

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON AND GUMMOW JJ

RE REFUGEE REVIEW TRIBUNAL & ANOR

RESPONDENTS

EX PARTE H & ANOR

PROSECUTORS

Re Refugee Review Tribunal; Ex parte H
[2001] HCA 28
24 May 2001
S276/2000

ORDER

- 1. Order absolute for a writ of prohibition prohibiting the respondents from taking action on the decision of the first respondent made on 16 November 1999.*
- 2. Order that time be extended and that a writ of certiorari issue to quash the decision of the first respondent made on 16 November 1999.*
- 3. In respect of the application by the prosecutors dated 31 December 1997, Order absolute for a writ of mandamus requiring the first respondent to consider and determine the application according to law.*
- 4. Respondents to pay prosecutors' costs of the proceedings in this Court.*

Representation:

T A Game SC with D H Godwin for the prosecutors (instructed by R A Kessels)

No appearance for the first respondent

S J Gageler SC for the second respondent (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Re Refugee Review Tribunal; Ex parte H

Administrative law – Natural justice – Reasonable apprehension of bias – Affirmation by Refugee Review Tribunal of decision to refuse applications for protection visas – Credibility in issue before Tribunal – Constant interruptions of and challenges to evidence of applicant – Whether vigorous testing of evidence might lead a fair-minded lay person to apprehend bias on the part of the Tribunal – Appropriate modification of test for apprehended bias when applied to administrative proceedings – Whether relief under s 75(v) of the Constitution should be refused on discretionary grounds.

1 GLEESON CJ, GAUDRON AND GUMMOW JJ. The prosecutors, who are husband and wife, are citizens of Sri Lanka. They seek relief under s 75(v) of the Constitution with respect to a decision of the Refugee Review Tribunal ("the Tribunal"). Their application for relief has been referred to a Full Bench of this Court to be determined by reference to the transcript of argument which the parties presented before the Chief Justice and, also, by reference to their supplementary written submissions.

2 The prosecutors arrived in Australia in October 1997. Shortly afterwards, they applied for protection visas pursuant to s 45 of the *Migration Act* 1958 (Cth) ("the Act"). Their applications were refused by a delegate ("the delegate") of the Minister for Immigration and Multicultural Affairs. They then sought review of that decision by the Tribunal under s 412 of the Act.

3 The Tribunal embarked upon a hearing of the prosecutors' application for review on 21 September 1999. The prosecutors thereafter made complaint about that hearing and a further hearing took place on 19 October 1999. On 16 November 1999, the Tribunal affirmed the decision of the delegate not to grant protection visas. The Tribunal's decision with respect to the male prosecutor was subsequently the subject of judicial review by the Federal Court of Australia which held, at first instance and on appeal, that the Tribunal's decision was not affected by actual bias.

4 In his separate judgment dismissing the male prosecutor's appeal to the Full Federal Court, Marshall J expressed the view that, although actual bias had not been established, "a reasonable apprehension of bias ha[d] been demonstrated."¹ The prosecutors now seek relief with respect to the Tribunal's decision on grounds of apprehended bias and breach of the rules of natural justice; grounds that were not available in the Federal Court².

5 It was held in *Re Refugee Review Tribunal; Ex parte Aala* that administrative decisions may be reviewed in this Court for failure to observe the rules of natural justice³. Further, it was accepted in *Minister for Immigration and Multicultural Affairs v Jia* that such a failure would extend to cases in which

1 *H v Minister for Immigration and Multicultural Affairs* [2000] FCA 1348 at [40].

2 See *Abebe v Commonwealth* (1999) 197 CLR 510.

3 (2000) 75 ALJR 52; 176 ALR 219.

apprehended bias is established⁴. However, the rule with respect to apprehended bias, as it has developed in relation to the judicial process, is not based solely on the concept of natural justice. Its development is also referable to the need to maintain confidence in the judicial process⁵. Thus, the rule as to apprehended bias, when applied outside the judicial system, must take account of the different nature of the body or tribunal whose decision is in issue and the different character of its proceedings⁶. Moreover – and on this the parties are in substantial agreement – regard must be had to the statutory provisions, if any, applicable to the proceedings in question, the nature of the inquiries to be made and the particular subject-matter with which the decision is concerned.

6 Before turning to the question whether the prosecutors have established apprehended bias or breach of the rules of natural justice on the part of the Tribunal, it is convenient to identify the precise issues upon which the Tribunal's decision ultimately turned. And to do that, it is necessary to outline the basis upon which the prosecutors sought protection visas.

7 The prosecutors claimed before the Tribunal that they feared persecution on the grounds of race and/or political opinion if returned to Sri Lanka. So far as the possibility of persecution on grounds of race is concerned, the male prosecutor is Sinhalese and his wife is partly Tamil, being descended from a Sinhalese father and a Tamil mother. The prosecutors claimed that, because of the female prosecutor's ethnicity, they were perceived to be supporters of the Liberation Tigers of Tamil Eelam ("the LTTE"). They claimed that they had, on that account, been subjected to hurtful remarks and other harassment from their neighbours. Moreover, they claimed that the male prosecutor, who worked for

4 [2001] HCA 17 at [95], [105], [106] per Gleeson CJ and Gummow J (with whom Hayne J agreed at [176]), [167] per Kirby J, [310] per Callinan J.

5 See *Johnson v Johnson* (2000) 74 ALJR 1380 at 1382 [12] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; 174 ALR 655 at 658. See also *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 266 per Barwick CJ, Gibbs, Stephen and Mason JJ.

6 See *Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17 at [181], [187] per Hayne J (with whom Gleeson CJ and Gummow J agreed at [100]). See also *Ebner v Official Trustee* (2000) 75 ALJR 277 at 279 [4] per Gleeson CJ, McHugh, Gummow and Hayne JJ; 176 ALR 644 at 646-647. This approach is consistent with that adopted by Mason J in *Kioa v West* (1985) 159 CLR 550 at 585.

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Airlanka, had come under suspicion when the airline's water supply was poisoned and, again, when one of its laptop computers was stolen.

8 The attitude of their neighbours and the suspicions which were said to attach to the male prosecutor with respect to incidents concerning Airlanka also provided the context in which the prosecutors claimed that they feared persecution on political grounds if returned to Sri Lanka. In this regard, they claimed they would suffer at the hands of Sri Lankan authorities because they either knew or believed that they, the prosecutors, had rendered assistance to the LTTE. Further, the prosecutors claimed that, if returned to Sri Lanka, the LTTE would force them to render assistance in the future, it being said in the male prosecutor's application that he was sure that "the LTTE will take the maximum out of me until the end of me."

9 A critical aspect of the prosecutors' claim that they feared persecution on political grounds was their assertion that they had, in fact, assisted the LTTE by providing accommodation for some of its members and, also, by furnishing it with information as to flights and flight patterns which the male prosecutor was able to obtain through his employment with Airlanka. Assistance with respect to accommodation was provided, it was said, because the LTTE had detained the female prosecutor's mother. Later, according to the male prosecutor, he was asked to provide other assistance. To support his account, the male prosecutor produced to the Tribunal two letters written under the letterhead of the LTTE. The first letter concerned the provision of accommodation and the other requested further assistance.

10 The Tribunal accepted that "the [prosecutors] may have suffered some harm because the [female prosecutor was] part Tamil ... [but not] such serious or significant harm as to amount to persecution". Accordingly, the Tribunal was not satisfied that there was a real chance that, if returned to Sri Lanka, the prosecutors would be persecuted on grounds of race.

11 The Tribunal's reasons for rejecting the prosecutors' claims with respect to persecution on grounds of political opinion were primarily based on its rejection of their claim to have assisted the LTTE. In this regard, the Tribunal stated:

"I note that they have produced what they claim are letters from the LTTE making arrangements for the accommodation of LTTE operatives. I am not satisfied that the letters are genuine. It is fanciful to suggest that the LTTE would make such arrangements by mail.

I did not find the [prosecutors] to be convincing witnesses. I am not satisfied that the [prosecutors] provided any assistance to the LTTE".

12 Having rejected the prosecutors' claims that they had provided assistance to the LTTE, it was necessary for the Tribunal to consider whether they might be persecuted by reason of political opinion that might be attributed to them. In this regard, the Tribunal rejected the male prosecutor's claim that he had been suspected of poisoning the Airlanka water supply and of stealing an Airlanka laptop computer. It did so because of a favourable character reference that had been given to him by his immediate supervisor. The Tribunal stated that "[it found] his claims incredible in the light of that reference", adding:

"Surely if he was suspected of assisting a terrorist attack on Airlanka he would not be released nor would he have been given such a reference."

Ultimately, the Tribunal concluded that it was "not satisfied that it would be suspected that the [male prosecutor] would assist the LTTE *for reasons of his or his wife's political opinion.*"

13 As appears from the Tribunal's reasons, its decision rested, in the main, on its assessment of the male prosecutor's credibility. That issue was at the forefront of both hearings before the Tribunal. One matter upon which the male prosecutor's credibility was brought into question in the hearing before the Tribunal was the question whether his wife's ethnicity was or would be known in Colombo where the prosecutors lived before coming to Australia. The transcript records the following:

"[Male Prosecutor]: after I got married, just after we got married the people around us they stoned – stoned us.

[The Tribunal]: Why is that?

[Male Prosecutor]: In the night – in the midnight.

[The Tribunal]: Why would they do that?

[Male Prosecutor]: They – they have – they have put some posters around our wall. You don't understand that.

[The Tribunal]: Why would they do that?

[Male Prosecutor]: They didn't like any Tamil people come and live – live in your area. They have a scary feeling that it's – it's – that's the discrimination.

[The Tribunal]: Because your wife's mother's Tamil?

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- [Male Prosecutor]: Yes, of course. That – that's the discrimination. That's the discrimination ...
- [The Tribunal]: But surely – surely if you moved to Colombo nobody would know she's Tamil?
- [Male Prosecutor]: I didn't want to go to Colombo. I'm not a coward man. I don't – I didn't want to leave like a coward.
- [The Tribunal]: If you – if you shifted to a neighbourhood in Colombo ...
- [Male Prosecutor]: Yes.
- [The Tribunal]: ... where you were not known, who would know that your wife's Tamil?
- [Male Prosecutor]: My office people do know that. They know that.
- [The Tribunal]: How?
- [Male Prosecutor]: They are telling ... people from Galle and it – it's a normal thing. I have to give my marriage certificate. They will get to know that anyway. It – it's a ...
- [The Tribunal]: She doesn't even speak Tamil.
- [Male Prosecutor]: No. She – she does understand but she – she doesn't speak Tamil. They stoned us twice on ...
- [The Tribunal]: Your marriage – your marriage certificate doesn't say that she's Tamil. It doesn't even have a mother's name on it.
- [Male Prosecutor]: But anyway its ...
- [The Tribunal]: So, I mean, even if you did hand over your marriage certificate it's not going to tell us anything.
- [Male Prosecutor]: I don't know, I just ...

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- [The Tribunal]: ... translation of it here in front of me. It doesn't even give her mother's name. In fact it says that you're both Sinhalese.
- [Male Prosecutor]: Yes, maybe.
- [The Tribunal]: It does.
- [Male Prosecutor]: Yes. It's the oral – it's [a] normal thing, I don't know how to ... about this. This – they would get to know that. It's – how can explain ...
- [The Tribunal]: Well, at the moment, Mr [H], you're not making me believe that. I mean, ...
- [Male Prosecutor]: They started ...
- [The Tribunal]: ... from my point of view your wife doesn't speak Tamil.
- [Male Prosecutor]: Yes.
- [The Tribunal]: Your marriage certificate lists her as being Sinhalese, both of you as being Sinhala. I don't understand – I'm not at this stage persuaded that – that anybody would know that she is anything else but Sinhalese.
- [Male Prosecutor]: It's hard to make you understand the situation that I ...
- [The Tribunal]: It may well be hard, Mr [H], ...
- [Male Prosecutor]: So how can I ...
- [The Tribunal]: ... and I'll tell you what, at the moment it's not just hard, it's not working.
- [Male Prosecutor]: I don't know if it's working or not.
- [The Tribunal]: Well, it isn't".

Almost immediately after the exchange set out above, the Tribunal, without having questioned the male prosecutor with respect to his claim to have assisted the LTTE, put to the male prosecutor that his claims were fabricated. In this regard, the Tribunal was aware that some time before coming to Australia in

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October 1997, the male prosecutor had sought employment in Australia with Qantas and Ansett. This then followed:

- "[The Tribunal]: Do you know what it looks like to me, Mr [H], at this stage?
- [Male Prosecutor]: Yes.
- [The Tribunal]: It looks like to me that you – you applied to come to – you sought to come to Australia for reasons of employment, that failed in April 1997 and this – this ...
- [Male Prosecutor]: No, it's not failing that.
- [The Tribunal]: All the rest of this is just a fabrication to – to fix that problem.
- [Male Prosecutor]: Which ones? Which ones?
- [The Tribunal]: The whole story about the – being ...
- [Male Prosecutor]: No, no, you don't understand, no.
- [The Tribunal]: Well, that's how it looks to me".

15 Following further questions and answers with respect to the female prosecutor's ethnicity, the Tribunal returned to the male prosecutor's earlier applications for employment in Australia with Qantas and Ansett, saying:

"Mr [H], it looks to me like this is – this is an attempt to fix your problem of not getting a job with Qantas or Ansett?"

The male prosecutor then explained that he had applied for employment with Qantas and Ansett after experiencing police harassment when questioned about the stolen Airlanka laptop computer. This exchange then followed:

- "[The Tribunal]: Well, Mr [H], if they thought you'd stolen a laptop computer in September 1996 ...
- [Male Prosecutor]: Yes.
- [The Tribunal]: ... my strong suspicion is that you wouldn't be sitting here.

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[Male Prosecutor]: No, they couldn't prove it. My – my company managers they didn't – they didn't think that I – I stole it – I did it – I did it. It was used by four of us, actually. So, they – after the company security investigations we – all we went to the police station but they didn't harass the other three, other three people.

[The Tribunal]: Well, Mr [H] ...

[Male Prosecutor]: You're thinking that I'm saying lies? Definitely thinking that I'm saying lies?

[The Tribunal]: Yes, I – you're absolutely right, Mr [H], I do think that. Perhaps I'll hear from your wife but you're absolutely right; that's precisely what I'm thinking, Mr [H].

[Male Prosecutor]: You think that?

[The Tribunal]: Yes.

[Male Prosecutor]: Do you believing that I'm lying?

[The Tribunal]: Yes, that's precisely what I think at the moment, Mr [H].

[Male Prosecutor]: How can I make – believe me?

[The Tribunal]: I don't know yet. Perhaps I'll hear from your wife and we'll see how it looks to me then".

16

Shortly after the exchange just recorded, the male prosecutor was attempting to explain to the Tribunal that he had been suspected by the police with respect to the laptop computer when this occurred:

"[The Tribunal]: Well, as far as I can see at the moment all they – all they had reason to suspect you for is for having a couple of Tamil people stay the night – well, stay four nights.

[Male Prosecutor]: I had to make an entry, I went to the police station at the first incident when they told us. When I go to the police station do you know what he said to me, the police officer?

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[The Tribunal]: No, I don't, I wasn't there.

[Male Prosecutor]: He noted down the thing and he said ...

[The Tribunal]: This is back in March 1996?

[Male Prosecutor]: Yes, somewhere after – just a couple of ..."

Without allowing the male prosecutor to say anything further, the Tribunal then said:

"Yes, thank you. Mr [H], I'm going to ask you to wait outside now while I hear from your wife, if that's all right."

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The female prosecutor was then questioned by the Tribunal with respect to the requests for assistance that she claimed to have received from the LTTE and, also, the provision of accommodation to its members. She was also questioned about her educational background, her Tamil ethnicity and the suspicions which had attached to her husband. In the course of being questioned about her husband's employment applications to Qantas and Ansett the following exchange took place:

"[The Tribunal]: I think – do you know what I think? I think that – that having been unsuccessful in coming to Australia for reasons of employment that you and your husband have decided, well, if we can't get in by getting a job with Ansett or Qantas we'll become refugees.

[Female Prosecutor]: Yes, to do what? To do ...

[The Tribunal]: Get to Australia.

[Female Prosecutor]: No, I don't think so because my husband ...

[The Tribunal]: I must say your evidence is not terribly convincing, Mrs [H], and at the moment all I can see is that the – that the police know that your mother was Tamil – is that what – I don't see any basis for the police suspecting you of anything else. Indeed, if they did suspect you of anything else why wouldn't they have arrested you?"

18 Further questions were asked and answers given by the female prosecutor with respect to police action in relation to her husband and her home. Then, although not asked about the matter, the female prosecutor volunteered reasons why her husband had not fabricated his claim to be a refugee simply to come to Australia. Amongst other reasons, she advanced the following:

"I mean, the Australian – they don't even recognise the qualifications that he has so they won't – by coming here as a refugee we have gained ... nothing of – I mean, he has what – what will he gain employ – just because – you think we – he didn't know that when he – like losing all his privileges – privilege tickets and everything. Having his land and all that back at home with no one to look after them, that he'll come and lodge an application just for – just to come and stay here."

The Tribunal then volunteered that that was precisely what it thought and adjourned briefly.

19 After the adjournment, the Tribunal announced:

"Mr and Mrs [H], from my point of view all that I can understand at the moment the police know – the police could know is that your mother is Tamil, that you've had some Tamils come and stay. Now, I don't know that that's a basis for me to conclude that you face any risk should you return to Sri Lanka. Do you understand what I'm saying? Is there anything else you want to tell me in response to that?"

The prosecutors then gave reasons why they thought the police were looking for them, including a claim that the police had searched their house after they left for Australia. Thereafter, this exchange took place:

"[The Tribunal]: Mr [H], however you weigh this up if somebody wanted to harm you why haven't they harmed you already?"

[Male Prosecutor]: We – we escaped on time, I think. We have escaped ... in time.

[The Tribunal]: Well, I'll go and consider that, Mr [H]. You will probably be notified ... in a couple of weeks that I've made a decision. As I say you'll then have the opportunity of either coming to collect the decision or having it sent to you ...

[Male Prosecutor]: You don't trust us.

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[The Tribunal]: It's not a question of trust at all, Mr [H], I've got to go away and consider all this and come to a conclusion.

[Male Prosecutor]: You don't think that we are saying true, you think we are – all these things lies?

[The Tribunal]: At this stage, that's – that's exactly what I think but I'll go away and consider it all, Mr [H], and listen to the tape again and we'll see what conclusion I come to. Okay. Good luck, Mr [H]."

20 As already indicated, the prosecutors complained about the Tribunal hearing which took place on 21 September 1999 and a further hearing took place on 19 October 1999. The Tribunal was constituted as on the first occasion. The Tribunal informed the prosecutors of its understanding that "there was information that [they] wanted to give ... which I hadn't listened to or something" and invited them to give that information. The male prosecutor gave an account of police harassment, including the burning of his thigh with cigarette butts (misrecorded in the transcript as the burning of his tie) when he was suspected of poisoning the Airlanka water supply. The Tribunal then referred to the character reference provided to the male prosecutor by Airlanka, observing:

"It's a bit hard to believe that somebody – that an organisation that would say this about you thought that you were poisoning their drinking water."

The male prosecutor then explained that it was not his employer who suspected his involvement, but the Sri Lankan police.

21 Following the exchange with respect to matters arising out of the poisoning of the Airlanka water supply, the Tribunal asked whether there was anything else the male prosecutor wished to say. He then sought to substantiate his belief that the police either knew or suspected that he had provided accommodation to LTTE members. The Tribunal observed:

"I understand what you're saying, Mr [H]. I don't find it the least bit convincing."

Shortly thereafter, the Tribunal questioned the male prosecutor about the letters he claimed to have received from the LTTE as follows:

"[The Tribunal]: Tell me, Mr [H], why would the Liberation Tigers of Tamil [Eelam] write to you and give you a letter telling you on what day two of

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their named comrades are going to be present at a certain location?

[Male Prosecutor]: I don't know, actually.

[The Tribunal]: Are they idiots?

[Male Prosecutor]: I'm not sure.

[The Tribunal]: Well, are they really because they're a longstanding successful terrorist organisation and you don't get to be a longstanding successful terrorist organisation by sending people letters telling them what time two of your activists are going to be present at a certain location, do you?

[Male Prosecutor]: I know that but ...

[The Tribunal]: That's just laughable, Mr [H].

[Male Prosecutor]: Yes.

[The Tribunal]: Absolutely laughable."

22

After some questions and answers about the male prosecutor's failure to take the letter seeking accommodation to the police and, also, concerning the police harassment which he claimed to have suffered, the Tribunal returned to the female prosecutor's ethnicity. The transcript records the following:

"[The Tribunal]: How many – how common is it, Mr [H], for there to be inter-marriage between a Sinhalese and a Tamil?

[Male Prosecutor]: I don't understand you?

[The Tribunal]: How unusual is your situation; you are a Sinhalese man who has married a part Tamil – it's not very unusual, is it?

[Male Prosecutor]: I did not quite get you?

[The Tribunal]: How unusual is your situation, Mr [H]?

[Male Prosecutor]: It's not that unusual.

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- [The Tribunal]: No, it isn't that unusual, is it?
- [Male Prosecutor]: Yes. No, it's not that unusual.
- [The Tribunal]: Yet you're telling me it's because of your situation that you are suspected of – despite the fact that you're a Sinhalese – that you're suspected of assisting the LTTE?
- [Male Prosecutor]: Yes.
- [The Tribunal]: It's nonsense, Mr [H], isn't it?
- [Male Prosecutor]: I know that they suspect me; that's – due to petitions, I know that, because of jealousies and all that, so.
- [The Tribunal]: I'm here to listen to you, Mr [H], but I'm telling you quite plainly, Mr [H], that I'm unconvinced by your evidence at this point in time."

23 After the above exchange, the male prosecutor attempted to explain his fears if returned to Sri Lanka but was interrupted when the Tribunal expressed the view that at least one of the letters on LTTE letterhead was manufactured and that his evidence was fabricated. When the male prosecutor replied that he had received the letter, the Tribunal stated:

"You see, there's no basis whatsoever from my point of view on which I could conclude that you will be suspected of being an LTTE supporter. You're Sinhalese. There is no Sinhalese support for the LTTE. Your wife doesn't even speak Tamil."

24 A little later, the Tribunal again asserted the belief that the letters on LTTE letterhead were not genuine and asked if the male prosecutor wished to say anything else. The following then occurred:

- "[Male Prosecutor]: If you don't believe us it's nothing else to say. The only thing that ...
- [The Tribunal]: You're absolutely right, Mr [H], I don't believe you.
- [Male Prosecutor]: The people around us they wanted to chase us away from that place. In [1996] they stoned

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us after a couple of months later – after our marriage they stone us then that was ...

[The Tribunal]: Because they somehow guessed that your wife is part Tamil?

[Male Prosecutor]: They know that.

[The Tribunal]: They can tell just by looking at her?"

There then followed a discussion as to whether the female prosecutor was of Tamil appearance until the male prosecutor pointed out that her appearance was beside the point because people in Sri Lanka were inquisitive about people's background. The Tribunal responded:

"Even if they know she's part Tamil ... in your evidence your situation is not unusual. That's certainly my understanding, that your situation is not particularly unusual. There isn't any evidence that people in your particular circumstance face difficulties, Mr [H]."

25 In response to the Tribunal's assertion that people in his situation did not face particular difficulties, the male prosecutor claimed that his case was different. This then ensued:

"[The Tribunal]: So you keep saying but you just don't seem to be able to say anything that's the least bit convincing, do you?

[Male Prosecutor]: Than by – stoning us ...

[The Tribunal]: Mr [H], at this point in time I don't accept that you had a single difficulty.

[Male Prosecutor]: Well, I'm sorry, sir, I have.

[The Tribunal]: Because they don't fit. They don't fit with what we know about Sri Lanka, they don't fit with your circumstance and I've heard you giving the evidence and I find you to be a most unconvincing witness.

[Male Prosecutor]: Well, [sir], I had to go through a lot ...

[The Tribunal]: Mr [H], about all I believe from you is your name and address."

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26 In reply to the Tribunal's statement that it did not believe his claims, the male prosecutor asserted that his wife and he, himself, knew what had happened. A short exchange followed in which the Tribunal informed him that:

"I've found your evidence to be most unconvincing. It's an improbable story and you've told it very badly".

There was a further short exchange in which the male prosecutor said that he and his wife were hoping to go and hide in India to escape from their problems. The Tribunal asked if there was anything else which he wished to add, to which the male prosecutor replied:

"If you don't believe us, no."

The hearing then concluded, the Tribunal's final remarks being:

"All I have is a power to make a decision on the facts that I think are true and I'm afraid to say, Mr [H], I don't think that you've told me the truth. I think that you've fabricated the story and it's most unconvincing. So that's the basis upon which I'm going to have to make a decision, Mr [H]. Good luck."

27 The test for apprehended bias in relation to curial proceedings is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question to be decided⁷. That formulation owes much to the fact that court proceedings are held in public. There is some incongruity in formulating a test in terms of "a fair-minded lay observer" when, as is the case with the Tribunal, proceedings are held in private.

28 Perhaps it would be better, in the case of administrative proceedings held in private, to formulate the test for apprehended bias by reference to a hypothetical fair-minded lay person who is properly informed as to the nature of the proceedings, the matters in issue and the conduct which is said to give rise to an apprehension of bias. Whether or not that be the appropriate formulation, there is, in our view, no reason to depart from the objective test of possibility, as

7 See *Ebner v Official Trustee* (2000) 75 ALJR 277 at 279 [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ; 176 ALR 644 at 647. See also *R v Watson*; *Ex parte Armstrong* (1976) 136 CLR 248; *R v Lusink*; *Ex parte Shaw* (1980) 55 ALJR 12; 32 ALR 47; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Re JRL*; *Ex parte CJL* (1986) 161 CLR 342; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* (2000) 74 ALJR 1380; 174 ALR 655.

distinct from probability, as to what will be done or what might have been done. To do otherwise, would be to risk confusion of apprehended bias with actual bias by requiring substantially the same proof.

29 Though the test in administrative proceedings, as in curial proceedings, is, in our view, one of objective possibility, the non-curial nature of the body or tribunal in question and the different character of the proceedings must, as already indicated, be taken into account. In the present case, a significant difference between curial proceedings and the proceedings of the Tribunal is that the former are adversarial and the parties are usually legally represented, whereas the latter are inquisitorial in nature and the parties are not represented.

30 Where, as in the present case, credibility is in issue, the person conducting inquisitorial proceedings will necessarily have to test the evidence presented – often vigorously. Moreover, the need to ensure that the person who will be affected by the decision is accorded procedural fairness will often require that he or she be plainly confronted with matters which bear adversely on his or her credit or which bring his or her account into question. Similar questions by a judge in curial proceedings in which the parties are legally represented may more readily give rise to an apprehension of bias than in the case of inquisitorial proceedings.

31 Where, however, parties are not legally represented in inquisitorial proceedings, care must be taken to ensure that vigorous testing of the evidence and frank exposure of its weaknesses do not result in the person whose evidence is in question being overborne or intimidated. If that should happen, a fair-minded lay observer or a properly informed lay person might readily infer that there is no evidence that the witness can give which can change the decision-maker's view.

32 In the present case, a fair-minded lay observer or a properly informed lay person, in our view, might well infer, from the constant interruptions of the male prosecutor's evidence and the constant challenges to his truthfulness and to the plausibility of his account of events, that there was nothing he could say or do to change the Tribunal's preconceived view that he had fabricated his account of the events upon which he based his application for a protection visa. In other words, a fair-minded lay observer or a properly informed lay person might well apprehend bias by the Tribunal against the male prosecutor. And because the female prosecutor's application stood or fell with his, a fair-minded lay observer or a properly informed lay person might, in our view, form the same view in her case.

33 Although, in our view, the prosecutors have made good their claim of apprehended bias, we would not grant relief under s 75(v) of the Constitution

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simply on that account. It is now established that, in the case of a breach of the rules of natural justice, relief under s 75(v) of the Constitution is discretionary⁸. Where, as here, there is a final determination by a superior court, that the decision in question was not affected by actual bias, discretionary considerations necessarily arise. However, in this case, we would grant relief as sought.

34 Where, as in the proceedings before the Tribunal, the central issue is credibility, the decision-maker's assessment will often depend upon the demeanour of the witnesses and the manner in which they give their evidence. It cannot be assumed that the prosecutors would have received an unfavourable assessment of their credibility if they had had the opportunity to present their claims without repeated interruptions from the Tribunal affirming its lack of belief in their claims. Nor can it be assumed that they could not have given further details of events which might have supported their applications. In particular, it should be noted that the male prosecutor was interrupted when he attempted to give an account of a stoning episode in which, presumably, his home was stoned. These considerations may not, of themselves, constitute a failure to provide the prosecutors with an opportunity to present their claims, but they constitute good reason why relief should not be refused on discretionary grounds.

35 Prohibition should issue to prevent further action by the respondents on the decision of the Tribunal. Time should be extended for the bringing of the application for certiorari and certiorari should issue to quash the Tribunal's decision. Mandamus should also issue to the Tribunal requiring it to determine the prosecutors' applications for review in accordance with law. The respondents should pay the prosecutors' costs of the proceedings in this Court.

8 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 64 [51]-[52] per Gaudron and Gummow JJ (with whom Gleeson CJ agreed at 54 [5] and Hayne J agreed at 86 [172]), 82 [149] per Kirby J, 93 [217] per Callinan J; 176 ALR 219 at 235 (Gleeson CJ agreeing at 221, Hayne J agreeing at 265), 259-260, 275. See also *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194 per Gibbs CJ.

