FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

DMZ17 v Minister for Immigration, Citizenship & Multicultural Affairs [2023] FedCFamC2G 53

File number(s):	MLG 1686 of 2017
Judgment of:	**JUDGE TAGLIERI**
Date of judgment:	2 February 2023
Catchwords:	**MIGRATION** – protection visa application – application for judicial review – whether jurisdictional error – whether the Tribunal failed to consider whether the Applicant faced a real chance or risk of serious or significant harm due to his disability and factors related to it – adverse credit finding based on misconstruction – the Tribunal failed to consider or determine whether the Applicant would be voluntarily or involuntarily returned to Iran – the Tribunal misconstrued the case before it – jurisdictional error established – application for review allowed
Legislation:	*Migration Act 1958* (Cth) ss 5J, 26(a), 36(2)(aa), 476, 477 (1), 477(2)
Cases cited:	AVQ15 *v Minister for Immigration and Border Protection* (2018) 266 FCR 83 *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109 *AWT15 v Minister for Immigration and Border Protection* [2017] FCA 512 *Chen v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 157 *CLS15 v Federal Circuit Court of Australia* [2017] FCA 577 *DUP16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1063 *Htun v Minister for Immigration and Multicultural Affairs* (2001) 233 FCR 136 *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16 *Minister for Immigration and Citizenship v SZRKT* (2013)

212 FCR 99
Minister for Immigration & Multicultural Affairs v Yusuf (2001) 206 CLR 323
NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2) [2004] FCAFC 263
Plaintiff M1/2021 v Minister for Home Affairs (2022) 96 ALJR 497
SZLGP v Minister for Immigration and Citizenship [2009] FCA 1470
VAAD v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 117
WAGO of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 194 ALR 676
Wohh Wang (1985) CLR 22

Division:	Division 2 General Federal Law
Number of paragraphs:	103
Date of hearing:	8 November 2022
Place:	Hobart
Counsel for the Applicant:	Mr Maloney
Solicitor for the Applicant:	Victoria Legal Aid
Counsel for the Respondents:	Mr Willoughby
Solicitor for the Respondents:	Australian Government Solicitor

ORDERS

MLG 1686 of 2017

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN:	**DMZ17** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP & MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY: **JUDGE TAGLIERI**

DATE OF ORDER: **2 FEBRUARY 2023**

THE COURT ORDERS THAT:

1. A writ of certiorari issue quashing the decision of the second respondent dated 3 August 2015.
2. A writ of mandamus issue directed to the second respondent as constituted by a different member to reconsider and determine the applicant's application for review according to law.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

Judge Taglieri

1 This is a judicial review application concerning a decision of the Migration and Refugee division of the Administrative Appeals Tribunal ("the Tribunal"). The decision under review was made on 3 August 2015 and affirmed the First Respondent's decision not to grant a Protection Visa to the Applicant.

2 The application for judicial review to the Court enlivening the Court's jurisdiction under s 476 of the *Migration Act 1958* (Cth) ("the Act") and was filed on 3 August 2017, two years after the Tribunal decision and well beyond the period of time within which a judicial review application should be made.[1] By his amended application for review filed 18 October 2022, the Applicant seeks an extension of time to permit determination of his application by this Court.[2]

3 The First Respondent opposes the extension of time on the basis that the grounds of review do not have merit.

4 Noting that sole basis of opposition to the extension of time, which does not extend to there being a lack of adequate explanation for the delay or prejudice, it was appropriate to determine the extension of time and substantive application at the same hearing before the Court on 8 November 2022.

COURT REVIEW

5 A review to this Court is authorised by s 476 of the Act. In order to succeed and obtain the relief sought the Applicant needs to demonstrate jurisdictional error by the Tribunal. What constitutes jurisdictional error is usefully described in *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82].

APPLICANT'S CASE

6 The following affidavits in the applicant's case were read unopposed:

- Affidavit of the Rachel Mason filed 18 October 2022;

[1] Being 35 days, pursuant to s 477(1) of the Act.
[2] Pursuant to s 477(2), of the Act.

- Affidavit of the Applicant filed 18 October 2022, largely providing explanation for the delay in making his application; and
- Affidavit of a friend of the Applicant filed 18 October 2022, also addressing the period of delay between the Tribunal's decision and filing the judicial review application.

7 The amended application relies on four grounds, which are particularised.

8 Ground 1 contends jurisdictional error on the basis that the Tribunal failed to consider the Applicant's claim that he faced a real chance or risk of serious or significant harm on return to Iran as a person with a disability.

9 Ground 2 asserts jurisdictional error on the basis that the Tribunal failed to consider or determine whether the Applicant would be voluntarily or involuntarily returned to Iran, and further how this bore on the chance of risk of serious or significant harm.

10 Grounds 3 and 4 assert jurisdictional error on the basis that the Tribunal misconstrued the case before it in respect of two aspects. The two aspects are:

(a) In Ground 3, the date on which the Applicant suffered an accident leading to serious leg injury and subsequent disability; and

(b) In Ground 4, the claim that the Applicant had been rejected for a government job because of his disability and thereafter attracted adverse attention from the Iranian authorities.

FIRST RESPONDENT'S CASE

11 The First Respondent contends that there is no demonstrated jurisdictional error in the Tribunal's decision and the application for review should be dismissed.

APPLICANT'S SUBMISSIONS

Grounds 3 and 4

12 Counsel for the Applicant submitted that a significant issue concerning the Tribunal's reasoning for rejecting the Applicant's claims for protection was its finding that the Applicant

was not a reliable witness, a conclusion based on conflicting evidence about the date of the accident which led to him sustaining a serious leg injury.[3]

13 It is contended that the Tribunal's conclusion about the Applicant's untruthfulness regarding the date of accident being in 2009 caused it to:

- refuse to accept that the Applicant had participated in anti-government protests;[4] and
- find that the Applicant overall lacked credibility;

which had a far reaching effect on its findings about relevant claims for protection.

14 Counsel submitted that the Tribunal engaged in a misconstruction of the evidence before it because it inferred, from a handwritten correction made to a statement accompanying his Protection Visa application,[5] that the Applicant had had his statement read back to him and had corrected errors in it. Pivotal to this submission is the Tribunal reasons at [12], which states:

> In the statutory declaration accompanying his protection visa application form, [the Applicant] claimed to be a Shi'a Muslim. He also claimed to be ethnic Azeri. The statement as originally typed says "I am Persian…" but the word Persian is obliterated and replaced by hand with the words "Azeri tribe" and the alteration to the text is signed by [the Applicant]. The signature used is the same one he used throughout the protection visa application process, and it is also the same signature that appears in the copies of various Iranian ID documentation that he submitted to the [First Respondent]. **I take this signed manual correction of the statutory declaration to be evidence of his having had his statement read back to him and, in particular, of his having taken the opportunity to correct errors in that statement. I note that [the Applicant] has raised no claims in relation to his Azeri ethnicity.**
>
> [emphasis added]

15 I was taken to the transcript of the interview with the Applicant during which the correction referred to above was made on 1 September 2014.[6]

16 Counsel submitted that the interview transcript makes it clear that the amendment to which the Tribunal refers at [12] of its reasons, was made because the Applicant was directed to change the reference to his ethnicity in the Statement from "Persian" to "Azeri Turk".

[3] Tribunal's reasons at [57] to [59].
[4] Tribunal's reasons at [55] to [58].
[5] Court Book at page 57.
[6] Affidavit of Ms Mason filed 18 October 2022 at [10] to [13] and Annexure 1 at questions 5 to 9.

17 Accordingly, he says that it was plainly wrong for the Tribunal to conclude that the manual correction of the statement about ethnicity was evidence that the Applicant *"had his statement read back to him"* and had *"taken the opportunity to correct errors in that statement*."

18 Counsel for the Applicant submitted that:

- During the hearing before the Tribunal, the Applicant gave evidence that the accident had occurred in 2009,[7] and he stated that he wanted to correct the mistake he had made during the interview.[8] It was emphasised that at no time did the Applicant say the accident had occurred in 2011, either in the interview with the delegate or in evidence before the Tribunal;
- The member had put to the Applicant that, according to the primary decision record, he had said that the accident that crippled him occurred in February 2011 and that he had "*continued to use the same erroneous date"*;[9] but
- The Applicant gave an explanation for that discrepancy, being that he was encountering a new language and culture, and although he conceded he had a Farsi interpreter available at interview, he stated "*I do forget*" and "*I have made a mistake with the dates and I'm really sorry that I could not fix it*".[10]

19 For the Applicant, it was submitted that the Tribunal's misconstruction about the correction and the statement having been read in Farsi constitutes jurisdictional error in the nature of that which is aptly demonstrated in the authorities of *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99 ("*SZRKT*") at [137] and [148], at [72] and [77], *AVQ15 v Minister for Immigration and Border Protection* (2018) 266 FCR 83 ("*AVQ15*") at [40], [41] and [48] and *WAGO of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 676.

20 The Applicant's counsel submitted that the First Respondent's written submissions at [34] and [36] provides no answer to Ground 3, as the approach invites impermissible merits review by this Court. I took this to mean that it required the Court to be satisfied on the basis

[7] Tribunal's reasons at [33].
[8] Transcript of Tribunal hearing dated 22 July 2015, as attached to the affidavit of Ms Mason filed 18 October 2022 at Annexure 2 on page 58, commencing line 13.
[9] Tribunal's reasons at [45].
[10] Tribunal's reasons at [45]; transcript of Tribunal hearing dated 22 July 2015, as attached to the affidavit of Ms Mason filed 18 October 2022 at Annexure 2 on page 59, lines 40 to 44.

of certain evidence before the Tribunal and for reasons not specifically mentioned its written decision, that was correct to find that the Applicant had had the whole statement read to him in Farsi. It was submitted that this is beyond the scope of judicial review.

21 Counsel for the Applicant submitted that the Tribunal may or may not have satisfied itself by means other than the misconstruction it relied upon, but this was irrelevant. The erroneous misconstruction cannot be excised from the Tribunal's reasoning and it demonstrates jurisdictional error.[11]

22 Ground 4 was submitted to be an independent ground of jurisdictional error also founded on misconstruction of the Applicant's case, but in a different way to Ground 3. It is dependent on the cascading effect of the error in Ground 3[12] and treatment of the claim that the Applicant was denied a government job and came to the adverse attention of Iranian authorities as a "new" claim.

23 Counsel for the Applicant referred to the Tribunal's reasons at [25], referring to what the member labelled a "*particularly significant new claim in his 10 July 2015 statement*". The claim to which the Tribunal referred is that the Applicant had attended an interview for a government job, but was told that he was not a suitable candidate due to his disability and that after this had openly criticised the Iranian regime and the Supreme Leader.

24 The evidence about this claim was noted by the Tribunal in its reasons at [32] and [38] to [39].

25 The Applicant contends that the Tribunal was plainly wrong to treat the claim as new. I was referred to the submission made by the Applicant's representative dated 10 July 2015, especially at page 134 of the Court Book.

26 Counsel contended that the 10 July 2015 submission was plainly in response to the findings of the delegate in the primary decision taken on 5 September 2014 and related to statements made during the interview on 1 September 2014.

[11] *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [45] to [47]; *Htun v Minister for Immigration and Multicultural Affairs* (2001) 233 FCR 136 at [13] to [14].
[12] *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109.

27 The Court was directed to what had been said during the interview with the delegate in September 2014 about the failed government job interview.[13]

28 The transcript of the interview discloses that after a natural justice break, the Applicant's representative sought to clarify the basis upon which the Applicant feared harm based on his disability, specifically in respect of the attitude of the government to such disability and its failure to protect persons with disability from discrimination, humiliation and degrading treatment.

Ground 1

29 Referring to Ground 1, counsel for the Applicant contends that the Tribunal failed to consider, as it was required to do, the claim that the Applicant faced a cumulative threat of harm to his subsistence upon return to Iran because of his disability.

30 It is contended that the Tribunal reasons make it plain that it did not consider this, but instead simply considered whether the Applicant would be mistreated or discriminated against. In essence, that it failed to consider the broader aspect of the claim based on the impact of disability on his ability to subsist.

31 Again, the Applicant contends that the First Respondent's answer to this ground is no answer at all because the Tribunal simply made no enquiry or finding about the broader subsistence claim in the manner which it was obliged to do based on accepted authorities.[14]

Ground 2

32 Counsel for the Applicant lastly addressed Ground 2, based on asserted jurisdictional error due to alleged failure to properly consider the claim of harm if returned to Iran as a failed asylum seeker.

33 The context of this ground was submitted to be that the Tribunal found that the Applicant did not have a valid passport and that he would have to be issued with a laissez-passer or travel document to return to Iran.[15] Further, that the Tribunal then stated it accepted that the Applicant would return on a laissez-passer, meaning on the Assisted Voluntary Return programme.

[13] Transcript of Applicant's interview with delegate, as attached to the affidavit of Ms Mason filed 18 October 2022 at Annexure 1 on pages 32 to 34.
[14] *AWT15 v Minister for Immigration and Border Protection* [2017] FCA 512 at [67] to [68]; *Chen v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 157 at [114].
[15] Tribunal's reasons at [71].

34 The difficulty with the Tribunal's approach was said to be that it failed to make a finding about whether:

(a) The Applicant would be returning voluntarily or involuntary; and,

(b) If involuntarily, what would occur and how this impacted the assessment of the consequent fear of harm.

35 Counsel for the Applicant submitted that the First Respondent's contentions about onus in response to this ground are not relevant.[16] He said that the delegate had not made any enquiry about whether the Applicant would return voluntarily or involuntarily if refused protection. In those circumstances, the Applicant contends that the Tribunal failed to undertake its function and there was no lawful or fair consideration of the claim clearly advanced.

FIRST RESPONDENT'S SUBMISSIONS

Grounds 3 and 4

36 The Respondent agrees that the Tribunal rejected the Applicant's evidence at the hearing about the accident occurring in 2009 and this was critical to its credit findings about the claims for protection.

37 However, it is contended that Ground 3 should be rejected for the following two reasons. First, the inference the Tribunal made that the statement had been read back to the Applicant in Farsi and that he had failed to correct the date of accident to 2009 during the interview with the delegate entitled the Tribunal to make a finding that the accident occurred in 2011.

38 In support of the contention referred to at [37] of these reasons, the First Respondent submitted that there is evidence that the statement had been read back to the Applicant. Counsel pointed to the transcript of the interview with the delegate, in which it is recorded that the following exchange occurred:[17]

> [DELEGATE]: I want to emphasise the importance of telling the truth during your interview, and that you take this opportunity to provide all necessary information regarding your claims. …
>
> So just another question to make sure that we understood each other. The – the statement that is provided with your protection visa application, has it been read back to you in

[16] First Respondent's Written Submissions filed 28 October 2022 at [16].
[17] First Respondent's Written Submissions filed 28 October 2022 at [35]

	Farsi?
INTERPRETER:	Yes.
[DELEGATE]:	Okay. So everything in – in what – what is there is – is all right and you – as you signed it, and there's nothing that you want to add or - - -
[APPLICANT]:	No.
INTERPRETER:	That is correct.

39 Second, that there was other evidence given by the Applicant himself which supported the finding that the accident had occurred in 2011,[18] and the Tribunal was entitled to reject the Applicant's evidence about making a "*mistake*" or having impaired "*memory*".[19]

40 However, the First Respondent contends that the credit findings the Tribunal made about the date of the accident and the claims for protection do not demonstrate jurisdictional error. I was referred to the uncontentious principles relating to this subject, in particular to *AVQ15* at [41] and *SZRKT* at [148].

41 Counsel for the First Respondent submitted that the basis for rejecting the date that the accident occurred in 2009 was rational and reasonable, and so too were the findings and conclusions that stemmed from this.

42 The Tribunal's inference that the Applicant had had his statement read back to him in Farsi and had opportunity to correct his statement was one that was open to be made. It was said to be not unreasonable and irrational, and demonstrated by the transcript of the interview annexed to the affidavit of Ms Mason.

43 I was referred to the transcript of the interview between the Applicant and the First Respondent's delegate on 1 September 2014. It was submitted that the Applicant was reminded of the significance of being correct and accurate, and he confirmed that his statement had been read to him and that he did not seek to amend or correct the date of the accident.[20]

44 However, it was submitted that in any event there was another basis for the Tribunal to find the date of accident was 2011, which diminished the Applicant's overall credit. Accordingly,

[18] Tribunal reasons at [28].
[19] Tribunal reasons at [39] and [45].
[20] Transcript of Applicant's interview with delegate, as attached to the affidavit of Ms Mason filed 18 October 2022 at Annexure 1 on page 11.

if I was of the view that the basis for the Tribunal's findings about credit were unreasonable or irrational, then it was not critical or fatal to the Tribunal's conclusions about credibility.

45 The First Respondent says the Tribunal was entitled to find the accident occurred in 2011 because:

(a) The Applicant's evidence about dates referred to in the Tribunal's reasons at [28] were not mathematically consistent with the accident having occurred in 2009;

(b) The Applicant's demeanour when giving his evidence as noted in the Tribunal's reasons at [30], [43] and [45]; and

(c) The Applicant's tendency to embellish or modify his evidence to increase his prospects. As examples of this, I was referred to the Tribunal's reasons at [39], [41], and [47] to [48].

46 Based on the contentions above, the First Respondent's counsel urged the Court to agree that a better reading of the transcript of the interview is that he was read the entire statement in Farsi. Second, that even if the reasoning is demonstrated to be irrational or illogical on the basis of what the Applicant says was a misconstruction, this did not vitiate the other bases upon which the Tribunal rejected the Applicant's case that the accident occurred in 2009.

47 In response to the submissions about Ground 4, relying on principle in *Wohh Wang* (1985) CLR 22, the First Respondent submitted that it was for the Applicant to demonstrate that the claim was made and that the Tribunal did not engage with it, something which he has failed to do.

48 In short, the Applicant made no mention of the job and interview in:

- His 17 June 2013 statement; or
- His interview with the delegate, as shown by the content of the transcript attached to the affidavit of Ms Mason filed 18 October 2022 at Annexure 1.

49 To the extent the claim was made at the hearing in the Tribunal, it is addressed in the Tribunal's reasons at [36] and [37]. In effect, the First Respondent says that the Tribunal rejected the claim because of inconsistencies in the Applicant's explanation about why he had not raised the claim fully at an earlier time.

50 The basis of the Tribunal taking the approach it did was said to not rise to the high standard to constitute jurisdictional error based on illogicality. Counsel for the First Respondent impressed that authorities urged the Court to review a Tribunal's reasons with latitude and it was not unreasonable or irrational for the Tribunal to reject the claim because of inconsistent accounts of why the claim was not raised earlier.[21]

51 While the First Respondent acknowledged the necessary disadvantage of language and unfamiliarity that refugees generally experience, it submits that the Applicant was given opportunity to raise the claim and provide information about it to the delegate during the interview on 1 September 2014, but did not do so.

52 In essence, the First Respondent says that if the claim was made in some coherent fashion before the Tribunal, it was entitled to reject it for the reasons it gave.

Grounds 1 and 2

53 The First Respondent submitted that the Tribunal was only obliged to consider claims actually made and the onus is on the Applicant to make out the claim by providing sufficient information about it.[22]

54 Further, the First Respondent says that the claim concerning inability to subsist was not made and did not "clearly arise".

55 Counsel referred to the Tribunal reasons at [14], [28], [58] and [60] to convey that the Tribunal did consider the information provided by the Applicant about his leg injury and consequent disabilities. He submitted that it was apparent from these passages that the Tribunal evaluated this information together with the Applicant's presentation at the hearing. It then characterised the disability as relatively minor and assessed there was no express or implied claim capable of arising that the Applicant could not subsist in Iran if he were to return there.

56 Further, there was material before the Tribunal which contradicted the implied claim relating to inability to subsist, namely:

(a) That he was able to take over his father's business;

[21] ie: that he had forgotten on the one hand and that he feared raising it on the other.
[22] *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497 at [25].

(b) Information in response to statements of claims in the Court Book at pages 57 and 135 to 138;

(c) That he made statements about doing electrical work and wanting to do different work, not that he was incapable of work in Iran; and

(d) The Applicant's claim was that he was rejected for a government job due to his disability and not because of the altercation or the attitude of the authorities.

57 Concerning Ground 2, the First Respondent submitted that established authority made it plain that whether there was a failure to consider a claim of serious or significant harm based on the voluntarily or involuntarily nature of the Applicant's return to Iran, depends on what the Applicant claimed.

58 If the Applicant had clearly articulated a claim for complementary protection based on involuntary return to Iran, the Tribunal was required to engage with it. However, the First Respondent says the claim for protection based on returning involuntarily was not made. Accordingly, the Tribunal did not err in confining its assessment on the premise of a voluntary return, as it did in its reasons at [71] and [72].

59 Further, the First Respondent says that it was unnecessary for the Tribunal to determine whether the Applicant met the requirements for complementary protection based on involuntary return to Iran, because Country information established that Iran would not receive involuntary returnees[23]. Reliance was placed on Federal Court authority in *DUP16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1063 and *CLS15 v Federal Circuit Court of Australia* [2017] FCA 577 ("*CLS*").

Reply submissions

60 Counsel for the Applicant submitted that the First Respondent's submissions regarding Grounds 3 and 4 relied upon the premise that the Tribunal's rejection of the claims for protection was neither irrational nor unreasonable.

61 However, counsel for the Applicant says that the asserted errors rely specifically on the Tribunal's misconstruction of the Applicant's case in respect of each claim.

[23] Tribunal reasons at [51].

62 In the case of Ground 3, that the Applicant had ***taken the opportunity to check and correct*** details of the statement ***but let the date of the accident stand as 2011***, when the transcript of the interview shows that he was directed to make a limited correction to text about his ethnicity.

63 Emphasising that the error in misconstruction was material and constituted jurisdictional error, counsel for the Applicant emphasised the principles in *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [45] to [47], *Htun v Minister for Immigration and Multicultural Affairs* (2001) 233 FCR 136 at [13] to [14], and *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 19 at [97].

64 Concerning Ground 4, Counsel for the Applicant submitted that the Tribunal was unambiguously incorrect in its reasons at [61] in stating that the claim for protection based on harm resulting from his job rejection due to disability and subsequently attracting adverse attention from government authorities was "new" and only made "recently". He says that the transcript of the interview with the delegate demonstrates the claim was made as early as 1 September 2014 during the interview with the delegate, a fact of which the Tribunal was simply unaware.

65 Reliance was again placed on the principles referred to at [63] of these reasons in terms of materiality of the error and it amounting to jurisdictional error.

66 Concerning Ground 1 and the alleged failure to consider eligibility for complementary protection based on inability to subsist due to disability upon return to Iran, I was directed to [22] of the written submissions dated 10 July 2015 made on behalf of the Applicant.[24] Counsel for the Applicant submitted that the claim was clearly made, but not considered adequately. Instead, the Tribunal only gave consideration to how he would be treated upon return and this approach reflects jurisdictional error as described in *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263 ("*NABE*") at [58].

67 Finally, in regard to Ground 2, counsel for the Applicant submitted that the First Respondent's submissions address the inverse of the ground contended. It was unnecessary for the Applicant to explicitly claim that if refused a Protection Visa, then his return to Iran

[24] Court Book at page 135.

would be involuntary. Instead, it was for the Tribunal to consider whether the requirements of s 36(2)(aa) of the Act based on the information and evidence before the Tribunal.

68 Rather than making a finding about the nature of the Applicant's return to Iran if refused a visa, the Tribunal merely assumed the return would be voluntary and then determined on that basis that he would not suffer serious or significant harm based on country information about voluntary returns.

EVALUATION AND DETERMINATION

Finding about date of accident and Ground 3

69 On 17 June 2013 the Applicant made a statement in which he identified the date of accident as being in 2011.[25] The statement accompanied his Protection Visa application and was prepared with the assistance of his migration agent at the time and a Persian interpreter.[26]

70 On 1 September 2014, the Applicant was interviewed by a delegate of the First Respondent. The transcript of the interview is in evidence before the Court, but was not before the Tribunal as it was only obtained in 2020.[27]

71 I accept that the transcript of the interview with the delegate demonstrates that correction to the statement of 17 June 2013 by obliterating "Persian" and replacing it with "Azeri" occurred during the interview with the delegate on 1 September 2014 and at the direction of the delegate.

72 However, the Tribunal did not have the transcript of the interview with the delegate on 1 September 2014 before it. It is clear from the Tribunal reasons at [12] and [44] that the member construed that the correction of the statement was made at the time the statement was read to the Applicant in Persian by an interpreter at the time the Applicant signed and witnessed it on 17 June 2013.

73 The construction by the Tribunal that the correction was made at the time of the statement being signed in June 2013 has now been demonstrated to be incorrect on the basis of the transcript annexed to the Affidavit of Ms Mason. However, **when** the correction was made in

[25] Court Book at page 57 at [6].
[26] Court Book at pages 27, 57 and 58.
[27] Affidavit of Ms Mason filed 18 October 2022 at [10] to [13].

my view is immaterial to the Tribunal's rejection of the evidence and explanation the Applicant gave during the hearing before it.[28]

74 Instead, it was the fact that, with the benefit of interpretation from an accredited Farsi interpreter, there had been a correction by him but not to the date of the accident when the Applicant signed the statement on 17 June 2013. This was a misconstruction as the Applicant's counsel submitted.

75 There was no correction to the statement at the time it was made on 17 June 2013. Instead, the transcript of the interview with the delegate in September 2014 demonstrates that:

- The Applicant was asked about whether he wanted to make any corrections or changes to the statement and he said he did not; and
- The change to "Azeri tribe" was made at the instigation and direction of the delegate **after** he had been asked about whether he wished to make any changes.

76 To the extent that the Tribunal relied on the Applicant having in effect detected an error and made a correction, it was plainly incorrect. I agree that the Tribunal misconstrued this and relied upon the misconstruction as part of its reasoning for rejecting the Applicant as being truthful during the hearing when he said that the date of the accident had been in 2009.

77 The Applicant gave an explanation about his failure to correct the date of the accident prior to the hearing. He stated he had made a mistake about the date of the accident because he was stressed, was struggling with new language, and further that he had not fixed the mistake because he forgot to do so and wished to fix it at the hearing.[29]

78 As the finder of fact "par excellence", the Tribunal may have disbelieved the Applicant's explanation about making a mistake about the date of accident. However, in the present case, it is clear that a material part for disbelieving the Applicant was factual misconstruction that he had taken the opportunity to make corrections, when this was factually wrong. In my view jurisdictional error is made out for the reasons submitted by the Applicant and referred to at [19] to [21] of the reasons. In arriving at this conclusion, I have also had regard to the statements of Logan J in *SZLGP v Minister for Immigration and Citizenship* [2009] FCA 1470.

[28] Transcript of Applicant's interview with delegate, as attached to the affidavit of Ms Mason filed 18 October 2022 at Annexure 1 from page 58 at line 17 to page 59 at line 44.
[29] Tribunal reasons at [45].

Ground 4

79 Having carefully reviewed the materials before the Tribunal at the hearing, it is my clear view that the Applicant did claim that he had been rejected for a government job because of disability and come to the adverse attention of authorities at the time of the interview with the delegate.

80 It may not have been eloquently expressed, but it was clearly made on behalf of the Applicant. Logically and reasonably, the claim cannot be categorised or described as "new" because of the following material:

(a) The initial written statement dated 17 June 2013 refers to constant discrimination due to disability; and

(b) There was reference expressly to a claim about the government job interview and being denied the job by the Applicant's representative during the interview with the delegate;[30] and

(c) The Applicant's new representative provided further information in support of the claim in written submissions made on 10 July 2015, when responding to the delegate's decision after the claim was made during the interview.[31]

81 Although the Tribunal did not have the transcript of the interview with the delegate before it, because the submissions referred to at [80(c)] of these reasons were following in response to the decision of the delegate, it ought to have alerted the Tribunal to likelihood that the claim had been made before the delegate took his decision.

82 I consider that this led the Tribunal to unfairly put to the Applicant that he had not mentioned this claim in his visa application. It expected an answer to an incorrect premise, which then unsurprisingly caused the member to doubt the explanation and say he had difficulty believing it was a recently recovered memory.[32]

83 I accept the First Respondent's submission that a fair reading of the Tribunal's reasons at [35] is a reference to the claim being omitted from the written application he made on 17 June 2013. That is consistent with that the Tribunal's reasons at [25].

[30] Transcript of Applicant's interview with delegate, as attached to the affidavit of Ms Mason filed 18 October 2022 at Annexure 1 at page 32.
[31] Submissions to the Tribunal at [9], [10] and [15] as included in the Court Book at pages 132 to 137.
[32] Tribunal's reasons at [39].

84 However, a full reading of Tribunal's reasons at [35] to [39] convey that:

- The member ultimately was putting to the Applicant that the claim had not been made until shortly before the hearing; and
- The Applicant was required to answer a question on an incorrect premise, namely that he had not raised the claim before including it in the submissions made on 10 July 2015.[33]

85 The evidence before the Court now demonstrates that the claim was made before the delegate at interview on 1 September 2014 and in the 10 July 2015 submission.

86 The adverse credit finding made by the Tribunal about the claim being effectively an invention was based on a false premise and misconstruction, meaning that it constitutes jurisdictional error in the nature discussed in the authorities to which the Applicant's counsel referred and are noted at [63] of these reasons.

87 I reject the First Respondent's submission that this claim was not made during the interview with the delegate. The transcript of the interview shows that it was raised by his representative, Mr Ford. The transcript suggests that the delegate sought to reframe the claim to be one of general adverse treatment in society because of disability, but in my view Mr Ford while agreeing there was such general treatment also maintained a separate claim based on the job interview.[34]

88 Accordingly, the claim was sufficiently articulated to be clearly made, as required by the authorities. Thus Ground 4 succeeds.

Ground 1

89 This ground asserts error due to failing to consider whether the Applicant met the requirements ***for complementary protection*** because of cumulative threat of harm to his subsistence due to disability and the effects of it.

90 In the Tribunal reasons at [60], the member stated:

> Whereas I accept that [the Applicant] suffered a serious knee injury and has had ongoing ailments arising from that 2011 accident, and whilst I accept that he has

[33] Tribunal's reasons at [35] to [37] and [61]; Transcript of Applicant's interview with delegate, as attached to the affidavit of Ms Mason filed 18 October 2022 at Annexure 1 on page 49 at lines 16 to 19.
[34] Transcript of Applicant's interview with delegate, as attached to the affidavit of Ms Mason filed 18 October 2022 at Annexure 1 on pages 32 to 34.

> knee and back pain, some depression, and a slight limp when he walks, I do not accept on the evidence before me that the societal or institutional response to his condition has been ostracising or isolating, let alone intentionally, and I am not satisfied on the evidence before me that he will be persecuted in Iran in the reasonably foreseeable future for reasons of his disability.

91 This passage of the Tribunal's reasons make it plain that the Tribunal considered the impact of the Applicant's injury and disability in the context of harm he may suffer, for the purpose of whether the Applicant met the requirements for protection as a refugee, persecuted on the basis of disability for the purposes of ss 5J and 36(a) of the Act.

92 However, I agree with the Applicant's submission that the Tribunal did not grapple with the claim of inability to subsist due to disability in the context of complementary protection. This is apparent from the very brief reasoning at [80] and [81] which generally refers to all claims not satisfying the requirements for complementary protection because of what the Tribunal concluded was "*false information*".

93 The problem with the conclusion about complementary protection is that:

(a) The subsistence claim consequent to disability was clearly made as if self-evident from references to the claim in the delegate's primary decision[35] and the Applicant's written submissions of 10 July 2015;[36]

(b) The Tribunal's reasons show it did not address the claim of harm based on inability to subsist due to impact of his injury and disability because it referred to a number of the claims, but not this one;

(c) The Tribunal had accepted the Applicant suffered a serious knee injury and has had ongoing ailments arising from an accident, had knee and back pain, some depression, and a slight limp;[37] and

(d) The credibility problems on which the Tribunal placed reliance did not attach to the claim of fact of injury and disability as opposed to the date they were suffered, as is evident from the Tribunal's reasons at [60].

94 The Tribunal's reasoning demonstrates jurisdictional error by failing to consider the claim in the context of complementary protection as it was obliged to do.[38] I accept the submissions of Counsel for the Applicant as summarised at [66] of these reasons. Further, if the Tribunal

[35] Visa Decision Record as included in the Court Book at pages 97 to 102.
[36] Court Book at pages 132 to 137.
[37] Cite reasons where this is accepted
[38] *NABE* at [58] and [63].

was rejecting the subsistence claim as a basis for complementary protection based on general credit, I consider this illogical and unreasonable, as it had accepted that the Applicant suffered a serious knee injury, was having pain and some impairment because of it, but did not address the effect of this on his ability to subsist.[39]

95 To the extent that the First Respondent's counsel submitted that if the *implied claim* was clearly made the Tribunal was entitled to reject it because of evidence that contradicted the claim,[40] I agree with the Applicant's submissions. That is, this impermissibly requires the Court to interpret and attribute findings and reasoning to the Tribunal which it did not make in the context of considering whether there were substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Iran, there is a real risk that the Applicant would suffer significant harm.

96 I consider Ground 1 is made out.

Ground 2

97 I reject the First Respondent's submission that the claim for protection due to being a failed asylum seeker was not made. It is, in my view, a component of the claims he expressly and consistently made that he feared harm of return to Iran due to illegally entering Australia. This claim appears:

- In the statement dated 17 June 2013;[41]
- To the delegate at interview;[42]
- In submissions dated 10 July 2015;[43] and
- The Tribunal hearing.[44]

98 In addition, I am conscious of the passage in the reasons for judgement of Charlesworth J in *CLS* at [46] and following. At [60], stating:

> If the premise underlying the Tribunal's reasoning in paragraph 32 is that of a voluntary return, then it has erroneously assessed a claim the appellant had not in fact made. If the premise underlying its reasoning is that of an involuntary return, then that premise is not only inconsistent with the inference the Minister seeks to have

[39] *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16 at [119].
[40] Submission at [56] of these reasons.
[41] Court Book on page 57 at [10].
[42] Court Book on pages 100 and 102.
[43] Court Book on pages 132 to 137.
[44] Tribunal reasons at [16].

> drawn from paragraph 31, but gives rise to an alternative error: the Tribunal has not dealt with the claim that the appellant would necessarily come to the attention of the authorities, not merely after his forcible return but because of the forcible return. In my opinion, neither assumed premise can be safely attributed to the Tribunal. The proper inference is that the Tribunal has engaged in confused thinking resulting in a failure to make factual findings concerning the appellant's particular circumstances and a failure to apply the statutory criteria to the facts as found, particularly the criterion in s 36(2)(aa).

99 Charlesworth J's remarks are equally applicable to the erroneous approach of the Tribunal in this case. In my view the Tribunal's approach and reasoning demonstrated at [51] and [71] reveal jurisdictional error.

100 Where it is uncontentious that the Applicant arrived in Australia as an Irregular Maritime Arrival[45] and no longer holds a valid passport,[46] I agree with the Applicant's submissions that the Tribunal was obliged to consider whether the Applicant met the requirements for complementary protection as a failed asylum seeker should his application for protection be refused.

101 I also agree that the terms of the Tribunal's reasons themselves demonstrate that the member assumed the Applicant would return voluntarily to Iran if not granted a protection visa rather than enquiring about this, then making a finding and giving reasons for its conclusion. The Tribunal approach in this case is distinguishable from that referred to in DUP to which counsel for the First Respondent relied.

102 I consider Ground 2 is made out.

CONCLUSION

103 As Grounds 1, 2, 3 and 4 have been made out, the application is allowed and the matter is remitted to another member of the Administrative Appeals Tribunal for redetermination.

I certify that the preceding one hundred and three (103) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Taglieri.

Associate:

[45] Court Book on pages 12 to 155.
[46] Tribunal reasons at [71] and [72].

Dated: 2 February 2023