HIGH COURT OF AUSTRALIA

KIRBY J

RE THE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS — RESPONDENT

EX PARTE "A" — APPLICANT/PROSECUTOR

Re Minister for Immigration and Multicultural Affairs; Ex parte "A"
[2001] HCA 77
21 December 2001
P16/2001

ORDER

1. *Application refused.*

2. *Applicant/prosecutor to pay second respondent's costs of and incidental to the application.*

Representation:

C M Chang for the applicant/prosecutor (instructed by Verschuer Edward Solicitors)

No appearance for the first respondent

M T Ritter for the second respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Re Minister for Immigration and Multicultural Affairs; Ex parte "A"

Immigration – Refugees – Application for protection visa on the ground of refugee status – Fear of persecution – Application to High Court for constitutional writs and other relief – Whether arguable breach of requirements of natural justice by delegate of Minister becomes irrelevant following later merits review by Refugee Review Tribunal – Whether breach of procedural requirements of the *Migration Act* 1958 (Cth) in failure of Tribunal to refer to allegation of torture – Whether breach of requirements of natural justice in failure to disclose country information to applicant concerning country of nationality – Whether Tribunal erred in treatment of applicant's protest activities in Australia post-arrival – Whether reasonably arguable case for grant of order nisi.

Immigration – Refugees – Application in original jurisdiction of High Court – Earlier decisions by the Minister's delegate, Refugee Review Tribunal and Federal Court – Whether applicant out of time for constitutional writs in application in original jurisdiction of High Court – Whether delay in commencement of High Court proceedings pending conclusion of proceedings below was explained and reasonable – Whether it was reasonably arguable that time default would be cured in circumstances of the applicant's prompt application to the High Court following final decision of Full Federal Court.

Immigration – Refugees – Constitutional writs – Whether available against Minister and Tribunal to prohibit further proceedings upon a decision alleged to be flawed by jurisdictional error.

High Court – Practice – Original jurisdiction – Application for constitutional writs of prohibition and mandamus and other relief – Applicant commences proceedings in High Court immediately following unsuccessful applications before delegate, Refugee Review Tribunal and Federal Court – Whether arguable case for waiver of time default – Whether applicant obliged to commence proceedings in High Court immediately to avoid being out of time.

Constitution, s 75(v).
Judiciary Act 1903 (Cth), s 33(2).
Migration Act 1958 (Cth), ss 57, 91R(3), 424A.
High Court Rules, O 55 r 17, O 55 r 30.

1 KIRBY J. This is another application for an order nisi for constitutional writs and other relief in a migration matter concerning a person who claims to be entitled to a protection visa as a refugee.

The facts

2 The applicant, who is known by the initial "A", is a Burmese national. A number of facts about his case are not disputed. In 1988, he was studying at a university in Rangoon. In September of that year he was taken into custody following his participation in widespread public demonstrations, amounting to an uprising against the military government of that country. In his application for a protection visa, the applicant says that he was rounded up at 3 a.m., arrested and imprisoned in a specified place "where I was tortured and interrogated for 24 days"[1]. Immediately following this assertion, the applicant stated:

> "On [October] 14 I was transferred to the big Insein prison where I was given hard labour for six months. In the prison where [sic] many young students and I suffered political discrimination, blackmail, physical torture."

3 The applicant claimed that he was not charged with an offence but eventually released from prison in April 1989. He said that he had thereafter barely spoken "about the atrocious [sic] in the prison"[2]. A medical certificate dated November 1989, issued by a doctor in Rangoon, certified that the applicant had been given treatment "due to physical and mental illness, and received treatment during the month of November, 1988". However, the certificate recommended that the applicant proceed with his education. The applicant did this after the Burmese universities reopened in 1990. He claimed that he was required to sign an undertaking that he would not engage in political activity again. He did this and stated that he did not breach that undertaking in Burma. Later, he transferred to a university in Mandalay. However, he returned to the university in Rangoon in 1993 and in August of that year he was awarded a degree.

4 The applicant stated that, after his detention, all his movements were closely monitored by agents of the Burmese government and that he had continued to suffer discrimination, despite having long ceased engagement in political activity.

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1 Applicant quoted in the reasons of the Full Federal Court *sub nom "W204/00A" v Minister for Immigration and Multicultural Affairs* [2001] FCA 437 at [44].

2 [2001] FCA 437 at [45].

5 The applicant left Burma in August 1994 and subsequently returned there. His last departure from Burma was in December 1996. He then came to Australia where his sister is a permanent resident. The applicant's two departures from Burma were made possible by the issue to him of a Burmese passport. The applicant suggested that this had been obtained by the payment of a very large sum of money to officials in the Burmese passport department. He claimed that in 1997, whilst in Australia, he had contacted the Burmese Embassy to have his passport extended. He was asked whether he was involved in any political activities in Australia. He wrote a letter saying that he was not involved in politics. The Burmese Embassy then extended his passport for one year[3].

6 In June 1997 the applicant lodged an application for a protection visa addressed to the Minister administering the *Migration Act* 1958 (Cth) ("the Act"). The Minister is the second (and contesting) respondent to this application. The other respondent is the Refugee Review Tribunal ("the Tribunal"). It has submitted to the orders of this Court.

The history of the proceedings

7 *Hearing before the Tribunal:* In accordance with the Act, the application for a protection visa was heard by a delegate of the Minister. On 24 March 1998, the delegate refused to grant the applicant the visa requested. The applicant then applied to the Tribunal for a review of that decision. The Tribunal received written submissions and materials from the Minister's department, as well as a record of an interview taken in connection with the application before the delegate. The applicant gave oral evidence to the Tribunal in July 1999. The transcript of that evidence and all of the foregoing materials are in evidence in these proceedings.

8 In addition to the testimony concerning the events in Burma, the applicant tendered to the Tribunal photographs and a letter from an organisation known as the Tribal Refugee Welfare Group. This body conducts functions and raises funds in Australia for refugees from Burma. The photographs portrayed the applicant participating in some of its activities.

9 Two witnesses gave evidence before the Tribunal in support of the applicant. A summary of their testimony is contained in the Tribunal's reasons for decision. The applicant's sister, who had then been resident in Australia for eight years, confirmed his detention in 1988-89. She did not know the organisation with which the applicant's dissident group in Burma was linked. However, she believed that it was unsafe for him to return to Burma "because the

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3 Recorded s*ub nom "H" v Minister for Immigration and Multicultural Affairs* [2000] FCA 1605 at [9].

government is very unscrupulous". In response to the suggestion put to her that the applicant had not been involved in politics for many years, had completed a university degree, and had been able to leave, return to and leave Burma for a second time, the sister responded that "someone with a political profile can obtain a passport if they are prepared to pay bribes". She also referred to the applicant's involvement in anti-Burmese government activities in Australia.

10 Another Burmese citizen, then resident in Australia for three years, also gave evidence for the applicant. This evidence concerned mainly the applicant's involvement in protests in Australia against the Burmese regime. The witness acknowledged that the applicant was not a leader of those protest activities. However, he recounted his beliefs concerning various oppressive acts in Burma. These caused him to have concern if the applicant were returned to Burma.

11 *Decision of the Tribunal:* The Tribunal accepted that the applicant had been involved in the popular protests in 1988. It accepted that he had been arrested for such involvement. However, it did not accept that he had been detained for six months or that he was an activist or high level organiser in the protests. It referred to the medical certificate. The Tribunal considered this to be incompatible with the evidence of a lengthy detention as alleged. Furthermore, noting that the applicant had not been involved in politics in Burma since 1988, the Tribunal rejected the assertion that the applicant had been under constant surveillance in Burma as claimed. It also refused to accept his statement that he had been unable to obtain employment in Burma because of his past political profile. In short, the Tribunal found that the applicant did not have a current political profile at all.

12 In the course of its reasons, the Tribunal explained why it rejected the applicant's assertion of substantial or recent political persecution in Burma. It referred to the fact that, when asked, the applicant did not know when important political events such as an election had been held. It referred to what it said were his inconsistent explanations as to why he had not become a member of a political party. It recorded his ignorance about the leadership of the National League for Democracy with whose student group the applicant claimed to have been associated. It said that such ignorance was difficult to accept in one who claimed to have spent a lengthy period in prison because of his involvement with that body. The Tribunal went on:

> "The Tribunal finds that the Burmese authorities have no interest in the applicant. He was able to complete his university education, obtain employment and travel overseas on two occasions. Even if the Tribunal accepts that he had to pay bribes there is nothing to indicate that these bribes were other than official corruption, and the fact that the applicant returned to Burma in 1995 indicates that he was not fearful of being persecuted. The Tribunal does not accept his explanation that he did not know about applying for refugee status.

> The Tribunal finds that the applicant had no political profile in Burma, that he has not been arrested or detained since 1988 and he has not been involved in any political activities since 1988. His involvement in 1988 was along with thousands of others and he did not take a leading role."

13 In addition to these conclusions, the Tribunal relied upon certain country information provided to it by the Australian Department of Foreign Affairs and Trade ("DFAT"). This information included general material in the country profile of Myanmar (the name given to Burma by the present military regime). The Tribunal referred to a DFAT cable and other information supplied to it by the Australian Embassy in Rangoon. This included statements that it was not uncommon for people to be arrested in Burma and that no stigma attached to arrest, particularly if it was for political reasons. The cable recorded that, in 1988, "many millions of Burmese were involved in the uprisings and it would be unlikely that such participation would lead to any adverse consequences. It is all a matter of degree and perceived hostility towards the government." The DFAT cable also contained the reminder that in 1988 Burmese army units, airforce units and others had marched with the protesters in the anti-government democracy rallies.

14 Whilst noting reports from other sources that political activists who persist in criticising the military regime do attract the adverse attention of the Burmese authorities, the Tribunal concluded this part of its reasons with a further reference to information supplied by DFAT on the subject of the events of 1988 and those who took part in them. According to this information, "[t]he vast majority have experienced no harassment since [1988]". Although many people who so participated "were interrogated and presumably are on file with the intelligence agencies … this has rarely been the basis for further harassment unless the person continues to participate in anti-government activities". According to this report, the Burmese government had been more willing to accept the return of 1988 protesters to Burma "over the last couple of years" without harassment "as long as they abstain from political activity".

15 Given the Tribunal's earlier finding that the applicant had not been involved in any political activity since 1988 when he had participated at a low level, the conclusion reached by the Tribunal was unsurprising. The Tribunal decided that, based on the objective facts of the applicant's departure from, and return to, Burma and the country information from DFAT referred to in its reasons, the applicant was not "a convention refugee" on the basis of his political involvement in anti-government activities. It also rejected as of any concern, the low level participation of the applicant in activities in Australia with the Burmese refugee organisation here:

> "The Tribunal finds that although the Burmese authorities would be concerned with people who were involved in high level political activities it would not be concerned about the applicant's level of involvement. The

> applicant has not had a political profile in Australia within the Burmese community and the Tribunal finds he would not experience difficulties for his low level involvement in social functions and demonstrations if he returned to Burma. The Tribunal finds that there is no real chance that the applicant will be persecuted for reasons of his political opinions, real or imputed, now or in the reasonably foreseeable future, and that his fear of persecution is not well founded."

16 *Review in the Federal Court:* Following the Tribunal's rejection of the applicant's request for review of the delegate's decision declining him a protection visa, the applicant applied to the Federal Court of Australia for judicial review of the Tribunal's decision.

17 In the first instance, this application came before French J. Substantially, the grounds of review concerned a complaint of error based on the suggested failure of the Tribunal to set out the reasons for its decision, its findings on material questions of fact and reference to evidence and other material upon which those findings were based[4]. The most important aspect of this complaint was the suggested failure of the Tribunal to address the applicant's claim that he had been tortured following his arrest in 1988.

18 In his rejection of this complaint, French J accepted that the Tribunal had not specifically referred to the complaint of torture. However, he concluded that "in substance" the Tribunal's reasoning had sufficiently revealed that it had rejected the claim that the applicant had been imprisoned for six months and tortured in 1988. Upon this footing, his Honour concluded that the Tribunal was "not required to make a finding as to his claim to have been tortured"[5]. He rejected the assertion that that claim had been overlooked or forgotten. Accordingly, he rejected the assertion that the Tribunal had failed to make a finding on a "material" fact. All other complaints were rejected. The application was dismissed.

19 The applicant then appealed to the Full Court of the Federal Court. That appeal was heard by a court constituted by Lee, Lindgren and Katz JJ. On 19 April 2001, the Full Court dismissed the applicant's appeal.

20 The Full Court accepted that the applicant had made claims of torture and that he regarded such claims as a "key" claim to support his application.

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4 The Act, s 430(1). The Court applied its then authority in *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469. See now *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 75 ALJR 1105; 180 ALR 1.

5 [2000] FCA 1605 at [23].

Nevertheless, the Full Court did not consider that, in this case, the applicant's complaint raised a material question of fact upon which, under the Act, the Tribunal was obliged to make a separate finding. In their reasons, Lindgren and Katz JJ said[6]:

> "First, the [Tribunal's] express non-acceptance of the claim of six months' imprisonment is logically inconsistent with acceptance of a claim of torture during that period of imprisonment, and, having rejected the claim of six months' imprisonment, it was unnecessary for the [Tribunal] to state expressly that it rejected that claim of torture[7]. The second reason is that the [Tribunal's] assessment that, in substance, the [applicant] was just one of the hundreds of thousands of pro-democracy demonstrators of 1988, is inconsistent, not only with the authorities' having imprisoned him for six months but also with their having tortured him."

21 The Full Court rejected all other arguments raised by the applicant and thus the appeal.

22 Within three weeks of the dismissal of the appeal, the applicant commenced his proceedings in this Court.

The relief sought

23 The applicant seeks an order nisi for a writ of prohibition directed by the High Court to the Tribunal and the Minister prohibiting them from proceeding further on the adverse decision of the Tribunal. He also seeks a writ of certiorari to quash the decision of the Tribunal and a writ of mandamus directed to the Tribunal requiring it to grant a protection visa to the applicant. Additionally, the applicant seeks a writ of mandamus directed to the Tribunal requiring it to consider his application for a protection visa according to law. He also seeks a declaration that the decision of the Tribunal made on 12 November 1999 was invalid. The applicant finally seeks an extension of time within which to permit him to prosecute the foregoing relief.

24 The grounds nominated in the draft order nisi for the relief sought are that there has been a failure or constructive failure on the part of the respondents to exercise their respective powers under the Act in that "he [sic]:

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6 [2001] FCA 437 at [70].

7 cf *Abebe v The Commonwealth* (1999) 197 CLR 510 at 545 [85] per Gleeson CJ and McHugh J, 608 [298] per Callinan J.

1.1.1 failed to take into account relevant considerations relevant to the determination of the power conferred and/or

1.1.2 has taken into account irrelevant considerations; and/or

1.1.3 made the decision unreasonably; and/or

1.1.4 made the decision improperly; and/or

1.1.5 failed to make the decision required to be made by him under the section [sic];

1.1.6 made the decision in circumstances which amounted [to] a breach of the rules of natural justice; and/or

1.1.7 failed to observe procedures that were required by the [Act] to be observed in connection with the making of the decision".

Approach to the application

25 In order to obtain an order nisi, the applicant must establish the existence of a reasonably arguable case[8].

26 Certiorari is not one of the constitutional writs mentioned in s 75(v) of the Constitution. However, it is contemplated by the *Judiciary Act* 1903 (Cth)[9]. It is commonly granted to make effective the provision of constitutional relief where that relief would be appropriate. The issue of the constitutional writs (prohibition, mandamus and injunctions) is discretionary[10]. However, where a party establishes the preconditions to the issue of the writ of prohibition, the grant of that relief ordinarily follows "almost as of right"[11]. This is because the postulate behind s 75(v) of the Constitution is that officers of the Commonwealth will scrupulously remain within the grant of any jurisdiction and power afforded to them by the law.

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8 *Re Brennan; Ex parte Muldowney* (1993) 67 ALJR 837 at 840; 116 ALR 619 at 624; *Re Australian Nursing Federation; Ex parte Victoria* (1993) 67 ALJR 377 at 382; 112 ALR 177 at 183; *Re Carmody; Ex parte Glennan* (2000) 74 ALJR 1148 at 1149-1150 [2]-[3]; 173 ALR 145 at 146-147.

9 s 33(2). See also High Court Rules, O 55 r 17.

10 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 107 [55], 136 [145].

11 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194.

27 In the past, I have expressed doubt as to whether the constitutional writs of prohibition and mandamus are (as has been commonly assumed) limited to cases where jurisdictional error is shown as distinct from legal error appearing more generally[12]. Relief by way of injunction (also mentioned in s 75(v) of the Constitution) is not, and never has been, confined to jurisdictional error. However, the current doctrine of this Court is to the effect that relief by way of the constitutional writs is limited to cases in which jurisdictional error is shown[13]. At least at this level of these proceedings, I should proceed on that basis. Neither the applicant nor the Minister contested this approach.

28 The question, therefore, is whether the applicant, in any of the matters raised in his arguments, has demonstrated a reasonably arguable case of jurisdictional error on the part of the Tribunal whose order he seeks to have quashed and recommitted for fresh decision according to law.

Two preliminary objections

29 *The language of the orders nisi:* For the Minister, two preliminary objections were raised which it is as well to deal with at the outset. The first was a complaint that the application was technically deficient in that this Court could not prohibit the Minister or the Tribunal from proceeding further with the application in the Tribunal whilst the Tribunal's decision stood. It was said that this was impossible because the Tribunal had completed its determination of the application and the Minister could not disturb the performance by the Tribunal of its independent statutory functions or the pursuit by other officers of the Commonwealth of their duties under the decision, pursuant to law. It was also contended that it would be inappropriate for this Court to issue a writ of mandamus to the Tribunal requiring it to grant a protection visa.

30 I agree that there are defects in the wording of the order nisi. However, these do not represent a fatal impediment to the provision of relief. The first objection constitutes no more than a commentary on the wording of the draft order which this Court would repair if the substance of the application otherwise revealed arguable merits.

31 *The suggested time default:* More substantially, the Minister suggested that the application should be dismissed as out of time. Reference was made to

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12 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 226-227 [78]-[80].

13 cf Gageler, "The legitimate scope of judicial review", (2001) 21 *Australian Bar Review* 279 at 284-288.

the provisions of the High Court Rules[14] requiring that an application for certiorari must be made within six months of the decision impugned and for mandamus within two months of the refusal to exercise the powers complained of.

32 This Court retains the power to excuse such time defaults. Although it is true that no express evidence was placed before me directed at excusing the failure to conform to the Rules of Court, the reasons for that failure are clear enough. They appear from the record.

33 The applicant pursued his remedies first before the delegate, then in the Tribunal and then in the Federal Court of Australia. He commenced the proceedings in this Court on 10 May 2001, ie 21 days after the order of the Federal Court dismissing his appeal from the judgment of French J. Although, theoretically, it would have been open to the applicant to proceed in this Court immediately following the adverse decision of the delegate (and to seek relief, at that stage, against a decision of the officer of the Commonwealth about which he made specific complaint) it would, as a matter of practice, be undesirable to oblige persons, exercising their rights under the law, to seek the intervention of this Court prematurely in order to escape any later complaint that they had failed to invoke this Court's jurisdiction within time. It is burden enough that so many of these cases have to be heard by the High Court in its original jurisdiction, amongst its other heavy obligations. I would not wish to approach the discretionary argument presented in this case in a way that might inflict still further needless duties upon the Court.

34 At least in the circumstances of the present case, therefore, I consider that it is arguable that, if he were otherwise entitled to relief, a Full Court of this Court would overlook or excuse the time defaults of the applicant and exercise its discretion on that ground in the applicant's favour[15]. It follows that I reject both of the preliminary objections of the Minister.

Natural justice and the delegate's decision

35 The first basis upon which the applicant asserted jurisdictional error concerned his complaints about the decision of the delegate. Put shortly, the applicant submitted that the delegate had exhibited actual bias against him and prejudice both in the manner in which the interview leading to the decision had been conducted and in the decision itself.

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14 O 55 r 17; O 55 r 30.

15 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 929-930 [223]-[224]; 179 ALR 238 at 294.

36 In support of this argument, the applicant referred to a finding stated in the reasons of French J. There, his Honour said[16]:

> "The interview as it appeared from the transcript was notable for the intrusive and challenging approach taken by the delegate. Given the tone of the interview, a decision adverse to [the applicant] could confidently have been anticipated."

37 The transcript of the interview before the delegate was placed before this Court. I have read it and I agree with the comment of French J. There is, of course, a fine line between a decision-maker's fairly putting to a person affected an adverse impression (so that that person may respond) and doing so in a way that indicates pre-judgment and bias[17]. The former is a proper course and may on occasion be required by the rules of fair procedure. The latter is an impermissible course. It may invalidate the administrative decision that follows.

38 For a number of reasons, I do not consider that this complaint gives rise to a reasonable argument for relief in the present case. First, in these proceedings, the applicant sought and obtained review by the Tribunal of the delegate's decision. That review involved a rehearing and a determination by the Tribunal of its own decision based on the new, additional and different evidence and material that had been placed before the Tribunal. Secondly, the application for relief in this Court is directed solely to the decision of the Tribunal. It is that decision which the applicant seeks to have quashed. There is no relief directed to the decision of the delegate. Indeed, no such relief would be appropriate, given that the delegate's decision was overtaken by the decision of the Tribunal. Thirdly, although it is true that every person is entitled to a correct and validly made primary decision[18] and that, in this field of the law, primary decisions on the facts can (even unconsciously) influence what follows in the Tribunal and on judicial review, in this case I see no such unfairness in what the delegate did so as to strike fatally at the validity of the Tribunal's later decision. Apart from recording the fact of the delegate's decision as a matter of procedural history, the Tribunal does not appear to have been influenced by that decision.

39 For these reasons, I reject the propounded ground for relief based on the suggested bias or want of procedural fairness on the part of the delegate.

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16 [2000] FCA 1605 at [5].

17 *Galea v Galea* (1990) 19 NSWLR 263 at 279; *Anderson v Judges of the District Court (NSW)* (1992) 27 NSWLR 701.

18 *Miah* (2001) 75 ALJR 889 at 923 [190]; 179 ALR 238 at 285.

Alleged failure to consider and decide the claim of torture

40 Secondly, the applicant submitted that the failure of the Tribunal to refer to his claim of torture showed that it had failed to determine an important factual element in the case. I will assume for the purposes of this application that, in a proper case, such a failure might invite relief[19]. However, the reasons given to rebut this claim both by the primary judge and the Full Court are compelling. It fails on the facts. It has no prospects of success in this Court.

Natural justice and the Tribunal's use of undisclosed cables

41 Thirdly, the applicant complained of procedural unfairness in the use by the Tribunal, in its reasons, of the DFAT cables to which I have referred. The applicant claimed that he was not given an opportunity to respond to the information in those cables. It is submitted that the applicant was not provided with copy of the cables nor told the substance of them before they were used against him by the Tribunal. The applicant argues that this course of events represented an unfair procedure that showed bias on the part of the Tribunal against his claim and, in any case, constituted a breach of the rules of natural justice and therefore amounted to jurisdictional error.

42 Breach of the rules of natural justice may constitute jurisdictional error on the part of an administrator. This is because it is a fundamental postulate of the law that (unless relieved by valid statutory provisions) repositories of statutory power will perform their functions in accordance with fundamental rules of natural justice (procedural fairness)[20].

43 In Australia, it is a basic principle of the common law rules of natural justice that a person whose interests are likely to be affected by an exercise of power will be afforded a fair opportunity to respond to information or relevant material adverse to that person's interests which the repository of the power proposes to take into account in deciding upon its exercise. In short, a person should ordinarily be afforded the opportunity to provide evidence or material to rebut information or material tendered against that person's interests. As well, the person should be afforded the opportunity of persuading the decision-maker, by oral or written submissions, as to the significance of the adverse evidence or material and the way in which it might be reconciled with the person's claim[21].

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19 *Yusuf* (2001) 75 ALJR 1105 at 1112 [34], 1117 [68], 1122 [95]-[97], 1128 [133]; 180 ALR 1 at 10, 17, 24-25, 33; *Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190; appeal dismissed (2000) 101 FCR 501.

20 *Miah* (2001) 75 ALJR 889 at 919 [171]-[172]; 179 ALR 238 at 279.

21 *Miah* (2001) 75 ALJR 889 at 906 [99], 912 [140]; 179 ALR 238 at 260, 269.

44 Principles to the foregoing effect were laid down by this Court in the context of a decision by a delegate of the Minister in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[22]. In that case, also involving an applicant under the Act, as a result of default on the part of his solicitor the applicant had not sought review by the Tribunal. The decision does not, therefore, address the position of the Tribunal and its obligations to make available to an applicant the substance of evidence or material that is not secret or confidential but which is adverse to the person concerned.

45 The Minister argued that the principle in *Miah* did not apply to a decision of the Tribunal. This was because the Tribunal is an independent body with no contradictor and acts by procedures that are generally inquisitorial in character. It is expressly excused from conforming to rigid court-like modes of trial. Specifically, the Minister relied on s 424A of the Act as it stood at the time of the Tribunal's decision in this case. Relevantly, that section states:

> "(1) Subject to subsection (3), the Tribunal must:
>
> (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
>
> (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and
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> (c) invite the applicant to comment on it.
>
> …
>
> (3) This section does not apply to information:
>
> (a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or
>
> (b) that the applicant gave for the purpose of the application; or
>
> (c) that is non-disclosable information."

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22 (2001) 75 ALJR 889; 179 ALR 238.

46 The Minister conceded that, in this case, the information contained in the country reports of the DFAT cables, provided to, and used by, the Tribunal, did not fall within the disqualifications mentioned in s 424A(3)(b) or (c). However, he suggested that s 424A(3)(a) did render the requirements of s 424A(1) inapplicable. Generalised country information that was not specifically about the applicant but about the potential persecution of people like the applicant in his country of nationality was (it was submitted) within par (a). Accordingly, the obligations in s 424A(1) did not apply. On this footing, the Minister submitted that the Tribunal was relieved by the Act of any duty to provide the contents, or substance, of the DFAT cables to the applicant. The use of such information was to be anticipated by a person such as the applicant. It was the kind of material that an inquisitorial body such as the Tribunal would be expected to use in reaching its decisions.

47 No decision of this Court determines whether the scope of s 424A(3)(a) is such as to oust the basic rule of procedural fairness that, in the case of the delegate, was held to apply by the Court's decision in *Miah*. There is presently before the Full Court a reference of certain questions under s 18 of the *Judiciary Act*, which relates to the obligations of the Tribunal to disclose country information used adversely to a claimant for refugee status. However, the provisions of s 424A, upon which the Minister relies, were inserted in the Act in 1998[23]. They were not available in the cases referred for the decision of the Full Court[24]. The decisions of the Tribunal in those cases were made prior to the commencement of s 424A.

48 One possible argument available to the applicant is that s 424A is not a code, as the Minister claimed, excluding the fundamental principle of procedural fairness but a provision enacted to make clear a procedure for affording relevant

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23 *Migration Legislation Amendment Act (No 1)* 1998 (Cth).

24 *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* High Court Applications S36 and S89 of 1999. Judgment was reserved in those matters on 10 October 2001. The decisions of the Tribunal in *Muin* and *Lie* were made prior to the coming into force of s 424A of the Act. That section was enacted by the *Migration Legislation Amendment Act (No 1)* 1998 (Cth). It commenced on 1 June 1999. By the transitional provisions of that Act, s 424A was applied to pending applications before the Tribunal and thus applied to the present applicant's case. In *Muin* and *Lie*, where the applications had already been determined, the applicants also relied on a Practice Direction of the Tribunal. The relevant Practice Directions applicable to the present case were directions under s 420A of the Act published by the Acting Principal Member of the Tribunal, dated 1 June 1999, and the Practice Directions of the Tribunal, dated May 1999. This change provides a further ground for distinguishing *Muin* and *Lie*.

information to a person affected by information supplied to the Tribunal. On this footing, the exemptions in s 424A(3) would apply only in respect of the explicit *statutory* duty. They would not qualify the residual *common law* requirements that remain in the background to the Act and are assumed to supplement its provisions. Another argument might be that the restriction in s 424A(3)(a) of the Act would be strictly construed and confined to information about a "class of persons" and not extended to information which, as such, referred to the social and political conditions of the country concerned, including any alleged change in the conditions in that country said to disentitle an applicant for refugee status.

49 The issue of what information and materials received by the Tribunal must be notified to a person affected is itself one of general significance and considerable importance. In a particular case, it could be critical to the outcome of the Tribunal's review. The Tribunal might act upon country information supplied by DFAT or some other organ of the Federal Government. Given an opportunity, an applicant for a protection visa might be able to show that such information represented an erroneous, ill-informed, out of date or biased view of the country's situation. Diplomatic officials have sometimes been known to be unduly optimistic about political conditions in a country to which they are accredited. Applicants for refugee status may be able to call upon testimony from recent refugees or members of civil society organisations who are in closer touch with the realities as they affect marginal and dissident groups.

50 The foregoing are reasons why, whatever the exemptions provided by the Act, the Tribunal, performing its functions independently and justly as the Parliament contemplated, might in a particular case need to afford an applicant notice of at least the substance of apparently adverse country material. Contrary evidence and materials as well as contradictory submissions could then contribute to better decision-making − a principal purpose of modern administrative law[25]. It might also ensure that the applicant, and the applicant's family and supporters, accept the fairness of the administrative procedures, even where the decision is adverse.

51 For three reasons, I am unconvinced in this particular case that any breach of the rules of natural justice has been demonstrated in the failure of the Tribunal to provide a copy to, or to bring the substance of the country information on Burma to the notice of, the applicant. For the purpose of this conclusion I have assumed that the provisions of s 424A of the Act do not stand in the way of the argument or that the issue presented by it is otherwise itself one deserving of elucidation by a Full Court.

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25 cf *Allan v Transurban City Link Ltd* (2001) 75 ALJR 1551 at 1568 [88]; 183 ALR 380 at 402-403.

52 First, the country information provided to the Tribunal was not (as had been the case in *Miah*) of recent origin that suggested a change in the political environment of Burma. On the contrary, the evidence and material, as described, presented a picture of a stable situation. There is therefore no element of novelty or surprise in this case that necessitated, or invited, a specific response.

53 Secondly, this case did not have the additional considerations relied upon in recent successful applications of this type. Thus, there was no suggestion here that the Tribunal had positively misled the applicant by asserting that it had read all of the contents of specified files when this was factually incorrect[26]. The officer constituting the Tribunal did advise the present applicant that she had read all the material submitted by the department, its file, and the material the applicant had submitted, and had heard the tapes of the interviews with the delegate and before the Tribunal. However, in this case, there was no issue concerning information of a general character that was available to the Tribunal but had *not* been considered by it.

54 Thirdly, the applicant has not placed before this Court a clear indication of the type of evidence or material that he would have placed before the Tribunal if he had known of the country information made available to it. In default of some indication of the nature of the opportunity which the applicant says he was denied (and the presentation of evidence or material that would constitute an arguable case that might result in a different outcome) any omission by the Tribunal to disclose the country information to the applicant (assuming such disclosure to be obligatory) was not shown to be material in this case.

55 Whilst, therefore, at some future time it may be appropriate to grant an order nisi to consider the impact of s 424A of the Act upon the requirements of natural justice to be observed in respect of applicants before the Tribunal, this has not been shown to be a case where that course is required[27]. On the facts of the

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26 *Aala* (2000) 204 CLR 82 at 88-89 [4], 115 [77], 118 [87], 130 [128], 153 [209].

27 The Minister conceded that his argument concerning s 424A of the Act was indistinguishable from the submission made and rejected in *Miah* (2001) 75 ALJR 889; 179 ALR 238 with respect to s 57 of the Act. The Minister accepted that the majority of this Court in *Miah* had rejected his argument: referring to *Miah* (2001) 75 ALJR 889 at 905 [95] per Gaudron J, 911-912 [138]-[139] per McHugh J, 921 [178] of my own reasons; 179 ALR 238 at 260, 268-269, 281-282. Having regard to this concession, the Minister also conceded that the applicant had an arguable case that the content of s 424A of the Act did not have the effect of "entirely replacing" the common law about the provision of country information, when the common law requirements of procedural fairness would otherwise require disclosure. However, he submitted that it was not arguable that the requirements of procedural fairness had been breached by the Tribunal in this case.

present case, I am unconvinced that the applicant has established, as reasonably arguable, the proposition that the Tribunal denied him procedural fairness by its use of the DFAT country information on Burma not provided to the applicant. This aspect of the applicant's claim must therefore likewise be rejected.

Participation in local anti-government activity

56 As the case was argued, the foregoing conclusions leave only the applicant's fourth submission that the Tribunal committed jurisdictional error by failing to take into account, as a relevant consideration, the activities of the applicant in Australia involving his association with the Tribal Refugee Welfare Group and others involved in anti-Burmese government activities in this country.

57 The question of whether activities of an applicant for refugee status in Australia, after arrival, may be relevant to the fulfilment of the preconditions to refugee status is contested. In two decisions, the Full Court of the Federal Court held, in effect, that post-arrival activities in Australia might be taken into account[28]. In at least one other decision the contrary view has been expressed[29]. This Court granted special leave to the Minister to appeal against the decisions that went against him on this point[30]. The appeals were listed to be heard in Perth in October 2001. However, just before the hearing, the Minister withdrew his appeals, apparently following the passage of the *Migration Legislation Amendment Act (No 6)* 2001 (Cth). That Act commenced in October 2001 and is said to contain provisions relevant to the issue of principle[31]. It is unnecessary for me to resolve this controversy in the present application. For the moment, I will assume that the applicant could rely upon his activities in Australia to support a well-founded fear of persecution such as he asserts.

58 In its reasons, the Tribunal took a similar view. It specifically addressed the activities of the applicant in Australia. It decided that those activities did not, of themselves, give rise to a well-founded fear of persecution if the applicant

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28 *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 98 FCR 405; *Minister for Immigration and Multicultural Affairs v Farahanipour* (2001) 105 FCR 277; cf *Danian v Secretary of State for the Home Department* [2000] Imm AR 96.

29 *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100.

30 *Minister for Immigration and Multicultural Affairs v Mohammed* (2000) 98 FCR 405; *Minister for Immigration and Multicultural Affairs v Farahanipour* (2001) 105 FCR 277.

31 The Act, s 91R(3).

returned to Burma. On no view of the evidence was the applicant a leading activist in Australia. It was well open to the Tribunal to conclude that the level of his activities in Australia against the Burmese government was not such as to bring him to the notice of that government or to provide, or add to, the requisite fear of persecution. On this footing the fourth submission is not reasonably arguable. It too must be rejected.

Conclusion

59 In addition to all of the foregoing, so far as the application sought relief requiring the exercise of the Court's discretion, I do not believe that the evidence and materials placed before me present an arguable case that such discretion would be exercised by a Full Court in favour of the applicant.

60 Prior to being heard by me, the applicant has been heard fully by the Tribunal and by two levels of the Federal Court. Whatever complaints he might have had against the delegate, there is no justifiable complaint about the procedures followed by the Tribunal or the courts. No doubt the applicant has a sense of distaste for returning to Burma. He has a sister in Australia. The Burmese government, as described by the Tribunal, is autocratic and undemocratic[32]. But the applicant did not prove that either in Burma or in Australia he had a high or even medium or prominent level of participation in anti-government activities such as would attract notice. In effect, he is one of hundreds of thousands − possibly millions − of opponents of the present military regime. The history of his earlier return to Burma, and of the grant and renewal of his passport, scarcely betokens the kind of fear of persecution that is commonly present in genuine refugee applications. At least, it was open to the Tribunal to so conclude. I therefore see no reasonable prospect that, in a constitutional review substantially limited to technical, legal and jurisdictional scrutiny of the Tribunal's decision, this Court would provide relief.

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32 The recent political history of Burma and some legal issues are described in Hom, "'Revolutionary Legality': The Coup d'État of 1962 and the Burmese Military Regime", (2000) 4 *Southern Cross University Law Review* 60 at 72-74; Zan, "Judicial Independence in Burma: Constitutional History, Actual Practice and Future Prospects", (2000) 4 *Southern Cross University Law Review* 17 at 44-47; Layton, "Forced Labour in Burma: A Summary of the International Labour Organisation Report and Subsequent Developments", (2000) 4 *Southern Cross University Law Review* 148, citing the report of the ILO Commission of Inquiry, *Forced Labour in Myanmar (Burma)*, (chaired by Sir William Douglas), (1998); see in particular par 543, reproduced at 157.

Order

61 The application for an order nisi is accordingly refused. The applicant must bear the Minister's costs.