FEDERAL COURT OF AUSTRALIA

NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)

[2004] FCAFC 263

MIGRATION – judicial review – protection visa – Refugee Review Tribunal – factual error – misunderstanding of evidence – whether failure to consider claim – whether jurisdictional error – obligation of Tribunal to consider claims arising on material before it – whether obligation to consider claim not expressly articulated – Sri Lankan Tamil – claim of persecution by government and by pro-government group – no express claim of lack of State protection with respect to pro-government group – erroneous conclusion by Tribunal that appellant claimed involvement with pro-government group – whether failure to consider claim – whether allegation of persecution by pro-government group carried implied claim of want of State protection – whether error within jurisdiction

Judiciary Act 1903 (Cth) s 39B

Migration Act 1958 (Cth) s 414,

NAAV v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 123 FCR 298 cited

Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476 applied

Lobo v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 200 ALR 359 cited

Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597 cited

Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 75 ALD 630 cited

Minister for Immigration and Multicultural Affairs v Anthonypillai (2001) 106 FCR 426 cited

Minister for Immigration and Multicultural Affairs v Tedella (2001) 195 ALR 84 cited

Pollocks v Minister for Immigration and Multicultural Affairs (2001) 195 ALR 73 cited

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 cited

Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen (2001) 177 ALR 473 cited

Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 198 ALR 59 cited

Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389 cited

Htun v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 244 cited

Chen v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 157 cited

Paramananthan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28 cited

Sellamuthu v Minister for Immigration and Multicultural Affairs (1999) 90 FCR 287 cited

Minister for Immigration and Multicultural Affairs v Sarrazola (No 2) (2001) 107 FCR 184 cited

SDAQ f Minister for Immigration and Multicultural and Indigenous Affairs (2003) 199 ALR 265 cited

SCAL v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 301 cited

SGBB v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 199 ALR 364 cited

SCAL v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 548 cited

Dranichnikov v Minister for Immigration & Multicultural Affairs [2000] FCA 1801 cited

STYB v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 705 cited

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte S134/2002 (2003) 195 ALR 1 cited

Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112 cited

NABE v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

N2701 OF 2003

BLACK CJ, FRENCH and SELWAY JJ

16 SEPTEMBER 2004

PERTH

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	N2701 OF 2003

On Appeal from a Single Judge of the Federal Court of Australia

BETWEEN:	NABE APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	BLACK CJ, FRENCH AND SELWAY JJ
DATE OF ORDER:	16 SEPTEMBER 2004
WHERE MADE:	PERTH

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	N2701 OF 2003

On Appeal from a Single Judge of the Federal Court of Australia

BETWEEN:	NABE APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	BLACK CJ, FRENCH AND SELWAY JJ
DATE:	16 SEPTEMBER 2004
PLACE:	PERTH

REASONS FOR JUDGMENT

Introduction

1 The appellant arrived in Australia on 30 April 2001 without lawful authority. He applied for a protection visa on the basis that he was a Sri Lankan Tamil who had a well-founded fear of persecution by Sri Lankan government authorities and by a pro-government Tamil organisation known as PLOTE. The basis of the apprehended persecution was his suspected affiliation with the anti-government Tamil Tiger group known as 'LTTE'. His application for a protection visa was refused by a delegate of the Minister. He then applied to the Refugee Review Tribunal ('the Tribunal') for a review of that refusal but the Tribunal affirmed it. In so doing the Tribunal made a factual mistake. It thought that the appellant had claimed fear of persecution by government authorities in part because of his association with PLOTE. In truth, he claimed a fear of persecution by both the government and PLOTE.

2 The appellant applied to this Court under s 39B of the *Judiciary Act 1903* (Cth) seeking to have the Court set aside the Tribunal's decision. Tamberlin J held that the Tribunal had made a factual error which could have affected the outcome of the case. However his Honour also held, having regard to restrictions on judicial review imposed by s 474 of the *Migration Act 1958* (Cth), that the factual error could not support an exercise by the Court of its power to grant relief under s 39B.

3 An appeal against the decision of Tamberlin J was dismissed by the Full Court. It was heard as one of a group of five appeals in which a special sitting of the Full Court considered the operation of s 474 in a number of different cases. The judgment of the Full Court is reported as *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298. In relation to this case, each member of the Court held that there had been an error of fact which was not 'jurisdictional' in character. A majority of the Court in that case held that, in any event, s 474 precluded relief for jurisdictional error other than in certain extreme cases of bad faith or a decision not relating to the subject matter of the Act, a decision not reasonably capable of reference to the power conferred by the Act or a decision contravening an inviolable limitation upon the powers of the decision maker. The decisions of the Full Court were eventually overruled by the decision of

the High Court concerning s 474 in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476. Subsequently the appellant, who had sought special leave to appeal to the High Court, succeeded in that application in the light of the High Court's decision in *Plaintiff S157/2002*. The High Court remitted the matter for reconsideration by the Full Court.

4 The Full Court, differently constituted, has concluded for the reasons set out below that while there was error on the part of the Tribunal it did not amount to jurisdictional error which, on the authority of *Plaintiff S157/2002*, would be capable of attracting relief under s 39B of the *Judiciary Act*. For that reason we have concluded that the appeal must be dismissed with costs.

The Appellant's Claims

5 The appellant is a Sri Lankan national of Tamil ethnicity. He arrived in Australia on 30 April 2001 using a false passport. Upon arrival he was interviewed by an officer of the Department of Immigration and Multicultural Affairs, who was assisted by a Tamil interpreter. In the course of that interview the appellant said he had begun to think about leaving Sri Lanka in January 1991. Asked why he had left Sri Lanka he said he found it difficult to live there because of 'the threat to my life'. He said he had been taken into custody several times. In Jaffna, where he lived permanently, artillery fire had destroyed many houses. He said he came to Australia because it was impossible for Tamils to live in Sri Lanka. Asked why he did not wish to return to his country of nationality he was recorded as saying:

'I came in here because it was impossible to live there so how can I go back there. I have come to Colombo three times. I have been sent back to Jaffna three times. If I return I will be arrested again. Many people who have been arrested disappeared in the past. As a Tamil person, if I return I will be arrested. Tamil are persecuted race in Sri Lanka.' (sic)

6 On 19 May 2001, the appellant applied for a protection visa. The application was lodged on his behalf by an immigration consultant, RT Selliah. In a covering letter with the application the appellant's agent submitted that he was a young Sri Lankan Tamil who had been persecuted and feared for persecution if he were to go back to Sri Lanka. Attached to the letter and translated from Tamil was a statement by the appellant. In that statement he said he had been born on 8 November 1974 in Jaffna. He had three brothers and two sisters. He described his primary education in Jaffna which had commenced in 1980. He referred to incidents between Tamils and the Sinhalese Army in the early 1980s and ethic rioting which had occurred in many parts of the country. He spoke of atrocities committed by the Sinhalese Army in Tamil areas. On one occasion his home had been invaded by Sinhalese government forces. In 1984 somebody fired into the schoolroom in which he was taking lessons. A bullet struck a fellow pupil. His education was generally affected by the violence between Tamils and others.

7 In 1986 the appellant commenced his secondary education. He said he was in danger from time to time because of continuing fighting between the

different ethnic movements. He could not live in Jaffna. After about 18 months the Indian Army came to Sri Lanka and some degree of peace was restored. However it did not last long. He described clashes between the Indian Army and the Liberation Tigers of Tamil Eelam (LTTE). He recounted incidents which occurred while he was undertaking his secondary schooling. At times it was impossible for him to go to school. He continued his education by attending intermittently and by getting notes.

8 Some Tamil groups which opposed the LTTE engaged, along with the Indian Army, in killing and torturing Tamil people on suspicion of affiliation with the LTTE. In addition some anti-LTTE groups forcibly conscripted young Tamil males. The appellant said that on one occasion some young Tamil boys took him from his home at gunpoint and detained him for about two weeks. They wanted him to join their movement. He was threatened with death if he refused. His mother looked for him and he was released after three days.

9 Tensions continued into the 1990s. The appellant claimed that his time as a student was completely ruined and that his future 'became under a question mark'. There was further civil disorder in the early 1990s and his home in Jaffna was destroyed in August 1990.

10 The appellant said he had studied by candlelight without any electric light, under constant bombing and at times in bunkers. He sat for an examination in April 1991 and another in August 1993. He undertook a one-year course of computer studies. He then became a part-time computer instructor and helped out at his aunt's shop. He asked the LTTE if he could go to Colombo. However he and his eldest sister were not allowed to do so. They were forced to remain in Jaffna. He had lost contact with his parents but later found out that they were in Canada. In October 1995 he was evacuated from Jaffna because of an army attack there. He went to a refugee camp at Pallai. In January 1996, the Sinhalese Army surrounded the camp at which he was and launched an attack which did not seem to end.

11 In January 1999, the appellant went to Vavuniya. He remained there for some months. That was in an area controlled by the army. There were other groups there who favoured the government. They took the appellant for interrogation and questioned him 'inhumanly'. They beat him and heated an iron bar and burnt his arms with it. He said he screamed and they continued to torture him. After being detained for more than two weeks he escaped and reached Colombo sometime in April 1999. He did not name the 'groups favouring the government' which had treated him in this way. There was no mention of the organisation called PLOTE.

12 The appellant said that in the capital cities Sinhalese people thought Tamils were enemies and must be subdued. Tamils had to register with the police. At one point he was arrested and was locked up for three days with eight others. He said the sole reason for this was that he was a Tamil. When released he was told he was a Tamil and should not stay in Colombo. He was told to go to a Tamil area. So he again went to Vavuniya in 1999. When he

returned to Colombo at the end of 2000 he was arrested twice and detained without any reason. He had to pay 10,000 rupees for his release each time. In the event, with financial assistance from his siblings, he went to Bangkok and from there travelled to Australia on 30 April.

13 The appellant's immigration agent wrote a letter to the Department on 23 July 2001 by way of further submission. In the letter it was said, inter alia:

'Because he is a young Tamil and suspected of being involved with the LTTE the applicant was arrested and tortured on many occasions.

The LTTE attempted to recruit the applicant on many occasions and forced him to dig bunkers. The applicant lived on many occasions in refugee camps. The LTTE finally forced the applicant to join them but the applicant escaped to another area.

The applicant escaped to Colombo to avoid further persecution where he was arrested and tortured by the authorities. He paid money to the authorities to secure his release.'

14 The agent submitted that young Tamils in particular were persecuted by the authorities and by the LTTE if they refused to join it. The agent characterised the appellant's fear of persecution as a fear of torture, detention, extortion and compulsory recruitment based upon reasons of race and actual or imputed political opinion as well as his membership of a particular social group, namely young Tamils from Jaffna. He also submitted that the appellant could not reasonably relocate to other parts of the country in order to avoid persecution. He had been arrested and tortured by the authorities in Colombo and had paid money to effect his release. He could not speak Sinhalese. Relocation was therefore impossible. The agent's letter made no reference to PLOTE.

The Delegate's Decision

15 On 9 August 2001, a delegate of the Minister of Immigration and Multicultural Affairs decided to refuse the application for a protection visa. In the decision record setting out the reasons for that decision, the delegate referred to claims made by the appellant. It was evident that some of these claims emerged in the course of an oral interview conducted by the delegate. No record of that interview was before this Court. Referring to a pro-government organisation called PLOTE, the delegate reported the following claims by the appellant:

'The applicant claims that Vavuniya was under the Sri Lankan army control and that whilst in Vavuniya he was arrested by PLOTE People. The applicant claims that he was arrested by PLOTE because persons who came from Mullaitivu were suspected of being LTTE supporters. The applicant claims that the PLOTE also knew that he had worked for the Tigers. The applicant claims that he was detained and tortured during the interrogation by the PLOTE. The applicant claims during the interrogation he admitted that he had been forced to work for the Tigers. The applicant claims he

escaped from detention with another detainee after two weeks, ie sometime in April 1999.'

16 The delegate went on to conclude that there was no reason for the appellant not to return to Jaffna and there was no real chance that he would be harassed by the LTTE in the future in Jaffna. The delegate went on to say:

'I accept that the applicant has been caught up in the activities of the LTTE, PLOTE and the Sri Lankan army over the years. Given (sic) the applicant the benefit of the doubt, I accept that the applicant worked for the LTTE Tigers as a cook and digging bunkers from 1996 until January 1999. I accept that the applicant has been detained by the PLOTE and questioned about the LTTE. I accept that the applicant has been in the past arrested and questioned about his support for LTTE Tigers. I accept that the applicant was arrested twice whilst in Colombo.'

The Appellant's Submissions and Evidence Before the Refugee Review Tribunal

17 Following the rejection of his application for a protection visa, the appellant lodged an application with the Tribunal. The application was dated 9 August 2001 and was lodged with the Tribunal on 10 August 2001. A supporting letter from the appellant's migration agent dated 18 September 2001 was sent to the Tribunal. In that letter the agent said, inter alia:

'The delegate accepted that the applicant had been caught up in the activities of the LTTE, PLOTE and the Sri Lankan Army over the years. Giving the applicant the benefit of the doubt, she accepted that the applicant worked for the LTTE Tigers as a cook and digging bunkers from 1996 until January 1999. The delegate accepted that the applicant had been detained by the PLOTE and questioned about the LTTE. The delegate accepted that the applicant had been in the past arrested and questioned about his support for LTTE Tigers. The delegate accepted that the applicant was arrested twice whilst in Colombo.'

Further in the letter the migration agent said:

'The applicant is a young Tamil and was suspected as an LTTE. The applicant had lived in Jaffna until 1996 and suffered enormous problems by the authorities,(sic) LTTE and anti LTTE movements. Finally, the applicant left the place in order to protect his life. The applicant is in fear of being persecuted by the authorities and other rival groups. In light of the country information the applicant's fear is well founded.'

18 The Tribunal conducted an oral hearing. In the course of that hearing, according to a transcript reproduced in the appeal book, the appellant referred to the insecure situation in Sri Lanka and said:

'Because there are many groups in Vavuniya PLOT Army. Not only them many groups it is a confusing situation in Vavuniya and these people they took me in suspicion. They took me to their camp, they beat me, they questioned me. ... There

were harassment for me. They burnt me by an iron bar. My hand. I could not bear the torture they tied me and another guy and we both in the night time we ran away from there.' (sic)

The dotted lines indicate a point at which, according to the transcript, certain words were not clear and there was tape noise.

19 Further in the transcript the following exchange occurred:

'Q If as you say you were detained and it was known or discovered that you have LTTE links I found it difficult to imagine how you could have make way from Vavuniya through check points and so on to Colombo.

A That's why I had to get a person to help me out. Only the PLOTE knows about me.'

The Tribunal's Decision

20 The Tribunal rejected the appellant's application and affirmed the decision not to grant a protection visa. It did so on 9 October 2001. In its reasons for decision, the Tribunal set out the background and the claims which it said that the appellant had made. It said, inter alia, that the appellant stated that in October 1995 he had gone to a refugee camp in Pallai to avoid the intense fighting in Jaffna and had remained there for three months. When the fighting became more intense he moved to Mullaithivu. It was there he said he was forced to join the LTTE and serve as a cook for two and a half years in a camp used by LTTE. He said he supported the aims of the LTTE but not its killings. According to the Tribunal the appellant claimed that when prevailed upon to take military training he escaped from the LTTE camp and went to Vavuniya in January 1999 where he remained for three months. The Tribunal reasons then said:

'He claims that he was interrogated, beaten and otherwise mistreated by the authorities while detained for two weeks on suspicion of involvement with the LTTE or with the People's Liberation Organization of Tamil Eelam (PLOTE). He claims that the authorities learned of his connections with the LTTE.'

21 In discussing the appellant's evidence and making its findings, the Tribunal rejected any suggestion that the appellant might seriously be thought to be an active supporter of the LTTE or any armed group. In relation to the claim that he had to dig bunkers for the LTTE the Tribunal noted that such activity had been commonplace in Jaffna, encompassing the need for the local population to protect itself in case of shelling by the military. The appellant

had not experienced any harm as a result of merely digging bunkers and the Tribunal found any prospect of adverse attention from the authorities for that reason to be remote.

22 The Tribunal did not accept that the authorities had discovered the appellant had a significant role with the LTTE over a substantial period of time. They would not have released him after only a few weeks of detention and allowed him to travel to Colombo. Additionally the Tribunal noted that PLOTE was a former militant group now operating openly as a pro-government force. It said:

'It is implausible that in 1999 the applicant would have been detained for involvement with an organization such as PLOTE. In weighing all the relevant information the Tribunal concludes that the applicant has fabricated his claim of involvement with the LTTE and of continuing problems with the authorities due to his association with the LTTE or PLOTE.'

23 The fact that the appellant had been able to return to Vavuniya before going to Colombo indicated to the Tribunal that he had again satisfied security forces that he was not a security risk. The Tribunal found accordingly.

24 The Tribunal found no material to indicate that the appellant had engaged in activity in Colombo that brought suspicion upon him. It was not satisfied that he had been detained and beaten in Colombo on account of his race or for any other Convention reason. The appellant had provided no satisfactory reason for his return to Vavuniya. Although he claimed he was escaping mistreatment in Colombo he had claimed worse treatment in Vavuniya. The Tribunal did not find it credible that the appellant would voluntarily return to Colombo and then reside there for so long in hiding.

25 The fact that the appellant was able to depart Sri Lanka on a passport in his own name indicated that he was not wanted by the authorities and had no actual need to retain a low profile while residing in Colombo.

26 The Tribunal referred to independent country information from a number of sources. It concluded as follows:

'There is no doubt that Tamils have often been at risk of persecution in Colombo and elsewhere in recent years. The evidence also indicates, however, that almost half the population of Colombo is Tamil and that the risk of persecution is very far from universal. Aforementioned information indicates that, apart from those who have fled the authorities in the north, those most at risk are recently arrived young people without established links to Colombo.

In the present case the applicant has a history of residence in Colombo of at least a year and no credible claims of harm there for any Convention reason. His sister resided there with him, at least for a time. The applicant registered with the authorities, thus indicating he established a valid purpose for residing in Colombo, as well as indicating he was not regarded as a security risk. The Tribunal is not satisfied that he has no work history or significant family or personal contacts still in

Colombo. In all the circumstances the Tribunal finds it would be reasonable for the applicant to again take up residence in the capital where he does not face any real chance of persecution for any Convention reason.

In considering all the circumstances of this case, including cumulatively, the Tribunal finds that the applicant does not have a well-founded fear of persecution for any Convention reason.'

The Tribunal's findings in relation to Colombo show that it proceeded upon the footing, consistently with what it understood the appellant's claims to be and consistently with the country information before it, that the claimed apprehended persecution in Colombo was at the hands of the authorities not PLOTE and that there was no basis for the appellant to fear persecution from the authorities in Colombo for any Convention reason.

The Application for Judicial Review of the Tribunal's Decision

27 The appellant sought judicial review of the Tribunal's decision, filing an application in this Court seeking mandamus and certiorari under s 39B of the *Judiciary Act*. The application was dated 6 November 2001. There were no grounds stated in the application. In the supporting affidavit it was said that the Tribunal's decision was infected by error in the following ways:

'a) The RRT found that the applicant had fabricated his claim of involvement with the LTTE as a cook between 1996 and January 1999 and of his continuing problems with the authorities due to his association with the LTTE. In making this finding, the RRT ignored parts of the applicant's claims in the statement attached to his application for a protection visa submitted in June 2001, in his interview with an officer of the Department on 26 June 2001, and in his oral hearing with the RRT on 19 September 2001. In doing so, the RRT ignored relevant material or reached a decision that could not reasonably have been reached, or reached a decision without reasonable or rational foundation, giving rise to jurisdictional error.

b) The RRT accepted the applicant's claim that he dug bunkers for the LTTE for a period of time. However, the RRT's finding that any prospect of adverse attention from the authorities on the basis of this activity was remote was vitiated by jurisdictional error.'

The Reasons for Judgment at First Instance

28 In his reasons for judgment delivered on 19 March 2002, Tamberlin J observed that there were errors of law or fact said to have been committed by the RRT which went to its jurisdiction. His Honour characterised these errors in two ways:

‘The first is that the RRT misunderstood the claims made by the applicant and therefore did not address the claims advanced so that there was constructive failure to exercise jurisdiction. The second, is that the RRT wrongly assumed that newspaper reports supported its findings as to the purpose of digging bunkers when in fact the articles were silent on the matter. It was also contended that the RRT acted on irrelevant material. In the alternative, it is said that the RRT has not given genuine and realistic consideration to the applicant’s claims.’

These grounds presumably emerged in part from later submissions made to his Honour as they did not appear in this form in the application for judicial review or the supporting affidavit.

> 29 At the time of his Honour’s decision the High Court had not given its judgment in *Plaintiff S157/2002* relating to the operation of the privative clause, s 474 of the *Migration Act*. His Honour took the view that s 474 made it evident that the decision of the Tribunal was intended authoritatively to resolve questions of fact and law before it. That principle was qualified by authorities to the effect that a privative clause would not prevent judicial review in the case of an unconstitutional decision, breach of an indispensable pre-condition to jurisdiction or the exercise of power or where the empowering statute made it clear that compliance with a condition was essential to the exercise of jurisdiction.
>
> 30 The appellant submitted to his Honour that the RRT had erred in dealing with his claims. He had claimed that he was detained by the PLOTE for involvement with the LTTE, not by the authorities. But the Tribunal had said:

‘He claims that he was interrogated, beaten and otherwise mistreated by the authorities while detained for two weeks on suspicion of involvement with the LTTE or with the People’s Liberation Organization of Tamil Eelam (PLOTE). He claims that the authorities learned of his connections with the LTTE.’

This statement, it was said, indicated jurisdictional error because the claim for protection was dealt with on an erroneous basis and the error was an important consideration affecting the decision.

> 31 His Honour referred to the passage from the decision record of the delegate dated 9 August 2001 in which the delegate referred to the appellant’s claim that he had been arrested by PLOTE people and detained and tortured during interrogation by the PLOTE. His Honour said:

‘This statement in the delegate’s decision clearly indicates that the applicant’s claim was **not** detention and torture by the **authorities**, but **by PLOTE**. It was the decision of the delegate that was the subject of the review by the RRT and this statement as to the nature of the claim was before the RRT when considering the decision. Other material before the RRT did not specify clearly who detained and tortured the applicant. On the material I have referred to, other statements by the applicant and the relevant part of the transcript of the hearing before the RRT which was tendered in evidence, I am satisfied that there was an error by the RRT which could have

affected the outcome because it bears directly on the question whether there were grounds, based on past persecution, for the applicant believing there is a real risk of persecution if returned.'

> 32 Applying s 474 as he had construed it to that case however, his Honour found that the RRT decision was within the protection afforded by the section. His Honour also rejected the contention that the RRT had not given any realistic or genuine consideration to the appellant's claims. He said that this was not an available ground of review but in any event he was not persuaded that there had been such a failure.

The Appeal from Tamberlin J

> 33 The judgment delivered by Tamberlin J was one of five judgments in unrelated matters which were the subject of appeals heard together by a specially constituted Full Court of five and eventually reported as *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298. The Court there held by a majority of three to two, that judicial review would be available, notwithstanding s 474 of the Act, in the following cases:

(a) Where the decision the subject of review was not made in a bona fide attempt to exercise the power which the Act reposed in the decision-maker.

(b) Where the decision did not relate to the subject matter of the Act.

(c) Where the decision was not reasonably capable of reference to the power conferred by the Act.

(d) Where the purported exercise of power contravened a condition precedent to, or a final or inviolable limitation upon the powers, duties and functions of the decision-maker.

> 34 It is unnecessary for present purposes to revisit the general reasoning of the majority judgments in *NAAV*. It was however an important element of the majority judges' judgments that jurisdictional error was not a ground of review which could withstand the operation of s 474. All of the judges were of the view that the appeal in *NABE,* that is the present matter, should be dismissed. Their reasons for so concluding may be summarised as follows:

Black CJ at [4] – For the reasons given by von Doussa J.

Beaumont J at [155] – [158] – The Tribunal had acted bona fide, its decision related to the subject matter of the Actand it was reasonably capable of reference to the power conferred upon it by the Act. This was at its highest a case of error within jurisdiction.

Wilcox J at [342] and [344] – The Tribunal's error was 'merely an error of fact' and not a jurisdictional error.

French J at [562] – The Tribunal's error was not jurisdictional.

von Doussa J at [650] – There was no jurisdictional error by the RRT. The error identified by Tamberlin J was an error of fact that did not amount to jurisdictional error. Even if it were a jurisdictional error the decision was validated by s 474 of the Act.

The common ground of all of the judges was that there was no jurisdictional error in the case albeit, on the view of the majority, a propounded jurisdictional error would not provide a sufficient basis for review in the face of s 474 of the Act unless it fell within one of the cases of bad faith, want of relationship between the decision and the subject matter of the Act and the power conferred by the Act and breach of a condition precedent to or a final or inviolable limitation upon the relevant power.

The Decision of the High Court in *Plaintiff S157*

35 The majority judgments in *NAAV* were effectively overruled by the decision of the High Court in *Plaintiff S157/2002.* The propositions emerging from the joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ in that case were summarised by the Full Court in *Lobo v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 200 ALR 359 at 371 as follows:

'1. Parliament cannot give power to any judicial or other body in excess of constitutional power: at [58] citing Dixon J in R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598.

2. Parliament cannot impose limits on the authority of a body with the intention that any excess of that authority means invalidity and at the same time deprive the High Court of authority to restrain the invalid action by prohibition: at [58] citing Hickman.

3. If legislation purports to impose limits on authority and contains a privative clause it is a question of interpretation of the whole legislative instrument whether the transgression of the limits (if bona fide and bearing every appearance of an attempt to pursue the power) necessarily spells invalidity: at [58] citing Hickman.

4. The Hickman principle is simply a rule of construction allowing for the reconciliation of apparently conflicting statutory provisions: at [60].

5. The meaning of a privative clause must be ascertained from its terms and if that meaning appears to conflict with the provision pursuant to which some action has been taken or some decision made its effect will depend entirely on the outcome of its reconciliation with that other provision: at [60].

6. The protection which a privative clause purports to afford will be inapplicable unless the three Hickman provisos are satisfied:

   (i) that there has been a bona fide attempt to exercise the power in question;

   (ii) that the decision relates to the subject matter of the legislation;

   (iii) that the decision is reasonably capable of reference to the power: at [64] read with [62].

7. Section 474 does not effect an implied repeal of all statutory limitations or restraints upon the exercise of the power or the making of a decision under the Act: at [67] and [68].

8. It may be, by reference to the words of s 474, that some procedural or other requirements laid down by the Act are to be construed as not essential to the validity of the decision. That is a matter which can only be determined by reference to the requirement in issue in a particular case: at [69].

9. The words “under this Act” in s 474(2) are not apt to refer either to decisions purportedly made under the Act or decisions that might be made under the Act.

10. The expression “decision[s] ... made under this Act” appearing in s 474 must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act: at [76].

11. An administrative decision which involves jurisdictional error is “regarded, in law, as no decision at all”: at [76].

12. If there has been jurisdictional error because, for example, of a failure to discharge “imperative duties” or to observe “inviolable limitations or restraints”, the decision in question cannot properly be described in the terms used in s 474(2) as “a decision ... made under this Act” and is, thus not a “privative clause decision” as defined in s 474(2) and (3) of the Act: at [76].

13. Section 474 requires an examination of limitations and restraints found in the Act. There will follow the necessity to determine whether as a result of the reconciliation process the decision of the tribunal does or does not involve jurisdictional error and accordingly whether it is or is not a “privative clause decision” as defined in s 474(2) of the Act: at [78].

14. A decision flawed for reasons of a failure to comply with the principles of natural justice is not a "privative clause decision" within s 474(2) of the Act: at [83].'

36 Importantly, the judgment of the High Court established that where jurisdictional error is demonstrated an application for constitutional writs under s 75(v) or their equivalents under s 39B of the *Judiciary Act* may succeed notwithstanding the terms of s 474.

The Application for Special Leave to the High Court in the Present Proceedings

37 The judgment of the High Court in *Plaintiff S157* did not, of course, operate directly upon the decision of the Full Court in the present case. An application for special leave to appeal against that decision was heard in the High Court on 12 September 2003. The Court granted special leave and allowed the appeal. In so doing it said:

'The decision of the Full Court of the Federal Court in this matter was given before the decision of this Court in S157/2002 v The Commonwealth. Consequently, the decision of the Full Court did not address the question of jurisdictional error in the light of the principles since enunciated in that case. We consider that in the circumstances the proper course to take is to grant special leave to appeal and allow the appeal and remit the matter to the Full Court of the Federal Court for further consideration in the light of the decision in the case to which I have referred.

We make the following orders:

Special leave to appeal is granted; the appeal is allowed with costs; the orders of the Full Court of the Federal Court are set aside; the matter is remitted to the Full Court of the Federal Court for further consideration in the light of the decision of this Court in S157/2002 v The Commonwealth. The question of costs of proceedings in the Federal Court to date will be in the discretion of the Full Court when it reconsiders the matter.'

The Notice of Contention

38 On 8 June 2004, the Minister filed a notice of contention in the following terms:

'TAKE NOTICE that the respondent contends that the judgment of Tamberlin J given on 19 March 2002 should be affirmed on the grounds that:

1. the decision made by the Refugee Review Tribunal (the Tribunal) on 9 October 2001 did not involve jurisdictional error;

2. the primary judge erred in holding (at [37]) that the Tribunal's statement that the appellant claimed that he was detained by the authorities (and not by the PLOTE) was an error made by the Tribunal which could have affected the outcome; and

3. the primary judge should have held that any such error was merely an error of fact and not a jurisdictional error.'

39 The Minister had not filed a notice of contention before the Full Court at the first appeal hearing in which the question whether the Tribunal's error was jurisdictional or not was agitated by both parties. Counsel for the appellant in written submissions argued that the notice of contention was out of time. The argument is academic. The matter was remitted to this Court by the High Court to reconsider the issue of jurisdictional error in the light of the principles enunciated in *Plaintiff S157*. The characterisation of the error as jurisdictional was debated before this Court and falls for reconsideration not just in the light of *Plaintiff S157* but also in the light of subsequent High Court and other authorities mentioned later in these reasons.

Statutory Framework – The *Migration Act 1958*

40 The decision of the Tribunal in this case was made on 9 October 2001. The decision was made under Pt 7 of the *Migration Act* relating to Review of Protection Visa Decisions. The classes of reviewable decision are known as RRT-reviewable decisions (s 411(1)). They include decisions to refuse to grant protection visas (s 411(1)(c)). Provision is made for applications to be made for the review of RRT-reviewable decisions (s 412). The obligation of the Tribunal with respect to such applications is set out in s 414:

'(1) Subject to subsection (2), if a valid application is made under section 412 for review of an RRT-reviewable decision, the Tribunal must review the decision.

(2) The Tribunal must not review, or continue to review, a decision in relation to which the Minister has issued a conclusive certificate under subsection 411(3).'

41 The powers of the Tribunal on review are set out in s 415. It may 'for the purposes of review of an RRT-reviewable decision' exercise all the powers and discretions which the Act confers on the primary decision-maker (s 415(1)). It may affirm or vary the decision, set it aside and substitute a new decision or remit the matter for reconsideration (s 415(2)).

42 The nature of the review process emerges from the provisions of the Act relating to the conduct of such reviews. Initially the Tribunal is to be provided with a copy of the reasons for the decision under review and documents considered by the Secretary of the Department to be relevant to the review (s 418). The Tribunal is required, in conducting review, to act 'according to substantial justice and the merits of the case' (s 420(2)(b)).

43 The Tribunal may receive evidence by way of statutory declaration from the applicant and may also receive written arguments from the applicant and the Secretary (s 423). It may 'get any information that it considers relevant' (s 424) and, unless able to decide the case in favour of the applicant on the papers, must afford the applicant the opportunity to appear, give evidence and present arguments (s 425).

44 Where the applicant before the Tribunal seeks review of a decision refusing the grant of a protection visa, the function of the Tribunal is informed by the statutory criteria for the grant of such visas. In particular, s 36(2)(a) of the Act requires that an applicant for a protection visa be '... a non-citizen in Australia to whom the Minister [relevantly the Tribunal] is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'. Absent various qualifications which are not material for present purposes, the relevant protection obligations which arise under Art 33 of the Refugees Convention are met if the applicant satisfies the definition of a refugee in Art 1A(2) of the Refugees Convention. That definition describes a refugee as a person who:

'Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.'

Statutory Framework – The Jurisdiction of the Federal Court

45 The relevant original jurisdiction of this Court is conferred by s 39B of the *Judiciary Act* which provides, inter alia:

'(1) Subject to subsections (1B) and (1C), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

(a) in which the Commonwealth is seeking an injunction or a declaration; or

(b) arising under the Constitution, or involving its interpretation; or

(c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.'

It is not necessary to refer to the other sections or the qualifications upon the jurisdiction conferred by s 39B(1). They are not material for present purposes.

46 Section 39B was introduced into the *Judiciary Act* by the *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth). In the Second Reading Speech, given on 21 September 1983 in the House of Representatives, the Hon Lionel Bowen, said, inter alia:

‘The first amendment inserts a new section 39B into the Act. Paragraph 75(v) of the Constitution confers original jurisdiction on the High Court of Australia in matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. The High Court has a heavy work load and one way of reducing that work load would be to confer jurisdiction in paragraph 75(v) matters on the Federal Court of Australia. The High Court cannot be divested of its jurisdiction in this area.

Section 44 of this Act empowers the High Court to remit matters pending before it to any Federal court, or court of a State or Territory where that Court has jurisdiction in respect of the subject matter and the parties. The proposed amendment will not only confer jurisdiction so that proceedings under paragraph 75(v) may be commenced in the Federal Court but will also allow the High Court to remit to the Federal Court matters commenced before it.’

47 As is apparent from the language of s 39B and its identity with that of s 75(v) of the Constitution and as also appears from the Second Reading Speech, the legislative intention was to confer on the Federal Court, subject to some specific exceptions, the full amplitude of the original jurisdiction of the High Court under s 75(v).

The Review Process as a Condition of Power

48 The review process, as is apparent from the provisions of the Act involves, in a case such as the present, a determination on the merits of whether or not the applicant satisfies the criteria for a protection visa. The conduct of a review is a necessary condition of the exercise of the Tribunal’s powers in making a final decision of the kind set out in s 415(2). A failure to undertake a review would vitiate any purported decision made pursuant to s 415. Like provisions with respect to the Immigration Review Tribunal condition the valid exercise of that Tribunal’s powers so that, for example, a failure to afford an applicant the oral hearing required by the Act where a favourable decision is not possible on the papers, would render any purported decision invalid. This is not just a failure of natural justice. It is a failure to conduct a review as required by the Act – *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [14] per Gleeson CJ, [43] per Gaudron and Gummow JJ (McHugh J agreeing at [63]), [149] per Hayne J and [163] per Callinan J. In discussing the review function, Callinan J said at [163]:

‘If one thing is abundantly clear, it is that the Tribunal must, if an application has properly been made as it was here, review the Minister’s decision. This means that the Tribunal must exercise the jurisdiction of reviewing the Minister’s decision: that is to say, it must make a decision on the application and any documents properly submitted by an applicant, with, as part of, or relevant to it. To fail, or refuse to receive and consider such a document, and to make a decision without regard to it, is a failure to exercise jurisdiction.’

49 As the Full Court observed in *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 75 ALD 630 at 640 [44]:

‘It is central to the exercise of the dispositive powers conferred by s 415 that the tribunal has first conducted a review. That is to say it must have considered the application which is the subject of review in light of the information, evidence and arguments which are relevant to the application and which are provided to it or which it obtains for itself. So much is contemplated by ss 423, 424, 425 and 426 of the Act.’

50 In the context of the statutory scheme for judicial review under the former Pt 8 of the *Migration Act,* the scope of the argument that the Tribunal had failed to consider an application or failed to conduct a review was described in the Full Court as narrow and limited and as likely to succeed only in extreme cases – *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 444 [78]; *Minister for Immigration and Multicultural Affairs v Tedella* (2001) 195 ALR 84 at 88 [15]. One example, offered in *Anthonypillai,* of failure to consider an application and to conduct a review included misapprehension of the nature of the review process by confusing it with an appellate review. Another example was the hypothetical case in which the Tribunal paid lip service to its task, such as by deciding the application without reading the relevant material. What was said in *Anthonypillai* however must be read now in the light of *Bhardwaj.*

51 It had been suggested in a number of cases preceding *Anthonypillai* that a failure by the Tribunal to give ‘proper genuine and realistic consideration’ to the application before it disclosed error reviewable under the former Pt 8. That proposition was rejected in *Anthonypillai* at 440-441 [59]. The putative ground was said to create ‘... a kind of general warrant, involving language of indefinite and subjective application, in which the procedural and substantive merits of any Tribunal decision can be scrutinised’ – at 442 [65]. See also *Pollocks v Minister for Immigration and Multicultural Affairs* (2001) 195 ALR 73 at 80 [30]. Such language used in judgments must not be treated like the words of a statute. The touchstone must always be the words of the empowering Act and the nature of the function which it confers upon the decision-maker.

Error of Fact and Jurisdictional Error in the Refugee Review Tribunal

52 The question that arises in the present case is whether and to what extent a factual error on the part of the Tribunal may evidence or constitute a failure to carry out its review function or otherwise amount to a failure of jurisdiction amenable to the writ of certiorari and/or mandamus and prohibition.

53 It is desirable first to restate the uncontroversial proposition that mere factual error by the Tribunal will not ground judicial review unless it relates to a jurisdictional fact or is a manifestation of some error of law, substantive or procedural, which constitutes jurisdictional error and thereby vitiates the purported decision. This is evident from the discussion, in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, of jurisdictional error as a ground for the review of Tribunal decisions under the former Pt 8 of the *Migration Act*. If the Tribunal identifies a wrong issue or poses the wrong question for itself or does not have regard to relevant material or takes into account irrelevant material, so as to affect the exercise

of its powers, error of law and/or jurisdictional error may be identified (at 351-352 per McHugh, Gummow and Hayne JJ). An error of fact in the course of a decision is unlikely to be a jurisdictional error unless the fact is a jurisdictional fact:

'Courts should be slow to find that an erroneous finding of fact or an error of reasoning in finding a fact, made in the course of making a decision, demonstrates that an administrative tribunal so misunderstood the question it had to decide that its error constituted a jurisdictional error.'

Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen (2001) 177 ALR 473 at 481 [35] per McHugh J.

54 The question was further discussed in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59. McHugh and Gummow JJ, with whom Callinan J agreed, rejected a submission by the Minister that the presence of an error of law was essential for a finding of jurisdictional error to support the grant of relief under s 75(v) of the Constitution. They said (at 71 [54]):

'The introduction into this realm of discourse of a distinction between errors of fact and law, to supplant or exhaust the field of reference of jurisdictional error, is not to be supported.'

Error of law may occur within jurisdiction – *S20/2002* at 72 [57]. The line drawn between factual and legal matters may vary according to the purposes it serves – at 73 [58]. Their Honours cautioned against importing into s 75(v) wider approaches to the consideration of factual errors derived from statutory jurisdictions providing for appeals on questions of law or systems of judicial review. Examples of such jurisdictions are the jurisdiction conferred on the Federal Court by s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) to hear appeals from AAT decisions on questions of law and that conferred on the Court by the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The observations in the joint judgment in *S20/2002* did not offer any clear guidance upon the circumstances in which factual error may amount to jurisdictional error for the purposes of the exercise by the High Court of its constitutional jurisdiction under s 75(v) or the exercise by this Court of its analogous statutory jurisdiction under s 39B of the *Judiciary Act*. The comments did, however, indicate that, absent a question of jurisdictional fact, which in itself may be a matter of some complexity involving questions of fact and law, the circumstances in which factual error will amount to or evidence jurisdictional error are likely to be quite limited.

Failure to Deal with a Claim – Express and Implied Claims

55 Although the discussion in *S20* did not set any precise limit upon the scope of factual error which may amount to or indicate jurisdictional error there is, in the case of Refugee Review Tribunal decisions, one circumstance in

which it is clearly established that the absence of a finding of a relevant fact may amount to jurisdictional error. Where the Tribunal fails to make a finding on '... a substantial, clearly articulated argument relying upon established facts' that failure can amount to a failure to accord procedural fairness and a constructive failure to exercise jurisdiction – *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 at 394 [24] per Gummow and Callinan JJ, Hayne J agreeing at 408 [95]. Although not expressly so identified in that case, the constructive failure to exercise jurisdiction may be seen as a failure to carry out the review required by the Act. The joint judgment of Gummow and Callinan JJ in *Dranichnikov* described the task of the Tribunal where the applicant relied upon membership of a particular social group. Their Honours said (at 394 [26]):

'... the task of the tribunal involves a number of steps. First the tribunal needs to determine whether the group or class to which an applicant claims to belong is capable of constituting a social group for the purposes of the Convention. That determination in part at least involves a question of law. If that question is answered affirmatively, the next question, one of fact, is whether the applicant is a member of that class. There then follow the questions whether the applicant has a fear, whether the fear is well-founded, and if it is, whether it is for a Convention reason.'

In that case the Tribunal should have decided the matter which was put to it by reference to the particular social group defined in the applicant's submissions – namely entrepreneurs and businessmen in Russia who publicly criticise law enforcement authorities for failing to take action against crime or criminals. Instead it decided whether the applicant's membership of the group of 'businessmen in Russia' was a reason for his persecution.

56 The observations cited reflect the general principle that the first task of the Tribunal is to determine whether the applicant's claims are claims of a well-founded fear of persecution for one of the reasons set out in Art 1A(2) of the Refugees Convention. Those are questions of characterisation which involve in part questions of law. The factual questions that follow are, as in *Dranichnikov,* whether the applicant has a fear of persecution, whether it is well founded and if so whether the apprehended persecution is for a Convention reason. Those logical steps emerge as necessary elements of the Tribunal's review function by reference to the nature of the decision it is called on to review. The way in which it discharges that function flows from the powers and procedures prescribed for the Tribunal in the conduct of reviews and the use of the word 'review'.

57 The nature of the review function was described by Allsop J (with whom Spender J agreed) in *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244 at 259 [42]:

'The requirement to review the decision under s 414 of the Act requires the tribunal to consider the claims of the applicant. To make a decision without having considered all the claims is to fail to complete the exercise of jurisdiction embarked on. The claim or claims and its or their component integers are considerations made mandatorily relevant by the Act for consideration ... It is to be distinguished from

errant fact finding. The nature and extent of the task of the tribunal revealed by the terms of the Act... make it clear that the tribunal's statutorily required task is to examine and deal with the claims for asylum made by the applicant.'

> 58 The review process is inquisitorial rather than adversarial. The Tribunal is required to deal with the case raised by the material or evidence before it – *Chen v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 157 at 180 [114] (Merkel J). There is authority for the proposition that the Tribunal is not to limit its determination to the 'case' articulated by an applicant if evidence and material which it accepts raise a case not articulated – *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28 at 63 (Merkel J); approved in *Sellamuthu v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 287 at 293 – 294 (Wilcox and Madgwick JJ). By way of example, if a claim of apprehended persecution is based upon membership of a particular social group the Tribunal may be required in its review function to consider a group definition open on the facts but not expressly advanced by the applicant – *Minister for Immigration and Multicultural Affairs v Sarrazola (No 2)* (2001) 107 FCR 184 at 196 per Merkel J, Heerey and Sundberg JJ agreeing. It has been suggested that the unarticulated claim must be raised 'squarely' on the material available to the Tribunal before it has a statutory duty to consider it – *SDAQ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 265 at 273 [19] per Cooper J. The use of the adverb 'squarely' does not convey any precise standard but it indicates that a claim not expressly advanced will attract the review obligation of the Tribunal when it is apparent on the face of the material before the Tribunal. Such a claim will not depend for its exposure on constructive or creative activity by the Tribunal.

> 59 There is some authority which might be taken to suggest that the Tribunal is never required to consider a claim not expressly raised before it. In *SCAL v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 301, membership of a 'particular social group' was put to the Tribunal as a Convention ground for apprehended persecution. The Tribunal was held 'not obliged to consider whether some other social group might be constructed ...' at [19]. That decision however turned upon particular circumstances. Its correctness is not in contention here. It does not establish a general rule that the Tribunal, in undertaking a review, can disregard a claim which arises clearly from the materials before it.

> 60 In *SGBB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 364 at 368 [17], Selway J referred to the observation by Kirby J in *Dranichnikov,* at 405, that '[t]he function of the Tribunal, as of the delegate, is to respond to the case that the applicant advances'. He also referred to the observation by von Doussa J in *SCAL v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 548 that '[n]either the delegate nor the Tribunal is obliged to consider claims that have not been made' (at [16]). Selway J however went on to observe in *SGBB* (at [17]):

'But this does not mean the application is to be treated as an exercise in 19th Century pleading.'

His Honour noted that the Full Court in *Dranichnikov v Minister for Immigration & Multicultural Affairs* [2000] FCA 1801 at [49] had said:

'The Tribunal must, of course, deal with the case raised by the material and evidence before it. An asylum claimant does not have to pick the correct Convention "label" to describe his or her plight, but the Tribunal can only deal with the claims actually made.'

His Honour, in our view, correctly stated the position when he said (at [18]):

'The question, ultimately, is whether the case put by the appellant before the tribunal has sufficiently raised the relevant issue that the tribunal should have dealt with it.'

This does not mean that the Tribunal is only required to deal with claims expressly articulated by the applicant. It is not obliged to deal with claims which are not articulated and which do not clearly arise from the materials before it.

> 61 In *STYB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 705, Selway J questioned whether the comments made by Merkel J in *Paramananthan* accurately reflected the position. He said (at [15]):

'Whether or not those comments were correct when they were made, they may not now accurately reflect the jurisdiction of this Court. That jurisdiction is limited to the identification of jurisdictional errors. The question in this context is whether the Tribunal has made a jurisdictional error in not considering a claim that has not been made. In my view it does not make a jurisdictional error in such circumstances, providing, of course, that it correctly identifies the legal issues relevant to the claim that is made: contrast the majority and minority reasons in Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112.'

We are of the view that the observations by Merkel J in *Paramananthan,* by the Full Courts in *Sellamuthu* and *Sarrazola (No 2)* and by Cooper J in *SDAQ* are consistent with the proposition that the Tribunal is not required to consider a case that is not expressly made or does not arise clearly on the materials before it. The Tribunal's obligation is not limited to procedural fairness in responding to expressly articulated claims but, as is apparent from *Dranichnikov*, extends to reviewing the delegate's decision on the basis of all the materials before it.

> 62 Whatever the scope of the Tribunal's obligations it is not required to consider criteria for an application never made. The application for protection visas by a mother and her children on the basis that they were refugees was not required to be considered as though it were an application in their capacity as the family of a man who had been granted a temporary protection visa – *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte S134/2002* (2003) 195 ALR 1 at 8-9 [31]-[32]. Gleeson CJ generalised from this, albeit in dissent, in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 112 at 114 [1]:

‘Proceedings before the tribunal are not adversarial; and the issues are not defined by pleadings, or any analogous process. Even so, this court has insisted that, on judicial review, a decision of the tribunal must be considered in the light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant, or an applicant’s lawyers, at some later stage in the process.’

> 63 It is plain enough, in the light of *Dranichnikov*, that a failure by the Tribunal to deal with a claim raised by the evidence and the contentions before it which, if resolved in one way, would or could be dispositive of the review, can constitute a failure of procedural fairness or a failure to conduct the review required by the Act and thereby a jurisdictional error. It follows that if the Tribunal makes an error of fact in misunderstanding or misconstruing a claim advanced by the applicant and bases its conclusion in whole or in part upon the claim so misunderstood or misconstrued its error is tantamount to a failure to consider the claim and on that basis can constitute jurisdictional error. The same may be true if a claim is raised by the evidence, albeit not expressly by the applicant, and is misunderstood or misconstrued by the Tribunal. Every case must be considered according to its own circumstances. Error of fact, although amounting to misconstruction of an applicant’s claim, may be of no consequence to the outcome. It may be ‘subsumed in findings of greater generality or because there is a factual premise upon which [the] contention rests which has been rejected’ – *Applicant WAEE* (at 641 [47]). But as the Full Court said in *WAEE* (at [45]):

‘If the tribunal fails to consider a contention that the applicant fears persecution for a particular reason which, if accepted, would justify concluding that the applicant has satisfied the relevant criterion, and if that contention is supported by probative material, the tribunal will have failed in the discharge of its duty, imposed by s 414 to conduct a review of the decision. This is a matter of substance, not a matter of the form of the tribunal’s published reasons for decision.’

In that case the appellant, who was an Iranian citizen, put to the Tribunal that the marriage of his son to a Muslim woman in Iran had ramifications for him and his family. The Tribunal made no express reference in its discussion and findings to the claimed fears of persecution which arose out of the marriage by the appellant’s son to a Muslim woman although it made reference to the claim in its overview of the appellant’s case. The Court held that the Tribunal had failed to consider an issue going directly to the question whether the criterion under s 36 of the Act was satisfied. The Court held that the Tribunal had therefore failed to discharge its duty of review and had made a jurisdictional error.

Whether the Tribunal’s Decision was Affected by a Jurisdictional Error

> 64 It was submitted for the appellant that in the light of the decision of the High Court in *Plaintiff S157* the error found to have occurred in the present case went to the jurisdiction of the Tribunal. The Tribunal, it was said, had not considered the appellant’s claim to a protection visa on the basis advanced by

him. That error was said to have led to a constructive failure to exercise jurisdiction falling within the principles enunciated in *Dranichnikov.*

65 The Minister, on the other hand, relied upon the reasoning of Wilcox J in the first Full Court. That is to say, at no time did the appellant claim to have a fear of persecution at the hands of PLOTE as distinct from the authorities. The claimed mistreatment by PLOTE was not a separate claim requiring evaluation. It was relevant to the fear of persecution by the authorities. On that basis the error was an error of fact only. Moreover, whatever the truth about the PLOTE incident, there was no reason for apprehended future mistreatment from that source. The Minister submitted that nothing in *Dranichnikov* detracted from the first Full Court in this case.

66 In the course of oral argument, counsel for the appellant referred to the PLOTE as 'pro-government' but did not go so far as to suggest that there was material to support the conclusion that PLOTE was a pro-government agency. He also accepted that the appellant had not made any claim that he lacked effective State protection from persecution by PLOTE. However counsel went on and said:

'As long as the evidence is there, that is something that the tribunal has to consider and if the tribunal had done its job properly and had not made this egregious error as to who it was who inflicted the most inhumane treatment upon him in Vavuniya, then it would necessarily have had to go on to consider in the circumstances whether he could rely upon government protection either in Jaffna Peninsula or in Colombo, because while, because while, as the tribunal mentioned, there is a large Tamil population in Colombo, as the applicant properly pointed out, the majority of those people are in fact Colombo born and bred. People who are at risk and who are suspected of being associated with the Tamil Tigers are young men who come from the north of the state, and that's expressly mentioned by the tribunal.'

The PLOTE was not the government nor was it said to be an agent of government. The way in which counsel for the appellant encapsulated his argument to this Court was to say that, had the Tribunal correctly apprehended the appellant's evidence about persecution by PLOTE it would have had to consider whether there was State protection against that persecution.

67 The way in which the claim of persecution by PLOTE was formulated before the Tribunal was not a model of clarity. In his letter of 18 September 2001 to the Tribunal, accompanying the application for review, the appellant's migration agent referred to persecution of the appellant by 'the authorities and the anti-LTTE groups'. He also made express reference to the appellant's detention by the PLOTE and the fact that he had been questioned by members of PLOTE about the LTTE. He referred to persecution 'by the authorities and other rival groups'. The latter could reasonably be taken in context as including a reference to PLOTE. Nothing was said in the letter specifically about the want of State protection from persecution by PLOTE or other groups. The statement that the appellant feared persecution by the authorities and other rival groups could arguably be seen as carrying that implication. It is however significant that the precise ground of failure to

consider an implied claim of want of State protection from PLOTE persecution was not raised in the application for judicial review before Tamberlin J. It was not the subject of any express claim before the Tribunal. It seems to have emerged by way of submission in this second round appellate hearing.

68 Although such a claim might have been seen as arising on the material before the Tribunal it did not represent, in any way, 'a substantial clearly articulated argument relying upon established facts' in the sense in which that term was used in *Dranichnikov.* A judgment that the Tribunal has failed to consider a claim not expressly advanced is, as already indicated in these reasons, not lightly to be made. The claim must emerge clearly from the materials before the Tribunal. In our opinion the judgment that the Tribunal, by reason of the error it made about the appellant's involvement with PLOTE, failed to consider an unexpressed claim of want of effective State protection against persecution by PLOTE, is not open having regard to the thresholds required for such a judgment by the authorities to which we have referred. This case does demonstrate an unfortunate factual error which, as Tamberlin J found, contributed to the Tribunal's adverse finding as to credibility and could have affected the outcome of the review by the Tribunal. It did not, however, constitute jurisdictional error in the sense earlier discussed. It was, as the members of the Full Court found on the first occasion, an error of fact within jurisdiction.

Conclusion

69 For the preceding reasons the appeal must be dismissed with costs.

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 16 September 2004

Counsel for the Appellant:	Dr JL Cameron
Counsel for the Respondent:	Mr PR Macliver
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	9 August 2004
Date of Judgment:	16 September 2004