FEDERAL COURT OF AUSTRALIA

ABAR15 v Minister for Immigration and Border Protection (No 2) [2016] FCA 721

Appeal from:	*ABAR15 v Minister for Immigration & Anor* [2016] FCCA 638
File number(s):	SAD 98 of 2016
Judge(s):	**CHARLESWORTH J**
Date of judgment:	17 June 2016
Catchwords:	**MIGRATION** –protection visa –complementary protection regime – real risk of significant harm in the nature of domestic violence – existence of laws in Vietnam prohibiting domestic violence – whether laws effectively implemented **ADMINISTRATIVE LAW** – legal unreasonableness – application for protection visa - where Tribunal found that the applicant could obtain protection from authorities in Vietnam – where Tribunal ignored qualifications stated in country information upon which it relied – where Tribunal's findings not available on the material before it
Legislation:	*Migration Act 1958* (Cth), ss 5, 36, 189, 414, 424A, 430, 474, 476 *Tribunals Amalgamation Act 2015* (Cth) *Federal Court of Australia Act 1976* (Cth), s 28(1)(c), *Migration Amendment (Complementary Protection) Act 2011* (Cth)
Cases cited:	*A v Minister for Immigration and Multicultural Affairs* (1999) 53 ALD 545 *ABAR15 v Minister for Immigration & Anor* [2016] FCCA 638 *ABAR15 v Minister for Immigration and Border Protection* [2016] FCA 363 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 *Craig v South Australia* (1995) 184 CLR 163

Minister for Immigration and Border Protection v MZYTS (2013) 230 FCR 431, [2013] FCAFC 114

Minister for Immigration and Border Protection v Singh (2014) 231 FCR 437

Minister for Immigration and Border Protection v Stretton [2016] FCAFC 11

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332

Minister for Immigration and Citizenship v MZYYL (2012) 207 FCR 211, (2012) 133 ALD 465, [2012] FCAFC 147

Minister for Immigration and Citizenship v SZIAI (2009) 83 ALRJ 1123

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611

Minister for Immigration and Citizenship v SZQRB (2013) 210 FCR 505, [2013] FCAFC 33

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

NAHI v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 10

Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476

Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82

SZATV v Minister for Immigration and Citizenship (2007) 233 CLR 18

VQAB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 104

VHAJ v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 131 FCR 80

Date of hearing:	18 May 2016
Registry:	South Australia
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	104
Counsel for the Appellant:	Ms C O'Connor SC
Solicitor for the Appellant:	Camatta Lempens

Counsel for the Respondents:	Mr S McDonald
Solicitor for the Respondents:	Australian Government Solicitor

ORDERS

SAD 98 of 2016

BETWEEN:	**ABAR15** Appellant
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
JUDGE:	**CHARLESWORTH J**
DATE OF ORDER:	**17 JUNE 2016**

THE COURT ORDERS THAT:

1. The appeal is allowed.
2. The appellant's application for review of the first respondent's decision to refuse her application for a protection visa is remitted to the second respondent for hearing and determination.
3. The first respondent is to pay the appellant's costs of and incidental to the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

CHARLESWORTH J:

1 The appellant is a 54 year old citizen of Vietnam. She arrived in Australia in August 2008 as the holder of a sponsored family visa issued under the *Migration Act 1958* (Cth) (Act). When that visa expired in November 2008, the appellant remained in Australia without a valid visa.

2 The appellant was detained as an unlawful non-citizen pursuant to s 189 of the Act on 16 April 2014. She has remained in immigration detention since that time. On 23 April 2014, she made an application for a Protection (Class XA) visa (Visa). In support of her application, the appellant made a claim to the effect that there was a real risk that she would suffer significant harm should she be returned to Vietnam. More specifically, she claimed to have suffered severe domestic violence at the hands of her husband in Vietnam and that he had threatened to kill her should she return. She claimed that she had remained in Australia without a visa because she feared for her life and safety.

3 The appellant's application for the Visa was refused by a delegate of the first respondent (Delegate). The appellant made an application for review of the Delegate's decision to the then-named Refugee Review Tribunal (Tribunal). The Tribunal accepted the appellant's claim that she had been the victim of violence inflicted by her husband. The Tribunal nonetheless found that the appellant could obtain protection from the authorities in Vietnam should she return there. The Tribunal determined that the appellant did not satisfy the criteria for the Visa and affirmed the Delegate's decision.

4 The appellant commenced judicial review proceedings in the Federal Circuit Court. On 24 March 2016, the Federal Circuit Court dismissed the application for judicial review: *ABAR15 v Minister for Immigration & Anor* [2016] FCCA 638. This is an appeal against that judgment.

5 For the reasons given below, the appeal should be allowed.

Injunction

6 The appeal first came before me at short notice on 11 April 2016. On that day, on the application of the appellant, I granted an interim injunction restraining the removal of the appellant from Australia until 5:00pm on 28 April 2016: *ABAR15 v Minister for Immigration and Border Protection* [2016] FCA 363. The first respondent (Minister) subsequently

consented to the extension of that injunction pending the hearing and determination of the appeal, having withdrawn a submission to the effect that this Court did not have jurisdiction to grant the interlocutory relief.

The appellant's claims

7 The appellant made the following claims concerning the violence inflicted on her by her husband:

(a) On one occasion, the appellant had been so severely beaten by her husband that she sustained and a concussion resulting in her spending three days in hospital.

(b) The appellant's husband had nearly killed her.

(c) The appellant's husband beat her "again and again".

(d) The beatings occurred in front of the appellant's four children.

(e) One beating was so severe it required 15 days of medical treatment, although it was unclear whether this incident is the same incident in which the appellant suffered concussion.

(f) The appellant's husband had informed the appellant that should she ever oppose him in any way he would stab her and dump her body in a river.

(g) The appellant's husband had made further threats since she came to Australia, including threats that he would buy a knife and kill their second son and that he would take revenge on her for running away from him.

(h) The appellant had not reported her husband to the police because she feared he would retaliate against her for doing so.

8 These claims were made by the appellant variously upon making her application for the Visa, and in her interview with the Delegate, and in written submissions and evidentiary materials provided to the Delegate and the Tribunal, and during the course of the Tribunal hearing. The appellant's evidence included her own statements, together with statutory declarations made by two of her children and her sister. The appellant's children stated that their mother had been beaten "pitilessly" by their father.

9 The appellant told the Tribunal that "her fear from the government was very small, but her fear of harm from her husband was very great". When the Tribunal asked "why do you think

this will happen to you if you go back?" the appellant said "because it happened before – many times".

10 In addition to the claims summarised in [7] – [9] above, the appellant claimed that the physical harm she had suffered at the hands of her husband was politically motivated in that her husband had strong Communist views and beat her because she outwardly opposed Communism. She claimed that her husband expected that she would behave as a "loyal party member" and that he would beat her if she did not comply with his expectations. In addition, the appellant told the Delegate and the Tribunal that she had not and could not report her husband's conduct to the authorities in Vietnam because of her own political profile and because of her husband's political influence.

The legal context

11 A visa may only be granted under the Act if the Minister is satisfied that the prescribed criteria for the grant of the visa are met: s 65 of the Act.

12 A primary applicant for a protection visa must satisfy either the criteria in subsection 36(2)(a) or the criteria in s 36(2)(aa) of the Act. The grounds of review before the Federal Circuit Court and the grounds of appeal before this Court concern the application of the criteria in s 36(2)(aa).

13 Section 36(2)(aa) of the Act, together with ss 36(2A), 36(2B) and 36(2C) were inserted by the *Migration Amendment (Complementary Protection) Act 2011* (Cth). Together, these provisions form what is commonly known as the "complementary protection regime" and give effect, according to their terms, to Australia's obligations under the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child: *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211 (*MZYYL*) (2012) 133 ALD 465; [2012] FCAFC 147 at [18]–[20] (Lander, Jessup and Gordon JJ).

14 The provisions forming the complementary protection regime relevantly provide:

> **36 Protection visas—criteria provided for by this Act**
>
> (2) A criterion for a protection visa is that the applicant for the visa is:
>
> (aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable

> consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non- citizen will suffer significant harm; or
>
> …
>
> (2A) A non citizen will suffer ***significant harm*** if:
>
> (a) the non-citizen will be arbitrarily deprived of his or her life; or
>
> …
>
> (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
>
> (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
>
> …
>
> (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

15 Section 36(2C) of the Act prescribes circumstances in which a non-citizen is taken not to satisfy the criterion mentioned in s 36(2)(aa), none of which apply on the present appeal.

16 Section 5 of the Act exhaustively defines the phrase "cruel or inhuman treatment or punishment":

> ***cruel or inhuman treatment or punishment*** means an act or omission by which:
>
> (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
>
> (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;
>
> but does not include an act or omission:
>
> (c) that is not inconsistent with Article 7 of the Covenant; or
>
> (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

17 It is important to recognise that the appellant's claims also obliged the Delegate and the Tribunal to consider whether the appellant was a person to whom Australia owed protection obligations by reason of s 36(2)(a). At the time of their respective decisions, s 36(2)(a) provided:

> (2) A criterion for a protection visa is that the applicant for the visa is:
>
> (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention

as amended by the Refugees Protocol; …

18 The Refugee Convention there referred to is the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967: see s 5(1) of the Act. For the purposes of s 36(2)(a) as it then stood, Australia had protection obligations under the Convention to persons described in Article 1A(2) of the Convention, namely:

> A person who owing to a 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

19 The Tribunal rejected the appellant's claim that she satisfied the criterion in s 36(2)(a). Although the appellant did not bring an application for judicial review in respect of that part of the Tribunal's decision, the Tribunal's reasons for decision on this appeal are to be read against the context of the appellant having made a claim that she fulfilled the criteria in both s 36(2)(a) and s 36(2)(aa).

The Tribunal's reasons

20 The Tribunal received written submissions prepared on behalf of the appellant by a migration agent. The submissions drew the Tribunal's attention to sources of country information, four of which concerned the situation in Vietnam with respect to the prevalence of domestic violence in that country and the effectiveness of its domestic violence laws. The Tribunal says, at [24] of its reasons:

> [24] …The submissions draw my attention to reports from various sources regarding domestic violence in Vietnam and I have had regard to those sources. …

21 The Tribunal found that the appellant had indeed been subjected to domestic violence inflicted by her husband in Vietnam. This finding is restated a number of times throughout the Tribunal's reasons and is not qualified in any way. The Tribunal does not suggest, for example, that the violence was any less severe than she had claimed, nor that any one of the particular incidents recounted in her claims had not occurred. Nor does the Tribunal suggest that the appellant should be disbelieved in her claim that her husband had threatened to kill her should she return to Vietnam. It accepted that the appellant had a genuine for her life and safety should she return. On a fair reading of the whole of the Tribunal's reasons, the

Tribunal accepted the appellant's version of events, at least to the extent that I have summarised them at [7] above.

22 Notwithstanding that it accepted the appellant's claim that she genuinely feared for her life by reason of her past treatment, the Tribunal rejected the appellant's claim that the harm she had suffered amounted to persecution so as to satisfy the criteria in s 36(2)(a) of the Act. On that subject, the Tribunal said:

> [42] I accept that the applicant fears harm at the hands of her husband, and has suffered from domestic violence at his hands while living in Vietnam. I note the supporting evidence from members of the applicant's family in Australia to this effect, and was also able to observe that the applicant became visibly distressed when the topic of the hearing turned to discuss domestic violence. Country information I have referred to below indicates that domestic violence is commonplace in Vietnam.
>
> [43] However, for the reasons set out below, I do not accept that there is any political motivation behind violence suffered by the applicant hand husband. …
>
> …
>
> [49] … While I accept that the applicant has suffered harm at the hands of her husband in the past, and genuinely fears harm from him should she returned to Vietnam, I do not accept that the applicant husband's motivations were or are political in nature. …
>
> [50] … the applicant is not a person in respect of whom Australia has protection obligations under the Refugees Convention. She does not meet the requirements of section 36(2)(a) of the Act.

23 The Tribunal rejected the appellant's claim that her husband was a person with political influence and that for that reason the police would not act on any reports of violence she made about him. It also rejected the appellant's claim that the appellant herself had a political profile such that the Vietnamese authorities would discriminate against her in the implementation of the law.

24 The Tribunal then turned to consider whether the appellant fulfilled the criterion in s 36(2)(aa) of the Act. At [56] to [61] of its reasons (to which I will later refer), the Tribunal gave a summary of the content of four country information reports concerning domestic violence in Vietnam. The reports were as follows:

(a) a report of the Immigration and Refugee Board of Canada titled *Viet Nam: Domestic Violence* and dated 8 January 2010 (the Canada IRB Report);

(b) a report of the US Department of State titled *Vietnam 2012 Human Rights Report* (the 2012 USDOS Report);

(c) a report authored by J Rasanathan and A Bhushan titled *Gender-based violence Viet Nam: Strengthening the response by measuring and acting on the social determinants of health*, prepared for a World Health Organisation conference in October 2011 (the WHO Report);

(d) a report of the United National Office on Drugs and Crime titled *Research on Law Enforcement Practices and Legal Support to Female Victims of Domestic Violence in Vietnam* dated 19-21 October 2011 (the 2011 UN Report).

25 At [36] of its reasons, the Tribunal states that it put to the appellant its view of the effect of the country information to which it had referred (emphasis added):

> [36] I explained that sources available to me indicate that the Vietnamese government has demonstrated its commitment to acting on gender based violence, including that people can become divorced easily in Vietnam, people can be charged with crimes if they commit domestic violence. **I indicated I had seen no evidence to suggest that the Vietnamese police do not act on reports of domestic violence**, although had seen that domestic violence is under reported, and people may suffer from domestic violence without ever acting on it. The applicant responded that this was 'just like me'.

26 The Tribunal made the following conclusions on the basis of the country information before it:

> [62] I am conscious that the scourge of domestic violence and the threat it poses to those affected is complex and difficult for the state to address. In the Vietnamese context, I note in particular the references in the country information to traditional family gender roles and the challenges faced by the Vietnamese authorities in responding to domestic violence and the low rate of reporting of offences. As to the effectiveness of the measures against domestic violence that form part of Vietnam's law, I note that reports are varied on their effectiveness.
>
> [63] However, the country information in my view shows that the Vietnamese government takes domestic violence seriously, and there is identifiable support available for people at risk. I note that in some sources it is acknowledged, even where criticism is mounted of the measures taken to address domestic violence, that the government works towards improving the situation; for example, USDOS in the context of education and public awareness, and the 2011 WHO report acknowledges the Vietnamese government's commitment to such measures as the Law on Domestic Violence.

27 In its concluding paragraphs, the Tribunal stated that the Vietnamese authorities do not fail to provide "reasonable" protection to victims of domestic violence and that they would afford the appellant "reasonable" protection so as to reduce the risk of her suffering significant harm to something less than a real risk. The Tribunal repeated its earlier findings that the Vietnamese authorities would not withhold protection from the appellant by reason of the appellant's own political views or because her husband wielded political influence. It is

implicit in the Tribunal's concluding remarks that the Tribunal took the view that there was no reason personal to the appellant preventing her from seeking and obtaining from the authorities in Vietnam such protection as they were able to afford and that the protection would be such that there was not a "real risk" that the appellant would suffer significant harm.

The proceedings in the Federal Circuit Court

28 The jurisdiction of the Federal Circuit Court to review a decision of the Tribunal is conferred by s 476(1) of the Act and equates to that jurisdiction conferred on the High Court under s 75(v) of the Constitution. The remedies that may be granted by the High Court on an application for judicial review under s 75(v) are only available where jurisdictional error can be demonstrated: *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 508 [83] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALRJ 1123 at 1127 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); see also s 474 of the Act.

29 As explained in *Craig v South Australia* (1995) 184 CLR 163 (*Craig*) (at 179), an administrative tribunal will make a jurisdictional error if it:

> … falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

30 In *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (*Yusuf*), McHugh, Gummow and Hayne JJ said of the list in *Craig* (at [82]):

> [82] Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it.

31 The appellant's application for judicial review before the Federal Circuit Court was made on the following grounds:

> **Ground 1**
>
> 2. The Tribunal committed jurisdictional error in its assessment of whether the applicant was in need of complementary protection.
>
> **Particulars**
>
> 2.1 The Tribunal, in finding that the applicant was a victim of domestic violence was no longer at risk of harm because of protection offered by authorities in Vietnam.
>
> 2.2 The Tribunal erred in finding at paragraphs [56] – [61] that there was evidence that victims of domestic violence in Vietnam were no longer at risk because of changes to practice and policy.
>
> 2.3 The Tribunal erred in finding that there would be less than a 'real risk' to the applicant that she would suffer harm at the hands of her husband at paragraphs [64] and [66].
>
> **Ground 2**
>
> 3. The Tribunal erred in failing to give the applicant the opportunity to provide evidence of the failure of the Vietnamese government to implement domestic violence practices and policies that made the applicant safe from domestic violence.

32 As will be seen, those grounds are as broadly stated as the grounds of appeal before this Court. Specifically, while it is alleged that the Tribunal erred in finding that there would be less than a "real risk" to the appellant if she were returned to Vietnam, no particulars are given of the manner in which the Tribunal is said to have so erred. There does not appear to have been any complaint made by or on behalf of the Minister as to the lack of particularity in the grounds of review before the Federal Circuit Court.

33 As to the first ground of review, the Federal Circuit Court found (at [89] – [90]):

> [89] Essentially, an administrative decision maker is required to provide an intelligible and reasonable explanation as to why a particular decision has been reached. In my view, there is a sufficient degree of intelligibility, to be gleaned from the Tribunal's reasons, as to why it considered there would be a sufficient degree of state based protection, available to the applicant, if she returned to Vietnam.
>
> [90] The Tribunal's finding was based on the passing of the Law on the Prevention & Control of Domestic Violence in 2007 together with the existence of processes to train police, lawyers and the legal system officials in the implementation of the law, which, in the finding of the Tribunal, evinced a commitment by the Vietnamese Government to support individuals at risk of being exposed to family violence.

34 The Court went on to say (at [94]):

> [94] In my view, the findings reached by the Tribunal, regarding the availability of state based protection, in Vietnam, for the victims of family violence, was one which was open to the Tribunal, notwithstanding the qualified nature of the material concerned.

35 As to the second ground of review, the Federal Circuit Court held (at [99]) that it was a consequence of s 424A(3)(a) of the Act that the Tribunal was under no obligation to provide the appellant with the country information upon which it proposed to rely for her comment or potential rebuttal. The learned Federal Circuit Court Judge held that, quite apart from s 424A of the Act, the issue of complementary protection "was clearly a live issue both before and during the hearing process itself" and that much of the material relied upon by the Tribunal was in any event material that was available to the appellant. The learned Judge concluded:

> [105] In practical terms, I do not believe that there has been any injustice accorded to the applicant. In my view, I do not consider that it can be said that injustice has arisen merely because an applicant asserts, with the benefit of hindsight, that he or she could have provided a more extensive or compelling case, if he or she had known what the ultimate result was going to be.

The grounds of appeal

36 The grounds of appeal are expressed in paragraphs 2 and 3 of an Amended Notice of Appeal filed on 13 April 2016. It is convenient in these reasons to reverse their order, to renumber them, and to title them Ground One and Ground Two. With those adjustments, I reproduce the grounds verbatim:

> **Ground One**
>
> 1. The Federal Circuit Court erred in not finding that the Administrative Appeals Tribunal had failed to give the appellant the opportunity to provide evidence of the failure of the Vietnamese government to implement domestic violence practices and policies that made the applicant safe from harm.
>
> Particulars
>
> 1.1 The Federal Court erred in finding that the Administrative Appeals Tribunal made a finding reasonably open to it on the materials available when the Administrative Appeals Tribunal had only taken into account limited materials concerning legislative and policy changes to practices in Vietnam towards victims of domestic violence but not materials relevant to the implementation of those laws and policies;
>
> 1.2 The Federal Court erred in finding that the Administrative Appeals Tribunal had not erred in failing to provide the appellant with any opportunity to provide evidence of the failures of such policy and legislative changes to ensure that the appellant was safe from a real risk of harm in answer to the materials relied upon by the Tribunal.

Ground Two

2. The Federal Circuit Court erred deciding that the Administrative Appeal Tribunal committed no jurisdictional error in its assessment of whether the applicant was in need of complementary protection.

Particulars

2.1 The Federal Circuit Court, erred in finding that the Administrative Appeals Tribunal had not fallen into jurisdictional error when, having found that the applicant was a victim of domestic violence, it failed to determine that the appellant remained at risk of harm.

2.2 The Federal Circuit Court erred in finding that the Administrative Appeals Tribunal did not fall into jurisdictional error when it found that victims of domestic violence like the appellant would be afforded protection in Vietnam from perpetrators.

2.3 The Federal Circuit Court erred in finding that the Administrative Appeals Tribunal had not fallen into jurisdictional error when it found that the appellant would not suffer a 'real risk' to the appellant of harm should she be returned to Vietnam.

Ground One

37 By Ground One the appellant alleges that the Federal Circuit Court erred in rejecting the second ground of review advanced before that Court, namely that the Tribunal had denied the appellant procedural fairness and had thereby committed jurisdictional error.

38 Section 424A relevantly provides:

424A Information and invitation given in writing by Tribunal

(1) Subject to subsections (2A) and (3), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and

(c) invite the applicant to comment on or respond to it.

(2) The information and invitation must be given to the applicant:

(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or

(b) if the applicant is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.

(3) This section does not apply to information:

(a) that is not specifically about the applicant or another person and is

> just about a class of persons of which the applicant or other person is a member; or
>
> (b) that the applicant gave for the purpose of the application for review; or
>
> (ba) that the applicant gave during the process that led to the decision that is under review, other than such information that was provided orally by the applicant to the Department; or
>
> (c) that is non-disclosable information.

39 The learned Federal Circuit Court Judge was correct in determining that the effect of s 424A of the Act was that the Tribunal was not obliged to put before the appellant country information of a general nature upon which it proposed to rely: *VHAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 80 (Kenny J at [50]). That, of itself, is sufficient to dispose of Ground One on this appeal.

40 It is clear in any event that the appellant's representatives were alive to the fact that the Tribunal would have regard to country information concerning the existence of domestic violence laws in Vietnam and the effectiveness of the implementation of those laws. The Delegate's decision itself sets out extracts from country information upon which the Delegate relied in reaching his own conclusion that "there are options available in Vietnam for the appellant to address her claimed domestic violence situation to the extent that she would not face a real chance of being seriously harmed". That was the very decision that the Tribunal had the statutory task of reviewing: see s 414 of the Act. The written submissions made to the Tribunal on the appellant's behalf demonstrate that the appellant's representatives understood the issues the Tribunal would consider. As I have said, those submissions included passages extracted from four sources relevant to the questions arising under s 36(2B)(b) of the Act. Whether or not the Tribunal erred in failing to have regard to the written submissions is not to the point, at least upon my determination of Ground One of this appeal. The ground does not complain of a failure to take into account material already before the Tribunal, rather, it complains of a lost opportunity to furnish the Tribunal with additional material not already before it.

41 Further, the Tribunal in fact made it known to the appellant that it had considered country information concerning the implementation of domestic violence laws which, on its foreshadowed view, was adverse to the appellant's claims. An issue arises on Ground Two of this appeal as to whether the Tribunal correctly summarised the effect of that information in the statement it made to the appellant during the course of the Tribunal's hearing

emphasised in the passage I have extracted at [25] above. However, any mistake the Tribunal might have made in that statement is of no assistance to the appellant on the discreet error alleged in Ground One. The Tribunal's statement made it clear to the appellant that the Tribunal had considered country information and that it took the view (rightly or wrongly) that there was "no evidence to suggest that the Vietnamese police do not act on reports of domestic violence". That statement, in my opinion, put the appellant on notice as to the conclusion the Tribunal suggested was available to it to reach on the materials before it. The appellant's representatives were, by that statement, given an opportunity to take issue with the proposition put by the Tribunal, either by challenging the Tribunal's use or construction of the country information to which the Tribunal referred, or by adducing additional country information so as to persuade the Tribunal to come to a different conclusion to that which it had foreshadowed.

42 The learned Federal Circuit Court Judge was correct in determining that there had been no breach of procedural fairness in the proceedings before the Tribunal. Ground One of this appeal must therefore fail.

The materials before this Court on appeal

43 The appellant adduced in the Federal Circuit Court a series of country information reports that, it was alleged, the appellant would have adduced before the Tribunal had the appellant not been denied procedural fairness in the manner alleged in the grounds of review before that Court. The same materials were before this Court insofar as they were contained in a Court Book prepared by the parties for the purposes of the judicial review proceedings below. The appellant submitted that this Court should review those materials to determine that the introduction of the materials before the Tribunal could have and would have made a difference to the outcome in the Tribunal.

44 Given my finding that the appellant was not denied the opportunity to adduce those materials before the Tribunal, I do not read or take into account the additional country information reports upon which the appellant sought to rely, whether for the purpose of determining Ground One or Ground Two of the appeal. There is, however, one qualification to be made. In the passage of the Tribunal's reasons to which I have referred at [20] above, the Tribunal claims to have had regard to the country information reports referred to in the written submissions dated 15 February 2015 made on the appellant's behalf. Those sources, being

materials to which the Tribunal did in fact have regard, are read and considered on this appeal to the extent that they are relevant to this Court's determination of Ground Two.

Ground Two

45 Ground Two alleges that the Federal Circuit Court erred in failing to find that the Tribunal committed jurisdictional error in making findings concerning the effectiveness of domestic violence laws, practices and policies in Vietnam that were, to adopt the phrase preferred by the appellant's Counsel, not reasonably open on the materials before it.

46 The paraphrase I have just given is a distillation of the written ground of appeal that is lacking in particulars. In the form in which it is expressed in the Amended Notice of Appeal, the ground does not identify precisely the jurisdictional error that was argued in the Court below and cannot therefore enable this Court to determine whether or not a new ground of appeal is sought to be introduced on the appeal. In the course of argument before me, the parties each acknowledged that it was appropriate that this Court confine Ground Two so as to not introduce any ground of review not previously argued. That approach, of itself, introduces some degree of difficulty, as the grounds of review before the Federal Circuit Court suffered from the same want of particulars.

47 In the event, argument proceeded before me on the basis that the Tribunal's ultimate conclusion that the appellant, if returned to Vietnam, would not be at real risk of significant harm, was affected by legal unreasonableness in the sense explained by the High Court in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (*Li*).

48 In *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 (*Stretton*) Allsop CJ summarised the many and various words and phrases used in the authorities to encapsulate or explain the concept of legal unreasonableness. Of those verbal descriptions, his Honour said (at [2]-[3]):

> [2] The proper elucidation and explanation of the concepts of jurisdictional error and legal unreasonableness does not depend on definitional formulae or on one verbal description rather than another. Both concepts concern the lawful exercise of power. For that reason alone, any attempt to be comprehensive or exhaustive in defining when a decision will be sufficiently defective as to be legally unreasonable and display jurisdictional error is likely to be productive of complexity and confusion. One aspect of any such attempt can be seen in the over categorisation of more general concepts and over-emphasis on the particular language of judicial expression of principle. Thus, it is unhelpful to approach the task by seeking to draw categorised differences between words and phrases such as arbitrary, capricious, illogical, irrational, unjust, and lacking evident or intelligent justification, as if each contained a definable body of meaning separate from the other.

> [3] These words and phrases express a rule that is directed to the limits of the exercise of power, and, because of that function, are necessarily expressed as abstractions applying to the infinite variety of decision-making under variously expressed statutory provisions, in a wide variety of legal contexts.

49 Allsop CJ continued (at [6]-[7]):

> [6] Each of the judgments in *Li* sought to give explanatory content to the concept of legal unreasonableness. As was discussed in *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; 231 FCR 437, the judgments in *Li* identified two different contexts in which the concept of legal unreasonableness was employed: a conclusion after the identification of jurisdictional error for a recognised species of error, and an 'outcome focused' conclusion without any specific jurisdictional error being identified: *Singh* at [44].
>
> [7] It is in relation to the second context, the 'outcome focused' application of the concept, that precise definition, beyond explanation of the operative notion and of the legal technique by which to make the assessment, becomes productive of complexity and confusion. There is 'an area of decisional freedom' of the decision-maker, within which minds might differ. The width and boundaries of that freedom are framed by the nature and character of the decision, the terms of the relevant statute operating in the factual and legal context of the decision, and the attendant principles and values of the common law, in particular, of reasonableness.

50 The reference to "principles and values of the common law, in particular of reasonableness" to which his Honour there refers is to be understood as including (if not confined to) a reference to the common law principle of statutory construction reiterated by the High Court in *Li*, summarised in this way by Gageler J (at 370 – 371, [90]) (citations omitted):

> Implication of reasonableness as a condition of the exercise of a discretionary power conferred by statute is no different from implication of reasonableness as a condition of an opinion or state of satisfaction required by statute as a prerequisite to an exercise of a statutory power or performance of statutory duty. Each is a manifestation of the general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to *reason* within limits set by the subject matter, scope and purposes of the statute.

51 See also the remarks of French CJ (at 350 [26] and 351 [29]), Hayne, Kiefel and Bell JJ (at 362 [63]), and Gageler J, (further, at 370 [88]). As to the standard of reasonableness that is to accompany the exercise of a statutory power, Hayne, Kiefel and Bell JJ said (at 364 [67]):

> The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

52 The concept of legal unreasonableness cannot be understood in isolation from the concept of jurisdictional error. As explained by Allsop CJ in *Stretton* in the passage extracted above, both concepts are concerned with identifying the boundaries of power. The boundary

delineating the standard of reasonableness of an administrative decision is the same boundary delineating the point at which a Court, exercising powers of judicial review equivalent to those given under s 75(v) of the Constitution, may legitimately interfere with the decision. As Allsop CJ acknowledged (at [11]), "the boundaries of power may be difficult to define". His Honour continued:

> [11] … The evaluation of whether a decision was made within those boundaries is conducted by reference to the relevant statute, its terms, scope and purpose, such of the values to which I have referred as are relevant and any other values explicit or implicit in the statute. The weight and relevance of any relevant values will be approached by reference to the statutory source of the power in question. The task is not definitional, but one of characterisation: the decision is to be evaluated, and the conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident and intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.
>
> [12] Crucial to remember, however, is that the task for the Court is not to assess what it thinks is reasonable and thereby conclude (as if in an appeal concerning breach of duty of care) that any other view displays error, rather, the task is to evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful. The undertaking of that task may see the decision characterised as legally unreasonable, whether because of specific identifiable jurisdictional error, or the conclusion or outcome reached, or the reasoning process utilised.

53 Against those principles, I now turn to consider the subject matter, scope and purpose of the statutory source of power at issue in the present appeal.

Section 36(2)(aa)

54 In *MZYYL*, Lander, Jessup and Gordon JJ dismissed an application for judicial review made by the Minister in the original jurisdiction of this Court. The Minister's application had been transferred from the Federal Magistrates Court (as it then was) and the Chief Justice of this Court had determined that the court's jurisdiction be exercised by a Full Court. At issue was the proper construction of s 36(2B)(b) of the Act. The Minister submitted that the prescribed standard in s 36(2)(aa) will be satisfied if the receiving nation in question operates an effective legal system for the detection, prosecution and punishment of acts constituting significant harm and the applicant in question had access to such protection. It was further submitted that it was sufficient that the State in question "take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal

law, and the provision of a reasonably effective and impartial police force and Justice system". It was further submitted that if, notwithstanding the existence of those measures an applicant for a protection visa remained at risk of significant harm, that risk "necessarily becomes a risk that every member of the population faces and not one faced by the individual personally", that circumstance being one expressly excluded as one constituting a "real risk" under s 36(2B)(c) of the Act.

55 The Full Court rejected the Minister's submissions. The starting point in its reasoning was a concession, properly made by the Minister, to the effect that the question of whether there existed a real risk that a non-citizen will suffer significant harm must be resolved by asking whether there is a "real chance" that the non-citizen will suffer such harm if removed from Australia to the receiving country (at [31]).

56 The Court then said (at [33]):

> [33] At the outset, a number of matters should be noted. First, s 36(2B)(b) is the obverse of s 36(2)(aa). It uses the same language as s 36(2)(aa). Section 36(2B)(b), like the other paragraphs in s 36(2B), deems a particular circumstance to mean that the non-citizen will not suffer significant harm if the non-citizen were to be returned to the receiving country. If any of the circumstances mentioned in s 36(2B) are found to exist, the Minister must conclude that the non-citizen would not suffer significant harm for the purposes of s 36(2)(aa). However, the inquiry in s 36(2B) is not at large. It is an inquiry into the particular circumstances that appertain to the non-citizen whose application for a visa is under consideration. That is made clear by the reference in the chapeau to the 'non-citizen' and the references in paragraphs (a) and (b) to the non-citizen relocating or seeking protection from an authority of the country but, even more particularly, by paragraph (c) which speaks of the non-citizen personally.

57 The Court concluded (at [38]) that the construction of s 36(2B)(b) advanced by the Minister was contrary to existing authority appertaining to the criteria for a protection visa under s 36(2)(a), in respect of which "courts have recognised that the mere existence of a system of state protection may not of itself be sufficient" and that "unsurprisingly, the particular circumstances of the individual may be determinative": *A v Minister for Immigration and Multicultural Affairs* (1999) 53 ALD 545 (at [38]-[43]); *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 (at 27 [24]). The Full Court further concluded (at [39]) that:

> [39] Section 36(2B)(b) poses the question whether, in obtaining protection from the receiving country, the protection is such that there would not be a risk that the non-citizen would suffer significant harm if returned. The section proceeds from an assumption (correctly made) that there will be circumstances where the protection offered is not sufficient to remove the fact that there is a real risk that the non-citizen

will suffer significant harm.

58 In rejecting the Minister's submissions, the Full Court held that the proper enquiry is one that remains focused upon the circumstances of the particular non-citizen. It was not sufficient that there was, generally speaking, protection available to persons in the non-citizen's position or like position. It was necessary to ask the additional question as to whether, notwithstanding the availability of that protection, the non-citizen will remain at a "real risk" of significant harm.

59 In all cases, the emphasis is on the concept of protection. The word "protection" in the statutory context of s 36(2B)(b) does not require an absolute assurance of the prevention of significant harm. Rather, the enquiry called for by s 36(2B)(b) involves an evaluation of the degree of a risk. The protection that might be obtained from the authorities of the receiving country must be of such a nature and of such a degree that it cannot be said that the visa applicant, if afforded that protection, would be at a real risk of significant harm.

60 Consistent with the Full Court's reasoning in *MZYYL*, in my opinion s 36(2)(aa), s 36(2B) and the definition of "significant harm" in s 36(2A) of the Act together evince an intention that the decision-maker (here, the Tribunal), be obliged in the appellant's case to ask itself the following questions:

(a) What is the source and nature of the significant harm at which the appellant claims to be at risk?

(b) What is the nature and degree of protection able to be afforded by Vietnamese authorities, being protection from the specific harm at which the appellant claims to be at risk?

(c) Could the appellant herself obtain from the Vietnamese authorities that protection, again having regard to the source and nature of the harm at which the appellant claims to be at risk?

(d) Would the appellant, upon obtaining that protection from the said authorities, nonetheless be at real risk of significant harm?

61 My expression of the questions to be asked under s 36(2B)(b) should not be understood as a prescription for reasoning that must be addressed systematically in the expression of an administrative decision-maker's reasons. It is to be accepted that the mixed questions of fact and law that arise under the complementary protection regime are overlapping and that in

many instances a decision-maker's determination of any one of the questions I have identified might fairly be made without detailed elaboration. It is, however, convenient to decide Ground Two on this appeal by assessing whether it was reasonably open to the Tribunal to make the decision that it did, by reference to the four questions I have identified, because it is those questions that encapsulate the subject matter, scope and purpose of the relevant statutory provisions.

Source and nature of the harm

62 As I have said, the Tribunal did not reject the appellant's factual claims as to the harm she had suffered at the hands of her husband whilst residing in Vietnam, nor did it reject the appellant's claim that her husband had made threats to kill the her should she return there, including threats to retaliate against her for escaping to Australia. The threats of harm were specifically targeted at the appellant as an individual, rather than as a member of a class of persons.

63 It is implicit in the Tribunal's reasons that it accepted that the harm previously suffered by the appellant satisfied the definition of "cruel or inhuman treatment or punishment" in that it constituted:

> (a) intentionally inflicted severe physical pain or suffering; or
>
> (b) intentionally inflected physical pain or suffering of a kind that could reasonably be regarded as cruel or inhuman in nature.

64 The circumstance that the appellant was the specific target of previously inflicted harm, and the circumstance that the appellant was the recipient of a threat of further specifically targeted and retaliatory harm were relevant circumstances to be taken into account when applying the statutory criteria to the facts of the appellant's case.

65 It should be noted that the definition of cruel or inhuman treatment or punishment does not import any notion about the infliction of physical injury. The act against which the appellant sought protection was the intentional infliction of pain or suffering that was either severe within the meaning of paragraph (a) of the definition, or "cruel or inhuman" in nature within the meaning of paragraph (b). The Act recognises that a person may suffer harm by the infliction of physical pain or suffering irrespective of whether the act causes a demonstrable injury to the person's body. This was a further circumstance the Tribunal was obliged to take

into account when applying s 36(2B)(b) to the facts of the appellant's case, particularly when addressing the issues that now follow.

Nature and degree of protection

66 The Tribunal's conclusions about the protection afforded by the Vietnamese authorities to victims of violence were expressed to have been based wholly on the sources of country information referred to in its reasons.

67 It is generally true to say that the appellant cannot establish jurisdictional error by showing that the Tribunal should have preferred other country information to that upon which it relied: *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 (*NAHI*) (Gray, Tamberlin and Lander JJ at [13]); *VQAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 104 (Beaumont, Weinberg and Crennan JJ at [26] and [32]).

68 In *NAHI* the Full Court explained:

> By s 420(2)(a) of the Migration Act, the Tribunal is not bound by the rules of evidence. By s 424(1), in concluding a review, the Tribunal may get any information that it considers relevant. There can be no objection in principle to the Tribunal relying on 'country information'. The weight that it gives to such information is a matter for the Tribunal itself, as part of its fact-finding function.
>
> …

69 The Full Court's decision in *NAHI* is to be read subject to what the plurality of the High Court more recently said in *Li* at [72] in connection with questions of weight:

> … in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, Mason J considered that the preferred ground for setting aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to an irrelevant factor of no importance, is that the decision is 'manifestly unreasonable'. Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.

70 The Tribunal properly identified that the question of the existence of domestic laws and the question of the effective implementation of those laws were issues requiring its separate consideration.

71 As to the existence of laws prohibiting domestic violence in Vietnam, the Tribunal made the following findings (at [56] of its reasons):

> Vietnam passed the *Law on the Prevention and Control of Domestic Violence 2007* on 21 November 2007, which came into effect on 1 July 2008. According to the US Department of State (USDOS), the law prohibits violence against women, as well as threats of violence, and specifies acts that constitute domestic violence. Furthermore, the law 'assigns specific portfolio responsibilities to different government agencies and ministries, and stipulates punishments for perpetrators ranging from warnings, through probation for up to three years, to imprisonment for three months to three years'. The Immigration and Refugee Board of Canada (IRBC) concurs, reporting that the law codifies 'the duties of the state, individuals, families, organizations and institutions in regards to preventing and controlling domestic violence and supporting of its victims', as well as proscribing punishments that include fines, payment of compensation to victims, and 're-education' for repeat offenders.

72 The material from the US Department of State is drawn from the 2012 USDOS Report. The first page of the 2012 USDOS Report provides an executive summary of human rights protection and abuses in Vietnam. The Executive Summary makes no specific reference to domestic violence in the country. Under the heading "Women" there appear five paragraphs, commencing with the following sentence:

> Rape and Domestic Violence: The law prohibits using or threatening violence against women or taking advantage of a person who cannot act in self-defense.

73 The Canadian material to which the Tribunal refers was drawn from the Canada IRB Report. It contains the following statement:

> **Legislation**
>
> On 21 November 2007, the government of Viet Nam passed the *Law on Domestic Violence Prevention and Control*, which came into force on 1 July 2008 (Viet Nam 1 July 2008). The law legislates the duties of the state, individuals, families, organizations and institutions in regards to preventing and controlling domestic violence and supporting of its victims (ibid., Art. 1.) The law also defines what constitutes domestic violence (ibid., Art. 2) and states that those who perpetrate domestic violence 'shall either be fined as a civil violation, disciplined or charged for criminal penalty and have to compensate for any damages caused' (ibid., Art. 42). The law also prescribes 're-education' measures for repeat offenders (ibid., Art 43). According to the United States (US) *Country Reports on Human Rights Practices for 2008* punishment ranging from warnings to two years' imprisonment can be imposed by the law (US 25 Feb. 2009, Sec.5)

74 Subject to what is said below, the two country reports to which the Tribunal refers are capable of supporting the conclusions it reached at [56] of its reasons concerning the existence of laws in Vietnam prohibiting violence and threats of violence against women. However, none of the country information provides any further detail as to the content of the law to that given in the Canadian material extracted above. In particular, the material does

not define the particular conduct that falls within the operation of the criminal law (to which police may respond) as distinct from the civil law (to which the police may not).

75 As to the effectiveness of the law, the Tribunal correctly summarised (at [57] of its reasons) the WHO Report to the effect that domestic violence remained "normalised" and that there was a suggested gap between policy existence and implementation.

76 The Tribunal then drew heavily from the 2012 USDOS Report. At [58] of its reasons, the Tribunal extracted the following information from the third relevant paragraph of that Report (emphasis added):

> USDOS reported in May 2012 that some "NGO [non-governmental organisation] and survivor advocates considered many of the provisions [of the law] to be weak". However, USDOS adds that **"[w]hile the police and legal system generally remained unequipped to deal with cases of domestic violence, the government, with the help of international and domestic NGOs, continue to train police, lawyers, and legal system officials in the law"**.

77 At [60] of its reasons, the Tribunal then extracted most of the fourth and all of the fifth relevant paragraphs of the 2012 USDOS Report.

78 The Tribunal did not include in its reasons any summary of, or otherwise make any reference to, or otherwise give express consideration to the following statement included in the second relevant paragraph of the 2012 USDOS Report (emphasis added):

> Domestic violence against women was common. A 2010 UN report found that 58% of married women had been victims of physical, sexual, or emotional domestic violence. **Domestic violence cases were treated as civil ones, unless the victim suffered injuries involving more than 11 percent of her body.**

79 As I have said, the Tribunal had before it the written submissions of the appellant's migration agent which included extracts from a later version of the 2012 USDOS Report published in 2013 (the 2013 USDOS Report). The extract from the 2013 USDOS Report included in the appellant's submissions stated (emphasis added):

> Domestic violence against women was common. A special 2010 UN report found that 58 percent of married women had been victims of physical, sexual, or emotional domestic violence. **Authorities treated domestic violence cases as civil ones, unless the victim suffered injuries involving more than 11 percent of her body.**

80 As can be seen, the more recent of two USDOS reports before the Tribunal made it clear that it was the Vietnamese authorities themselves who treated certain domestic violence cases as "civil".

81 At [59] of its reasons, the Tribunal drew upon the 2011 UN Report as follows:

> [59] According to a 2011 report by UNODC, *Research on Law Enforcement Practises and Legal Support to Female Victims of Domestic Violence in Vietnam*, an organisation called the 'Women's Union' is tasked by the government to promote and instigate the 2007 law on domestic violence. According to the report, some of the Women's Union duties include 'setting up counselling and support centres for victims, organizing vocational training, credit and saving activities for victims, and cooperating with the authorities to protect and assist victims'.

82 The Tribunal's findings as to the tasks entrusted to the Women's Union under the Vietnamese law are supported by the 2011 UN Report. However, that report does not state that the Women's Union has been able to perform those tasks so as to afford effective protection to potential victims, as opposed to responsive support to actual victims. Nor does the report state that the authorities in Vietnam are willing to respond to reports of threats of domestic violence, so as to reduce the risk of the threats being carried out. To the contrary, on the subject of the effectiveness of the implementation of the law, the 2011 UN Report states:

> Prevention of domestic violence requires a change in attitudes and actions of the police, legal aid providers and reconciliation teams in dealing with domestic violence, as well as a change in attitudes and behaviour among the population.
>
> A number of issues seriously limit the police and legal aid providers in their ability to respond to domestic violence. Police and legal aid providers have a narrow understanding and knowledge of domestic violence. Many still believe that domestic violence is primarily caused by women's behaviour. Traditional roles and cultural values also affect how they deal with domestic violence.
>
> Police and legal aid providers do not have a thorough understanding of the Law on Domestic Violence Prevention and Control and consequently, continue treating domestic violence as they have always done in the past. They mostly investigate 'serious' (i.e. with considerable physical injuries) domestic violence cases and consider less serious domestic violence cases as private family issues, which should be reconciled. The new law provides the opportunity to prohibit perpetrators to contact victims and it provides other safety measures, such as shelters for victims. However, these have yet to be implemented.

83 The 2011 UN Report then contains a recommendation that:

> Police officers at village, commune and district level need adequate training in particular about the concept, forms ... and consequence of domestic violence. They need to learn skills how to deal with victims and perpetrators…

84 The statement in the 2011 UN Report to the effect that police and legal aid providers mostly investigated serious cases of domestic violence cases is consistent with the statement in the 2013 USDOS Report to the effect that authorities treated domestic violence cases as civil ones unless they involved injury to more than 11 percent of the victim's body. These statements qualify the remaining portions of the reports concerning the existence of domestic

violence laws in Vietnam and the commitment of the Vietnamese government to address the issue. The qualifications were of great importance in the application of the statutory criteria to the circumstances of the appellant's case such that the Tribunal was not entitled to ignore them. The qualifications precluded any reasonable inference that might otherwise have been drawn from the reports to the effect that domestic violence laws in Vietnam were effectively implemented and practically protective.

85 As I have mentioned, the written submissions of the appellant's migration agent contained an extract from the 2013 USDOS Report which the Tribunal states it had considered. Given that the Tribunal had read the submission, and given its statutory obligation to include in its reasons for decision the evidence upon which it based its material findings of fact, I infer that the Tribunal considered the statement contained in the 2013 USDOS Report to be irrelevant to the material findings of fact it was bound to decide: see subs 430(1)(c) and (d) of the Act and the principles stated by the Full Court in *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431; [2013] FCAFC 114 (at [49] – [51]). That inference is supported by the absence in the Tribunal's reasons of any reference to the very similar paragraph from the 2012 USDOS Report, notwithstanding that the Tribunal extracted or paraphrased all other relevant parts of that report in so far as it concerned the treatment of women in Vietnam (except in relation to rape).

86 In light of the observations I have made above, the Tribunal's statement at [62] of its reasons that "the reports are varied on [the law's] effectiveness" has no support in the country information materials the Tribunal considered: none of the information contained any statement or opinion to the effect that the laws were effectively implemented by the Vietnamese authorities. Nor was there contained in the country information any statistics from which the Tribunal could independently and indirectly infer that domestic violence laws in Vietnam were effectively implemented. The country information relied upon by the Tribunal states that the Vietnamese Government did not publish statistics recording the incidence of arrest, prosecution and conviction of perpetrators.

87 Generally speaking, it may be open to the Minister (or, on review, the Tribunal) to cherry pick from among various sources of country information so as to form, by its own evaluation of the selected material, its own conclusions of fact. It may also be accepted that, as a general rule, an administrative decision that involves the weighing and evaluation of countervailing considerations is not a decision amenable to interference by a Court on

judicial review merely because the Court might evaluate the considerations differently or accord different considerations more or less weight than that accorded by the Tribunal.

88 However, the material before the Tribunal did not contain conflicting statements as to the effectiveness of domestic violence laws in Vietnam so that the Tribunals' decision could properly be viewed as one involving the preference of one body of evidence over another. The statements and opinions expressed in the reports concerning the effectiveness of the law were consistent, not countervailing. They were not contradicted by any other material to which the Tribunal referred.

The protection the appellant could obtain

89 The Tribunal's finding that neither the appellant nor her husband had political profiles in Vietnam such that the appellant would be discriminated against by Vietnamese authorities was one reasonably open to be made. Accordingly, it was open to the Tribunal to find that there was no political reason why the appellant could not seek the assistance of the Vietnamese authorities.

90 The Tribunal's conclusion that the appellant could in fact obtain protection from the Vietnamese authorities is expressed at [64] of its reasons as follows:

> [64] In my view, the country information demonstrates that the Vietnamese authorities do not fail to provide reasonable protection to the victims of domestic violence, and I consider the Vietnamese authorities would afford the applicant reasonable protection against any threat of domestic violence posed by her husband on her return to Vietnam. I consider that the protection offered by the Vietnamese state, in light of the information I have referred to above, reduces the risk of the applicant being significantly harmed to something less than a 'real risk'.

91 In reaching that conclusion, the Tribunal made no assessment of the scope of the law in Vietnam so as to determine precisely what kinds of conduct the authorities could and would protect the appellant against should she return there. The Tribunal does not give any consideration to the question of whether (and how) the appellant could obtain protection from the Vietnamese authorities without first suffering injuries of such a severity that the Vietnamese authorities would be willing to act.

92 Relatedly, the Tribunal makes no finding to the effect that the existence of laws prohibiting domestic violence in Vietnam would deter the appellant's husband from carrying out the threats he had made against her. Relevant to that enquiry was the appellant's claim that the laws prohibiting domestic violence were already in place before the appellant left Vietnam and remained in place at the time that her husband persisted in his threats, including his

threats to retaliate against her for "running away". These issues peculiar to the appellant were simply not addressed.

93 I have already mentioned that the definition of "cruel and inhuman treatment" in s 5(1) of the Act encompasses intentionally inflicted physical pain whether or not resulting in injury to the body. It is significant harm, as defined in the Act, from which the appellant seeks protection, not "domestic violence" as that phrase may be defined under the law of Vietnam or subjectively understood by the Vietnamese authorities.

94 As I have mentioned, the Tribunal stated to the appellant, in the course of its hearing, that there was "no evidence" that the Vietnamese police do not act on reports of domestic violence. The conclusion ultimately reached by the Tribunal indicates that it reasoned from that premise to a conclusion that the Vietnamese authorities could and would act on reports of domestic violence (including threats of domestic violence) that might be made by the appellant. It may well have been open to the Tribunal to refer to the contradictory material and give a reasoned explanation for rejecting it, but that is not what it has done. It instead proceeded upon the false premise that there was no evidence contradicting its conclusion at all.

95 It should be acknowledged that the Tribunal's statement is contained in that part of its reasons in which it gives an account of its hearing, rather than in that part of its reasons in which it considers the substantive issues before it and reasons to its ultimate conclusion. However, there is nothing in the reasons to indicate that the Tribunal had, since its hearing, reconsidered its statement concerning the absence of evidence and corrected itself on that issue. The result arrived at, in all of the circumstances, suggests that it did not.

Real risk

96 The Tribunal correctly directed itself (at [53]) that the words "real risk" as they are used in ss 36(2)(aa) and 36(2B)(b), import the same standard as the test of a "real chance" applicable to the assessment of whether an applicant for a protection visa has a well-founded fear of persecution for the purposes of the Convention as required by s 36(2)(a) of the Act: see *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505; [2013] FCAFC 33 (SZQRB) (at [242] – [246]). The Tribunal then correctly stated at [54] of its reasons that the protection referred to in s 36(2B)(b) of the Act must be "such as to reduce the risk of the applicant being significantly harmed to something less than a real one": see *MZYYL* (at 219 [40]).

97 The phrase "real risk" necessarily involves an evaluation of the likelihood of the appellant suffering significant harm should she be returned to Vietnam. In performing that evaluation, the Tribunal must discount possibilities that are remote, insubstantial or far-fetched: *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (*Chan*) Toohey J (at 407), McHugh J (at 429). The test does not involve an assessment of whether it is more likely than not that the harm will be suffered: *SZQRB* (at [246] - [247]). It is enough that the infliction of significant harm on the appellant is a reasonable possibility, as opposed to a remote chance: *Chan* Mason CJ (at 389).

98 Adopting the several expressions used in the authorities to describe the test of a real risk, the practical effect of the Tribunal's decision is that there was no reasonable possibility that the appellant would suffer significant harm if she was returned to Vietnam or, alternatively, that the chance of her suffering significant harm was remote, insubstantial or far-fetched.

99 The Tribunal's conclusion was one reached by impermissible reasoning from findings that were not capable of being supported by the country information upon which the Tribunal relied, particularly findings as to the content and practical implementation of the Vietnamese law in the appellant's particular circumstances.

Conclusion

100 For the reasons given above, the Federal Circuit Court Judge erred in rejecting the appellant's submissions as being nothing more than an attack on the merits of the Tribunal's decision. There is appealable error in the Federal Circuit Court's failure to identify that the country information referred to in the Tribunal's reasons was not reasonably capable of supporting its findings on factual matters critical to the proper application of s 36(2)(aa) and s 36(2B)(b) of the Act.

101 The Tribunal's decision is properly to be regarded as an abuse of the statutory powers conferred upon it, whether because the decision as a whole was not rationally open to it by reference to materials upon which relied, or because the Tribunal ignored relevant and important material before it, or because the Tribunal failed to reason within the limits set by the subject matter, scope and purpose of ss 36(2)(aa), 36(2A) and 36(2B) of the Act. As the High Court emphasised in *Li*, some decisions may be considered unreasonable in more than one sense such that "all things run into one another" (at 365 [72]) (Hayne, Kiefel and Bell JJ, citing Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 228). This is such a case.

Orders

102 The appeal should be allowed.

103 On 1 July 2015 the *Tribunals Amalgamation Act* 2015 (Cth) came into force. It provided for the merger of the Tribunal with the Administrative Appeals Tribunal (AAT). As I have found that the appeal should be allowed, the matter may, in my discretion, be remitted to the AAT (being the second respondent joined on the appeal): *Federal Court of Australia Act* 1976 (Cth), s 28(1)(c). The appellant's application for a review of the Delegate's decision will be remitted to the AAT for rehearing.

104 The parties on the appeal agreed that the costs should follow the event. I will order that the respondent pay the appellant's costs of and incidental to the appeal, including the appellant's costs of her application for interlocutory relief restraining the Minister from removing her to Vietnam pending the outcome of the appeal.

I certify that the preceding one hundred and four (104) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Charlesworth.

Associate:

Dated: 17 June 2016