIMIA* (2004) 214 ALR 264 per Allsop J at [129] – [136]). Reference was made to the discussion by Allsop J in *NADH* of the view expressed by Gleeson CJ in *Re MIMA; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at [9] in relation to a discretion to be exercised judicially, that, as stated in *Sharp v Wakefield* [1891] AC 173 at 179 per Lord Halsbury LC, where there is a duty to act judicially, a power must be exercised *"according to law, and not humour"* and that irrationality of the kind described in

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 367 per Deane J may *"… involve non-compliance with the duty"* (*Applicant S20/2002* at [9] per Gleeson CJ).

21. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, Deane J stated at (at 367):

> *If a statutory tribunal is required to act judicially, it must act rationally and reasonably. Of its nature, a duty to act judicially (or in accordance with the requirements of procedural fairness or natural justice) excludes the right to decide arbitrarily, irrationally or unreasonably. It requires that regard be paid to material considerations and that immaterial or irrelevant considerations be ignored. It excludes the right to act on pre-conceived prejudice or suspicion. Arguably, it requires a minimum degree of "proportionality" … when the process of decision-making need not be and is not disclosed, there will be a discernable breach of such a duty if a decision of fact is unsupported by probative material. When the process of decision-making is disclosed, there will be a discernable breach of the duty if findings of fact upon which a decision is based are unsupported by probative material and if inferences of fact upon which such a decision is based cannot reasonably be drawn from such findings of fact. Breach of a duty to act judicially constitutes an error of law which will vitiate the decision.*

22. It was submitted for the applicant that because of the lack of a link between the Tribunal's earlier findings and its conclusion, the finding that the applicant was not a Falun Gong practitioner from 1997 until 2001 was unsupported by probative material and inferences of fact upon which the decision was based could not reasonably be drawn from the findings of fact. Hence there was a said to be breach of the duty to act judicially in the sense contemplated by Deane J in *Bond*

23. It was also suggested for the applicant that in *Applicant S20/2002* (per McHugh and Gummow JJ, at [52], [138] and [173] per Callinan J) the other members of the High Court had identified the concept of irrationality and illogicality as a separate ground of review and that this was endorsed in *SGLB* at [38]. In *SGLB* Gummow and Hayne JJ stated at [38]:

> *Satisfaction of the criterion that the applicant is a non-citizen to whom Australia has the relevant protection obligations may*

include consideration of factual matters but the critical question is whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds.

24. It was noted that their Honours had cited *Applicant S20/2002* per McHugh and Gummow JJ at [37] and [52] and Callinan J at [173] in support of this proposition.

25. It was acknowledged that there was an overlap between such a ground of review and the concept of a lack of procedural fairness or natural justice but also argued that while s.422B of the *Migration Act 1958* (Cth) was applicable (so that the code in the relevant part of the Migration Act was an entire code such that breach of the code did not give rise to a separate ground of review based on denial of procedural fairness), s.422B did not eliminate the separate ground of review of irrationality and illogicality said to have been recognised by the High Court in *SGLB*.

26. It was suggested that the reasoning of Allsop J in *NADH* at [136] leading up to the conclusion that the assertion of conclusions by the Tribunal in that case *"may be seen as not to engage in a reasoning process, but to assert conclusions by a process that it no more than an intuitive, arbitrary or capricious response to the task"*, provided an indication of the way in which it could be concluded that irrationality or illogicality constituted a jurisdictional error. It was acknowledged, however, that in *NADH* Allsop J had found (at [135]) that it was unnecessary to decide that issue to dispose of the case.

27. Counsel for the applicant provided post-hearing written submissions in relation to recent cases concerning illogically. Reference was made to a number of recent cases in the Federal Court in which it was said that illogicality had been recognised and/or applied as a ground of review: *SZAPC v MIMIA* [2005] FCA 995 at [50] to [57]; *QAAI v MIMIA* [2006] FCA 4 at [65] – [85] in particular at [81]; and *Tran v MIMA* [2006] FCA 1229 at [16] – [38] in particular at [25] and [34].

28. It was contended that most of the Federal Court decisions which took the view that irrationality and illogicality was not a ground of review had preceded the handing down of *SGLB*, with the exception of *S635 of 2002 v MIMA* [2004] FCA 1162 and *VWST v MIMIA* [2004] FCAFC

286, neither of which decision referred to the High Court decision in *SGLB*. It was argued that the High Court decision in *SGLB* marked a change in the law concerning the status of irrationality or illogicality as a ground of review, and that the Court should be cautious about relying on decisions of the Federal Court handed down before *SGLB* or handed down thereafter which did not refer to *SGLB*.

29. It was also said that the Tribunal fell into jurisdictional error in failing to have regard to the evidence of the applicant's witnesses. The applicant's witnesses had both given evidence to the Tribunal that they had commenced the practice of Falun Gong together with the applicant in 1997 and had been detained by the authorities for a week in 1999. It was submitted that this evidence corroborated the applicant's claims. However the Tribunal made no reference to this corroborative evidence in the findings and reasons part of its decision. It was pointed out that in *WAIJ v MIMIA* (2004) 80 ALD 568 at [25] – [27], Lee and Moore JJ had stated:

> *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".*
>
> *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 *at [49] per McHugh and Gummow JJ. 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; 180 ALR 1; 62 ALD 225 at [82] – [85] per McHugh, Gummow and Hayne JJ.*

30. Reliance was also placed on what Madgwick J (with whom Conti J agreed) stated in *NAJT v MIMIA* (2005) 147 FCR 51 at [212] in relation to whether the decision-maker (in that case a delegate of the Minister) had regard to a letter of support for an applicant or whether its genuineness should be checked:

> *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.*

31. In the present case it was contended that the Tribunal had failed to consider, in the sense of "*give genuine consideration to*" the corroborative evidence of the two witnesses called by the applicant at the Tribunal hearing and in those circumstances fell into jurisdictional error.

32. It was accepted that the Tribunal had recorded the evidence of the witnesses in summarising what had occurred at the Tribunal hearing, but pointed out that when it made its findings it made no reference to this evidence. While it was accepted that the mere failure of a Tribunal to refer to corroborative evidence by itself would not suffice, it was submitted that in certain circumstances jurisdictional error would be established (as discussed in *WAIJ* and *NAJT*). It was contended that

this was not a case in which the applicant's credibility was clearly so poor that it could be said that the well was "poisoned beyond redemption" (see *Applicant S20/2002* at [49] per McHugh and Gummow JJ) such that it was not necessary for the Tribunal to grapple with or consider the allegedly corroborative material. It was suggested that this was not a case in which the applicant's claims had been discredited by "*comprehensive findings of dishonesty or untruthfulness*" there being no cogent material to support a conclusion that the applicant had lied. It was contended that the Tribunal was required to have genuine regard to the corroborative evidence and that if the Tribunal did not consider it, refer to it or make any findings in relation to such evidence, then that may lead to the view that the Tribunal had failed in its obligation to grapple with or to consider that evidence.

33. This was also said not to be not a case in which the purportedly corroborative material was itself found on probative grounds to be worthless, so that it could be excluded from consideration by the Tribunal in assessing the credibility of the applicant's claims. As Lee and Moore JJ stated in *WAIJ*, it is not open to a Tribunal to find that it is unnecessary to consider material corroborative of an applicant's claims merely because it considers it unlikely that the events described by an applicant had occurred. It was submitted that *WAIJ* made it clear that the Tribunal was bound to have regard to and consider the material put forward as corroborative evidence in determining whether the applicant's claims were true.

34. In relation to *NAJT*, while it was acknowledged that Madgwick J was dealing with a statutory obligation to have regard to information, it was contended that the common law obligation was the same and whatever the boundaries of relevant material, the concept included the evidence given by the two witnesses that sought to corroborate a core aspect of the applicant's claims in relation to the practice of Falun Gong in China from 1997.

35. The first respondent submitted that the Tribunal had rejected the claim that the applicant was a Falun Gong practitioner because she had travelled on a passport in her own name, travelled to Vietnam and departed China without being hindered by the authorities. In this sense

it was submitted that the Tribunal had rejected the base claim and having done so rejected the integers of the claim, namely that she had been detained by reason of the practice of Falun Gong and signed a guarantee letter which obtained her release from that detention. It was submitted that where the base claim had been rejected, the Tribunal did not then have to deal with each of the particular integers of the claim. It was said not to be necessary for the Tribunal to consider whether the basis on which the base claim was rejected would be altered if it had considered whether the applicant really had been detained and released after signing a guarantee because the Tribunal reasoning was clear. Further it was submitted that the applicant did not appear to have raised with the Tribunal that because she had signed the guarantee letter she was no longer going to be of any interest to the authorities. In this respect it was noted that the evidence that she had had no further difficulty with the authorities addressed a different issue to the question of whether or not she was of interest to the authorities. It was submitted that the Tribunal finding was open to the Tribunal, dealt with the Falun Gong claim and with the integers of that claim.

36. It was pointed out that the Tribunal had subsequently dealt with the claim that the applicant had been released and signed a guarantee and rejected it on the basis that the Tribunal did not believe that the applicant was a Falun Gong practitioner.

37. It was said to be open to the Tribunal to reject the applicant's claim to have practised Falun Gong in China on the basis of her ability to depart the country on her own passport and submitted that having rejected that claim the Tribunal was not required to take the further step to consider whether it was wrong (and hence to ask whether a person who signed a "guarantee letter" may not be of adverse interest to the authorities and would be able to leave the country). It was observed that the Tribunal was only required to ask whether it was wrong if it was in doubt. The first respondent submitted that this claim challenged the reasoning of the Tribunal and amounted to an impermissible attack on the merits of the Tribunal decision.

38. It was also pointed out that the applicant's witnesses' evidence that they practised Falun Gong with the applicant in China from 1997 until she left in 2001 was referred to by the Tribunal in the section of its

decision record entitled claims and evidence. However it was submitted that as this was evidence contrary to the Tribunal's finding of fact that the applicant did not practise Falun Gong in China as she had been able to depart China on her own passport, the Tribunal was not required to set out reasons for separately rejecting it. See *NAXR v MIMIA* [2004] FMCA 413). It was suggested that in this case it could be inferred that the Tribunal placed no weight on the corroborative evidence of the applicant's witnesses as to the applicant's practice of Falun Gong (both in China and in Australia) and that this was not an error of law.

39. Insofar as the applicant sought to rely on a ground of illogicality, it was contended for the first respondent that while some members of the High Court in S20/2002 expressed some support for illogicality as a ground of review, the utility of illogicality was limited (see *SZDTZ v MIMIA* [2006] FMCA 1709). It was pointed out that in *NACB v MIMIA* [2003] FCAFC 235 at [29] and [30] the Full Court of the Federal Court had held that there was nothing in the remarks of the High Court in *S20/2002* that would warrant a departure from a line of earlier authorities to the effect that illogical reasoning does not in itself constitute an error of law or jurisdictional error and that this decision had been followed in *S635 of 2002 v MIMA* [2004] FCA 1162; *VWST v MIMA* [2004] FCAFC 286 at [16] – [19]; *NACT v MIMIA* [2004] FCAFC 52 and *M153 of 2004 v MIMIA* [2006] FMCA 42 (also see *SZCUU v MIMIA* [2006] FMCA 775 at [64] and *SZDVC v MIMIA* [2006] FMCA 40 at [27]).

40. It was submitted that the Tribunal did not engage in illogicality of a kind *"such as to constitute a capricious or an arbitrary dealing with objective material amounting to an arbitrary or capricious conclusion such as to reveal a jurisdictional error"* (see *NBKT v MIMIA* [2006] FMCA 6 at [87]).

Reasoning

41. The first respondent's submissions did not address the applicant's arguments in relation to *SGLB*. Nonetheless, contrary to the contention for the applicant it is not clear that in *SGLB* at [38] Gummow and Hayne JJ endorsed a proposition that irrationality and illogicality of

itself was a separate ground of judicial review. First, it is notable that in *Applicant S20/2002* their Honours were considering a "criterion" which had been advanced by the applicants (based on what had been said by Gummow J in *MIMA v Eshetu* (1991) 197 CLR 611 at 656 – 7) that there was jurisdictional error if the Tribunal determination *"that the condition upon which depended the power (or duty) to grant [the applicant] a protection visa was not met, was irrational, illogical and not based upon findings or inferences of facts supported by logical grounds"* (*Applicant S20/2002* at [34] per McHugh and Gummow JJ).

42. In *Eshetu* what Gummow J had pointed out that under a statutory regime of judicial review,

> *"'the criterion of 'reasonableness review' would permit review in cases where the satisfaction of the decision-maker was based on findings or inferences of fact which were not supported by some probative material or logical grounds'"* (at 656 – 657) and see *SZAPC v MIMA* [2005] FCA 995 at [45] – [59])

43. In *Applicant S20/2002* McHugh and Gummow JJ referred to the fact that in *Eshetu* Gummow J went on to suggest that it may be that there should be stricter view as to what must be shown by an applicant seeking relief under s.75(v) of the *Constitution* (at 146). This argument was developed in *Applicant S20/2002* in the joint judgment of McHugh and Gummow JJ referring to the fact that s.65 of the Migration Act conditions the attraction of jurisdiction *"upon the attainment by the decision-maker of satisfaction that a certain state of affairs exists and that state of affairs includes factual matters"*. Their Honours pointed out that such a stricter view appeared to have been taken in *Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 119 in the distinction between *"insufficiency of evidence to support the conclusion of fact by an administrative decision-maker and the absence of any foundation in fact for the fulfilment of the conditions upon which, in law, the existence of a power depends."*

44. As Dixon CJ, Williams, Webb and Fullager JJ stated in *Melbourne Stevedoring* at 120:

> *The inadequacy of the material is not in itself a ground for prohibition. But it is a circumstance which may support the*

> *inference that the Tribunal is applying the wrong test but is not in reality satisfied of the requisite matters. If there are other indications that this is so or that the purpose of the function committed to the Tribunal is misconceived, it is but a short step to the conclusion that in truth the power has not arisen because the conditions for its exercise do not exist in law and in fact."*

45. In that context, McHugh and Gummow JJ accepted the formulation of the criterion put forward by the appellant in *Applicant S20/2002* for the purposes of the case, without further consideration of what was said in *Melbourne Stevedoring*. However their Honours found that the determination by the Tribunal was not, in any event, irrational or illogical as contended.

46. It is also relevant to note that in *Applicant S20/2002* Gleeson CJ referred to what had been said in *Eshetu* at [40] per Gleeson CJ and McHugh J in relation to illogicality and unreasonableness stating (at [5]):

> *To describe reasoning as illogical, or unreasonable, or irrational may merely be an emphatic way of expressing disagreement with it. If it is suggested that there is a legal consequence it may be necessary to be more precise as to the nature and quality of the error attributed to the decision-maker, and to identify the legal principles or statutory power that attracts the suggested consequence.*

47. In *Applicant S20/2002* the illogicality in issue was said to be in the Tribunal's process of reasoning, particularly in the way in which it dealt with certain information relied on as corroboration of the applicant's claims. In that context Gleeson CJ stated at [9]:

> *To describe as irrational a conclusion that a decision-maker is not satisfied of a matter of fact, or a state of affairs because the decision-maker does not believe the person seeking to create the state of satisfaction, or to describe the process of reasoning leading to such a conclusion as illogical, on judicial review of an administrative decision, might mean no more than, that on the material before the decision maker, the court would have reached the required state of satisfaction. Ordinarily, however, it will be necessary to go further, as in the respect mentioned by Dixon J in [in* Avon Downes Pty Ltd v FCT *(1949) 78 CLR 353 at 360]. On the other hand, where there was a duty to act judicially, a power must be exercised 'according to law, and not humour',… an*

> *irrationality of the kind described by Deane J in* Australian Broadcasting Tribunal v Bond … *at 367 may involve non-compliance with the duty. Furthermore, where the 'true and only reasonable conclusion contradicts [a] determination' then the determination may be shown to involve legal error…it is often unhelpful to discuss in the abstract the legal consequences of irrationality, or illogicality, or unreasonableness or some degree. In a context such as the present, it is necessary to identify and characterise the suggested error, and relate it to the legal rubric under which a decision is challenged.*

48. It was in light these decisions that Gummow and Hayne JJ outlined the jurisdiction of the Tribunal in *SGLB*, referring to sections 36 and 65 of the *Migration Act 1958* (Cth) and the fact that the Minister (or Tribunal) has an obligation to grant or refuse to grant a visa rather than a power to exercise a discretion if is satisfied of various matters and that the *'satisfaction'* of the Minster (Tribunal) is a *'condition precedent to the discharge of the obligation to grant or refuse to grant the visa, and is a "jurisdictional fact" or criterion upon which the exercise of that authority is conditioned'* (at [37])

49. On this basis their Honours went on to state at [38] that:

> *The satisfaction of the criterion that the applicant is a non-citizen to whom Australia has the relevant protection obligations may include consideration of factual matters but the critical question is whether the determination was irrational, illogical and not based on findings or inferences of facts supported by logical grounds.*

50. However their Honours continued:

> *inadequacy of the material before the decision-maker concerning the attainment of that satisfaction is insufficient in itself to establish jurisdictional error.* (at [38]).

51. Their Honours then considered the grounds relied on in *SGLB*. There was no general claim that irrationality and illogicality in findings of the Tribunal constituted jurisdictional error as such, but rather a claim that there was "no evidence", that the Tribunal had erred in its credibility finding, that there was an issue about the competence of the applicant and more generally that there was a denial of procedural fairness.

52. It has not been established that in *SGLB* Gummow and Hayne JJ were suggesting that irrationality and/or illogicality in fact finding of itself constituted a jurisdictional error. Rather, what their Honours stated appears to reflect the proposition that the Tribunal was required to reach its state of satisfaction in a *"reasoned fashion"* (see Allsop J and *NADH* at [355]). As Madgwick J suggested in *SZAPC* (at [57]) *"the powers of decision makers such as the Tribunal are not to be exercised capriciously – not according to humour but according to law"*. It is in this sense that Madgwick J summarised what was said by Gummow and Hayne JJ in *SGLB* at [38] as a requirement that *"the determination must be a rational one"*. Notably, however, his Honour went on at [58] – [59] to consider the application of these principles to a situation where there was a crucial finding made without evidence to support it.

53. Moreover, there is a clear line of authority in the Full Court of the Federal Court that illogical reasoning *of itself* does not constitute a jurisdictional error (see in particular *NACB v MIMA* [2003] FCAFC 235 at [30] and *VWST v MIMIA* [2004] FCAFC 286 at [18] in which the Full Court stated, after referring to the decision in *NACB* in which the High Court had refused special leave to appeal, that the *"current state of the law is that want of logic in the reasons of the RRT is not an available ground of review"* (also see *W404/01A of 2002 v MIMIA* [2003] FCAFC 255 at [35]; *NATC v MIMIA* [2004] FCAFC 52 at [25], *WAJW v MIMIA* [2004] FCAFC 330 at [31] – [32] and *WAJQ v MIMIA* [2005] FCAFC 79 at [22]).

54. While these decisions make it clear that want of logic **of itself** is not a ground of review, it is also clear that in all the circumstances of a particular case want of logic may cast doubt upon the Tribunal's reasoning, at least where there is no base upon which that reasoning can be supported (see *NACB* at [30]) or may be such as to point to a basis on which the decision may be challenged as involving a jurisdictional error.

55. In this case the applicant relied not only on a complaint of illogicality in the sense of a lack of a link between findings that the fact that the applicant travelled on her own passport indicated that she was not of adverse interest to the Chinese authorities upon departure in 2001 and the conclusion that she was not practising Falun Gong in China prior to

her departure in 2001, but also claimed, in effect, that the Tribunal overlooked or ignored the evidence of the applicant that she and her friends (two of whom were her witnesses) had been detained for a week in August 1999 and released after they agreed to sign a guarantee document stating that they would not practise Falun Gong in the future. It was submitted that the Tribunal overlooked or ignored the evidence that from the perspective of the Chinese authorities the applicant had renounced Falun Gong in August 1999 so that she would no longer be of interest to them (and hence would not be a 'wanted' person or stopped from leaving the country).

56. In addition, it was contended that in making this finding the Tribunal had failed to consider or have regard to the corroborative evidence of the two witnesses who gave evidence for the applicant at the Tribunal hearing in circumstances where it could not be said that the applicant's claims had been discredited by comprehensive findings of dishonesty or untruthfulness (see *WAIJ* at [26]).

57. This may not be a case in which it can be said that there was "no evidence" in relation to the findings in issue, in light of the evidence the applicant's ability to travel overseas and then depart from China on her own passport and the country information relied on by the Tribunal in relation to exit from China and to the effect that it was improbable that '*dissidents on wanted list'* would be able to exit on passports issued in their own names. However, counsel for the applicant correctly pointed out that there may nevertheless be a legal consequence of the "difficulty" with the manner in which the Tribunal moved from its reasoning that the fact that the applicant travelled on her own passport and departed China unhindered by the authorities did not suggest that she was of 'adverse interest' to the authorities on her departure to the conclusion that the Tribunal did not accept that she was a Falun Gong practitioner in China from 1997 until she left China in 2001.

58. The "legal consequence" (see Gleeson CJ in *Applicant S20/2002* at [5]) of the difficulty with the reasoning of the Tribunal becomes apparent when one considers the precise nature of the claims made by the applicant as to what occurred in China. The applicant did not simply claim, as the Tribunal stated in its findings and reasons, that "*she*,

together with three others commenced the practise of Falun Gong in China in 1997 and all four were detained in August 1999". Whilst she claimed she met three people in May 1997, one of whom introduced his experience of practising Falun Gong to them, her claim (in the statement attached to her protection visa application) was that the next, day she and two of the others went to the Falun Gong practitioners' practice site in a park where a named person was the coach and that she persisted in practising Falun Gong every morning. She not only claimed to have practised Falun Gong in this public way but also that they gathered at the coach's residence to study Falun Gong principles every Thursday evening.

59. She then claimed that, after the campaign was launched against Falun Gong in July 1999, the named coach *"was arrested"* and *"we were put into the Brain-washed (sic) classes and were force to give up our beliefs of Falun Gong. If we didn't do as we were asked we would be put into labour camp. So we had to do as he ordered to write guarantee statement of giving up our beliefs and stopping practising Falun Gong in the Brain-Washing class at a [named] Police Station"*.

60. In other words, this was not simply a claim that the applicant practised Falun Gong privately in China (as distinct from her claims about what occurred when she arrived in Australia). Rather she claimed that she had participated in exercises in a park and also weekly study with a coach who was arrested. After he was arrested, she was detained she then wrote a guarantee statement giving up her beliefs and to the effect that she would stop practising Falun Gong. Her evidence at the hearing that after her release in August 1999 she and her friends got together in each other's homes and continued to practise Falun Gong, can be contrasted with her claims about the more public practice of Falun Gong she claimed to have engaged in prior to August 1999. In that context she claimed that she and her friends were told they could *'freely'* practise Falun Gong if they came to Australia.

61. Moreover two of the applicant's friends attended the Tribunal hearing and gave evidence on her behalf. The only record of what occurred in the Tribunal hearing is the Tribunal reasons for decision, in which it is recorded that they both stated that they had commenced the practice of Falun Gong together with the applicant in 1997. These statements

must be seen, however, in the context of the claims made by the applicant in relation to practise with a named coach in a park and study sessions at the home of that coach who was arrested in 1999.

62. In corroboration of the applicant's claims the witnesses also claimed to have been detained by the authorities for a week in August 1999. The Tribunal recorded that they agreed that they had no further difficulties with the authorities and were able to leave China without any problems with the Chinese authorities. Again this evidence must be seen in the context of the applicant's claim that after their release from detention they got together in each other's homes to practise Falun Gong. In other words she claimed that after her release from detention she practised Falun Gong in private with her friends.

63. The applicant also agreed she had no further difficulties with the authorities. While the applicant may not have expressly raised with the Tribunal the claim that after she signed the guarantee letter she would no longer be of interest to the authorities as she would be perceived as having renounced Falun Gong, it is clear that such a claim is implicit in what the applicant said about the nature of her practice of Falun Gong in China at various times and her wish to practise Falun Gong freely.

64. As contended for the applicant, it is clear that an aspect of the claims that arose on the material before the Tribunal was that from 1997 to 1999 she had engaged in a form of public practice and also study of Falun Gong with a coach who was arrested in 1999, but that after his arrest and her subsequent detention and signature of a guarantee, from the perspective of the Chinese authorities she had renounced Falun Gong. The Tribunal did not address this aspect of the applicant's claims in making its finding that, given that she could depart China unhindered on her own passport, it did not accept that she was a Falun Gong practitioner in China in 1997 until she left China in 2001.

65. It is the case that the Tribunal referred to the applicant's claims about detention and release after she signed a guarantee letter, but it did so only after its finding that it did not accept that she was practising Falun Gong prior to her departure from China. However in making that critical finding, the Tribunal did not take into account the integers of the applicant's claims about the nature of her practice of Falun Gong, the implications of such practice, the fact that she signed a guarantee

letter and thereafter did not practise in public or attend study at her coach's residence.

66. Even if such material were not of itself to be regarded as a relevant consideration but only as an item of evidence, I am satisfied that the Tribunal fell into jurisdictional error in circumstances where it also failed to take into account and give consideration to the corroborative evidence of the two witnesses called by the applicant at the Tribunal hearing in the manner considered by the Full Court of the Federal Court in *WAIJ*.

67. Importantly, this is not a case in which it can be said that the applicant's claims were discredited by comprehensive findings of dishonesty or untruthfulness (see *WAIJ* at [27] and *Applicant S20/2002* per McHugh and Gummow JJ at [49]). Nor is it a case in which the Tribunal had regard to implausibilities, inconsistencies or other deficiencies in the applicant's evidence in relation to what occurred in China such that there could be said to be *"cogent material to support the conclusion that the [applicant] has lied"* (*WAIJ* at [27]). Rather, the Tribunal simply did not accept that the applicant was a Falun Gong practitioner in China because she had been able to leave China on her passport in her own name.

68. This is not a case in which it can be said that no corroboration could undo the consequences of a conclusion that the applicant's case comprised lies, given the limited basis on which the Tribunal reached its decision and its failure to address the nature of the applicant's claims about her practice of Falun Gong in China at varying times from 1997 to 2001. Rejection of the claim that the applicant was a Falun Gong practitioner in China cannot be said to reflect a *comprehensive* finding of dishonesty or untruthfulness. There is no reference to any aspect of the applicant's evidence being unsatisfactory, inconsistent or implausible (cf *Applicant S20/2002* at [12] per Gleeson CJ). Contrary to the submissions for the first respondent, it is not a case in which it can be said that there was a comprehensive basis for the rejection of the underlying claim of the applicant to be a Falun Gong practitioner so that it was not necessary for the Tribunal to deal with the particular integers of the claim whether consisting of aspects of the claim as

raised by the applicant or, in particular, the corroborative evidence of her witnesses.

69. Moreover, the Tribunal did not address the purported corroborative evidence from the witnesses in terms that indicated that it regarded such material as worthless on probative grounds.

70. The legal representative for the first respondent was given the opportunity to make post-hearing written submissions in relation to this ground (which was continued in an amended application filed in court). The respondent's submissions did not address the applicability of the principles in *WAIJ* to the circumstances of this case. It was submitted that as the witnesses' corroborative evidence was contrary to the Tribunal's finding as to the practice of Falun Gong it could be inferred that it placed no weight on it and it was not required to set out reasons for rejecting it. However this does not provide a basis for distinguishing *WAIJ*.

71. Contrary to the suggestion that it can be inferred that the Tribunal placed no weight on the corroborative evidence of the applicant's witnesses, given the potential importance of those witnesses and the failure to refer to such matters in the findings and reasons part of the decision (in contrast to the discussion of the evidence about what occurred in Australia and the corroborative evidence in that respect) the inference should be drawn that the Tribunal did not actually consider what significance and weight the evidence of the witnesses in relation to what occurred in China should be accorded (see *NAJT* at [212]).

72. While it is clear that the Tribunal was aware of the evidence of the witnesses, as Sackville J stated in *Singh v MIMA* (2001) 109 FCR 152 at [58] (albeit in a different context) *"a decision maker may be aware of information without paying any attention to it or give it any consideration."* In this case I am satisfied that the Tribunal failed to have regard to the corroborative material in the findings and reasons part of its decision.

73. In all the circumstances I am satisfied that the Tribunal's failure to have regard to the corroborative material before reaching a conclusion that (while not expressed in those terms) rejected the applicant's credibility, as it rejected her claims as untrue, was such that the Tribunal's

determination was not carried out *"according to law"* (*WAIJ* at [27]) so that the decision was affected by jurisdictional error. In *WAIJ* such error was characterised first as an error in the sense of a failure to act judicially in respect of corroborative material. In that case there was no material before the Tribunal that permitted it to dispose of documents it was otherwise bound to consider on the "surmise" that it was possible the documents had been fabricated (at [52]). Lee and Moore JJ also found that it was a *"denial of a fair process to dismiss documents from consideration where the material therein supports an applicant's case in substantive respects and no ground for such a course is provided by the documents in their face or by other facts"* (at [53]) and thus that the Tribunal did not accord the applicant practical fairness. The same may be said in this case in relation to the oral evidence of the witnesses. I note in this respect that it was not suggested for the first respondent that s.422B of the Migration Act was relevant and the question of the applicability of principles of procedural fairness was not addressed. In any event, in oral submissions counsel for the applicant clarified that his contention was that there had been a failure to have regard to relevant material.

74. In *WAIJ* the Tribunal had considered the corroborative evidence in issue in one sense, in dismissing the documents from consideration. However in this case the Tribunal failed to have any regard to the corroborative evidence in the findings and reasons part of its decision. It also, as set out above, failed to address (and perhaps failed to appreciate) the nature of the applicant's claimed practise of Falun Gong in China and hence the relevance of the corroborative evidence to those claims. In all the circumstances I am satisfied that the Tribunal fell into error that can be characterised as a jurisdictional error in the sense considered in *Craig v South Australia* (1995) 184 CLR 163 at 179 and *Yusuf* at [82] – [85] in that it ignored relevant material in a way that affected the exercise of power.

75. Accordingly the matter should be remitted to the Tribunal for reconsideration according to law.

Practise in Australia issue

76. The second ground in the amended application takes issue with the fact that the Tribunal did not accept that the applicant was involved in the practice of Falun Gong prior to her detention in Villawood and following her release from Villawood from June 2005 until October 2005. The Tribunal is said to have fallen into jurisdictional error in making these findings as it failed to consider or have regard to the corroborative evidence given by the two witnesses at the Tribunal hearing.

77. The Tribunal described the relevant evidence at the hearing as follows:

> *The witnesses gave evidence that they commenced practising Falun Gong together with the applicant in 1997. They mentioned they were detained by the authorities for a week in 1999. They confirmed they had joined the Falun Dafa organisation in October 2005. When asked why they waited so long before joining the organisation one of the witnesses stated that they did not know about it as they just practised for health reasons but once they got to Villawood they were told that they could join the organisation and take a step further by studying Falun Dafa.*

78. It was submitted for the applicant that the Tribunal failed to have regard to the evidence of the witness (it was conceded that it appeared that only one witness addressed this issue) that he, the other witness and the applicant, had practised Falun Gong for health reasons following their arrival in Australia in 2001 (that is, prior to being detained at Villawood in June 2005). It was acknowledged that this evidence was recorded by the Tribunal in the account of what occurred in the Tribunal hearing. However it was said that the Tribunal made no reference to this evidence in the findings and reasons part of its decision. It was said that for the reasons set out in relation to the first ground the Tribunal also fell into jurisdictional error in this respect.

79. As the first respondent submitted, the evidence given by the witnesses that they undertook Falun Gong practice privately for health reasons in Australia prior to being detained was referred to by the Tribunal in the findings and reasons part of the decision in the statement: *"It was also her evidence, confirmed by the witnesses, that she did not join in any*

Falun Gong activities, other than private practice until October 2005, some four years and eight months after arriving in Australia".

80. It was submitted for the respondent that in this part of its reasons for decision the Tribunal dealt with the evidence in issue and consequently made findings about it, being that it did not accept that they applicant had been involved in the practice of Falun Gong since her arrival in Australia.

81. It was also said to be clear from the subsequent findings, in which the Tribunal accepted that the applicant did become involved in Falun Gong during her detention in Villawood and that she had attended practice sessions at Chatswood since October 2005, that in reaching the conclusion in issue the Tribunal was addressing the period prior to the applicant's involvement with the Falun Dafa organisation. In other words that the Tribunal had noted that the applicant and the witness gave evidence that she practised privately in Australia but rejected that evidence. It was argued that as the Tribunal had made findings contrary to the applicant's evidence "confirmed by the witnesses" in relation to her Falun Gong practice in Australia, it was not required to set out its reasons for separately rejecting the corroborative evidence. It was said that it could be inferred that the Tribunal placed no weight on the corroborative evidence of these witnesses as to the applicant's practice of Falun Gong in Australia (except in detention and after October 2005).

82. It was submitted for the first respondent that the Tribunal was not required to give reasons for rejecting all items of evidence (see *Re MIMA; Ex parte Durairajasingham* (2000) 168 ALR 407) and did not have to refer to evidence contrary to its findings of fact (see *MIMA v Yusuf* (2001) 206 CLR 323 holding that the Tribunal was only required to set out its findings on facts material to its decision).

Reasoning

83. In contrast to the position in relation to the applicant's claims about what occurred in China, it has not been established that the Tribunal failed to have regard to the corroborative evidence of the two witnesses in relation to the applicant's practice of Falun Gong in Australia. The

claim for the applicant in this respect was that one of the witnesses gave evidence that he, the other witness and the applicant had practised Falun Gong for health reasons following their arrival in Australia in 2001. As the first respondent submitted, this evidence was referred to by the Tribunal in its statement "it was also her evidence, **confirmed by the witnesses**, that she did not join in any Falun Gong activities **other than private practice** until October 2005 some 4 years and 8 months after arriving in Australia" (emphasis added). Hence the reasoning in relation to ground 1 (based on the Tribunal's failure to make any reference to the witnesses' evidence in its findings and reasons) is not applicable. No other issue was taken by the applicant with the reasoning of the Tribunal in reaching its conclusion that it did not accept that the applicant had been involved in the practice of Falun Gong since her arrival in Australia. It has not been established that the Tribunal failed to consider the evidence of the witness as to private practice in Australia in a manner constituting jurisdictional error.

84. It is apparent however that the Tribunal reasoning in that respect followed on from its finding that it did not accept that the applicant was a Falun Gong practitioner in China from 1997 until she left China in 2001. Given the jurisdictional error in relation to that finding, even if there was no error in the Tribunal findings in relation to Australia, that would not provide a separate independent basis for the Tribunal reasons for decision such as to warrant exercise of the discretion to refuse relief.

85. In the result the application should be remitted to the Tribunal for reconsideration according to law.

I certify that the preceding eighty-five (85) paragraphs are a true copy of the reasons for judgment of Barnes FM

Associate:

Date: 27 March 2007