HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

RE THE MINISTER FOR IMMIGRATION
AND MULTICULTURAL AFFAIRS & ANOR RESPONDENTS

EX PARTE FAUSTIN EPEABAKA PROSECUTOR

Re Minister for Immigration and Multicultural Affairs;
Ex parte Epeabaka [2001] HCA 23
3 May 2001
M22/1999

ORDER

Application dismissed with costs.

Representation:

R R S Tracey QC with P R D Gray for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondent

I R L Freckelton for the prosecutor (instructed by Victoria Legal Aid)

CATCHWORDS

Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka

Immigration – Refugees – Protection visa – Affirmation by Refugee Review Tribunal of decision to refuse application for protection visa – Public statements made by Tribunal member on personal Internet home page about truthfulness of applicants for refugee status – Whether Pt 7 of *Migration Act* 1958 (Cth) constitutes a code excluding the common law rules of natural justice and in particular the ostensible bias rule.

Administrative law – Natural justice – Bias – Reasonable apprehension of bias – Whether a reasonable party or member of the public might apprehend that decision of Tribunal member was affected by a prejudiced mind – Whether ostensible bias may be inferred from statements made after a decision.

Constitution, s 75(v).
Migration Act 1958 (Cth), Pts 7 and 8.

1 GLEESON CJ, McHUGH, GUMMOW AND HAYNE JJ. This application, brought under s 75(v) of the Constitution, was directed by Hayne J to be made to the Full Court. The applicant seeks writs of prohibition (with certiorari) and mandamus.

2 The applicant, in April 1996, sought a protection visa, claiming to be a refugee. In September 1996, a delegate of the first respondent refused that application. The applicant, in October 1996, applied to the Refugee Review Tribunal ("the Tribunal") to review the delegate's decision. The Member constituting the Tribunal was Dr Rory Hudson. In January 1997 the Tribunal affirmed the delegate's decision. There were then proceedings in the Federal Court of Australia, to which further reference will be made below. In February 1999, the applicant commenced proceedings in the original jurisdiction of this Court, claiming that the decision of the Tribunal, constituted by Dr Hudson, was "affected by … bias". This was later refined to an assertion of apprehended, rather than actual, bias. The applicant's contention was that "the decision of the … Tribunal made by Dr Rory Hudson … would excite in the mind of a reasonable party or member of the public [an apprehension] that it was the product of a partial and prejudiced mind."

3 The source of the asserted apprehension of partiality and prejudice was a public statement made by Dr Hudson, said to reveal what counsel for the applicant referred to as his "attitudes" towards people claiming refugee status. Counsel explained that, by "attitude", he meant "an entrenched predisposition toward an issue or a class of person". The entrenched predisposition was said to involve an adverse opinion of the credibility of people claiming to be refugees.

The proceedings before the Tribunal and the Federal Court

4 The statement by Dr Hudson upon which the applicant's case is based was published several months after the Tribunal decision adverse to the applicant. Nevertheless, the grounds of that decision, and the subsequent history of the matter in the Federal Court, form part of the context in which the claim of apprehended bias is to be evaluated.

5 The applicant arrived in Australia on 2 April 1996. He is a national of Congo. He travelled to Australia, from France, under the name of Malou Timissi, carrying a passport belonging to Mr Timissi, which the applicant later claimed to have stolen. On 10 April 1996, the applicant told the authorities his name was Faustin Epeabaka, and applied for a protection visa. He produced a birth certificate and a Congolese National Identity Card. He said that, immediately following his arrival, he had returned Mr Timissi's passport by post.

His own passport, he claimed, had previously been sent back to Congo by French authorities.

6 The Tribunal's assessment of the applicant's claim for a review of the delegate's decision commenced as follows:

> "There are many very serious credibility problems with the applicant's account. A number of these go to the issue of whether the applicant is indeed Faustin Epeabaka and a citizen of Congo. These arise principally from the claimed circumstances surrounding his use of the passport of Malou Timissi and his travel to Australia, and it is appropriate to deal with them first."

7 Fingerprint evidence satisfied the Tribunal that the applicant was Faustin Epeabaka, but the Tribunal considered it was possible that he used two names, one of which was Timissi, and that he had acquired a second nationality. The Tribunal questioned the applicant about various aspects of his claim that he feared persecution and, for reasons given, found a number of his answers implausible and unconvincing. At different times, he gave different versions of the events said to have given rise to his fear of persecution. On some matters, the Tribunal was prepared to give him the benefit of the doubt. Ultimately, however, the Tribunal did not believe the applicant "when his claims are considered cumulatively", and rejected his contention that he faced a real chance of persecution in Congo. The decision was made on 17 January 1997.

8 The applicant appealed successfully to Finkelstein J in the Federal Court[1]. In brief, Finkelstein J, upon analysing the Tribunal's reasons for disbelieving the applicant, concluded that those reasons were so illogical and unreasonable as to involve, or manifest, error of law.

9 The Minister then appealed to the Full Court of the Federal Court (Black CJ, von Doussa and Carr JJ). The appeal was allowed[2]. The decision of the Full Court was based upon two grounds. The first, which is significant for present purposes, was that Finkelstein J's criticisms of the reasoning of the Tribunal on matters of fact and, in particular, on the applicant's credibility, were unjustified. The Full Court rejected the finding of Finkelstein J that the

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1 *Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 397.

2 *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411.

Tribunal's reasoning was illogical. The Court supported substantial parts of the Tribunal's reasoning on the matter of the applicant's credibility. The second ground, which is not presently significant, was that the Full Court disagreed with Finkelstein J's approach to whether the errors his Honour attributed to the Tribunal constituted, or involved, error of law.

The home page on the Internet

10 While the proceedings in the Federal Court were taking their course, there came to the attention of the applicant or his advisers the publication which is relied upon as the source of the apprehension of bias.

11 The circumstances of the publication were unusual. Dr Hudson, while still a member of the Tribunal, (he no longer holds that office), decided to tell the public "something about what [he] believe[d] in and what [he] like[d] to do." He said: "That way, perhaps you will get some idea of where I'm coming from." So, in a home page on the Internet, in October 1997, he published some photographs of himself and his friends, and told some of his life's story.

12 For people who hold judicial, or quasi-judicial, office to set out to give the public "some idea of where [they are] coming from" might be regarded by some as reflecting a commendable spirit of openness; but it has dangers. It may compromise the appearance of impartiality which is vital to public confidence in the administration of justice. It is the recognition of such a danger that has traditionally caused judges to exercise caution in their public conduct and statements. Dr Hudson set out to tell the public about his approach to his job and, in so doing, furnished the applicant with an argument about his "entrenched predispositions". He may have allowed enthusiasm to outrun prudence.

13 Dr Hudson said:

> "Working at the Refugee Review Tribunal is rewarding in many ways. One is independent and able to use one's critical faculties to accomplish something that is worthwhile, giving protection to people in need and, one hopes, ultimately promoting the observance of basic human rights throughout the world. Regrettably, the RRT does not often get the credit it deserves. When we find a person to be a refugee, we are criticized for being too soft; when we refuse an applicant, others complain that we are [biased] against refugees. But it's not like that. I think that all of my colleagues try conscientiously to reach the decision which is right. We try to avoid preconceptions one way or the other. When I was first appointed, a colleague who shall remain nameless said to me, 'Let 'em all in, Rory!'. But while I would like to let in to Australia at least 95% of the applicants

> who come to us, who are usually deserving cases and decent human beings even if they lie through their teeth (as they often do) in their desperation to find a better life, it's not as simple as that. The Government has a fixed quota of places for refugees both onshore and offshore every year. Therefore, for every person in Australia one finds to be a refugee, who is thus able to remain in Australia, another person overseas, also in deep distress, misses out. So it would not be right to find an applicant to be a refugee if they were not truly in need of protection. This means that we have to make decisions which are not easy and not pleasant to make. But it has to be done.
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> We work with dishonesty and corruption on all sides: foreign governments who practise the most abhorrent forms of cruelty against their citizens, immigration officials bent on keeping out as many people as they can irrespective of need, other parties who in my present position I had better not mention, applicants who weave webs of lies, lawyers and migration agents who prey on them to rip off what little money they have. In these sordid surroundings, it is, I firmly believe, only the RRT and the courts (and, to be fair, a small minority of honest lawyers and migration agents) who stand up for decent values and who honestly seek to do what is right.
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> I was lucky to be reappointed as a member of the RRT in 1997 when my first term of appointment expired. Unfortunately, many fine colleagues were not, and I miss their wisdom, compassion and expertise. However, we battle on. I have until mid-1999 before my second appointment expires. I have reason to think I won't be reappointed again when that happens. Who knows what the future holds? I shall be looking for opportunities to continue to work in this field in some capacity. I would hope to serve as an advocate for refugee and human rights causes. It is more pleasant to be a person's advocate than his judge."

14 In December 1998, Heerey J, in the Federal Court[3], in proceedings brought by another applicant claiming refugee status, set aside a decision of the Tribunal constituted by Dr Hudson on the ground of apprehended bias based upon the publication of the above material.

15 Heerey J held that there was "a clear case of apprehended bias", and, therefore, a failure to accord substantial justice. He referred to s 420(2)(b) of the *Migration Act* 1958 (Cth) ("the Act"), and to the decision of the Full Court of the Federal Court in *Eshetu v Minister for Immigration and*

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3 *Ferati v Minister for Immigration and Multicultural Affairs* (1998) 54 ALD 381.

Multicultural Affairs[4]. That decision was later reversed by this Court[5]. However, the ground of reversal does not touch the factual finding made by Heerey J.

16 Heerey J gave the following reasons for his finding[6]:

> "Dr Hudson has published to the world a view that applicants for refugee status, as a class, are likely to be untruthful. Literally of course that does not deny the possibility that some asylum seekers are truthful. But no asylum seeker could reasonably be expected to accept as fair a decision-maker who has already indicated a predisposition to regard asylum seekers as untruthful. An applicant would regard him or herself as starting behind scratch.
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> …
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> The kind of bias exhibited here is through 'interest or preconceptions existing independently of the case': *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 372 … per Dawson J …
>
> I do not think there is room for the application of any bane and antidote theory. Dr Hudson has expressed compassion for refugees and manifested that in a practical way by his work in Hong Kong. But his critical role in either believing or disbelieving an individual applicant is hopelessly compromised by his published preconception that applicants often 'lie through their teeth' and 'weave webs of lies' ."

17 In substance, that expresses the argument for the applicant in the present case, who contends that the same result should follow.

Jurisdictional issues

18 The first respondent in the present case raised jurisdictional issues that were not raised in the case before Heerey J. For reasons that will appear, the outcome does not turn upon the resolution of those issues. However, they need to be considered.

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4 (1997) 71 FCR 300.

5 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

6 *Ferati v Minister for Immigration and Multicultural Affairs* (1998) 54 ALD 381 at 383-384.

19 The second respondent to the application before this Court was originally identified as Dr Hudson, described as a former member of the Tribunal. By consent, the proceedings were amended to describe the Tribunal itself as the second respondent. The jurisdiction invoked is that given by s 75(v) of the Constitution. The Tribunal is "established" by s 457 of the Act. It "consists" of members appointed by the Governor-General (ss 458, 459). The Tribunal is not created as a body corporate. Accordingly, no occasion arises here to consider the question whether, had the Tribunal been given corporate status by the Act, this would have prevented it being characterised as an officer of the Commonwealth within the meaning of s 75(v)[7]. The case was argued on the assumption that the members of the Tribunal collectively are officers of the Commonwealth. The first respondent, the Minister, is undoubtedly such an officer.

20 The legal basis of the applicant's complaint, assuming it is made good, is that the members of the Tribunal are bound by the common law principles of natural justice, or procedural fairness. Those principles where they apply, include a requirement that a decision-maker be, and appear to be, capable of bringing an impartial mind to bear upon the exercise of his or her decision-making functions. In *The Queen v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group*[8] this Court said:

> "The common law principles of natural justice are well understood though they have been variously expressed …
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> Those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds."

21 The kind of suspicion presently relevant is one based, not upon interest, or relationship, or association, but upon a form of prejudgment, or predisposition[9],

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7 See Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 27-28.

8 (1969) 122 CLR 546 at 553-554.

9 cf *The Queen v Watson*; *Ex parte Armstrong* (1976) 136 CLR 248 at 258 per Barwick CJ, Gibbs, Stephen and Mason JJ.

or, to use the words of Dawson J, "preconceptions existing independently of the case."[10]

22 There is a question as to the extent to which the common law rules of natural justice, or procedural fairness, applied to the Tribunal when it made the decision in question. Since the present proceedings are brought in this Court under s 75(v), that should not be confused with the question of the limits of the power of the Federal Court to review a decision of the Tribunal[11].

23 Part 7 of the Act deals with review of protection visa decisions. It empowers the Tribunal to review, amongst others, decisions of the kind made by the Minister's delegate in September 1996 in relation to the applicant. Divisions 3, 4, 5 and 7, of Pt 7, in the form in which they stood at the relevant time, governed the conduct of the Tribunal. The Tribunal's procedures were, and are, inquisitorial rather than adversarial in nature. Proceedings before the Tribunal do not take the form of litigation between parties. If the Tribunal varies or sets aside the decision under review, the decision as varied or substituted is taken to be the decision of the Minister. Section 420 of the Act requires the Tribunal to act according to the substantial justice and the merits of the case. Hearings are in private (s 429). The Tribunal is empowered to take evidence on oath or affirmation (s 427) and must give reasons for its decision (s 430). Part 8 of the Act provides for review of the Tribunal's decisions by the Federal Court. At that stage, the proceedings become adversarial in nature.

24 At the relevant time, ss 423, 425, 426, 427 and 438 contained various provisions as to what the Tribunal was, and was not, required to do in the course of a review. For example, s 425(1)(a) required the Tribunal, subject to a presently irrelevant qualification, to give an applicant an opportunity to appear before it to give evidence. Section 467 required a Tribunal member who had a conflict of interest to make disclosure, and prohibited the member from conducting a review without consent.

25 Part 8 of the Act, dealing with review of decisions by the Federal Court, included the following provision:

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10 *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 372.

11 cf *Abebe v The Commonwealth* (1999) 197 CLR 510.

"476 (1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

(a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;

(b) that the person who purported to make the decision did not have jurisdiction to make the decision;

(c) that the decision was not authorised by this Act or the regulations;

(d) that the decision was an improper exercise of the power conferred by this Act or the regulations;

(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;

(f) that the decision was induced or affected by fraud or by actual bias;

(g) that there was no evidence or other material to justify the making of the decision.

(2) The following are not grounds upon which an application may be made under subsection (1):

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

(3) The reference in paragraph (1) (d) to an improper exercise of a power is to be construed as being a reference to:

(a) an exercise of a power for a purpose other than a purpose for which the power is conferred; and

(b) an exercise of a personal discretionary power at the direction or behest of another person; and

(c) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

but not as including a reference to:

(d) taking an irrelevant consideration into account in the exercise of a power; or

(e) failing to take a relevant consideration into account in the exercise of a power; or

(f) an exercise of a discretionary power in bad faith; or

(g) any other exercise of the power in such a way that represents an abuse of the power that is not covered by paragraphs (a) to (c).

(4) The ground specified in paragraph (1) (g) is not to be taken to have been made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

26 The validity of that provision was upheld in *Abebe*. It is to be noted, however, that it defines and limits the jurisdiction of the Federal Court; not of this Court.

27 The practical content of the requirements of natural justice, or procedural fairness, in the case of the operations of the Tribunal is affected both by the non-adversarial form of its procedures, the nature of the matters it is required to consider in coming to a decision, and the legislation which in some respects directly modifies those requirements. However, s 476(2)(a) is a provision about the jurisdiction of the Federal Court; read either alone or together with

s 476(1)(g) it does not affect the capacity of this Court to exercise its constitutional jurisdiction. Nor does it, either expressly or by implication, produce the result that ostensible bias leaves the Tribunal's decision-making unaffected. The kind of conduct on the part of the Tribunal that might give rise to a reasonable apprehension of bias needs to be considered in the light of the Tribunal's statutory functions and procedures. Conduct which, on the part of a judge in adversarial litigation, might result in such an apprehension, might not have the same result when engaged in by the Tribunal. That is another matter.

28 It was submitted for the first respondent that the provisions of Pt 7 of the Act, at the relevant time, were sufficiently comprehensive in their prescription of the procedures to be followed by the Tribunal as to exclude, by necessary intendment, the need to comply with any other requirements of procedural fairness and, in particular, with the requirements concerning bias. This submission must be rejected, at least in so far as it relates to bias, actual or apprehended. The consequences of such a legislative intent are far-reaching. In the case of actual bias, s 476(1)(f) negates such a purpose. It being obvious that there is no such purpose in relation to actual bias, the existence of such a purpose in relation to apprehended bias would need to be made plain. No such purpose appears.

29 There was also an argument as to whether conduct after a decision could be relied upon to make out a case of apprehended bias. In theory, there is no reason why not. In practice, a substantial interval between such conduct and the decision might make the case harder to establish.

The issue for decision

30 The applicant must fail, not on the grounds referred to above, but on the merits. In this respect, we are unable to agree with the decision of Heerey J in the earlier case.

31 A fair reading of the matter published by Dr Hudson would take account of the following:

1. One of the primary points Dr Hudson sets out to make is that members of the Tribunal "try to avoid preconceptions one way or the other".

2. The remarks about the fact that some applicants tell lies are made in the context of explaining the difficulty of the Tribunal's task. One difficulty is that people who claim refugee status are often so fearful of persecution, and so desperate, that they lie. The pressures which lead people to do that are seen as an obstacle to discovering the truth; not as a reason for making anything other than an honest attempt to discover the truth.

3. Dr Hudson, in a variety of ways, stresses his sympathy for, not his antipathy towards, applicants. He concludes with what looks like an expression of desire, at a future time, to work for applicants.

4. The material is designed to emphasise how conscientious Dr Hudson is in the performance of his duties.

32 The views expressed as to the pressure of circumstances leading some applicants to lie are not peculiar to Dr Hudson. They reflect common experience, and common sense. In *Abebe*[12], Gummow and Hayne JJ said:

> "… the fact that an applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising. It is necessary always to bear in mind that an applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself."

33 This was referred to as a difficulty confronting the Tribunal in the execution of its tasks. If those very words had been used by Dr Hudson, it is not easy to see what different meaning they would have given his material.

34 It is not a question of bane and antidote. It is a question of reading the remarks about applicants who tell lies in the context in which they appear. These remarks were regrettable, as was the fact that another member of the Tribunal encouraged him to "Let 'em all in". If that encouragement were meant to be taken seriously and literally, it appears to reveal pro-applicant bias in another member of the Tribunal. However, what Dr Hudson said about the difficulties created by some desperate applicants who lie would not lead to a reasonable apprehension that he might not have brought an impartial mind to bear upon an assessment of the present applicant's credibility.

Conclusion

35 The application should be dismissed with costs.

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12 (1999) 197 CLR 510 at 577-578 [191].

36 KIRBY J. These proceedings arise out of a decision[13] of the Refugee Review Tribunal[14] ("the Tribunal") and concern the requirements of the law of natural justice. Specifically, they raise that aspect of the law of natural justice that requires a court[15], tribunal[16], jury[17] or other formal decision-maker[18] to reach its decision in relation to the parties and proceedings before it, without bias towards those parties or the issues which they present for decision. The case has unusual features. It comes before this Court, in its original jurisdiction, on an application for the constitutional writs of mandamus and prohibition, and for a writ of certiorari to make those constitutional writs effective[19].

The facts and procedural questions

37 Mr Faustin Epeabaka ("the applicant") seeks orders quashing the decision of the Tribunal, constituted by a former member, Dr Rory Hudson, and addressed to the Minister for Immigration and Multicultural Affairs ("the Minister"). The Tribunal, by that name, submitted to the orders of this Court, although it is not a body corporate but rather a body constituted by its individual [present] members[20]. The Minister resists the applicant's entitlement to relief.

38 The proceedings have an extensive history. Both before the delegate of the Minister and the Tribunal, the applicant failed to establish his entitlement to a

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13 Decision and Reasons for Decision, Epeabaka, Refugee Review Tribunal, V96/05128, 17 January 1997, per Member Hudson.

14 Established by the *Migration Act* 1958 (Cth), s 457 ("the Act").

15 Recent cases involving courts include *Johnson v Johnson* (2000) 74 ALJR 1380; 174 ALR 655; *Ebner v Official Trustee in Bankruptcy* (2000) 75 ALJR 277; 176 ALR 644.

16 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552.

17 *Webb v The Queen* (1994) 181 CLR 41.

18 *Najjar v Haines* (1991) 25 NSWLR 224 (court appointed referee); *R v Gough* [1993] AC 646 at 670 (referring to "justices or members of other inferior tribunals, or with jurors, or with arbitrators").

19 Constitution, s 75(v).

20 The Act, ss 458, 459.

protection visa as a "refugee"[21] under the *Migration Act* 1958 (Cth) ("the Act"). However, he did succeed at first instance in the Federal Court of Australia[22] which ordered that the decision of the Tribunal be set aside and that the matter be remitted for redetermination by a differently constituted Tribunal. On appeal, that order was itself set aside by the Full Court of the Federal Court[23].

39 The substantive issues litigated in the Federal Court are not directly relevant to the question agitated in these proceedings. This is because the argument that has concerned this Court, namely that Dr Hudson was disqualified from deciding the matter by reason of ostensible bias, did not occur to the applicant until the publication of the reasons of Heerey J in *Ferati v Minister for Immigration and Multicultural Affairs*[24]. That decision, raising similar issues on almost identical facts, was announced approximately two weeks before the Full Court's decision was delivered in the applicant's case. But even if *Ferati* had been noticed, and its holding raised in time before the Federal Court, the jurisdiction of that Court is limited by the Act. Relevantly, it may only review an administrative decision on the ground that such decision "was induced or affected by ... *actual* bias"[25]. Although, at times, the allegations of the applicant appeared to come close to suggesting actual bias on the part of Dr Hudson, as ultimately framed, they contended no more than imputed, apparent or ostensible bias. They suggested that the parties or the public might, in the facts proved, entertain a reasonable apprehension that Dr Hudson, in making the Tribunal's decision concerning the applicant, might not have brought an impartial and unprejudiced mind to the resolution of the case[26].

40 The basis for the imputed bias alleged in this Court was the contents of a home page, which Dr Hudson published on the Internet. This publication concerned his experience as a member of the Tribunal, his attitudes to the general

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21 The Act, s 36. The history of the incorporation in the Act of the definition of "refugee" in Art 1A(2) of the Convention relating to the Status of Refugees in Australian law is set out in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-232, 251-256, 287.

22 *Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 397.

23 *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411.

24 (1998) 54 ALD 381 ("*Ferati*").

25 The Act, s 476(1)(f) (emphasis added).

26 *Vakauta v Kelly* (1989) 167 CLR 568 at 573-574.

issue of refugees, to the laws and practices affecting them and to the evidence they commonly gave before the Tribunal. Relevant extracts from the home page appear in the reasons of Gleeson CJ, McHugh, Gummow and Hayne JJ ("the joint reasons")[27]. I will not repeat them.

41 Singled out for special attention by Heerey J in *Ferati* were Dr Hudson's remarks that applicants for refugee status (of whom Mr Ferati, like the applicant, was one) often "lie through their teeth" and "weave webs of lies". Heerey J was of the opinion that such remarks had "hopelessly compromised" Dr Hudson by revealing publicly a preconception that existed independently of a particular case[28]. In such circumstances, according to Heerey J, an applicant approaching the Tribunal, constituted by Dr Hudson, "would regard him or herself as starting behind scratch"[29]. This was, in his Honour's view, a position that "no asylum seeker could reasonably be expected to accept"[30].

42 Although the home page was not published by Dr Hudson until 21 October 1997, ten months after the decision concerning the applicant, it was submitted that the views there expressed portrayed an attitude derived during Dr Hudson's entire service as a member of the Tribunal. It was therefore to be attributed to him as reflecting opinions held by him at the time that the impugned decision was made. The applicant argued that he was entitled to have his application determined by a Tribunal that was manifestly impartial. He sought from this Court the same relief as Heerey J had provided in *Ferati*. Although, in that case, Heerey J had rejected the suggestion of actual bias, he considered that the "clear case of apprehended bias" disclosed by the evidence amounted to a failure to act in accordance with the requirements of the Act. In providing relief, notwithstanding the lack of proof of actual bias, his Honour followed the authority of the Federal Court[31], which has since been reversed by this Court[32]. However, that matters not in these proceedings and Heerey J's finding of fact remains to be invoked by the applicant.

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27 Joint reasons at [13].

28 *Ferati* (1998) 54 ALD 381 at 384.

29 *Ferati* (1998) 54 ALD 381 at 383.

30 *Ferati* (1998) 54 ALD 381 at 383.

31 *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 300.

32 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

The issues

43 Given the matters argued for the applicant and for the Minister, the following issues were presented to this Court for consideration:

1. Having regard to the statutory context in which the decision of the Tribunal concerning the applicant was made, and the provision for judicial review of that decision, was the Tribunal bound to comply with the rules of natural justice in its conduct and determination of the review affecting the applicant? In particular, was it bound to comply with the rule that "forbids those making decisions which are subject to the rules of natural justice from exercising their power if they are ... ostensibly biased"[33]? Was that rule a jurisdictional condition to the exercise of the Tribunal's functions under the Act?

2. If so, having regard to the fact that the comments of Dr Hudson relied upon were not made public until well after the conclusion of the review affecting the applicant, is it shown that, in respect of the decision concerning the applicant, the parties or the public might entertain a reasonable apprehension that the Tribunal might not have brought an impartial and unprejudiced mind[34] to the resolution of its review in the applicant's case?

3. If so, by the applicable test, was Dr Hudson disqualified for ostensible bias from acting as the Tribunal and deciding the applicant's case?

4. If so, should relief nonetheless be denied on discretionary grounds, including by reason of the applicant's delay in bringing the present proceedings?

5. If not, what relief should be provided, given that Dr Hudson has now retired from office as a member of the Tribunal?

Natural justice, ostensible bias and the statutory scheme

44 *The Minister's first preliminary objection*: The Minister took two preliminary, or jurisdictional, objections relevant to the relief available in this

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33 Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 453; *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Vakauta v Kelly* (1989) 167 CLR 568 at 575, 584.

34 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294.

Court to a person in the position of the applicant. He submitted first that the provisions of the Act, governing the conduct of review by the Tribunal codified, and exhaustively provided for, the procedural requirements binding the Tribunal in making decisions concerning applications for refugee protection visas (such as that concerning the applicant). As such, those provisions did not expressly or impliedly require the Tribunal, in the conduct of its review, to comply with the common law rules of natural justice. Alternatively, it was submitted that the codification of these procedural requirements excluded the operation of the common law rules.

45 On either of the foregoing arguments, the Minister contended that the common law rules of natural justice were inapplicable to the Tribunal. To the extent that the rules of natural justice included the requirement that a decision-maker should not, at the time of decision, be affected by ostensible bias (as distinct from actual bias), such a requirement was not, so it was said, part of the law governing the Tribunal. Even if it could be shown that, for a particular decision, the Tribunal was constituted by a member who displayed ostensible bias towards the parties or the issues, this would not invalidate the Tribunal's decision. It would give rise to no legal redress either in the Federal Court or in this Court. At most, it could give rise to political complaint or to a request to the Minister to exercise his residual discretion[35]. But the decision of the Tribunal would remain valid and legally binding.

46 This is such an astonishing submission that it is as well to make it clear that I reject it. However, out of fairness to the careful way in which the argument was presented, I will outline how it was developed and why it fails.

47 *Arguments of the Minister*: First, reliance was placed upon the collection of mandatory procedural requirements contained in Pt 7 of the Act. Those requirements are binding on the Tribunal in the conduct of the review of protection visa decisions. They included:

- s 423: providing the applicant with an entitlement to give the Registrar of the Tribunal a statutory declaration on matters of fact and written arguments in relation to the decision under review;

- s 425: providing, relevantly, for the Tribunal to give the applicant an opportunity to appear before it to give evidence and present arguments, and to obtain other evidence as considered necessary;

- s 426: requiring notification to the applicant of the right to appear before the Tribunal;

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35 The Act, s 417.

- s 426: entitling the applicant, upon giving notice, to request that the Tribunal call other persons to give evidence but relieving the Tribunal of an obligation to obtain evidence suggested by the applicant;

- s 427: providing for the giving of information to an applicant and for the conduct of such investigations or medical examinations that the Tribunal thinks necessary;

- s 427(6): removing a right to be represented before the Tribunal or to examine or cross-examine other persons;

- s 438: empowering the Tribunal to have regard to matters contained in documents or information which may or may not be disclosed to the applicant; and

- s 467: requiring a member of the Tribunal to disclose to the applicant any conflict of interest in relation to a review and, in that case, not to take part in the review or exercise powers under the Act unless the applicant and the Principal Member of the Tribunal consent[36].

48 There is no express general exemption in Pt 7 of the Act from a duty to observe the requirements of the rules of natural justice. Such express exemptions now appear elsewhere in the Act[37]. Nevertheless, the description of the procedural requirements as a "code", the terms of the Minister's Second Reading Speech in support of the Bill[38] which introduced many of the relevant procedures into the Act[39], the Explanatory Memorandum that accompanied the Bill[40] and the contents of Pt 7 of the Act all indicate, clearly enough, a legislative purpose to regulate, by express provision, the way in which the Tribunal would conduct its

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36 The Act, Pt 7 has been amended by the *Migration Legislation Amendment Act (No 1)* 1998 (Cth), Sched 3. Sections 424 and 425 were repealed and substituted by ss 424, 424A, 424B, 424C, 425, 425A and 426A. The amendment took effect on 1 June 1999. These amendments do not affect the substance of the Minister's argument.

37 See eg the Act, s 501(5) as amended by the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act* 1998 (Cth).

38 Migration Reform Bill 1992 (Cth).

39 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 November 1992 at 2621-2622, 2623.

40 *Explanatory Memorandum* (1992) at 23 [51]-[52], 74 [372], 81 [411].

review jurisdiction. At least to the extent that the legislation deals with matters such as procedural fairness, the common law rules that might otherwise have applied to the exercise by the Tribunal of its jurisdiction are replaced by the express requirements of the detailed statutory scheme[41].

49 Secondly, the Minister drew attention to the provision in s 476 of the Act. This section removes from the grounds of judicial review, upon which an application might be made to the Federal Court, a ground "that a breach of the rules of natural justice occurred in connection with the making of the decision". It also limits review in that Court, relevantly, to a ground alleging "actual bias" on the part of the decision-maker. Whilst these provisions do not purport to control the jurisdiction or powers of this Court, they evidence (so it was put) a purpose of confining judicial review of Tribunal decisions, in effect, to those in which actual bias can be established or where bias of the kind expressly dealt with in s 467 of the Act (concerning disclosure of conflicts of interest) can be made out. Outside such circumstances, so it was submitted, this Court, when invited in the exercise of its constitutional jurisdiction to review decisions of the Tribunal for ostensible bias on the part of a Tribunal member, would withhold relief.

50 To the extent that I understood this argument, it appeared to suggest that this Court, in providing constitutional relief, would take into account the way in which the Parliament had expressly determined the content of natural justice as it applied in the Tribunal[42]. This Court would therefore not defy valid federal legislation regulating the proceedings in the Tribunal. On the contrary, it would confine any relief available under the constitutional writs to cases where jurisdictional error was shown by reference to the jurisdiction which the Tribunal actually enjoyed, not to rules of the common law effectively excluded by the enactment of the detailed procedural code.

51 Thirdly, the Minister submitted that, if the rules of natural justice relating to imputed bias were not excluded by the detailed provisions of the Act (as primarily argued), the statutory provisions at least narrowed the operational content of the rules. In particular, they had this effect because of the inquisitorial character of the review conducted by the Tribunal. It was suggested that natural

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41 *Kioa v West* (1985) 159 CLR 550 at 584-585; *Annetts v McCann* (1990) 170 CLR 596 at 598-599; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 66 [60]; 176 ALR 219 at 238.

42 cf *Abebe v The Commonwealth* (1999) 197 CLR 510 at 568 [157]; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 628 [49], 643-644 [109], 664-668 [176]-[179]. But see *Minister for Immigration and Multicultural Affairs v Cho* (1999) 92 FCR 315 at 330 [64].

justice rules, applicable to a court or a body conducting its proceedings according to adversarial procedures, were substantially modified in the case of an administrative decision-maker like the Tribunal. Such a person was entitled (perhaps expected) to gather information informally from many sources and to keep up to date with a vast range of information. Administrators were not confined to the more formal procedures of a court where contested material facts would normally be ignored unless proved[43]. According to this branch of his argument, the Minister submitted that the Tribunal was more like an administrative decision-maker of the ordinary kind than a formal court-like body.

52 There is no doubt that there are aspects of the Tribunal's statutory procedures which partake of inquisitorial functions. Thus the Tribunal is empowered to secure evidence for itself. It is authorised to satisfy itself, as an expert decision-maker, of conditions in other countries in a way that would not be usual to a court of law or other more formal body where such considerations have to be proved or otherwise disregarded. In *Abebe v The Commonwealth*, Gummow and Hayne JJ stated that the proceedings before the Tribunal were inquisitorial[44]. In that case, the Tribunal had failed to put to the applicant the suggestion that her story of detention and rape were untrue. Their Honours pointed out that "the Tribunal is not in the position of a contradictor"[45]. By s 420(2)(a) of the Act, the Tribunal is not bound by technicalities, legal forms or the rules of evidence. This relatively common statutory provision has been said to free the Tribunal "at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals"[46].

53 *The Tribunal must be free of bias*: It is not necessary, in these proceedings, for me to return to the question of whether the writs of mandamus and prohibition provided by s 75(v) of the Constitution are universally confined to cases of jurisdictional error. I will assume for present purposes that they are. But if they are, it is well established that breach of the requirements of natural

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43 cf *Pasini v Boland* (1999) 92 FCR 438 at 445-446 [26]-[29].

44 (1999) 197 CLR 510 at 576 [187]. In several cases the Federal Court has held that the Tribunal "must follow inquisitorial procedures" and to procure information for itself: see eg *Li v Minister for Immigration and Multicultural Affairs (No 2)* [2000] FCA 172 at [8].

45 (1999) 197 CLR 510 at 576 [187].

46 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 628 [49].

justice amounts to such a jurisdictional error. If proved, such a breach will attract constitutional relief[47].

54 Notwithstanding the Minister's arguments, the Tribunal must, in my view, conform at least to that requirement of the rules of natural justice that forbids participation in a decision by a member who is affected by ostensible bias (as well as actual bias) in relation to the parties or the proceedings. The preliminary objection, and first argument, of the Minister must therefore be rejected. My reasons are as follows.

55 First, it may be accepted that the legal obligations of natural justice must, in their detail, be harmonious with applicable statutory provisions. The requirements of natural justice cannot contradict those provisions, so long as they are valid[48]. This rule applies whether the true foundation of the requirement to observe natural justice is an implication, imputed to the legislature, as inherent in the conferral of statutory power, or whether it lies in the rules of the common law that mould themselves to, and supplement, the terms of the statute[49]. Either way, the requirement may not conflict with valid legislation.

56 However, the obligation to comply with the rules of natural justice run deep in the presuppositions of the Australian Constitution and of the entire legal system of the Commonwealth. Even where they do not find their root in the Constitution itself (as, it has been suggested, the prohibition on actual or ostensible bias on the part of judges may do[50]), it would require very clear

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47 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243.

48 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 66 [60]; 176 ALR 219 at 238; cf *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 324 [97].

49 The two theories are referred to in *Kioa v West* (1985) 159 CLR 550 at 584-586, 615; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652; *Annetts v McCann* (1990) 170 CLR 596 at 604; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 553-554 [112]-[113]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 60-61 [38]-[42], 85-86 [168]-[169]; 176 ALR 219 at 230-231, 264-265.

50 *Johnson v Johnson* (2000) 74 ALJR 1380 at 1386 [37]; 174 ALR 655 at 664; *Ebner v Official Trustee in Bankruptcy* (2000) 75 ALJR 277 at 289-290 [79]-[82] per Gaudron J, 295-296 [116]-[117] of my own reasons; 176 ALR 644 at 661-662, 670-671.

legislative provisions to relieve an adjudicative statutory body from the obligation to comply with such deeply entrenched principles[51].

57 The rule against bias on the part of federal tribunals in Australia is a well established part of the law of natural justice[52]. To excuse a tribunal from compliance with the obligation of being free from the actuality and appearance of bias would, at the least, require express, or very clearly implied, legislative authority. This is because of the strong presumption, which the courts impute to the Parliament, that it would not, without a provision that is unmistakably clear, depart from such a fundamental assumption of governance[53]. Even assuming that the procedural rules contained in Pt 7 of the Act are a "code" of some variety, they fall far short of such an exclusive regulation of the matters of natural justice as to expel the deeply entrenched presupposition that a repository of statutory power will be free from actual or ostensible bias in exercising such power.

58 When one looks at the provisions of the Act, from which it is suggested an inference can be drawn that the Parliament intended to condone the performance by a biased Tribunal member of functions under the Act, they fail to establish that proposition. In *Judicial Review of Administrative Action*[54], Professor Aronson and Mr Dyer comment that, although a statute can exclude the bias rule, it is rarely wholly excluded. The authors point to the extreme reluctance of courts to sanction bias for causes which are unnecessary for the proper operation of the Act. If relief for ostensible bias is excluded by the statutory "code", it must be excluded in the case of ostensible bias occasioned by venal causes for, equally, what is said about that matter by no means covers the field. This is such a dubious notion that it would require valid legislation of the greatest particularity to drive a court to such a conclusion.

59 The express mention of disclosure of conflicts of interest in s 467 of the Act does not constitute regulation of the entire variety of matters that can arise in arguments about bias, actual or ostensible. Whilst it is true that s 467(2) of the Act makes it plain that the conflict of interest to be disclosed extends to "any interest, pecuniary or otherwise", the kind of attitudinal bias of which the applicant complains in this case might well extend far beyond the "interest" so defined. The member in question might not even perceive an attitudinal bias as

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51 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 204.

52 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552.

53 *R v Home Secretary; Ex parte Pierson* [1998] AC 539 at 587.

54 2nd ed (2000) at 492.

an "interest". In any case, it cannot be left to the member alone to determine the existence and extent of a disqualifying bias.

60 Depending on the circumstances, the presence of actual or ostensible bias may be so antithetical to the lawful performance of statutory functions that it could strike at the very heart of the power conferred and suggest that such power has been deployed for a personal or idiosyncratic (and thus unlawful) purpose. However that may be, no such exemption has been provided by the Act. The code of procedure in the Act is substantially silent about the variety of matters that may be raised in an allegation of actual or ostensible bias. The Minister's first argument is therefore rejected.

61 Secondly, in so far as s 476(1)(f) of the Act limits the applications that may be made for review by the Federal Court (relevantly, to a ground alleging that a decision was "induced or affected by ... actual bias") and in so far as s 476(2) of the Act provides that grounds for such review in the Federal Court do not include a complaint "that a breach of the rules of natural justice occurred in connection with the making of the decision", such provisions say nothing about the relief available under the Constitution in this Court. In *Minister for Immigration and Multicultural Affairs v Eshetu*[55], Gaudron J and I said:

> "The effect of s 476(2) is not to relieve the Tribunal from observance of the rules of natural justice or to authorise the making of unreasonable decisions. Rather, it is to forbid the Federal Court from reviewing a decision on those grounds. A person who wishes to rely on those grounds can do so only in proceedings under s 75(v) of the Constitution".

62 Because the limiting provisions in s 476 are confined, in terms, to proceedings in the Federal Court and to "grounds" available in such proceedings, it would be contrary to their terms, and to principle, for this Court to exercise its own powers under s 75(v) of the Constitution by reference to the provisions of s 476 of the Act[56]. The latter does not even purport to govern this Court. As properly acknowledged by the Minister, even if it attempted to do so, such a provision could not control the discharge by this Court of its constitutional jurisdiction. Neither as a matter of power nor as a matter of discretion are the limitations imposed by the Parliament on the Federal Court relevant to the scope and exercise of the jurisdiction and powers which the applicant has invoked in this Court. The second argument of the Minister is likewise rejected.

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55 (1999) 197 CLR 611 at 632 [64] (footnote omitted).

56 See also the Act, ss 485, 486 referred to in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 634 [72].

63 Thirdly, I do not consider it necessary or helpful, in this case, to decide whether the Tribunal can be classified as "inquisitorial", as some have considered it[57], or "adjudicative" or "investigative". Such labels may have a tendency to mislead. What is important is that the Tribunal is "established", as such, by federal law[58]. It consists of members who are appointed by the Governor-General[59]. The Tribunal is obviously intended to act independently of the delegates whose decisions it reviews and of the Minister who gives effect to the Tribunal's determinations.

64 The Tribunal enjoys very considerable power over individuals who come within its jurisdiction. In the nature of that jurisdiction, its exercise will sometimes affect the welfare, and even the lives, of the persons involved and possibly those associated with them. The requirements of natural justice in a particular case may vary in accordance with considerations such as the functions and independence of the relevant decision-maker and the importance of the decisions which that person makes[60]. By such criteria, members of the Tribunal are, and are expected to be, persons who approach their functions free from disqualifying bias. They are intended to perform those functions in compliance with lawful procedures. The procedures which the Parliament has spelt out in its "code" (in some respects going beyond the requirements of the common law) would be a charade if the persons discharging those functions were irretrievably biased in fact, or if they appeared to be such to the parties or the ordinary, reasonable member of the community.

65 It can therefore be assumed that the Parliament intended members of a body such as the Tribunal to be free of actual and ostensible bias. Otherwise public confidence in the decisions of the Tribunal would be shaken and applicants for refugee status, and those associated with them, would be left with a deep sense of grievance. This conclusion is further reinforced by the fact that,

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57 See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 656 [142]; Kneebone, "The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role?", (1998) 5 *Australian Journal of Administrative Law* 78: based on a study of decisions of the Tribunal involving the assessment of credibility, the author argues that far from being inquisitorial in its methods the Tribunal has sometimes appeared too confrontational and adversarial.

58 The Act, s 457.

59 The Act, ss 458, 459.

60 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Australian National Industries Ltd v Spedley Securities Ltd (In Liq)* (1992) 26 NSWLR 411; *Gas & Fuel Corporation Superannuation Fund v Saunders* (1994) 52 FCR 48.

effectively, save for a residual discretion of the Minister, the Tribunal is the final decision-maker on disputed questions of fact and on contests about credibility and the merits[61]. Appeals to the Federal Court and applications to this Court are limited to legal questions. They do not provide a means to substitute decisions on the facts for those found by the Tribunal[62].

66 In some ways, the freer hand given to an independent member of the Tribunal, to secure information and to use it without necessarily disclosing it to the person affected, imposes practical requirements of manifest impartiality greater than in the case of judges and like decision-makers. Judicial office is controlled by centuries of tradition. Judges are obliged to sit in public. They are required to accept the legal representatives of the parties. They are controlled by settled procedures and rules of evidence. Their orders are reviewable by superior courts. If members of the Tribunal are authorised to act in some respects by inquisitorial procedures, that fact does not, of itself, exempt them from the rules of natural justice prohibiting bias.

67 This last point has been firmly established by the Supreme Court of Canada in an analogous case. In *Newfoundland Telephone Co v Board of Commissioners of Public Utilities*[63], Cory J, delivering the reasons of that Court, said:

> "All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine. ...
>
> Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. ... The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. ...

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61 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 263.

62 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 34-36; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, 291; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651-653 [132]-[134].

63 [1992] 1 SCR 623 at 636; cf *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 at 170-171 [35]; *R v Bow Street Magistrate; Ex parte Pinochet (No 2)* [2000] 1 AC 119 at 138.

> The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator."

The standard in Australia is no lesser one.

68 Fourthly, there is yet a further reason for insisting on that standard in the present statutory context. The Tribunal is exercising statutory powers of a special kind. They are powers designed to fulfil Australia's obligations in international law. Those obligations were freely accepted and evidenced by Australia's ratification of the applicable international treaties. Such law has been adopted for a high humanitarian purpose[64].

69 By ratification of another international treaty, Australia has committed itself to the standards of the International Covenant on Civil and Political Rights[65]. Although that treaty is not part of Australia's domestic law as such, by subscribing to the first Optional Protocol, Australia has submitted itself to the supervisory scrutiny of the United Nations Human Rights Committee, established pursuant to the Protocol. It is inevitable, over time, that the content of Australia's common law will be influenced by the norms of international law established by, and under, such instruments[66]. It is also inevitable as the influence of international law spreads, that decisions on the requirements of such treaties (and like requirements of regional and national instruments) will come to influence the interpretation of relevant Australian legislation and even of the Constitution itself[67]. This is particularly so in respect of legislative provisions which are themselves designed to give effect to Australia's international obligations.

70 Article 14.1 of the International Covenant on Civil and Political Rights relevantly provides:

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64 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 74 ALJR 1556 at 1594-1595 [197]-[199]; 175 ALR 585 at 639-640.

65 Done at New York on 19 December 1966; (1980) *Australian Treaty Series* No 23 (entered into force 13 November 1980); (1976) 999 *United Nations – Treaty Series* 171; (1967) 6 ILM 368.

66 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288.

67 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-661; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167]; see Simpson and Williams, "International Law and Constitutional Interpretation", 11 *Public Law Review* 205 at 210-211, 214-225.

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

The width of this article is evidenced by the fact that the principle of equality applies both before courts and tribunals. Although the word "tribunal" is used in the Covenant in a way that might not exactly correspond to its common use in Australian law, the juxtaposition of "courts" and "tribunals", and the generality of the obligation stated, make it clear that the rule established binds any formal and independent body making a decision under law affecting the rights and obligations of an individual. Such a body must, by international law, be "impartial".

71 Without impartiality, independence would be a sham[68]. The decision-maker would be entitled to shelter behind independence to pursue partial or biased decisions to the detriment of the persons and society affected. The decisions of the United Nations Human Rights Committee[69] and of the European Court of Human Rights[70] on the equivalent provisions of the European Convention on Human Rights[71], reinforce the principles recognised in Australian law. They make it all the more unlikely that, in this case especially, the statutory scheme relied on by the Minister would condone, or excuse, ostensible bias on the part of a Tribunal member and deprive the person affected of the right to object, and to obtain redress, where necessary in this Court.

72 To the extent that the Act is in any way ambiguous, and the statutory code of procedure or other provisions in it might be read as having the result urged for the Minister, it is not an interpretation that should be preferred. In a matter where the Act constitutes the means by which Australia discharges its international obligations, this Court should ensure, so far as it may, that those

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68 *Ebner v Official Trustee in Bankruptcy* (2000) 75 ALJR 277 at 301-302 [143]-[149]; 176 ALR 644 at 678-680.

69 See eg *Karttunen v Finland* (1994) 1 *International Human Rights Reports* 78 at 82 [7.2], discussed in Martin et al (eds), *International Human Rights Law and Practice: Cases, Treaties and Materials* (1997) at 527-531.

70 *Huber v Switzerland*, European Court of Human Rights, 23 October 1990, Series A, No 188.

71 That is, the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, (1950) *European Treaty Series* No 5.

obligations are carried out in accordance with the applicable norms of international law. This means that the Tribunal, as the body deciding contested claims to refugee status, must in terms of the Covenant be both "independent" and "impartial".

73 It follows that the first preliminary objection by the Minister should be rejected. The Act does not exempt the Tribunal, and did not exempt Dr Hudson, from conforming to the rules of natural justice requiring that decisions be made without ostensible bias on the part of the Tribunal or its members.

Inferring bias from later comments

74 *The Minister's second preliminary objection*: The Minister had a second preliminary objection. He argued that the time for determining whether there was an appearance of bias was the time of the conduct of the review before the Tribunal or, at the latest, the time of the decision. It was submitted that, if the rule against imputed bias were extended to include the conduct of proceedings and the making of decisions by judicial officers and tribunal members months or possibly years before the disqualifying conduct relied on, two undesirable consequences would flow. The first was that a serious potential to invalidate decisions would be established. Particularly because the suggested flaw was said to be one that deprived the decision-maker of jurisdiction, it was submitted that this would be contrary to principle. It would involve determining such a question by reference to facts alleged to have a retrospective operation. Secondly, such an approach was also said to be incompatible with the fundamental purpose of disqualification for actual or imputed bias. That purpose is to uphold the integrity of the relevant decision-making process as perceived both by the parties and by the impartial and reasonable observer. If a rule permitting retrospective invalidation were adopted, it was argued, this would effectively remove the incentive which the law should impose upon parties, who wish to raise objections of this kind, to do so before or during proceedings, at the earliest time, so as to avoid the injustice to others and needless cost to the public involved in persisting with a futile hearing.

75 *Later statements may suggest earlier bias*: I agree that such considerations are relevant to the decision which a court will make when faced with a belated allegation, relying on later events, that a formal decision-maker is disqualified for bias. Because people change their minds, abandon old preconceptions or embrace new ones, proof that prejudice existed at one time will not necessarily establish that it existed at an earlier or later time when the person concerned was discharging a decision-making function. Depending on the preconceptions that are proved, and the passage of time involved, it will often be impossible to prove that the suggested attitude existed at an earlier, or later, moment. Furthermore, the serious responsibility of adjudication ordinarily expects that personal predilections will be kept in tight rein. Opinions recorded before, or after, a person held the office of a public decision-maker may,

depending on the circumstances, be such as to be discounted, or put to one side, when evaluating what that person did, or said, when discharging such functions.

76 In the present case none of these considerations warrants upholding this second preliminary objection of the Minister. At the time of publishing his home page, Dr Hudson was still a member of the Tribunal. The time between that publication and the decision concerning the applicant was 10 months. It was not suggested that anything had occurred in that interval to alter Dr Hudson's views or to warrant a conclusion that the opinions expressed were lately formed and did not represent the opinions held by him when he rejected the applicant's application for review. On the contrary, the terms in which the home page is expressed suggest that the views stated amounted to considered opinions, drawn from the extensive professional experience recorded in the publication. Such experience predated Dr Hudson's appointment to the Tribunal. The character and subject matter of the published views therefore represented a statement of deeply felt personal attitudes, operative at the relevant time.

77 In these circumstances, whatever may be the situation in other cases where the facts are different, it would certainly have been open to the hypothetical bystander to derive from the published home page an opinion that the views there expressed existed before, and at the time, of Dr Hudson's decision concerning the applicant. The Minister's second preliminary objection is therefore rejected.

Ostensible bias is not established

78 *Bias as disposition undermining impartiality*: The foregoing conclusions bring me to the merits of the applicant's complaint. In this regard it is helpful to start with an explanation of the concept of "bias" in a case such as the present. One such explanation was provided in *Liteky v United States* by Scalia J, delivering the judgment of the Court[72]:

> "The words ['bias or prejudice'] connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts)."

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72 510 US 540 at 550 (1994) (original emphasis).

79 As the Supreme Court of Canada pointed out, when referring to these remarks, Scalia J was careful to emphasise that not every favourable or unfavourable disposition attracts the label of bias or prejudice in this sense[73]:

> "For example, it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavourable disposition is objectively justifiable – in other words, it is not 'wrongful or inappropriate'."

What is required for a disqualifying bias is that the condition or state of mind displayed "sways judgment and renders [the decision-maker] unable to exercise his or her functions impartially in a particular case"[74].

80 In 1943 Judge Frank, writing for the Second Circuit of the Court of Appeals in the United States, pointed to the obvious fact that "[t]he human mind, even at infancy, is no blank piece of paper". He went on[75]:

> "We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices. ... Interests, points of view, preferences, are the essence of living. Only death yields complete dispassionateness, for such dispassionateness signifies utter indifference. ...
>
> The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner; the sunlight of awareness has an antiseptic effect on prejudices. Freely avowing that he is a human being, the judge can and should, through self-scrutiny, prevent the operation of this class of biases."

81 *Considerations suggesting ostensible bias*: I acknowledge that there are a number of considerations that support the applicant's submission that Dr Hudson was disqualified for ostensible bias of an impermissible kind and degree.

82 First, there is the unusual feature of this matter which most applicants before the Tribunal would not have faced. That feature is not so much that

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73 *R v S (RD)* [1997] 3 SCR 484 at 528 per Cory J approving *Liteky v United States* 510 US 540 at 550 (1994).

74 *R v Bertram* [1989] OJ No 2123 (HC) at 51-52 per Watt J cited with approval in *R v S (RD)* [1997] 3 SCR 484 at 529 per Cory J.

75 *In re J P Linahan* 138 F 2d 650 at 651-653 (1943); cf *United States v Conforte* 457 F Supp 641 at 651-652 (1978) (footnotes omitted).

Dr Hudson had a personal home page on the Internet (something that may become unremarkable in years to come[76]). Nor was it the fact that he referred, in his home page, to his statutory office and to refugee law. What was unusual was that, in that discussion, he made direct remarks concerning a matter which is usually at the heart of the exercise of the Tribunal's jurisdiction. He did so in terms that could be read as derogatory of the majority (or at least many) of the applicants for refugee status.

83 The existence of electronic communication of ideas, and the discussion by judges and tribunal members of issues relevant to their vocations, is less shocking today than it would have been in earlier times. Then it would have been unthinkable. Now, prudently performed, it may contribute to a more informed understanding of matters of legitimate community concern, a better appreciation of professional issues relevant to the administration of justice and greater transparency in government generally.

84 According to the applicant, however, Dr Hudson went beyond these legitimate activities. He displayed a "bent of mind"[77]. This, it was argued, was incompatible with the impartial performance of his functions as a member of the Tribunal. He was not obliged to reveal his mind in such an ample and candid way. But having done so, what he had written was available to raise real concerns for the parties and the public. Moreover, it placed the applicant, and people like him, in a disadvantageous position. Normally, those approaching the Tribunal are, by virtue of silence on the part of the Tribunal member, entitled to infer, and expect, that the member would approach the decision in their case impartially. Dr Hudson had, according to the applicant, deprived the Tribunal's decision of the presumption that it would otherwise enjoy. It left, so the applicant argued, those whose fate had been decided by Dr Hudson with the ineradicable belief that he was prejudiced against them. It thereby undermined the integrity and authority of the Tribunal's decisions in their cases.

85 Secondly, the applicant was entitled to rely on the fact that, in his case (as in the case of *Ferati* decided by Heerey J), the essential reason for rejecting his entitlement to a protection visa was a belief on the part of Dr Hudson that he had been dishonest in making his application and in the evidence which he gave before the Tribunal.

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76 The Chief Justice of British Columbia in Canada, a senior and experienced judge, has such a home page and invites, and responds to, email communication with the public: www.courts.gov.bc.ca/CJBC/welcome.htm.

77 *Berger v United States* 255 US 22 at 33-34 (1921).

86 It is a fair reading of the Tribunal's decision in the applicant's case, encapsulated in the section of the primary judge's reasons cited by the Full Court[78], that Dr Hudson's difficulty with the applicant's claim rested, substantially, on a conclusion arrived at concerning the applicant's credibility. Thus, the reasons repeatedly refer to the "implausibility" of the applicant's conduct and evidence. Specifically, they refer to the "many credibility problems surrounding the applicant's identity"[79]. These were identity problems which the primary judge in the Federal Court regarded as insubstantial and unreasonable once Dr Hudson accepted (as he did) the evidence of Mr Norton, a fingerprint expert, to the effect that the applicant was, indeed, the person whom he said he was[80].

87 As the Full Court pointed out, this still left eight matters, identified by Dr Hudson, as telling against the acceptability of the applicant's evidence[81]. Those eight matters were held by the Full Court to sustain, as not unreasonable in the relevant sense, the decision of the Tribunal. But in these proceedings, the applicant was entitled to point out that most, if not all, of those eight matters were grounds by which Dr Hudson had rejected the applicant's credibility and found his testimony "implausible". Put shortly, the applicant argued, Dr Hudson was unduly suspicious of applicants for refugee status. His suspicions, revealed on his home page, had flowed over to affect the outcome of the applicant's case.

88 Thirdly, the applicant pointed to the high standards envisaged by the Parliament and by decisions of Australian courts for the determination by the Tribunal of the reviews encrusted to it, consonant with the serious interests at stake. The applicant supported the opinion of Heerey J in *Ferati*[82]. He submitted that, like Mr Ferati, he should not be obliged to accept a flawed decision of a Tribunal member who had stated that he approached cases coming before the Tribunal believing that many applicants "[lied] through their teeth" and "[wove] webs of lies". Setting aside the decision would not ensure that the applicant succeeded in his application for refugee status. But it would ensure that he, and

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78 *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411 at 413-415 [4].

79 Reasons of Dr Hudson cited by the Full Court: *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411 at 414 [4].

80 *Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 397 at 406.

81 *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411 at 416 [7]-[8].

82 (1998) 54 ALD 381.

others like him, were afforded a decision by a manifestly fair and impartial Tribunal, not one that had published to the world preconceptions which, in the midst of generalisations about sympathy, had disclosed a disqualifying bent or attitude.

89 *Ostensible bias is not established*: I do not regard the foregoing arguments as meritless. Out of respect for the opinion of Heerey J in *Ferati*, and the view which I share with him concerning the high standard of impartiality demanded of the Tribunal, I have hesitated before coming to the contrary opinion. But in the end, I have done so for the following reasons:

90 First, it must be remembered that the test for disqualification in a case such as the present is not merely a sense of unease or a feeling that conventions of discretion and prudence have been breached. Something more is required. Although the law interposes the imputed consideration of a fair minded observer and speculates on whether that person "might" (rather than "would") entertain a reasonable apprehension of bias in the particular case[83], the serious consequences that necessarily attend the affirmative conclusion oblige that it should be "firmly established"[84]. This reflects a recognition that decision-makers (whether in the judiciary, in adjudicative tribunals or elsewhere vested with public power) are human beings. They have foibles and personal characteristics that vary substantially, reflecting differences of view that also exist in the community at large. Being independent, such decision-makers, in their professional conduct and utterances, will often exhibit robust individuality that is characteristic of people who are obliged to make important and difficult decisions without fear or favour.

91 Secondly, it is unfair to Dr Hudson to take out of context the references in his home page to the fact that applicants often "lie through their teeth" and "weave webs of lies"[85]. These remarks must be read against the background of the entire home page which is in the nature of a personal revelation concerning Dr Hudson's homelife, work experience and values.

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83 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 294; *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70.

84 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553-554; *R v Lusink; Ex parte Shaw* (1980) 55 ALJR 12 at 14; 32 ALR 47 at 50-51; *Australian National Industries Ltd v Spedley Securities Ltd (In Liq)* (1992) 26 NSWLR 411 at 427-428; cf Allars, "Procedural Fairness: Disqualification Required by the Bias Rule", (1999) 4 *The Judicial Review* 269 at 278.

85 *R v S (RD)* [1997] 3 SCR 484 at 545.

92 Far from emerging from a fair reading of the entire home page as a decision-maker prejudiced against persons in the position of the applicant, Dr Hudson is revealed as someone sensitive to the "desperation" which the overwhelming majority of such applicants feel "to find a better life". He describes their cases as "usually deserving" and most applicants as "decent human beings". The reference to the fact that some tell lies appears as a counterpoint to the remark of an unnamed colleague who told Dr Hudson, on his first appointment, to "[l]et 'em all in".

93 The reference to "weav[ing] webs of lies" appears in a context of condemning particular people (cruel foreign governments, obdurate immigration officials, greedy lawyers and migration agents who prey on applicants) whilst praising the Tribunal and the courts of Australia. Therefore, in context, the words complained of are much less objectionable than they might appear, viewed in isolation. They are indicators of a person who gave up a well paid position in the Federal Attorney-General's Department to work presumably for a pittance amongst Vietnamese refugees in Hong Kong and who looked to his appointment to the Tribunal as a high privilege. He regarded his appointment to the Tribunal, when it was made and renewed, with surprise. He expressed the hope to "serve as an advocate for refugee and human rights causes" when his service on the Tribunal concluded. Against this background, it can hardly be said that the reference to lies displayed a general bias against applicants for refugee status. If anything, the overall impression of the home page is of a person, by inclination, vocation and experience, sympathetic to refugee applicants.

94 Thirdly, it cannot really be regarded as surprising to see a reference by a member of the Tribunal to the fact that applicants for refugee status sometimes lie in prosecuting their claims. Numerous cases that have come before this Court have revealed the extent to which issues of credibility loom large before the Tribunal, simply because of the nature of its jurisdiction. This point has been remarked upon in this Court as the passage from *Abebe*[86], extracted in the joint reasons[87], illustrates.

95 Anyone who has read Holocaust stories or the biographies of refugees in earlier times and other places will know how desperate situations sometimes produce lies and deception ventured in the name of deliverance[88]. It is

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86 (1999) 197 CLR 510 at 577-578 [191].

87 Joint reasons at [32]; see also Kneebone, "The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role?", (1998) 5 *Australian Journal of Administrative Law* 78.

88 eg Klemperer, *I Shall Bear Witness* (1998) at 346.

unremarkable that the same should be true of claimants for refugee status in Australia today. Recognition of that fact by a member of the Tribunal, so long as it did not distort the actual decision made in a particular case, would be unlikely to "firmly establish" the presence of bias against persons driven to lie. Least of all would it be likely in a person of the disclosed attitudes and predilections of Dr Hudson.

96 Accordingly, the applicant has not shown that the Tribunal, in hearing and deciding the case against him, was affected by ostensible bias.

The remaining issues and order

97 The consequence of this conclusion is that, although both of the preliminary objections raised by the Minister fail, the applicant's application for constitutional and related relief must be dismissed. It is not, therefore, necessary to decide the residual issues of discretion and relief. They would have arisen only if the applicant had succeeded on the merits. There is likewise no point in considering the application for an extension of time within which to bring the proceedings for the writs claimed by the applicant.

98 Because the applicant was forced to make his application to this Court, in consequence of the bifurcated review process mandated by s 476(2) of the Act, I would adopt the course which Gaudron J and I took in *Minister for Immigration and Multicultural Affairs v Eshetu*[89]. There should be no order as to the costs of the application for the issues raised in the application could otherwise have been included, without inhibition, in proceedings in the Federal Court, without troubling this Court.

99 The application should be dismissed.

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89 (1999) 197 CLR 611 at 641 [104].