HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MUIN PLAINTIFF

AND

REFUGEE REVIEW TRIBUNAL & ORS DEFENDANTS

Muin v Refugee Review Tribunal
[2002] HCA 30
8 August 2002
S36/1999

ORDER

The questions reserved for consideration by the Full Court are answered as follows:

Question 1
Was there a failure to accord the Plaintiff procedural fairness?

Answer
Yes.

Question 2
Was there a failure to comply with s 418(3) of the Migration Act *1958 (Cth)?*

Answer
Inappropriate to answer.

Question 3
Was there a failure to comply with s 424(1) of the Migration Act *1958 (Cth)?*

Answer
Inappropriate to answer.

Question 4
If the answer to any of questions (1) to (3) is yes,
(a) Was the decision of the First Defendant to affirm the refusal of the delegate to grant a protection visa for that reason invalid?
(b) What declaratory, injunctive or prerogative writ relief, if any, *should be ordered?*

Answer
(a) Yes.
(b) Prohibition should issue to prevent the second and third defendants from acting on the Tribunal's decision; certiorari should issue to quash that decision; and mandamus should issue to the first defendant directing it to hear and determine the plaintiff's review application in accordance with law.

Question 5
By whom should the costs of the proceedings be borne?

Answer
The second and third defendants.

Representation:

M A Robinson with R Nair for the plaintiff (instructed by Adrian Joel & Co)

No appearance for the first defendant

J Basten QC with R T Beech-Jones for the second and third defendants (instructed by Australian Government Solicitor)

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

NANCY LIE PLAINTIFF

AND

REFUGEE REVIEW TRIBUNAL & ORS DEFENDANTS

Lie v Refugee Review Tribunal
8 August 2002
S89/1999

ORDER

The questions reserved for consideration by the Full Court are answered as follows:

Question 1
Was there a failure to accord the Plaintiff procedural fairness?

Answer
Yes.

Question 2
Was there a failure to comply with s 418(3) of the Migration Act *1958 (Cth)?*

Answer
Inappropriate to answer.

Question 3
Was there a failure to comply with s 424(1) of the Migration Act *1958 (Cth)?*

Answer
Inappropriate to answer.

Question 4
If the answer to any of questions (1) to (3) is yes,
(a) Was the decision of the First Defendant to affirm the refusal of the delegate to grant a protection visa for that reason invalid?
(b) What declaratory, injunctive or prerogative writ relief, if any, *should be ordered?*

Answer
(a) Not answered.
(b) Prohibition should issue to prevent the second and third defendants from acting on the Tribunal's decision; certiorari should issue to quash that decision; and mandamus should issue to the first defendant directing it to hear and determine the plaintiff's review application in accordance with law.

Question 5
By whom should the costs of the proceedings be borne?

Answer
The second and third defendants.

Representation:

M A Robinson with R Nair for the plaintiff (instructed by Adrian Joel & Co)

No appearance for the first defendant

J Basten QC with R T Beech-Jones for the second and third defendants (instructed by Australian Government Solicitor)

CATCHWORDS

Muin v Refugee Review Tribunal
Lie v Refugee Review Tribunal

Administrative law – Constitutional writs – Procedural fairness – Alleged failure to have regard to relevant documents – Alleged failure to provide reasonable opportunity to respond to adverse material – Jurisdictional error for denial of procedural fairness and natural justice.

Immigration – Refugee – Protection visa – Decision by Minister to refuse application for visa – Review of decision by Refugee Review Tribunal – Obligation of Secretary of Department of Immigration and Multicultural Affairs to give relevant documents to Registrar of Tribunal for purpose of review – Nature and extent of obligation – *Migration Act* 1958 (Cth), ss 418(3), 424(1).

Constitutional law (Cth) – High Court – Federal Court – Review of administrative decision by officers of the Commonwealth – Migration – Refusal to grant protection visa to claimant for refugee status – Requirement of procedural fairness – Alleged failure to have regard to relevant documents – Alleged failure to provide reasonable opportunity to respond to adverse materials – Jurisdictional error – Availability of constitutional relief under s 75(v) and other relief for denial of procedural fairness and natural justice.

Constitution, s 75(v).
Migration Act 1958 (Cth), ss 418(3), 424(1).

1 GLEESON CJ. In both of these proceedings, the plaintiffs sue in a representative capacity, complaining of the procedures adopted by the first defendant, the Refugee Review Tribunal ("the Tribunal"), in reviewing adverse decisions of delegates of the Minister for Immigration and Multicultural Affairs relating to claims for protection visas. In both cases, the second and third defendants are the Commonwealth and the Secretary of the Department of Immigration and Multicultural Affairs. The Tribunal has filed a submitting appearance. It is the second and third defendants who have the carriage of the defence. Each proceeding was commenced in the Court's original jurisdiction. In each case, Gaudron J has referred questions to a Full Court. The specific questions will appear at the conclusion of these reasons. In brief, they ask whether, upon certain facts stated, and the inferences if any, to be drawn from those facts, there was a failure by the Tribunal to accord procedural fairness or a failure to comply with s 418(3) and/or s 424(1) of the *Migration Act* 1958 (Cth) ("the Act"). They also ask, in the event of an affirmative answer, what relief should be given.

2 The facts stated in the two proceedings are similar, but, as will appear, there is one significant difference. A common element concerns the way in which certain documents, described as "Part B documents", referred to in the delegates' reasons for decision, were dealt with.

3 For the purposes of the referred questions, nothing turns upon the representative nature of the proceedings. Argument has been confined to the cases of Mr Muin and Ms Lie. They are both persons of Indonesian nationality and Chinese ethnicity. The essence of their claim that they were owed protection obligations as refugees was that, if they returned to Indonesia, they would be persecuted on racial grounds. In each case, the delegate was required to consider circumstances in Indonesia relating to the treatment of Chinese, including the willingness and ability of the Indonesian authorities to prevent ill-treatment. The expression "adverse material" has been used to describe "relevant and significant material which is or may be adverse to [the plaintiff's] case". Similarly, "favourable material" is material that was or may have been favourable to the plaintiff's case. The material with which we are presently concerned was not material personal to either plaintiff, or information about some particular circumstance relevant to either plaintiff as an individual. It consisted largely of "country background" material, being information concerning political and social circumstances in Indonesia.

4 The Tribunal's decision in the case of Mr Muin was made on 25 November 1998. The Tribunal's decision in the case of Ms Lie was made on 6 January 1998.

The case of Mr Muin

5 It is convenient to begin with the alleged failure to comply with ss 418(3) and 424(1) of the Act in the form it took in November 1998, because the plaintiff's argument directs attention to the statutory context in which all the issues in the proceedings arise. I will refer only to the provisions of direct relevance.

6 Section 418 required that, when an applicant sought review by the Tribunal of a delegate's decision, the Registrar of the Tribunal was to notify the Secretary of the Department of Immigration and Multicultural Affairs ("the Department") of the making of the application. The delegate whose decision was the subject of the application was an officer of the Department. The section provides:

> "418 (2) The Secretary must, within 10 working days after being notified of the application, give to the Registrar the prescribed number of copies of a statement about the decision under review that:
>
> (a) sets out the findings of fact made by the person who made the decision; and
>
> (b) refers to the evidence on which those findings were based; and
>
> (c) gives the reasons for the decision.
>
> (3) The Secretary must, as soon as is practicable after being notified of the application, give to the Registrar each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision."

7 A review of such a decision is not an adversarial proceeding. There is no contradictor. No issue is joined. The applicant seeks to persuade the Tribunal that the unfavourable decision under review should be set aside. Typically, the primary decision will have taken into account country background information. Both the delegate, and the Tribunal member to whom the application for review is assigned, will be likely to have considered many cases involving conditions in, say, Indonesia, and will have access to official and other sources of information bearing upon political and social circumstances in an applicant's country of origin. As is often the case with administrative decision-makers, they are likely to accumulate knowledge from the repetitive nature of the matters with which they deal. They have available to them what is, in effect, a library of reference material to which they may resort for the purpose of making decisions. The Act (s 420) requires the Tribunal to do substantial justice, deciding each case on its merits and avoiding technicalities.

8 An applicant is entitled to provide information to the Tribunal in the form of a statutory declaration, and to provide the Registrar with written argument in relation to the decision under review (s 423).

9 The Act then provides for two possible stages. Section 424 provides:

> "424 (1) If, after considering the material contained in the documents given to the Registrar under sections 418 and 423, the Tribunal is prepared to make the decision or recommendation on the review that is most favourable to the applicant, the Tribunal may make that decision or recommendation without taking oral evidence."

10 Section 425 provides that where s 424 does not apply, the Tribunal must give the applicant an opportunity to appear before it to give evidence and may obtain such other evidence as it considers necessary.

11 In the case of Mr Muin, the delegate's decision was made on 9 March 1998. She sent a written record of her decision to Mr Muin in a form that anticipated the requirements of s 418 if there was to be an application for review. In that record, she identified the "evidence" she used in making her decision. In Part B of her statement of reasons she referred to 31 "documents". The first was the Department's file concerning the plaintiff. It is relevant to note the nature of the remaining Part B documents. Item 2 was a reported decision of this Court, stated in the facts to have been available in the Tribunal library. Items 3 and 4 were a textbook on refugee law, and a UNHCR handbook on refugee law, both available in the Tribunal library. Items 5 and 6 were international reports of country background material, both available on the CISNET electronic database. Item 7 was a country profile on Indonesia, available in the Tribunal library. Items 8 and 9 were newspaper or magazine articles on Indonesia, both on CISNET. Item 10 was a directory extract, available in the Tribunal library. Items 11 and 12 were newspaper or journal articles, available on CISNET. Items 13 and 14 were news publications, available on the ISYS electronic database. Items 15 and 16 were newspaper or journal publications, available in the Tribunal library. Item 17 was a Department of Foreign Affairs and Trade cable available on CISNET. Item 18 was a press report, available on CISNET. Item 19 was a journal article, available in the Tribunal library. Item 20 was a book, available in the Tribunal library. Items 21 to 26 were newspaper or magazine articles, available on CISNET. Item 27 was a journal article, available on the Nexis electronic database. Items 28 and 29 were newspaper articles, available in the New South Wales State library. Item 30 was a Department of Foreign Affairs and Trade country profile on Indonesia, available in the Tribunal library. Item 31 was a newspaper article available in the New South Wales State library.

12 It will be apparent that the preparation of the list of Part B documents took a broad and non-technical approach to what constituted "evidence" and "documents". The list included a law report, legal textbooks, governmental reports from within Australia and from overseas, and articles in magazines, journals and newspapers. The stated facts compendiously describe them as "documents relevant to the position in Indonesia of Indonesian nationals of ethnic Chinese background and, also, to the ability and willingness of the Indonesian authorities to provide for their protection." This approach is no doubt related to the matter earlier mentioned, that is to say, the repetitive nature of the work of delegates and Tribunal members, the accumulation by them of a store of knowledge and experience, the availability to them of a kind of reference library, and the need to disclose their sources of information. The result is a description of documentary evidence of a kind that might surprise a lawyer accustomed to adversarial and technical procedures. But it is a practical response to a practical problem.

13 The plaintiff complains that there was a failure to comply with the requirements of s 418 because of what was done, or not done, by the Secretary of the Department in relation to the Part B documents. In particular, it is said, there was a failure to "give" each "document" to the Registrar of the Tribunal.

14 The stated facts include the following:

> "15 At the time of the making of [the delegate's] decision, the Part B documents were documents:
>
> (a) In the possession and control of the Secretary of the Department, the Third Defendant, or his delegate, at all material times; and
>
> (b) Considered by the Third Defendant to be relevant to the review of [the delegate's] decision by the Tribunal.
>
> …
>
> 17 At all material times all of the members of the First Defendant and the Registry and administration staff of the Tribunal had access, via desktop computers, to a computer database of source documents maintained by the Department in Canberra known as CISNET. The Registry and administration staff of the Tribunal, which were based at the Registry offices in Sydney and Melbourne, also maintained its own library of source material ('the RRT Library'). Members could obtain documents from that Library and from the Library maintained by the Department's Country Information Service (CIS Library) in Canberra, other electronic databases such as Nexis (a database of international media articles) and utilise inter

library loan arrangements with some other libraries in Australia. Members could request research staff of the First Defendant to obtain documents from the same sources.

18 At all material times many of the members of the First Defendant and the Registry and administration staff of the Tribunal had access to a computer software program known as 'ISYS' allowing them to search electronic databases and retrieve country information and other documents relevant to the RRT's functions. The databases capable of being searched by ISYS were set up and maintained by staff of the First Defendant.

19 All of the Part B documents listed in Schedule 1 as being held on the CISNET or ISYS databases comprised the full text of the original article except that with item 5, the report by the Minority Rights Group entitled the Chinese of South East Asia, the CISNET database only contained that section of the article which dealt specifically with Indonesia. It did not contain certain 'boxed information'. Entries to the said databases were added to and removed from the databases from time to time during the relevant period and different versions were recorded at different times.

20 Each of the Part B documents was available to Members and the Registry and administration staff of the Tribunal from the dates, and from the source, set out in Schedule 1 hereto in and to the extent that:

(a) They could each go to their own desktop computer (if they had one) or a computer terminal or a computer somewhere at the Tribunal's offices, manually access the CISNET database, download the information to the Tribunal's computer screen, and then, view the relevant Part B documents on the computer screen;

(b) They could each apply to the Department's CIS Library in Canberra for an inter-library loan or to be provided with a copy of the relevant Part B document;

(c) They could each physically attend the Tribunal library to view or copy the relevant Part B documents by way of a computer terminal, a computer, or in hard copy form and they could each request the Tribunal library staff to obtain a copy for them; and,

(d) They could each physically attend the New South Wales State library to view or copy the relevant Part B documents by way of a computer terminal, a computer, or in hard copy

form and they could each request the Tribunal library staff to so obtain a copy for them.

…

24 On or about 1 April 1998 the Department dispatched its file concerning the Plaintiff to the Registrar of the First Defendant. The file did not include hard copies of any of the Part B documents or copies in electronic form.

25 The Part B documents or a part or parts of them were each capable of being printed or copied from the sources [the delegate] used in her consideration of them in the making of her decision and were each capable of being physically delivered to the Registrar of the First Defendant.

26 Those of the Part B documents that were contained on the CISNET database were each capable [of] being delivered or transmitted to the Registrar of the First Defendant by way of delivery of a floppy disk or by transmission as an internal email or as an attachment to internal email by use of a computer network.

27 Each document identified in Schedule 1 hereto as being available on CISNET was made available by the Department to the First Defendant by electronic transfer of the CISNET databases to each of two computers (known as servers) maintained by the First Defendant, one being located at each of its premises in Sydney and Melbourne. The material available on CISNET was updated from time to time by officers of the Department in Canberra. Documents were removed from the CISNET databases from time to time for various reasons. The updated versions of the relevant database or databases of CISNET were usually electronically transferred to the First Defendant's servers in Sydney and Melbourne on each evening that the relevant part of CISNET was amended by the addition of a document, except for certain limited periods for reasons concerning computer, network or related technical difficulties which arose from time to time. Material was usually transferred during the course of each week night. In this process, the relevant updated CISNET database or databases were sent and the former relevant database or databases were overwritten on the servers maintained by the First Defendant.

28 On or about 1 April 1998 the Deputy Registrar of the Sydney office of the First Defendant received the Department's file.

29 On or about 1 April 1998, 2 April 1998, 6 April 1998, and 22 April 1998, the Plaintiff's migration agent wrote to the First Defendant in support of the Plaintiff's application and making submissions and enclosing, *inter alia*:

(a) a signed statement of the Plaintiff dated 2 April 1998; and

(b) various articles, newspaper clippings and reports printed from the Internet concerning racially motivated attacks upon ethnic Chinese in Indonesia.

30 On or about 1 October 1998 Ms Patricia Leehy was constituted as the relevant member of the First Defendant for the purpose of determining the Plaintiff's application.

31 At all material times, Member Leehy had a computer terminal allocated for her personal use which was connected to the computer server referred to in paragraph 27.

32 A review on the papers was purportedly conducted by Member Leehy and was completed on 13 October 1998.

33 On 13 October 1998 the Deputy Registrar of the First Defendant wrote to the Plaintiff in the following terms, *inter alia*:

'The Tribunal has looked at all the material relating to your application but it is not prepared to make a favourable decision on this information alone. You are now entitled to come to a hearing of the Tribunal to give oral evidence in support of your claims.' "

15 Thereafter the Tribunal proceeded under s 425 of the Act and made a decision adverse to the plaintiff.

16 The plaintiff says that he was misled, and disadvantaged, by what occurred. The stated facts recite:

"42 The Plaintiff believed that the Part B documents were sent to and looked at by the First Defendant in the making of the review on the papers and/or the final decision on the Plaintiff's protection visa application.

43 Had the Plaintiff been aware of: (i) the fact, if it be the fact, that the Department or the Third Defendant did not ever physically transfer to or send to the Tribunal all of the Part B documents at any time prior to the making of the Tribunal's decision on 25 November 1998; and (ii) the fact, if it be the fact, that adverse materials were not to be brought to his attention prior to the date of

the review on the papers, prior to the hearing, or prior to the making of the Tribunal's decision then he would have:

(a) arranged to have a migration agent or a solicitor/migration agent act for him in order to make further written submissions to the Tribunal and seek to appear at the oral hearing with him or on his behalf;

(b) made submissions to the Tribunal going to the content of the Part B documents and the adverse materials highlighting the passages in those documents which assisted his case concerning the then bad situation of ethnic Chinese people in Indonesia and challenging the correctness or significance of that part of the Part B documents and materials which was adverse to his case before the Tribunal;

(c) sought to bring forward before the Tribunal additional evidence to that which he did send to the Tribunal by way of documents, statements, further witnesses or country information which went to the question of the true position in his home country, Indonesia, to the effect that it was unsafe for him to return home and supporting his claims that his stated fears of persecution in Indonesia were reasonable at the time; and/or

(d) would have undertaken research or further research and submitted to the Tribunal additional information or documents of the type or kind referred to or contained in the following examples of Tribunal decisions which were favourable to ethnic Chinese persons from Indonesia seeking refugee status in Australia and which contain references to other material dated before the date of the delivery of the Tribunal's decision of 25 November 1998:

(i) Decision of the Tribunal in relation to RRT Reference V97/07405 dated 21 May 1998 by Tribunal Member Dr Rory Hudson;

(ii) Decision of the Tribunal in relation to RRT Reference V97/07946 dated 17 July 1998 by Tribunal Member Dr Rory Hudson;

(iii) Decision of the Tribunal in relation to RRT Reference V97/07944 dated 28 July 1998 by Tribunal Member Dr Rory Hudson;

(iv) Decision of the Tribunal in relation to RRT Reference N97/17437 dated 21 September 1998 by Tribunal Member Roque C Raymundo;

(v) Decision of the Tribunal in relation to RRT Reference N97/17646 dated 22 September 1998 by Tribunal Member Roque C Raymundo; and/or,

(vi) Decision of the Tribunal in relation to RRT Reference N97/19726 dated 18 December 1998 by Tribunal Member Bruce Haigh."

17 Those allegations are also relevant to the claim of failure to accord procedural fairness, but I will deal first with the argument concerning the suggested failure to comply with the statutory requirements.

18 The delegate's statement of reasons was prepared in the light of s 418 of the Act. The statement was required to set out the findings of fact, refer to the evidence on which the findings were based, and give reasons for the decision. The law report, and the legal texts on refugee law, were not evidence, and there was no need to refer to them at all. The other material in Part B was, in the broadest sense, evidentiary. Section 418 imposes a requirement to "give" to the Registrar certain "documents". What constitutes sufficient compliance with such a requirement depends upon the nature of the documents in question, the form in which they were available to the delegate, and the purpose for which they are to be made available to the Tribunal. The purpose of the requirement is to enable the person reviewing the decision to know, and have access to, the material upon which the delegate relied, so as to be able to conduct the review. If the material is in the nature of general reference material, stored for convenience in a library, or on an electronic database, then provided the library, or the database, is accessible to the Tribunal, I see no reason to interpret the requirement literally so as to require physical delivery of paper by the Secretary to the Registrar of the Tribunal.

19 The expression "other document" in s 418(3) means a document other than the documents referred to in s 418(2), that is, other than the copies of the statement about the decision under review containing the information referred to in pars (a), (b) and (c) of sub-s (2). The nature of those other documents may vary. In the present case there was a file of papers relating specifically to Mr Muin, and those papers were physically transferred from the possession of the Secretary to the possession of the Registrar of the Tribunal. The only other

relevant documents were what I have described as the reference library. Having regard to the nature of that material, and the form in which it was available to the delegate when she made her decision, I would regard it as sufficient compliance with a requirement to give the material to the Tribunal for the purpose of reviewing the delegate's decision if the material was identified, and made available to the Tribunal in the same manner and form as it was available to the delegate. The statutory provision is concerned with access to information, not with possession of paper. The object is to make available to the Tribunal member who reviews the delegate's decision the "evidence" (in the broadest sense) that was before the delegate. In the case of the Part B documents, the Act did not require that they be gathered together in hard copy form and delivered to the Tribunal. No legislative purpose would have been served by such a requirement, and the statutory language does not compel such a conclusion.

20 The contention that there was a failure to comply with s 418 has not been sustained.

21 However, as both Gaudron J and Gummow J have explained, even if there had been a failure to comply with s 418, it does not follow that Mr Muin is entitled to the relief he seeks. And, this being a case where the Tribunal proceeded, not under s 424 but under s 425, the allegation of a failure to comply with s 424 is misdirected.

22 The claim that there was a failure to accord procedural fairness, insofar as it is based upon the material so far referred to, involves a factual issue. The plaintiff asserts that he was misled about the documents that were received and considered by the Tribunal. In that respect, it is common ground that some of the information contained in the Part B documents was favourable to the plaintiff in that it referred to ill-treatment of Chinese in Indonesia. The plaintiff was told by an officer of the Tribunal that the Department's documents concerning his case would be sent to, and considered by, the Tribunal. Later, the Tribunal wrote to the plaintiff, at the stage of the review on the papers, saying that the Tribunal had looked at "all the material relating to [the] application", as amended.

23 There is no agreed or stated fact as to whether the Tribunal member who dealt with the matter actually read all the Part B documents, on the occasion of considering this particular case, or at any time. It is clear that she did not physically receive the documents in hard copy from the Department but, in terms of fairness to the plaintiff, nothing turns on that. There was no disadvantage to the plaintiff in the Tribunal member having electronic, as distinct from physical, access to the material. Underlying the plaintiff's complaint is the allegation that the Tribunal was not telling the truth when it said that the member had "looked at all the material relating to your application". That is an inference I am not prepared to draw.

24 Once again, it is important to bear in mind the nature of the material in question. It is not particular to the plaintiff. It is a reference library of background country information. The newspaper and journal reports were dated between 1992 and 1995. None of the documents except one bore a date less than three years before the Tribunal's decision, and that one document was produced two years and 11 months before. To say that the Tribunal member had "looked at", or had regard to, or taken notice of, that material does not mean that, every time she dealt with a case about Indonesia, she read the entire library from beginning to end. If, as may well have been the case, (and there is no reason to assume it was not), the Tribunal member had dealt with many cases concerning Chinese applicants claiming to be refugees from Indonesia, she was likely to have become familiar with the reference material referred to in Part B, and fairness did not require her to read it all again every time a new case came before her. The plaintiff bears the onus of making out a case of failure to accord procedural fairness. I would not find as a fact that what the Tribunal did or said was misleading, or that the plaintiff was disadvantaged by what occurred in relation to the Part B documents.

25 It was argued for the plaintiff that *Jones v Dunkel*[1] supported an inference that the Tribunal member had not read, and had regard to, the Part B documents. Relating *Jones v Dunkel* to a case stated procedure has its own difficulties; but there is a more fundamental problem about the argument. It is based upon a false premise as to the role of the Tribunal. Section 435(1) of the Act and s 60(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth), read together, provide that Tribunal members enjoy the same protection and immunity as a Justice of this Court. It places a Tribunal member in a false position, inconsistent with that immunity, to expect a member, in proceedings challenging his or her decision, to go outside the published reasons for decision and explain the process of research and consideration leading up to the making of the decision. Furthermore, this Court has taken pains to discourage tribunals and members from endangering their impartiality by assuming the role of protagonist in proceedings challenging their decisions[2]. Consistently with that approach the Tribunal has entered a submitting appearance in these proceedings. The process of factual inference considered in *Jones v Dunkel* involves an expectation that the party against whom the inference is drawn would call the absent witness. There was no proper basis in the present case for an expectation that the Tribunal member would be called to give an account of the process of decision making beyond that which is set out in her published reasons for her decision.

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1 (1959) 101 CLR 298 at 321.

2 *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 36.

26 In the case of Mr Muin, there is a separate ground upon which it is contended that there was a failure to accord procedural fairness. It relates to certain material received by the Tribunal after the delegate's decision; material that was adverse in the sense that it was capable of supporting a view that the Indonesian government was willing and able to protect Chinese citizens from ill treatment.

27 The stated facts in relation to this aspect of the matter include the following:

> "44 In the making of the final decision on the Plaintiff's protection visa application, the First Defendant took into account an attachment to a written submission styled '*Submission to the Refugee Review Tribunal on the Effectiveness of the Protection Provided by the Indonesian Government For Ethnic Chinese Indonesian applicants for Australian Protection Visas*' made by the Third Defendant to the Tribunal made pursuant to section 423(2) of the Act which contained a number of attachments ('the section 423 submissions'). The said attachment was 'Attachment A' to the section 423 submissions and was a Department of Foreign Affairs ('DFAT') Cable dated 18 June 1998.
>
> 45 The section 423 submissions and/or the said Attachment A:
>
> (a) Were relevant to the question whether the Indonesian authorities were willing and able to provide protection for Indonesians of ethnic Chinese background; and
>
> (b) Were received by the First Defendant on 24 June 1998 and distributed to those Tribunal Members dealing with protection visa applications made by nationals of Indonesia, including Member Leehy.
>
> 46 A copy of any part of the section 423 submissions was not provided to the Plaintiff at any time prior to the making of Member Leehy's decision of 25 November 1998.
>
> 47 The Plaintiff was not made aware of the existence or the substance of the section 423 submissions or any part of them by anyone at any time prior to the making of Member Leehy's decision of 25 November 1998.
>
> 48 Had the Plaintiff then possessed the knowledge that the section 423 submissions would be before the Tribunal and would be taken into account by it (if that be the case) then in addition to the things stated in paragraph 43 above he would have:

(a) Made submissions and/or sought to call or adduce evidence or further evidence to the Tribunal specifically going to the section 423 submissions in seeking to highlight those parts of the submissions (including its attachments) which assisted his case and challenging or going against those parts which were clearly adverse to his case; and,

(b) Relied upon those parts of the Tribunal cases referred to in paragraph 43(d) above which argue against the legal correctness, validity or substance of the section 423 submissions."

28 The plaintiff also complains that the member of the Tribunal who dealt with his case took into account other adverse material (in the sense described above) which came into the possession of the Tribunal after the delegate's decision, that is to say, between March and November 1998. The stated facts record that the documents in question contained information capable of supporting the conclusion that the Indonesian authorities were willing and able to provide protection for Indonesians of ethnic Chinese background and that the plaintiff was not made aware of the substance of any of the documents.

29 Counsel for the second and third defendants pointed out that Mr Muin was given an oral hearing a week before the Tribunal's decision was made, that he was aware from the delegate's decision, and from what was said to him by the Tribunal member, that the critical question was whether the Indonesian authorities were willing and able to protect him, in the light of current circumstances in that country, and that he was given an opportunity to say whatever he wanted to say about that issue. Even so, the fact stated is that the plaintiff was not made aware of the substance of the documentary information which was received between the time of the delegate's decision and the Tribunal's decision and which contained adverse material. It is also stated as a fact that, had the plaintiff been made aware of the substance of that material, he would have taken certain steps which he failed to take. We are obliged to deal with the case upon the basis that the facts so stated are true.

30 The plaintiff, in argument, referred to a Practice Note of the Tribunal which said that a person in his position would be given an opportunity to respond to any relevant and significant material by being provided with the substance of the material. This was said to create a legitimate expectation; one of the kind which may arise even where a person is unaware of the source of the expectation[3]. It is unnecessary to enter into that area of debate. The Practice Note does not add anything to the common law requirement of procedural

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3 See *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273.

fairness. On the facts stated, the case is not relevantly distinguishable from *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[4]. It is not the submissions of the Department, but the information referred to in them, or accompanying them, and the other adverse documentary material produced after the delegate's decision, that is significant. The stated fact that there was a failure to bring the substance of that material to the attention of the plaintiff, and the disadvantage that followed, entitles the plaintiff to succeed on this ground.

31 In the case of Mr Muin, there was a failure to accord procedural fairness. The appropriate remedies are certiorari, prohibition and mandamus.

The case of Ms Lie

32 In this matter the plaintiff's case is narrower. In relation to the procedures adopted in respect of the Part B documents it is the same as that of Mr Muin. However, it does not involve reliance by the Tribunal upon adverse material coming to the Tribunal between the time of the delegate's decision and the decision of the Tribunal.

33 The delegate's decision was made on 13 March 1997. There was a hearing before the Tribunal on 16 December 1997. The Tribunal affirmed the delegate's decision on 6 January 1998.

34 Leaving aside the matter of the adverse material which, in the case of Mr Muin, came into the possession of the Tribunal after March 1998, the stated facts and arguments in the case of Ms Lie were the same. For the reasons given in relation to the case of Mr Muin, I consider that no failure to accord procedural fairness, and no relevant failure to comply with the requirements of the Act, has been shown.

Questions and Answers

35 In the case of Mr Muin the questions, and my answers to them, are as follows:

1. Q. Was there a failure to accord the Plaintiff procedural fairness?

   A. Yes.

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4 (2001) 75 ALJR 889; 179 ALR 238.

2. Q. Was there a failure to comply with s 418(3) of the *Migration Act*?

   A. Inappropriate to answer.

3. Q. Was there a failure to comply with s 424(1) of the *Migration Act*?

   A. Inappropriate to answer.

4. Q. If the answer to any of questions (1) to (3) is yes,

   (a) Was the decision of the First Defendant to affirm the refusal of the delegate to grant a protection visa for that reason invalid?

   (b) What declaratory, injunctive or prerogative writ relief, *if any*, should be ordered?

   A.

   (a) Yes.

   (b) Certiorari to quash the decision of the first defendant and prohibition to prohibit further proceeding on it and mandamus to the first defendant to hear and determine the plaintiff's review application according to law.

5. Q. By whom should the costs of the proceedings in this Court be borne?

   A. The second and third defendants.

36 In the case of Ms Lie the same questions are asked. My answers to them are as follows:

1. No.

2. Inappropriate to answer.

3. Inappropriate to answer.

4. Does not arise.

5. The plaintiff.

37 GAUDRON J. The facts, the relevant legislative provisions and the questions reserved for the consideration of the Full Court are set out in other judgments. I shall repeat them only to the extent necessary to make clear the reasons for my answers to the reserved questions.

Transmission of documents to the Refugee Review Tribunal and their consideration

38 In each of these cases, the second question reserved for the consideration of the Full Court asks whether there was a failure to comply with s 418(3) of the *Migration Act* 1958 (Cth) ("the Act"). Section 418 sets out administrative procedures to be taken when an application is made for review of a decision by the Refugee Review Tribunal ("the Tribunal"). By sub-ss (2) and (3), the Secretary of the Department of Immigration and Multicultural Affairs ("the Secretary") is required to give to the Registrar of the Tribunal ("the Registrar") various documents including, by sub-s (3), "each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision".

39 The decisions of the original decision-maker in each of the present cases referred to written materials which were not physically handed to the Registrar. Those materials have come to be known as "the Part B documents". Much of the material consisted of background reports and articles, including newspaper articles, with respect to the position in Indonesia of Indonesian nationals of Chinese background and the ability and willingness of Indonesian authorities to provide for their protection.

40 At the time of the decisions by the Tribunal, some of the Part B documents were in electronic form on databases available both to the Department and to the Tribunal. However, the databases were changed from time to time with the consequence that a different or abridged version of some of the material was on the relevant database when, in each case, the Tribunal was conducting its review. Other material was in the Country Information Service Library of the Department of Immigration and Multicultural Affairs ("the Department") in Canberra or in the Tribunal's own library. In the case of Mr Muin, a few other documents were available only in the State Library of New South Wales.

41 In each case it is agreed that the Part B documents were documents that were in the possession and control of the Secretary or his delegate and were considered by him to be relevant to the decision of the original decision-maker. There are difficulties with the parties' agreement to this effect. First, there is a question whether the materials in question are documents for the purposes of s 418(3) of the Act. It is not obvious that, given the context and purpose of s 418, the documents referred to in sub-s (3) extend beyond departmental documents which relate to the particular applicant seeking review. Certainly, it is not clear that the sub-section refers to background reports and articles concerned

with the political or other situation in the applicant's country of origin. Moreover, it is difficult to see on what basis it could be said that the material that was available only in the State Library of New South Wales was in "the Secretary's possession or control".

42 It was argued on behalf of the second and third defendants that s 418(3) of the Act does not require that documents be made available by the Secretary to the Registrar by any particular means. If s 418(3) of the Act refers to documents in electronic form (and I see no reason why it should not), there seems no reason why such documents should not be given to the Registrar electronically, including by making them available on the databases to which he or she has access. At least that is so if the Registrar is informed that they have been so transmitted.

43 Whether s 418(3) refers to documents in electronic form and whether it permits of their electronic transmission to the Registrar are not questions which need be answered because, in my view, there is a more fundamental issue which must be addressed, namely, whether this Court should answer the question whether the Secretary complied with s 418(3) of the Act. In this regard, it was argued on behalf of the second and third defendants that, if there was a failure by the Secretary to comply with s 418(3), it was neither a matter about which the plaintiffs have standing to complain nor a matter which rendered the Tribunal's decision invalid.

44 The present proceedings are brought in this Court's original jurisdiction. So far as concerns s 418(3) of the Act, the plaintiffs seek relief by way of declaration that the Secretary's practice of not giving all or substantially all of the relevant documents was unlawful, alternatively, that the Secretary breached s 418(3). Additionally, they seek an injunction to prevent the second and third defendants from acting on the Tribunal's decisions upholding the decisions of the original decision-makers, or, alternatively, the issue of constitutional writs preventing them from acting on the Tribunal's decisions, quashing those decisions and requiring the Tribunal to determine their review applications in accordance with law.

45 So far as the Tribunal's decisions are concerned, relief by way of constitutional writ pursuant to s 75(v) of the Constitution is available only if the decision in issue involves jurisdictional error, including constructive failure to exercise jurisdiction[5]. It is conceivable that a failure by the Secretary to comply with the requirements of s 418(3) of the Act might, in some cases, result in or

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5 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889; 179 ALR 238.

contribute to jurisdictional error on the part of the Tribunal. However, that is not to say that the Secretary's non-compliance with s 418(3), of itself, will necessarily result in jurisdictional error on the part of the Tribunal.

46 Section 418 of the Act imposes an administrative duty on the Secretary, the evident purpose of which is to enable the effective and efficient exercise by the Tribunal of its review functions. But there is nothing in the Act to suggest that the Secretary's compliance with s 418(3) is either a precondition to the Tribunal's conduct of review proceedings or to its making of a decision on review. Accordingly, it does not, of itself, constitute an error which would entitle the plaintiffs to relief by way of constitutional writ either prohibiting the defendants from acting upon the Tribunal's decisions or quashing those decisions. And if neither of those steps is taken, there is no basis for the issue of mandamus.

47 The plaintiffs' claim to injunctive relief raises somewhat different considerations. There is, in my view, no reason why injunctive relief pursuant to s 75(v) of the Constitution should be confined by notions of jurisdictional error[6]. Thus, for example, were an applicant for review to seek an injunction restraining the Tribunal from proceeding to a decision until the documents referred to in s 418(3) of the Act were provided, it would be unnecessary to establish that the making of a decision would, in the absence of those documents, constitute jurisdictional error. Rather, it would be sufficient to establish that the documents had not been provided, that they might affect the decision and, perhaps, that they could not otherwise be obtained. However, that is not what the plaintiffs seek. Rather, they seek an injunction to restrain the Secretary and the Commonwealth from acting on the Tribunal's decisions by reason of the Secretary's non-compliance with s 418(3).

48 To obtain injunctive relief based solely on the Secretary's non-compliance with s 418(3) of the Act the plaintiffs must establish that the Tribunal's decisions were, on that account, without legal effect. Once it is accepted, as, in my view it must be, that the Secretary's compliance with s 418(3) is not a precondition to the Tribunal's exercise of its review functions, it is necessary, at the very least, to show that the Tribunal was required to consider the documents described in s 418(3) of the Act as part of the review process before it could be said that the Tribunal's decisions were without legal effect.

49 The question whether the Tribunal was required to consider the documents referred to in s 418(3) of the Act necessitates consideration of s 424(1) of the Act which, in each of these cases, is the subject of the third question reserved for the

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6 See in relation to injunctive relief under s 75(v) of the Constitution, *Abebe v Commonwealth* (1999) 197 CLR 510 at 552 [107]-[108] per Gaudron J.

consideration of the Full Court. That question asks whether there was a failure to comply with s 424(1) of the Act.

50 At the relevant time, s 424(1) of the Act provided:

> " If, after considering the material contained in the documents given to the Registrar under sections 418 and 423, the Tribunal is prepared to make the decision or recommendation on the review that is most favourable to the applicant, the Tribunal may make that decision or recommendation without taking oral evidence."[7]

It was contended on behalf of the plaintiffs in each of these cases that s 424(1) was not complied with in that the Tribunal failed to consider the Part B documents.

51 The relief sought by the plaintiffs by reference to s 424(1) of the Act is similar to that sought in relation to s 418(3). It is convenient to set out the primary declaration sought in relation to s 424(1) because it identifies the way in which the plaintiffs contend that sub-section should be construed. The proposed declaration is that:

> "the practice of the first defendant in failing to receive and/or consider material given to it or which ought to have been given to it under section 418(3) of the Migration Act 1958 as it is required to do under section 424(1) of the said Act was unlawful"[8].

52 Section 424(1) of the Act conferred a discretionary power on the Tribunal to make a decision in favour of an applicant for review without taking oral evidence. The exercise of that discretion was, in terms, predicated on the Tribunal's consideration of the material given to the Registrar, not, as the plaintiffs assert, the material that ought to have been given to him or her. However, that is not the real issue.

53 The premise on which injunctive relief and relief by way of the issue of constitutional writs is sought in relation to s 424(1) of the Act is that, before conducting a review involving the taking of oral evidence, the Tribunal was obliged to consider whether, by reference to the documents provided pursuant to ss 418 and 423, it could make the decision or recommendation that is most favourable to the applicant in question. If it was not so required, it is

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7 Section 424 of the Act was repealed by the *Migration Legislation Amendment Act (No 1)* 1998 (Cth) and a new s 424 substituted.

8 In the alternative, the plaintiffs seek declarations that the Tribunal breached s 424(1) of the Act.

inappropriate to speak in terms of "non-compliance with" or "breach of" s 424(1) of the Act. Moreover, and more fundamentally, if it was not so required, there was nothing in that sub-section that could, of itself, provide the foundation for injunctive relief or relief by way of any of the constitutional writs.

54 In terms, s 424(1) of the Act permitted of a method of review which might result in administrative efficiency by obviating the need for oral evidence. However, only if the word "may" in s 424(1) is treated as "shall" or "must", could that sub-section be read as requiring the Tribunal to consider the material contained in documents provided by the Secretary and to decide whether or not it was then prepared to make the decision or recommendation that was most favourable to the applicant in question.

55 If the plaintiffs' construction were correct, the Tribunal would have been required to consider all the material provided to it by the Secretary, even if it had no bearing on an issue which might result in a decision in favour of an applicant for review. Such a construction cannot be accepted. Moreover, as explained in *Samad v District Court of New South Wales*, the word "may" means "may", although circumstances may arise or findings may be made such that the discretionary power in question must be exercised[9]. Once that is accepted, it follows that s 424(1) imposed no obligation on the Tribunal to consider whether it was prepared to make a favourable decision without taking oral evidence and, thus, imposed no obligation on the Tribunal to consider the Part B documents as part of the review process.

56 Because s 424(1) did not impose an obligation on the Tribunal to consider the Part B documents as part of the review process, the Secretary's failure to comply with s 418(3) of the Act, if such there was, would entitle the plaintiffs neither to the injunctive relief nor the relief by way of constitutional writs which they seek. Further, a bare declaration of non-compliance with s 418(3) would not determine any right or liability put in issue in these proceedings and would be of no practical value to the plaintiffs. That being so, it would not be appropriate to make the declarations in relation to that provision which the plaintiffs seek[10].

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9 (2002) 189 ALR 1 at 17-18 [66]-[68]. See also *Ward v Williams* (1955) 92 CLR 496 at 505-506 per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ; *Re Carl Zeiss Pty Ltd's Application* (1969) 122 CLR 1 at 5 per Kitto J; *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 133-134 per Windeyer J; *Mitchell v The Queen* (1996) 184 CLR 333 at 345-346 per Dawson, Toohey, Gaudron, McHugh and Gummow JJ; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274 per Brennan CJ, Toohey, McHugh and Gummow JJ; *Lowndes v The Queen* (1999) 195 CLR 665 at 671 [14].

10 See with respect to declaratory relief, *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188 per Mason J (with whom Jacobs and Murphy JJ

(Footnote continues on next page)

57 Because it would not be appropriate to make the bare declarations sought by the plaintiffs with respect to s 418(3) of the Act, it is inappropriate to answer the question whether there was a failure to comply with that sub-section. And because the third question, that being the question with respect to s 424(1) of the Act, proceeds on a false premise, it is also inappropriate to answer that question.

Procedural fairness

58 The first of the questions asked in each case is whether there was a failure to accord procedural fairness to the plaintiff. That question raises slightly different considerations in each case and it is convenient to deal first with the case of Mr Muin.

59 The Tribunal informed Mr Muin that it had asked the Secretary "to send a copy of its documents" and that when they were received, it would "look at them along with any other evidence on the Tribunal file to determine whether it [could] make a decision in [his] favour immediately". Later, the Deputy Registrar informed him that the Tribunal had looked at "all the material relating to [his] application" but was not prepared to make a favourable decision based solely on it. It is agreed that Mr Muin believed that the Tribunal had received the Part B documents and that if he had known otherwise, he would have taken steps to correct that situation.

60 The first issue that arises is whether the Tribunal, in fact, had the Part B documents. In this regard, it is sufficient to note that the documents were not physically sent to the Registrar; there is nothing to suggest that the Registrar was informed where the documents could be located; and only three of the documents were referred to in the Tribunal's decision. Accordingly, I would infer that, save for the documents referred to in its decision, the Tribunal did not have and did not have regard to the Part B documents.

61 It is now settled that, notwithstanding the limited grounds upon which an aggrieved person may seek review of a Tribunal decision in the Federal Court, the Tribunal is bound by the rules of natural justice and is, thus, bound to proceed

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agreed) and 189 per Aickin J; 18 ALR 55 at 69, 71; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 579 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 613 [52] per Gaudron J. See also *Ainsworth v CJC* (1992) 175 CLR 564 at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ.

in a manner that is procedurally fair[11]. Procedural fairness requires, in relation to a review application by a person who has been refused a protection visa, that he or she be given a reasonable opportunity to present a case that he or she is a refugee as defined in the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 ("the Refugee Convention") and to answer any material or information in the possession of the Tribunal which suggests otherwise.

62 The agreed statement of facts makes it clear that Mr Muin was misled into thinking that it was unnecessary for him to draw the information in the Part B documents that favoured his application to the attention of the Tribunal and that, had he not been misled in that regard, he would have taken steps to correct that situation. That, of itself, does not mean that there was a want of procedural fairness. As already indicated, all that was relevantly required was that Mr Muin be given a reasonable opportunity to present his case. It can only be said that he was denied procedural fairness if a reasonable person in his position would also have been misled and, in consequence, would have acted as Mr Muin did.

63 In my view, a reasonable applicant for review who had been informed that the Tribunal would look at the Department's documents along with other evidence on the Tribunal file and, later, that the Tribunal had looked at "all the material relating to [the] application" would have been misled into thinking that it was unnecessary to draw the Tribunal's attention to the material that favoured his or her application in the Part B documents referred to in the original decision and would have refrained from so doing. Accordingly, it follows that, by reason of the Tribunal's failure to have regard to all of the Part B documents that favoured Mr Muin's case, he was denied procedural fairness.

64 As already indicated, there is a second aspect to procedural fairness in relation to Tribunal hearings, namely, a requirement that an applicant for review be given a reasonable opportunity to answer any material in the possession of the Tribunal which suggests that he or she is not a refugee as defined in the Convention. In reaching its decision in relation to Mr Muin, the Tribunal took into account information in a Department of Foreign Affairs and Trade cable dated 18 June 1998 which was attached to submissions made by the Secretary pursuant to s 423(2) of the Act[12]. Mr Muin was not made aware of the

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11 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889; 179 ALR 238. See also *Abebe v Commonwealth* (1999) 197 CLR 510 at 553-554 [111]-[113] per Gaudron J.

12 Section 423(2) provides:

> " The Secretary may give the Registrar written argument relating to the issues arising in relation to the decision under review."

submissions or of the cable. He was, thus, not given a reasonable opportunity to answer material in the possession of the Tribunal which suggested that he was not a refugee as defined in the Convention. In this regard, also, he was denied procedural fairness.

65 So far as concerns Ms Lie, her claim to have been denied procedural fairness relates solely to the Part B documents relevant to her case. The facts relevant to her case are similar to but not identical with those involved in Mr Muin's. On the question whether the Tribunal, in fact, had the Part B documents there is a difference in that six such documents were referred to in its decision and some of the material contained in those documents favoured her case. This notwithstanding, I would infer, for the same reasons given in relation to Mr Muin, that the Tribunal did not have all the Part B documents relevant to Ms Lie's review application and, in particular, did not have all the documents that contained material favourable to her case.

66 As with Mr Muin, it is agreed between the parties that Ms Lie was misled into thinking that the Tribunal had the Part B documents and, in consequence, did not take steps to bring to its attention those parts of the documents or other similar material which favoured her case. The question whether a reasonable person would have been misled in the same way and, thus, acted in the same way requires consideration of correspondence that is in slightly different terms from that forwarded to Mr Muin.

67 The correspondence forwarded to Ms Lie by the Deputy Registrar of the Tribunal informed her that the Tribunal had asked the Department to send a copy of its documents about her case to it. She was later informed that the Tribunal had "looked at all the papers relating to [her] application" but, as it could not make a favourable decision on that information alone, she was entitled to a hearing and to give oral evidence.

68 In Ms Lie's case, the Tribunal did not say that it would look at the Department's documents. It did, however, say that it had asked for a copy of them and, later, that it had looked at all the papers relating to her application. In a context in which the original decision referred to Part B documents, the correspondence was such, in my view, as to lead a reasonable applicant for review to consider that all Part B documents had been looked at and that it was unnecessary to do anything to bring the material in them that favoured his or her case to the attention of the Tribunal. Accordingly, in my view, Ms Lie was also denied procedural fairness.

Answers to questions reserved

69 In each case the questions reserved for the consideration of the Full Court should be answered as follows:

Question 1: Was there a failure to accord the plaintiff procedural fairness?

Answer: Yes.

Question 2: Was there a failure to comply with s 418(3) of the *Migration Act*?

Answer: Inappropriate to answer.

Question 3: Was there a failure to comply with s 424(1) of the *Migration Act*?

Answer: Inappropriate to answer.

Question 4(a): Was the decision of the First Defendant to affirm the refusal of the delegate to grant a protection visa for that reason invalid?

Answer: Unnecessary to answer.

Question 4(b): What declaratory, injunctive or prerogative writ relief, *if any*, should be granted?

Answer: Prohibition should issue to prevent the second and third defendants from acting on the Tribunal's decision; certiorari should issue to quash that decision and mandamus should issue to the first defendant directing it to hear and determine the plaintiffs' review applications in accordance with law.

Question 5: By whom should the costs of the proceedings in this Court be borne?

Answer: By the second and third defendants.

70 McHUGH J. The issue in these proceedings is whether decisions of the Refugee Review Tribunal should be set aside because the Tribunal failed to comply with its statutory duties and the duty to accord natural justice.

The general background

71 Mr Muin and Ms Nancy Lie have commenced separate actions in the original jurisdiction of this Court. They are Indonesian nationals of Chinese ethnicity who claim refugee status[13] and seek the grant of protection visas under s 36 of the *Migration Act* 1958 (Cth) ("the Act").

72 In each case, a delegate of the Minister for Immigration and Multicultural Affairs refused to grant a protection visa. Each delegate set out the reasons for the decision and itemised, under "Part B" of the statement of reasons, the documentary material or "evidence" relied on in reaching the decision.

73 Both plaintiffs applied to the first defendant, the Refugee Review Tribunal, to review the decision to refuse a protection visa. In each case, once notified by the Tribunal that an application for review had been made, the Secretary of the Department of Immigration and Multicultural Affairs provided the Tribunal with certain documents concerning the plaintiff's case[14]. Mr Muin and Ms Lie were both unsuccessful in the Tribunal.

74 In this Court, the plaintiffs rely on s 75(v) of the Constitution to quash the decisions and to order a re-hearing of their applications. They claim that in the review process there have been breaches of statutory duties and a failure to accord procedural fairness. To support their claim, they have applied for discovery and interrogatories[15]. To facilitate the litigation, the parties agreed on a Statement of Agreed Facts. On 3 November 2000, Gaudron J reserved the following questions for the consideration of the Full Court under s 18 of the *Judiciary Act* 1903 (Cth):

> "Upon the facts set out in the agreed statement of facts and the inferences, *if any*, to be drawn from those facts …

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13 For the purpose of the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees ("the Convention").

14 As required by s 418.

15 See for example judgments of Gaudron J in *Muin v Refugee Review Tribunal* (2000) 74 ALJR 698; *Muin v Refugee Review Tribunal [No 2]* (2000) 74 ALJR 703; *Muin v Refugee Review Tribunal [No 3]* (2000) 74 ALJR 1398.

1) Was there a failure to accord the Plaintiff procedural fairness?

2) Was there a failure to comply with s 418(3) of the *Migration Act*?

3) Was there a failure to comply with s 424(1) of the *Migration Act*?

4) If the answer to any of questions (1) to (3) is yes,

   (a) Was the decision of the First Defendant to affirm the refusal of the delegate to grant a protection visa for that reason invalid?

   (b) What declaratory, injunctive or prerogative writ relief, *if any*, should be ordered?

5) By whom should the costs of the proceedings in this Court be borne?"

75 In my opinion, only Mr Muin has made out a claim for relief. Before considering the grounds of relief sought, it is useful to set out some background details about each of the plaintiffs and their claims.

Mr Muin's case: Background

Application for a protection visa

76 Mr Muin applied for a protection visa in August 1996. In March 1998, a delegate of the Minister refused to grant him the visa[16].

77 In refusing the application, the delegate relied on 31 items of evidence that were listed under the heading "Part B Evidence Before Me" in the delegate's reasons. They included the Departmental file relating to Mr Muin, a judgment of this Court, the UNHCR Handbook, reports from government bodies and non-governmental organisations and articles in the print media.

78 The delegate found that Mr Muin feared that, if he was returned to Indonesia, he would be persecuted for reasons of race. He feared discrimination and racism and also extortion by corrupt government officials. The delegate found that such conduct could constitute persecution. But, after considering the Part B material, the delegate found that the fear was not "well-founded" because

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16 Section 496 of the Act gives the Minister power to delegate his powers. Under s 65 the Minister has the power to refuse a visa. The prescribed criterion for a protection visa, under s 36, is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Convention.

Mr Muin did not face a real chance of Convention based persecution on return to Indonesia.

Application for review

79 Late in March 1998, Mr Muin applied to the Tribunal to review the delegate's decision. When an applicant applies to the Tribunal, the Act requires the Tribunal to inform the Secretary of the Department of Immigration and Multicultural Affairs of the application. The Secretary is required to give to the Registrar of the Tribunal the statement of reasons for the delegate's decision. In addition, s 418(3) requires the Secretary as soon as is practicable, after being notified of the application, to *give* to the Registrar each other *document*, or part of a document, that is *in the Secretary's possession or control* and is considered to be *relevant* to the review of the decision. A principal issue in these proceedings is whether the Secretary complied with this requirement. In the Agreed Facts, the parties have agreed that the items in the Part B material were in the "possession or control" of the Secretary at all material times and were "considered by the Secretary to be relevant to the review of the decision". But they dispute whether the Part B materials were documents and, if so, whether they were given to the Registrar.

80 In April 1998, after being notified of the application, the Secretary dispatched the Department's file concerning Mr Muin to the Registrar of the Tribunal. According to the Agreed Facts, the file "did not include hard copies of any of the Part B documents or copies in electronic form". The Agreed Facts reveal that it was possible for the Secretary to have created hard copies of the Part B documents and for the Tribunal to have accessed the documents itself:

> "Each of the Part B documents was available to … the Tribunal from the dates, and from the source … to the extent that:
>
> (a) They could ... go to ... a computer ... [and] manually access the CISNET database, download the information to the ... screen, and then, view the relevant Part B documents on the computer screen [this was the case for items 5, 6, 8, 9, 11,12, 17, 18, 21, 22, 23, 24, 25 and 26 or use other computer software programs and databases for items 13, 14 and 27];
>
> (b) They could ... apply to the Department's CIS Library in Canberra for an inter-library loan or to be provided with a copy of the relevant Part B document [this was the case for items 3, 4, 7, 10, 15, 16, 20 and 30 all of which were also available from the Tribunal's own library];
>
> (c) They could ... physically attend the Tribunal library to view or copy the relevant Part B documents by way of a computer terminal, a

> computer, or in hard copy form and they could ... request the Tribunal library staff to obtain a copy for them [this was the case for items 2, 3, 4, 7, 10, 15, 16, 19, 20 and 30].
>
> (d) They could ... physically attend the New South Wales State library to view or copy the relevant Part B documents ... and they could ... request the Tribunal library staff to so obtain a copy for them [this was the case for items 28, 29 and 31 (newspaper articles from 1994 and 1995)]."

81 In the meantime, on 30 March 1998 the Tribunal sent a letter to Mr Muin acknowledging his application. The letter included the following statements:

> "The Tribunal has asked the Department to send a copy of its *documents about your case* to the Tribunal.
>
> When we receive the Department's documents the Tribunal *will look at them along with any other evidence on the Tribunal file* to determine whether it can make a decision in your favour immediately. This is known as 'review on the papers'." (emphasis added)

82 According to the Agreed Facts, after reading the Tribunal's letter, Mr Muin:

> "was then under the clear belief that the Tribunal would be sent all the documents about his case which were then held by [the Department] including;
>
> (a) the decision of the delegate dated 9 March 1998; and
>
> (b) a copy of each of the Part B documents;
>
> and that the Tribunal would look at all that material in the making of its review on the papers."

83 Further, par 42 of the Agreed Facts declares that the parties have agreed that:

> "The Plaintiff believed that the Part B documents were sent to and looked at by the First Defendant in the making of the review on the papers and/or the final decision on the Plaintiff's protection visa application."

84 Under s 423 of the Act, an applicant may give the Tribunal a statutory declaration in relation to any matter of fact that the applicant wishes the Tribunal to consider and any written arguments relating to the issues arising in relation to the decision under review. Accordingly, Mr Muin's agent wrote to the Tribunal on several occasions in April 1998 referring the Tribunal to news items and

reports describing violence and discrimination against the ethnic Chinese in Indonesia. Mr Muin also submitted a personal statement to the Tribunal. He referred to his background as a Chinese Indonesian Buddhist, the kinds of discrimination that ethnic Chinese Indonesians suffer and his own experiences of discrimination, blackmail and extortion and the fear that he had of persecution if returned to Indonesia. He declared that he had no confidence in the Indonesian government's ability to protect him:

> "My government cannot protect me should I return to my country of origin due to worsening racial discrimination and racially instigated physically violent attacks on a particular race which is ethnic Chinese. There is no freedom of speech on political issues and no freedom on religion practices, in particular Buddhism.
>
> I also wish to add further in this statement that the Indonesian government is badly corrupted, racist, restricts the right of individual citizen in terms of freedom in expressing political views, cultures and religions as well as detention without trial. Ethnic Chineses are suffering everyday and many are innocently killed as a result of racial-instigated and hatred violent attacks which have resulted in many deaths not reported by government-controlled medias."

85 Section 423 also permits the Secretary of the Department to give the Tribunal "written argument relating to the issues arising in relation to the decision under review". In June 1998, the Secretary sent written submissions to the Tribunal to be distributed to its members dealing with protection visa applications made by nationals of Indonesia. One of the Tribunal members was Ms Patricia Leehy who heard Mr Muin's application for review. The s 423 submission contained information relevant to the question of whether the Indonesian authorities were willing and able to provide protection for Indonesians of ethnic Chinese background. Mr Muin never received a copy of any part of the s 423 submissions sent by the Secretary. Nor was he made aware of its existence at any time prior to the making of the Tribunal's decision.

Review "on the papers"

86 Section 424 of the Act, before its repeal, permitted a "Review 'on the papers'":

> "(1) If, after considering the material contained in the documents given to the Registrar under sections 418 and 423, the Tribunal is prepared to make the decision or recommendation on the review that is most favourable to the applicant, the Tribunal may make that decision or recommendation without taking oral evidence."

87 The Tribunal, constituted by Ms Patricia Leehy, decided in October 1998 that:

> "After considering all the material relating to the application, I am not prepared to make a decision most favourable to the applicant on this information alone …"

88 When review on the papers was not favourable, the Tribunal *had to* give an applicant the opportunity to appear before it to give evidence and *could* obtain such other evidence as it considered necessary[17]. Consequently, the Tribunal sent Mr Muin a notice under s 426 of the Act informing him of the decision "on the papers" and inviting him to attend an oral hearing. Mr Muin accepted the invitation.

The Tribunal hearing

89 Mr Muin attended a hearing of the Tribunal in November 1998. In the course of explaining the Tribunal's role to Mr Muin, Ms Leehy said:

> "So what I must do is to consider your evidence and information that I've got from other sources to decide whether there is a real chance that you will be persecuted if you return to your country. …
>
> I must also be satisfied that protection from that persecution is not available to you from the Indonesian authorities."

90 Throughout the hearing, Ms Leehy questioned Mr Muin about his personal experiences in Indonesia. Mr Muin recounted an incident in July 1998 involving damage to his aunt's house by people in the neighbourhood at about the same time as riots were occurring. There was a brief discussion about the riots of July 1998, his family not being seriously hurt in those riots, and Mr Muin hearing from his uncle that the situation in Indonesia was getting worse. At no stage did Ms Leehy ask Mr Muin directly about the degree of government protection his family was afforded. She did not mention the material in the s 423 submission of the Secretary, nor did she ask him to comment on its substance.

The decision and reasons of the Tribunal

91 On 25 November 1998, the Tribunal affirmed the delegate's decision to refuse Mr Muin a protection visa. After identifying the evidence and some of the factual background, the Tribunal noted that it "had before it independent information relevant to the applicant's claims". Much of that information confirmed the existence of discrimination towards ethnic Chinese in Indonesia.

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17 Section 425(1).

The Tribunal referred to a number of news articles and reports of government organisations to describe the riots that had occurred in early 1998 and which ultimately brought down the Suharto government. The Tribunal said that those riots, while they did affect ethnic Chinese, in particular wealthy Chinese, were mainly spurred by political objectives but also partially by economic frustration.

92 Mr Habibie replaced General Suharto as President in May 1998. Ms Leehy cited 1998 news reports that stated that President Habibie had announced policy changes that would address the plight of ethnic Chinese. She also quoted Department of Foreign Affairs and Trade ("DFAT") information – published in March 1998 – that expressed DFAT's belief that Indonesian security forces have the ability and inclination to provide protection to all citizens. She also referred to a June 1998 DFAT cable that was part of the s 423 submission. That cable suggested that "Chinese-Indonesians would ... have reasonable grounds to fear for their property and physical safety if they were to be caught up in the type of rioting that occurred in Jakarta, Solo and Medan". Nevertheless, Ms Leehy held that it "seems reasonable to conclude that Indonesia's 'official' attitude during the Suharto regime was one of strong discouragement of hostilities directed at ethnic Chinese and indeed religious minorities".

93 Ms Leehy found Mr Muin to be a credible witness and accepted his factual account of several demeaning and at times frightening experiences that he suffered because of his ethnicity and his religion. She accepted everything that he said had happened to him and his family. But she held that it did not constitute persecution in a Convention sense. She said:

> "Given the country information on the long-term discrimination against ethnic Chinese in Indonesia and the credibility of the applicant's own account, the Tribunal finds that the applicant's claims of discriminatory acts against him are valid. However, the actions complained of by the applicant **are not**, in the Tribunal's view, **sufficiently serious as to amount to persecution** in a Convention sense, as described in *Applicant A* by Gummow J". (emphasis added)

94 Ms Leehy accepted that there had been violence against ethnic Chinese. But she held that the violence did not have an "official quality" about it. Ms Leehy referred to the statements by President Habibie about his policy of non-discrimination which culminated in new legislation, the public condemnation of anti-Chinese prejudice by General Wiranto and official inquiries into the behaviour of the military. Ms Leehy also referred to the attempts by the Indonesian government to control the violence and the preventative measures that it had put in place. She concluded:

> "Given that the violence against ethnic Chinese is neither official, nor officially tolerated, nor uncontrollable, the Tribunal is not satisfied that it can be described as persecution in a Convention sense."

Mr Muin's case: Analysis

95 Upon these facts, Mr Muin contends that the decision of the Tribunal constitutes jurisdictional error that calls for the exercise of this Court's power under s 75(v) of the Constitution.

96 First, Mr Muin claims that, because the Secretary did not physically transfer the Part B documents to the Tribunal, he failed to comply with his statutory duties under s 418. Consequently, the Tribunal failed to comply with s 424 of the Act. Second, Mr Muin alleges that he was led to believe that the Tribunal member had considered the Part B materials when in fact she did not, and he was thus deprived of an opportunity to bring favourable material to the attention of the Tribunal. He argues that this was a breach of procedural fairness and that the decision was *ultra vires*. Third, he argues that by taking into account adverse material (about the events of 1998 and the new government's capacity to protect him from persecution) without giving him an opportunity to comment on that material, the Tribunal breached its common law duty to accord him procedural fairness.

The legal framework

97 Under the heading: "Refugee Review Tribunal's way of operating", s 420 of the Act declares that the Tribunal is to pursue the objective of providing a mechanism of review that is "fair, just, economical, informal and quick". Further, in reviewing a decision, the Tribunal "is not bound by technicalities, legal forms or rules of evidence" but must act "according to substantial justice and the merits of the case".

98 Procedure in the Tribunal is inquisitorial and not adversarial[18]. A member is not a party to the proceedings, nor a contradictor to the applicant's claims. Under s 435(1) of the Act, a member has the same protection and immunity as a Justice of this Court[19].

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18 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 115 [76] per Gaudron and Gummow JJ. For an outline of the legal framework of the Tribunal, see *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 75 ALJR 1105 at 1117-1118 [70]-[71]; 180 ALR 1 at 18 per McHugh, Gummow and Hayne JJ.

19 Section 435 provides that a member "has, in the performance of his or her duties as a member, the same protection and immunity as a member of the Administrative Appeals Tribunal" and under s 60 of the *Administrative Appeals Tribunal Act* 1975 (Cth) a member has the same protection and immunity as a High Court Justice.

99 In addition to its specific statutory functions and duties, the Tribunal is under an overriding duty to accord procedural fairness to applicants[20]. Unfortunately, whether or not a breach of that duty has occurred is a matter that must be determined by this Court unaided by any findings of a trial judge or a review of those findings by an intermediate appellate court[21]. This is the inevitable effect of amendments to the *Migration Act* limiting the grounds upon which a visa applicant could seek judicial review in the Federal Court[22].

The statutory breaches argument: ss 418 and 424

100 Section 418(3) enacts:

> "The Secretary must, as soon as is practicable after being notified of the application, give to the Registrar each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision".

101 The obligation in s 418(3) is additional to the obligation under s 418(2) to give copies of a statement about the delegate's decision which sets out the findings of fact, refers to the evidence upon which those findings were based and gives the reasons for the decision. The reference in s 418(3) to "each other document" is to documents other than that statement of reasons.

102 Mr Muin contends that, as soon as practicable after being notified of the application, the Secretary did not "give" to the Registrar of the Tribunal documents or parts of documents in the Secretary's possession or control that the Secretary considered were relevant to the Tribunal's review of the delegate's decision. In other words, Mr Muin contends that the Secretary failed to comply with s 418(3) of the Act. Consequently, he asserts the decision of the Tribunal was *ultra vires*, in excess of jurisdiction and attracts relief under s 75(v) of the Constitution.

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20 *Kioa v West* (1985) 159 CLR 550; *Annetts v McCann* (1990) 170 CLR 596; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889; 179 ALR 238.

21 Under the constitutionally entrenched jurisdiction of s 75(v). See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

22 Because of s 476(2)(a) of the Act as it stood at the relevant time, which was inserted by the *Migration Reform Act* 1992 (Cth) the validity of which was confirmed by this Court in *Abebe v Commonwealth* (1999) 197 CLR 510.

103 The parties have agreed that the Part B material constituted "documents" that were "[i]n the possession and control of the Secretary ... at all material times" and that they were considered by the Secretary to be "relevant to the review" of the delegate's decision. I do not think that the Court can be bound by the agreement of the parties as to whether the Part B material constituted "documents". The meaning of "document" in s 418(3) inevitably throws light on the meaning of "give" in that sub-section. The Court must form its own view about the meaning of "document" in s 418(3).

104 Unless the context or purpose of a statute suggests otherwise, the words of its sections are to be given their natural and ordinary meaning[23]. The ordinary dictionary meaning of "document" is a printed or written paper containing information. That definition of "document" is not apt to cover the sequence of electronic impulses in the electronic circuits of a computer disc that store information. But it is more than 50 years since Learned Hand J assured us that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary"[24]. The object of ss 418(2) and (3) is to ensure that the Tribunal obtains all information in the Department's possession that is relevant to the review of the decision. No violence is done to the object or language of s 418(3) by holding that "document" includes information that is stored in a computer or a fax machine and which can be printed out by pressing one or more keys or buttons. No reason appears for thinking that Parliament intended to distinguish between information stored on paper and information stored in the electronic impulses of a computer that can be printed on paper by pressing a key or keys on the computer's keyboard. Statutes are always speaking to the present. If we can, we should give the words of a statute – which after all are only the means of conveying ideas and information to the public – a meaning that covers contemporary processes and accords with the object of the enactment[25]. As Justice Holmes once said[26], "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

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23 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161-162 per Higgins J; *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 at 648 per Dixon J; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305 per Gibbs CJ; *Mills v Meeking* (1990) 169 CLR 214 at 223 per Mason CJ and Toohey J.

24 *Cabell v Markham* 148 F 2d 737 at 739 (2nd Cir, 1945).

25 *Bropho v Western Australia* (1990) 171 CLR 1 at 19-20 adopting *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424.

26 *Johnson v United States* 163 F 30 at 32 (1st Cir, 1908).

105 I do not think that s 25 of the *Acts Interpretation Act* 1901 (Cth) – which has an inclusive definition of "document" – throws light on the problem. In *Australian Federation of Air Pilots v Australian Airlines Limited*[27], Gray J held that the definition of "document" in s 25(c) is "apt to cover computers, or computers coupled with printers". But accepting, as I do, the correctness of that statement, it does not assist in construing s 418(3). It is hardly to be supposed that s 418(3) requires the Secretary to give the computers or their silicon chips to the Tribunal. The better view is to give "document" in s 418(3) a purposive construction and to hold that it covers any information that is stored or recorded on paper or electronically.

106 The next issue is whether the failure to create and physically transfer paper versions of the documents to the Tribunal constituted a failure to "give" them to the Tribunal within the meaning of the Act. In my opinion, it did not.

107 Paragraphs 17, 18, 19 and 20 of the Agreed Facts state:

> "17. At all material times all of the members of the First Defendant and the Registry and administration staff of the Tribunal had access, via desktop computers, to a computer database of source documents maintained by the Department in Canberra known as CISNET. The Registry and administration staff of the Tribunal, which were based at the Registry offices in Sydney and Melbourne, also maintained its own library of source material ('the RRT Library'). Members could obtain documents from that Library and from the Library maintained by the Department's Country Information Service (CIS Library) in Canberra, other electronic databases such as Nexis (a database of international media articles) and utilise inter library loan arrangements with some other libraries in Australia. Members could request research staff of the First Defendant to obtain documents from the same sources.
>
> 18. At all material times many of the members of the First Defendant and the Registry and administration staff of the Tribunal had access to a computer software program known as 'ISYS' allowing them to search electronic databases and retrieve country information and other documents relevant to the RRT's functions. The databases capable of being searched by ISYS were set up and maintained by staff of the First Defendant.
>
> 19. All of the Part B documents listed in Schedule 1 as being held on the CISNET or ISYS databases comprised the full text of the

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27 (1991) 28 FCR 360 at 369.

original article except that ... with item 5, the report by the Minority Rights Group entitled the Chinese of South East Asia, the CISNET database only contained that section of the article which dealt specifically with Indonesia. It did not contain certain 'boxed information'. Entries to the said databases were added to and removed from the databases from time to time during the relevant period and different versions were recorded at different times.

20. Each of the Part B documents was available to Members and the Registry and administration staff of the Tribunal from the dates, and from the source, set out in Schedule 1 hereto in and to the extent that:

(a) They could each go to their own desktop computer (if they had one) or a computer terminal or a computer somewhere at the Tribunal's offices, manually access the CISNET database, download the information to the Tribunal's computer screen, and then, view the relevant Part B documents on the computer screen;

(b) They could each apply to the Department's CIS Library in Canberra for an inter-library loan or to be provided with a copy of the relevant Part B document;

(c) They could each physically attend the Tribunal library to view or copy the relevant Part B documents by way of a computer terminal, a computer, or in hard copy form and they could each request the Tribunal library staff to obtain a copy for them; and,

(d) They could each physically attend the New South Wales State library to view or copy the relevant Part B documents by way of a computer terminal, a computer, or in hard copy form and they could each request the Tribunal library staff to so obtain a copy for them."

108 So far as possible, s 418 must be given a meaning consistent with its general object – the object of having decisions of delegates reviewed by the Tribunal. In order to do that, the Tribunal must have access to the same material as the delegates who make the decisions. The Act also requires that non-citizens' visa applications should be processed in a way that is *fair*, *quick*, and *efficient*[28]. As long as the Tribunal considers the information in the "documents", the

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28 In addition to s 420, see Pt 2, Div 3, subdiv AB which provides for a "Code of procedure for dealing fairly, efficiently and quickly with visa applications".

method by which that is done does not affect the requirement of fairness. On the other hand, quickness and efficiency would be severely compromised if the plaintiff's arguments were accepted.

109 The evidence of the delegate proved that it was not the usual practice within the Department to maintain hard copies of country information within the Departmental file. It was her understanding that the Tribunal would have a copy of her decision and had access to all the same country information sources that she did. The delegate in Ms Lie's case in fact stated that keeping hard copies of country information on file was actively discouraged. The Departmental practices and policies of avoiding the unnecessary accumulation of paper and copies of documents make good administrative sense. They are consistent with the Act's object of speed and efficiency and do nothing to compromise the Act's aim of fairness. A construction of the Act that is consistent with those objectives must be preferred to one that runs contrary to them. And it would be contrary to the requirements of speed and efficiency, if the Secretary was required to print out the Part B documents and their equivalents and deliver them to the Tribunal. It would add to the cost of the process and thereby compromise the requirement of efficiency – which must include the costs of the process. It would also marginally slow down the process of review.

110 The word "give" has many meanings. The *Macquarie Dictionary* gives 30 meanings for the term. They include: "1. to deliver freely … 3. to grant permission … 11. to set aside for a specified purpose ... 13. to furnish or provide[29]". These meanings seem wide enough to cover a situation where the Secretary through the Department permits the Tribunal to have access to the CISNET database. Once it is held that the Part B materials were documents within the meaning of s 418, I see no difficulty in holding in that context that "give" includes the Department electronically transmitting data from its database to the Tribunal. No doubt it is more difficult to say that the Secretary has "given" the "documents" stored in the Nexis database (Item 27) or the New South Wales State Library (Items 28, 29 and 31) or stored solely in the Tribunal's library (Items 1 and 19) to the Tribunal. But the parties agree that these documents were in the Secretary's "possession or control". This agreement seems to record a fiction. But if the Secretary has possession or control of these documents, he should be taken to have given the Tribunal permission to use them – which is one of the meanings of "give".

111 Nor do I see any difficulty in holding that the computer stored "documents" are given "as soon as practicable", provided the "decision" is transmitted as soon as practicable. Once the Tribunal is notified of the decision –

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29 *Macquarie Dictionary*, (1981) at 753-754.

which as a matter of practice refers to the information relied on in Part B of the decision – the Tribunal is able to obtain access to it.

112 In this case, the Tribunal member did have access to the Part B material. She received Mr Muin's file; she received a list identifying the Part B materials upon which the delegate had relied; and she had access to that material through computer databases or libraries, in a manner similar to the way the delegate had access to that material in the first place. By providing the file and identifying the Part B materials so that they could be accessed by the Tribunal, the Secretary fulfilled its duty under s 418(3) to "give" each document to the Tribunal.

The Part B material – procedural fairness argument

113 Irrespective of whether there was a breach of s 418, Mr Muin contends there was a failure to accord procedural fairness in relation to the Part B material. He contends that, by representing to him that the Tribunal would look at all the Department's "documents about [his] case ... along with any other evidence on the Tribunal file"[30], and that it had "consider[ed] all the material relating to the application"[31], the Tribunal created or enlivened a legitimate expectation in him to the effect that favourable documents would be or had been considered by the Tribunal member in the course of making her decision under the Act. Mr Muin argues that, by making a decision inconsistent with that legitimate expectation and by failing to give him notice of that proposed course of action, he was deprived of an adequate opportunity of presenting a case against the taking of such a course. According to the Agreed Facts, Mr Muin would have availed himself of such an opportunity in a number of ways.

114 For Mr Muin to succeed in this argument, the Court must accept as a matter of fact that the Tribunal had not considered the Part B material. The onus is on the plaintiff to make out the contention that the Tribunal member did not "have before her; consider; and/or have regard to (most of) the Part B documents". I am not prepared to make that factual finding.

115 The plaintiff relies on several matters to support his submission. First, the decision refers only to four of the Part B documents, (the Departmental file, and three standard legal references). Second, the file notes and working papers of the member contain no reference to the Part B materials[32]. Third, the failure of the

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30 See par [81] above.

31 See par [87] above.

32 Note interlocutory judgment of Gaudron J in *Muin v Refugee Review Tribunal [No 2]* (2000) 74 ALJR 703 refusing further discovery and interrogatories.

Tribunal member to participate and give evidence in these proceedings to explain the true position.

116 The relevant date for considering whether Mr Muin was a refugee was the date of its decision, namely 25 November 1998. Most of the Part B material was three years old by that time – the most recent item being dated December 1995. The Tribunal member may have noted the dates from the Part B material and considered them out of date. The Tribunal member may have actually read each of the documents and considered them out of date or irrelevant. She may simply have omitted to refer to them in her decision. She may have previously read the documents when conducting other similar reviews and been aware of their contents. Tribunal members are expected to develop and build upon a body of expertise and general knowledge applicable to the cases that come before them. So the lack of reference in the notes and working papers does not lead to any firm conclusion as to whether the Tribunal member considered the Part B material. Moreover, on three occasions, the agent of Mr Muin sent the Tribunal updated information from 1997 and 1998, and the Tribunal member referred to those documents in her reasons. This tends to suggest that the Tribunal member was more interested in information concerning events close to November 1998 than in information covering the period 1992 to 1995, the years covered by the Part B material.

117 There are reasonable explanations for the absence of reference to the Part B material in the Tribunal's reasons.

118 Moreover, the plaintiff cannot rely on the rule in *Jones v Dunkel*[33] that "[u]nless a party's failure to give evidence be explained, it may lead rationally to an inference that his evidence would not help his case." I have pointed out earlier that a Tribunal member has the same protection and immunities as a Justice of this Court. For the reasons already provided by the other members of this Court[34], it would be inconsistent with the protection and immunities of the Tribunal member to draw inferences from the failure of the Tribunal member to give evidence concerning the matters which she took into account.

119 Accordingly, the plaintiff has not discharged his onus of proof.

The adverse material – procedural fairness argument

120 Mr Muin also complains that the Tribunal took into account "country information" that was adverse to his claim, without giving him an opportunity to

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33 (1959) 101 CLR 298 at 321 per Windeyer J.

34 Gleeson CJ at [25], Kirby J at [197], Callinan J at [299]-[300].

comment on it. He contends that this constituted a breach of the rules of procedural fairness.

121 According to the Agreed Facts:

> "38. In the reasons for her decision Member Leehy referred to various documents ('Country Information') which related to the circumstances prevailing in Indonesia generally and in some cases, in relation to the happening of specific events or issues in Indonesia.
>
> 39. In relation to the Country Information … referred to in the written reasons for decision:
>
> (a) The documents contained information capable of supporting the conclusion that the Indonesian authorities were willing and able to provide protection for Indonesians of ethnic Chinese background;
>
> (b) At no stage from 30 March 1998 to the date of Member Leehy's decision was the Plaintiff provided with or shown copies thereof; and
>
> (c) The Plaintiff was not made aware of the substance or contents of any of the documents by the First Defendant, Member Leehy or the Registrar."

The Agreed Facts also state that, if Mr Muin had been aware that those materials were being considered by the Tribunal, he would have taken similar steps to those he would have taken if he had known the Part B material would not be sent to the Tribunal.

122 There is no doubt that the Tribunal member was under a duty to accord Mr Muin procedural fairness. Whenever a statute confers on a public official or tribunal the power to do something that affects a person's rights, interests or legitimate expectations[35], the official or tribunal must accord procedural fairness to the person affected unless the statute plainly indicates a contrary intention. This Court has already held that the rules of procedural fairness govern the

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35 *Kioa v West* (1985) 159 CLR 550; *Annetts v McCann* (1990) 170 CLR 596; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889; 179 ALR 238.

exercise of power by the Tribunal[36]. The content of the obligation and whether it was in fact complied with are issues here.

123 Natural justice requires that a person whose interests are likely to be affected by an exercise of power be given an opportunity to deal with matters adverse to his or her interests that the repository of the power proposes to take into account in exercising the power[37]. This does not mean that the source and nature of all material that comes before the decision-maker must be disclosed. But "in the ordinary case ... an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made"[38]. What is required to discharge this duty depends on the circumstances of the particular case[39].

124 Before dealing with this issue, it is convenient to deal with an alternative argument of Mr Muin. He contended that he had a legitimate expectation of procedural fairness that was created by a Practice Direction of the Tribunal issued on 25 June 1997. The Direction included a section on Adverse Material. It stated that:

> "The applicant will be given an opportunity to respond to any relevant and significant material which is or may be adverse to his or her case.
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> …
>
> In general, it will be sufficient to identify the source and provide the substance of the material. There is no legal requirement to provide the actual source document.

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36 *Kioa v West* (1985) 159 CLR 550; *Annetts v McCann* (1990) 170 CLR 596; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889; 179 ALR 238.

37 *Kioa v West* (1985) 159 CLR 550 at 628 per Brennan J, citing *Kanda v Government of Malaya* [1962] AC 322 at 337. See also *De Verteuil v Knaggs* [1918] AC 557 at 560-561; *Ridge v Baldwin* [1964] AC 40 at 113-114.

38 *Kioa v West* (1985) 159 CLR 550 at 629 per Brennan J, in the context of adverse information that related to the applicants personally.

39 *Kioa v West* (1985) 159 CLR 550; *Annetts v McCann* (1990) 170 CLR 596; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889; 179 ALR 238.

> To ensure that the applicant has an adequate opportunity to respond to adverse material the Tribunal must be satisfied that the applicant understands the material and the way it relates to his or her case.
>
> The applicant will not normally be provided with any material which is referred to in the primary decision or is otherwise reasonably available to the applicant. The provision of adverse material by the Tribunal is subject also to any issue of confidentiality, privilege or public interest immunity (see also ss 437-439)."

125 This alternative contention of Mr Muin should be rejected. The Tribunal's internal Practice Direction did not constitute a promise or representation to Mr Muin upon which he could ground a claim of a legitimate expectation of procedural fairness concerning adverse material. It merely paraphrases the common law duty. The doctrine of legitimate expectation is fictitious enough without applying it to internal practice directions of the Tribunal of which Mr Muin did not know and may not have understood if he had known of their existence. His case must stand or fall on the proposition that the general principles of procedural fairness required that he be informed of the adverse matters that the Tribunal was proposing to consider.

126 In this case, a relevant matter adverse to Mr Muin that the Tribunal took into account was the level of protection that the Indonesian government could offer him from anti-Chinese violence and discrimination. Mr Muin was given notice that that would be a relevant matter, and he was given several opportunities to reply to it. In any event, the delegate's decision would have alerted him to the fact that it was a relevant matter. He addressed it in his written submissions and personal statement. And he was told at the outset of the hearing that, to succeed in his review application, the Tribunal member would have to be satisfied that he could not gain protection from the Indonesian authorities.

127 But it is at a more specific level that Mr Muin claims he was entitled to notice of, and opportunity to comment on, relevant matters. The Tribunal alluded to events and reports from 1998 that referred to changes in the Indonesian economic and political climate. Mr Muin does not contend that he should have been shown the actual documents relied on. But he does say that the Tribunal unfairly took into account "adverse material" which included information that came with the Department's s 423 submission about ethnic Chinese in Indonesia. He contends that the Tribunal member should have told him that she proposed to take into account, and asked him to comment on, the willingness and ability of the Indonesian authorities to protect him from persecution in light of the changes that occurred in Indonesia in 1998. They included an economic downturn, a number of riots, a period of political instability and the resignation of General Suharto on 21 May 1998 and his replacement by President Habibie.

128 Mr Muin's argument relied on the recent decision of this Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[40] which has a number of similarities to the present case. But material aspects of Mr Miah's case have no counterpart in Mr Muin's case. *Miah* is not a precedent that covers the present case.

129 Mr Miah had fled Bangladesh in fear of his life upon grounds that made his fear well-founded. According to Mr Miah and some independent news reports, both major political parties were in coalition with the fundamentalist groups who were the cause of his fear. He claimed that, irrespective of which party was in power, it would not protect him from the fundamentalists. A general election for Bangladesh occurred several months after Mr Miah had applied for a protection visa and made his submissions to the Department. There was considerable delay (over one year) on the part of the delegate in making his decision. The delegate did not reject Mr Miah's claims of prior persecution. But the delegate held that his fear of persecution upon return to Bangladesh was not well-founded because the *change* of government meant that he would now have effective protection. It had never been put to Mr Miah that a *change of government* would alter his situation. And given the way that his application had been presented, it was not obvious that his case might fall on this ground. Consequently, the delegate had denied Mr Miah natural justice.

130 There are two similarities between Mr Miah's and Mr Muin's cases. First, the decision-maker took into account a change of government that occurred after the application to that decision-maker had been lodged. Second, the decision-maker considered the applicant did not have a well-founded fear of persecution because a new government could offer protection. But this case is different from Mr Miah's in five material respects.

131 First, Mr Muin had an opportunity to comment that Mr Miah did not have. Second, the issue of the Indonesian government's protection against anti-Chinese violence was obvious. Third, the new information in the present case was less critical to the outcome of the decision than it was in Mr Miah's case. Fourth, the change of circumstances in *Miah* occurred after Mr Miah made his application and written submission to the Department. The country information relied on was also published after that date. In the present case not all of the material was new. Fifth, unlike Mr Miah, Mr Muin had the benefit of an oral hearing. He appeared before the Tribunal on 18 November 1998, just one week before the Tribunal's decision, but well after the key events in Indonesia had taken place. When the hearing commenced, the member told him that she must be satisfied "that protection from that persecution is not available to you from the Indonesian authorities". The riots of July 1998 – which occurred after General Suharto's

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40 (2001) 75 ALJR 889; 179 ALR 238.

resignation – were discussed at the hearing, although most of the discussion concerned Mr Muin's personal circumstances. However, apart from an open question "Is there something else you wanted to say?", the member did not ask for Mr Muin's comment directly on the capacity of the government to protect him in the new circumstances.

132 In addition, Mr Muin made written submissions to the Tribunal on four separate occasions between applying for review in March 1998 and the date of the Tribunal's decision. His agent wrote to the Tribunal enclosing various articles, newspaper clippings and reports, and a personal statement from Mr Muin. Each submission dealt with attacks on ethnic Chinese and the response of the authorities. But those letters were all sent in April, *before* the change in government.

133 The fact that Mr Muin addressed the question of the capacity of the government to protect him in those submissions and in his statement demonstrates that, unlike the circumstances of *Miah*, the question was an obvious one. It was also obvious from the delegate's decision, which he had the benefit of reading. The delegate asserted that "when riots and anti-Chinese violence occur, the Government can, and does exert its authority to control the situation and to protect the Chinese people". It would have been obvious to Mr Muin from reading the delegate's decision that the government's protection of Chinese Indonesians was an important issue. Whether or not an issue is obvious is usually of fundamental importance in determining whether a person affected by the exercise of power should be given an opportunity to make submissions.

134 In *Miah* I said[41]:

> "In some cases, exercises of the power, although conditioned by the rules of natural justice, will *not* require that the applicant have an opportunity to comment on the material. Examples of material that would not require comment by the applicant would include non-adverse country information, favourable or corroborative information in the public domain and information based on the circumstances already described in the application. But there are cases where the exercise of this power *does* require that the applicant be given an opportunity to comment on the material. An example is where the delegate proposes to use new material of which the applicant may be unaware and which is or could be decisive against the applicant's claim for refugee status. The need for disclosure by the delegate is even stronger where the material concerns circumstances that have changed since the date of application and is being used after

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41 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 912 [141]; 179 ALR 238 at 269-270.

> considerable delay. It is stronger still when the material is equivocal or contains information that the applicant could not reasonably have expected to be used in the way the delegate uses it."

135 The defendants argue that, even if there was a breach of the rules of natural justice, the Tribunal found "the actions complained of by the applicant are not, in the Tribunal's view, sufficiently serious as to amount to persecution in a Convention sense". However, the Tribunal member did tie in the question of "persecution" with the question of government protection:

> "Anti-Chinese violence, even if orchestrated as in the case of the May riots, may not amount to persecution if the State does not condone it and can effectively protect its ethnic Chinese citizens against it".

That being so, it cannot be said that the country information was not critical to the outcome of the decision, even if less acutely so than it was in Mr Miah's case.

136 The parties have agreed that, if the Tribunal had given Mr Muin an opportunity to comment on the new country information, he would have arranged for a solicitor or agent to make further submissions or to appear at the hearing. They also agree that he would have brought forward additional evidence to the effect that it was unsafe for him to return home. Such evidence, it was agreed, would have supported his claims that his stated fears of persecution in Indonesia were well-founded. The parties also agreed that he would have undertaken further research and submitted further material such as copies of six decisions of the Tribunal favourable to ethnic Chinese Indonesians whose circumstances were similar to his[42].

137 Did procedural fairness require the Tribunal member to tell Mr Muin that she was considering the *policies of President Habibie* and the *assurances of the Army* as evidence that the government would offer protection? It is an issue on which reasonable minds might differ. But I think that she should have told him. Although the general issue of government protection was at the forefront of the case, the *policies* of the new President and the *assurances* of the Army were not issues in the case. I do not think that it was obvious that these two matters – particularly the assurances of the Army – would be decisive of the outcome of the review, as arguably they were. The change of government occurred after Mr Muin had made his submissions. At the hearing he had not been asked whether a change of government might make a difference. Nor was he asked about the assurances of the Army. If he had been asked, he might have pointed to material that suggested that the policies of the new President and the assurances of the Army had failed or were likely to fail. Moreover, the Agreed

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42 See also *Castillo-Villagra v INS* 972 F 2d 1017 (9th Cir, 1992).

Facts suggest that he could have provided evidence, material or submissions that would have caused the Tribunal to reach a different view.

138 As the United States Court of Appeals in the 9th Circuit pointed out in a similar case[43]:

> "A case before an administrative agency, unlike one before a court, 'is rarely an isolated phenomenon, but is rather merely one unit in a mass of related cases … [which] often involve fact questions which have frequently been explored by the same tribunal.' …
>
> But the administrative desirability of [official] notice as a substitute for evidence cannot be allowed to outweigh fairness to individual litigants. Unregulated notice, even of legislative facts, gives finders of fact 'a dangerous freedom'."

139 Accordingly, the Tribunal breached the duty that it owed to Mr Muin to accord him procedural fairness.

Mr Muin's case: Conclusions

140 A breach of the rules of procedural fairness is jurisdictional error for the purposes of s 75(v) of the Constitution. Not every departure from the rules of natural justice automatically invalidates a decision adverse to the party affected by the breach[44]. Nevertheless, once a breach of natural justice is proved, a court should refuse relief only when it is confident that the breach could not have affected the outcome of the case. As this Court said in *Stead v State Government Insurance Commission*[45], "it is no easy task for a court … to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome". I am not confident that the breach could have had no bearing on the outcome in this case. Accordingly, I would grant relief under s 75(v) of the Constitution. *Prohibition* should issue to prevent the second and third defendants from acting on the Tribunal's decision; *certiorari* should issue to quash that decision; and *mandamus* should issue to the first defendant directing it to hear and determine the plaintiff's review application in accordance with law.

141 I would answer the questions reserved in regard to Mr Muin as follows:

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43 *Castillo-Villagra v INS* 972 F 2d 1017 (9th Cir, 1992) at 1026-1027.

44 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 122.

45 (1986) 161 CLR 141 at 145.

1) Was there a failure to accord the Plaintiff procedural fairness?

Yes

2) Was there a failure to comply with s 418(3) of the *Migration Act*?

No

3) Was there a failure to comply with s 424(1) of the *Migration Act*?

No

4) If the answer to any of questions (1) to (3) is yes:

(a) Was the decision of the First Defendant to affirm the refusal of the delegate to grant a protection visa for that reason invalid?

Yes

(b) What declaratory, injunctive or prerogative writ relief, *if any*, should be ordered?

Prohibition, Certiorari and *Mandamus*

5) By whom should the costs of the proceedings in this Court be borne?

The second and third defendants

Ms Lie's case: Background

142 The background to Ms Lie's claim is different from Mr Muin's. Moreover, there is no argument based on adverse material and a denial of natural justice.

Application for a protection visa

143 Ms Lie came to Australia in January 1997. She is an Indonesian citizen of Chinese ethnicity and Buddhist religion. She applied for a protection visa in March 1997. Eight days later, a delegate of the Minister refused her application. As with the delegate in Mr Muin's case, the delegate in Ms Lie's case made his

decision using the Departmental file and other documents that were described as the "Part B material".

144 In her application to the Department, Ms Lie claimed that she feared mistreatment by non-Chinese Indonesians. She claimed the native Indonesians and Indonesian government "look down on" and feel envy towards ethnic Chinese Indonesians and always cause problems for them. She also claimed discrimination based upon her Christianity – her claim to Christianity later proving to be false. She claimed she could never have a safe life in Indonesia and that she had no idea whether she could find protection from the Indonesian government.

145 The delegate found that:

> "Apart from general claims of racial discrimination the applicant has not provided any information from which I could be satisfied that she faces a significant detriment or disadvantage or any other mistreatment amounting to persecution owing to her ethnicity. Taking into account all the evidence … I find that she does not face treatment amounting to persecution owing to her ethnicity."

146 In reaching this conclusion, he took into account the response of the Indonesian government to curb the riot-related violence that had affected the ethnic Chinese even when the violence was spurred by social and political reasons.

147 In so far as the claim for refugee status was based upon religion, the delegate said that the independent evidence indicated that the riots and unrest in Indonesia were part of an "escalating pattern of civil unrest across the country with a myriad of underlying causes linked to economic and political frustrations". He was not satisfied that there was a pattern of conduct of such a degree or continuity directed at members of the Christian community to be considered as persecution for Convention reasons. Nor was he satisfied that the Indonesian authorities had tolerated ethnic or religious violence or failed to protect members of the Christian communities. Accordingly, the delegate found that the mistreatment that Ms Lie claimed to fear was not sufficiently grave to constitute persecution.

Application for review

148 Ms Lie applied for review of the delegate's decision in April 1997. As in Mr Muin's case, the Department was obliged under s 418 of the Act to give to the Tribunal relevant documents. The Tribunal had received Ms Lie's Departmental file by 21 April 1997, but this did not include the physical documents listed in Part B. As in Mr Muin's case, those documents were all available to the members of the Tribunal by means of accessing a computer or library. In the

case of Ms Lie, every document was available either through the CISNET system or through the Tribunal library.

149 On 17 April 1997, the Tribunal sent Ms Lie a letter confirming receipt of the application and noting that: "The Tribunal has requested the Department of Immigration and Multicultural Affairs to forward *a copy of its documents about your case* to the Tribunal". (emphasis added) It informed Ms Lie that she would be given the opportunity to lodge additional evidence and make submissions.

150 According to the Agreed Facts, after reading the Tribunal's letter, Ms Lie:

> "was under the clear belief that the Tribunal would be sent all the documents about [her] case which were then held by the Department including;
>
> (a) the decision of the delegate dated 13 March 1997; and
>
> (b) a copy of the Part B documents;
>
> and that the Tribunal would look at all that material in the making of its review on the papers."

151 As in Mr Muin's case, the parties agree that the plaintiff believed that the Part B materials were sent to and looked at by the Tribunal in the review on the papers and/or the final decision after the hearing. They agree that she would have taken certain actions if she had been aware that the Department had not physically transferred, or sent, all of the Part B material to the Tribunal.

152 Ms Lie wrote to the Tribunal on 1 May 1997. In that letter, which was signed by her, she detailed her mistreatment in Indonesia. This included beatings that had broken her nose. She claimed that on another occasion she was knocked down, ridiculed and threatened by some Muslims on her way home from church. She claimed she could "never get any help from the Indonesian government" who gave "tacit permission to the bad behaviours of the native Indonesians and Muslims".

153 The Tribunal conducted its review "on the papers" under s 424. On 12 November 1997, it wrote to Ms Lie saying:

> "The Tribunal has looked at *all the papers relating to your application* but it is unable to make a favourable decision on this information alone." (emphasis added)

The Tribunal hearing

154 Ms Lie requested a hearing. It took place in December 1997. Ms Norma Ford constituted the Tribunal. In making her introductory remarks, the Tribunal member told Ms Lie that:

> "I have read all the documents on your file, including all the documents you have sent to the Department and to the Tribunal. I will take all this material into account in reaching a decision on your application".

155 At the hearing, it emerged that Ms Lie was a Buddhist and that the claims in her letter were incorrect. She said that the only time she got hurt was in a squabble with a woman. As a Chinese woman, she said she experienced discrimination in Indonesia because she was not allowed to speak Chinese.

156 When asked what fears she had, she said that she feared being hit or even killed by her enemies who were a couple who competed with her in street selling. According to Ms Lie, the main reason she came to Australia was to earn a living. Towards the end of the hearing, after Ms Lie had told the member everything she wanted to say, the member asked Ms Lie "Now, if you went back to Indonesia, what would stop you from seeking the protection of the police or the other authorities?" Ms Lie said that she did not know who would protect her. She said she had never approached the police.

157 Finally, the member also asked Ms Lie about the "troubles happening now" to which Ms Lie had earlier referred. The member asked Ms Lie what she meant by "troubles happening now". Ms Lie replied "my difficulty is that in Indonesia it's difficult to earn a living".

The Tribunal's findings and reasons

158 The Tribunal affirmed the refusal to grant a protection visa on 6 January 1998. The Tribunal found that there was no evidence of Ms Lie's persecution:

> "The applicant was unable to provide the Tribunal with evidence of any persecution which she had suffered personally because of her Chinese ethnicity. The most serious harassment on the basis of her Chinese ethnicity to which the applicant could refer the Tribunal was the occasion on which she was spat on because she spoke in Chinese and not in Indonesian, in her place of business. Neither she nor her family were targeted in the riot in 1986 which she mentioned. She gave evidence that she remained indoors. It took considerable prompting from the Tribunal for the applicant to supply any claims of discrimination or persecution apart from her claim that it was difficult to earn a living. The Tribunal

> finds that this isolated incident where she was spat upon does not amount to persecution.
>
> … disputes concerning preferred locations by street vendors do not amount to persecution."

159 Further, the member referred more generally to circumstances in Indonesia. Thus, Ms Ford referred to evidence that indicated that official and informal discrimination against ethnic Chinese does exist in Indonesia. She referred expressly to seven of the items which were in the Part B material.[46] She noted that during general demonstrations (such as those during the lead-up to the Presidential and other major elections) and particularly in the major Indonesian cities, Chinese businesses and private homes have been the target of burning and looting.

160 Ms Ford said that the present Indonesian government was not anti-Chinese and that it was willing and able to act to protect Chinese Indonesians when they come under threat from private individuals or groups. The Tribunal found that, "[o]n the evidence available … the Indonesian Government is willing and able to offer the level of protection to Chinese which a citizen is entitled to expect from his or her government."

161 The Tribunal was aware that discrimination exists against ethnic Chinese and non-Muslims but held that such practices amount to discrimination, not persecution. The Tribunal found that even when the claims made on the basis of her Chinese ethnicity were given the widest possible interpretation, at best they amounted to discrimination, not persecution.

162 The Tribunal concluded that the applicant had sought a protection visa because she preferred to earn her living in Australia where rewards were more substantial than in Indonesia.

Ms Lie's case: Analysis

163 Ms Lie's case in this Court was argued on the same basis as Mr Muin's, except for the ground relating to adverse materials.

164 So far as the Part B material is concerned, it is harder to draw the factual inference urged by the plaintiff than in Mr Muin's case. That is because seven of the Part B materials were explicitly referred to in the Tribunal's reasoning. Further, every single one of the Part B materials were accessible on the CISNET database or through the Tribunal's library.

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46 Items 2, 4, 7, 9, 11, 12 and 25.

165 Even if Ms Lie could make out a ground for procedural fairness, or other jurisdictional error, I would have refused relief on discretionary grounds. Irrespective of the question of government protection, Ms Lie did not make out a case that she suffered serious harm for a Convention based reason. The Tribunal found that her fears were of her enemies in business and that she came to Australia to earn a better living. Nothing she could submit about the capacity of the Indonesian government to protect her would have made a difference to the outcome of her case[47].

Ms Lie's case: Conclusions

166 The answers to the questions stated with respect to Ms Lie should be as follows:

1) Was there a failure to accord the Plaintiff procedural fairness?

No

2) Was there a failure to comply with s 418(3) of the *Migration Act*?

No

3) Was there a failure to comply with s 424(1) of the *Migration Act*?

No

4) If the answer to any of questions (1) to (3) is yes:

(a) Was the decision of the First Defendant to affirm the refusal of the delegate to grant a protection visa for that reason invalid?

Not necessary to answer

(b) What declaratory, injunctive or prerogative writ relief, *if any*, should be ordered?

Not necessary to answer

5) By whom should the costs of the proceedings in this Court be borne?

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47 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 122 [104].

54.

Ms Lie

167 GUMMOW J. These proceedings in the original jurisdiction of the Court involve the construction of provisions of Pt 7 (ss 410-473) of the *Migration Act* 1958 (Cth) ("the Act") as they stood before the substantial changes made by legislation beginning with the *Migration Legislation Amendment Act (No 1)* 1998 (Cth). Part 7 is headed "**Review of protection visa decisions**".

168 There are before the Full Court questions referred by a Justice pursuant to s 18 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). The pleadings in both actions found the jurisdiction of the Court in s 75(v) of the Constitution. The final relief sought includes an injunction, prohibition and, it would appear, mandamus. Certiorari to quash and declaratory relief also is sought, presumably as supplementary remedies under s 32 of the Judiciary Act in the matter in which jurisdiction has been conferred by s 75(v) of the Constitution[48].

169 The actions in this Court thus differ in their nature from that of an application for judicial review brought in the Federal Court under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"). Prohibition, for the purposes of s 75(v) of the Constitution is, as Gaudron J explains in her reasons for judgment, concerned with excess of jurisdiction, not errors made within jurisdiction. On the other hand, the grounds specified in s 5(1) of the ADJR Act cast the net more widely. For example, par (b) of s 5(1) specifies as a ground of review:

> "that procedures that were required by law to be observed in connection with the making of the decision were not observed"

and par (f):

> "that the decision involved an error of law, whether or not the error appears on the record of the decision".

There is no requirement that the procedural failure or the error of law go to the jurisdiction of the decision-maker.

170 The distinction is of no significance for those of the questions referred to the Full Court which ask whether the first defendant, the Refugee Review Tribunal ("the RRT"), failed to accord the plaintiffs procedural fairness. It was indicated in several of the speeches in *Anisminic Ltd v Foreign Compensation Commission*[49] that the denial of procedural fairness in the course of reaching a decision goes to the jurisdiction of the decision-maker. This Court, in *Re*

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48 See *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 76 ALJR 694; 188 ALR 1.

49 [1969] 2 AC 147 at 171, 195, 207, 215.

Refugee Review Tribunal; Ex parte Aala[50], held that the denial of procedural fairness by an officer of the Commonwealth may result in a decision made in excess of jurisdiction in respect of which prohibition will issue under s 75(v).

171 With respect to those questions before the Full Court which are concerned with procedural fairness, I would answer them "yes" and do so for the reasons given by Hayne J. I should add that I would not withhold relief on any discretionary grounds.

172 The result in each action is that, as in *Aala*[51], there should be prohibition against the Secretary of the Department (the second defendant in *Lie* and the third defendant in *Muin*) to prevent action upon the decision of the RRT; in aid of that prohibition there should be certiorari to quash the decision of the RRT and mandamus requiring the RRT to determine according to law the application for review made under ss 412 and 414 of the Act. I see no utility in supplementing declaratory or injunctive relief respecting the procedural fairness issues.

173 That makes it unnecessary to answer the questions which ask whether there were failures to comply with s 418(3) and s 424(1) of the Act because the plaintiffs will have established their claims to ample final relief on other grounds. However, in my view, it is inappropriate to answer these questions for more fundamental reasons. These reflect the true construction of ss 418, 424 and 425, and the restricted scope of s 75(v), in contrast to the ADJR Act and some other forms of statutory administrative review.

174 It is convenient to begin by setting out the text of the relevant provisions.

175 Section 418(3) states:

> "The Secretary must, as soon as is practicable after being notified of the application, give to the Registrar each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision."

176 Section 424(1) then provides:

> "If, after considering the material contained in the documents given to the Registrar under sections 418 and 423, the [RRT] is prepared to make the decision or recommendation on the review that is most

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50 (2000) 204 CLR 82.

51 (2000) 204 CLR 82 at 157.

favourable to the applicant, the [RRT] may make that decision or recommendation without taking oral evidence."

177 Finally, s 425 states:

"(1) Where section 424 does not apply, the [RRT]:

(a) must give the applicant an opportunity to appear before it to give evidence; and

(b) may obtain such other evidence as it considers necessary.

(2) Subject to paragraph (1)(a), the [RRT] is not required to allow any person to address it orally about the issues arising in relation to the decision under review."

178 It will be apparent that s 424(1) empowered the RRT to make a certain decision or recommendation on the review sought by the plaintiffs "without taking oral evidence". That decision or recommendation was that most favourable to the plaintiffs. The power was exercisable by the RRT if certain conditions were met. First, "documents" must have been "given to the Registrar under [s] 418". Further, the RRT must have considered "the material contained in [those] documents". Finally, the RRT must have been "prepared" to make that decision. Where s 424 did not apply, "review on the papers" was not available and s 425 applied.

179 A question might have arisen if, notwithstanding a failure in one or more of these conditions, the RRT had, on the papers, given the plaintiffs decisions favourable to them. But, in such a case, the aggrieved party would have been the Secretary or the Minister, not the plaintiffs. They complain of different decisions, those made after hearing them under s 425 and outside the review on the papers provision of s 424. Their assertions of failure in application of the first condition identified in s 424(1) are to no point when there has been no purported decision under s 424(1).

180 The plaintiffs' case respecting these provisions may, as Gaudron J explains, proceed upon a different but related premise, that as part of its review the RRT had been obliged to consider whether it was prepared on the papers to make decisions under s 424 most favourable to the plaintiffs and had been disabled from doing so by the failure under s 418 with respect to the Pt B documents.

181 As her Honour explains, upon its proper construction, s 424(1) did not impose any obligation on the RRT, as part of its review process, to consider the Pt B documents. That being so, any ground for injunctive or declaratory relief disappears and to answer the relevant questions by the Full Court would be to

contrive a futility. It could not facilitate the future course of the litigation in this Court[52].

182 There is a further point. On the hypothesis advanced by the plaintiffs, there may be errors in the construction of s 418 and s 424 and failures in the procedures of the RRT, in the sense identified in the provisions of s 5(1) of the ADJR Act, to which reference has been made. Where, as here, the primary relief sought is prohibition under s 75(v) of the Constitution, a different question arises. It is whether the hypothesised failure to determine whether there should be a favourable review on the papers under s 424 renders the adverse determinations by the RRT under the procedures of s 425 liable to attack for jurisdictional error.

183 Is compliance with s 424, as it would be construed by the plaintiffs, an essential preliminary to the exercise of the statutory power to conduct the more rigorous species of review with a hearing provided by s 425[53]? That must be highly doubtful. But, given the proper construction of s 424, it is unnecessary to determine the issue.

184 I agree with the orders proposed by Hayne J.

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52 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [57].

53 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389 [92].

185 KIRBY J. Two plaintiffs have commenced proceedings in the original jurisdiction of this Court on their own behalf and on behalf of a large number of other persons, whom they claim to represent and who are said to share common interests[54]. Despite the representative form of the proceedings, argument before this Court has addressed only the facts concerning each named plaintiff.[55]

Two applications for refugee status with common features

186 Each of the plaintiffs (Mr Muin and Ms Lie) is an Indonesian national of Chinese ethnicity. Each applied to the Minister for Immigration and Multicultural Affairs ("the Minister") for a protection visa on the footing that each was a refugee within the relevant international[56] and Australian[57] law. Each rested that claim on the contention that Indonesia, by its applicable authorities, was unwilling or unable to provide protection for its nationals of Chinese ethnicity. On this basis, each contended that, owing to a well-founded fear of being persecuted for reasons of race, he or she was unwilling to avail him or herself of the protection of the country of nationality[58].

187 In each case the relevant Australian decision-makers rejected the plaintiff's claim. Initially, this was done by a delegate acting for the Minister[59]. Being dissatisfied with the delegate's decision, each plaintiff applied for review to the Refugee Review Tribunal ("the Tribunal")[60]. Initially, in accordance with

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54 Acting in reliance upon O 16, r 12 High Court Rules; cf *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 408, 430. Pursuant to the *Migration Legislation (Amendment) Act (No 1*) 2001 (Cth), s 3 and Sched 1, Pt 2, restrictions now apply to proceedings brought in respect of multiple parties. The future consequences (if any) of these provisions, in relation to the parties on behalf of whom Mr Muin and Ms Lie brought the proceedings, have not been argued or determined.

55 cf reasons of Gleeson CJ at [3]; reasons of Hayne J at [256]; reasons of Callinan J at [288].

56 Convention relating to the Status of Refugees done at Geneva 28 July 1951 and the Protocol relating to the Status of Refugees done at New York 31 January 1967 ("the Convention").

57 *Migration Act* 1958 (Cth) ("the Act") s 36.

58 The Convention, Art 1A(2).

59 Pursuant to the Act, s 496.

60 Established by the Act, s 457: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 75 ALJR 1105 at 1117-1118 [70]-[71]; 180 ALR 1 at 18. The

(Footnote continues on next page)

the then applicable provisions, the Tribunal purportedly conducted a review "on the papers"[61]. However, in each case, the Tribunal decided that it was not prepared on that footing to "make the decision or recommendation on the review that is most favourable to the applicant"[62]. Each plaintiff was notified of that fact. Each was then afforded the opportunity to attend a hearing before the Tribunal. Such hearings took place. In each case, the Tribunal affirmed the decision of the delegate, refusing the plaintiff the protection visa sought. Following that decision, each plaintiff commenced proceedings in this Court seeking constitutional and related relief[63].

188 The complaint of each plaintiff concerns the procedures that were followed by the Tribunal, both at the stage of reviewing the case "on the papers" and, subsequently, at the hearing of the review. The plaintiffs contend that such procedures were unlawful in a way that amounted to a failure on the Tribunal's part to exercise its jurisdiction as the *Migration Act* 1958 (Cth) ("the Act") required. One complaint relates to the suggested failure of the Secretary of the Department of Immigration and Multicultural Affairs ("the Secretary") and the Tribunal to conform to the procedures laid down by the Act and the implied requirements obliging the Tribunal to observe the rules of natural justice (procedural fairness). Those rules are implicit in the procedures that the Tribunal must observe[64]. A failure to conform to such requirements constitutes jurisdictional error, ordinarily attracting constitutional and ancillary relief from this Court[65].

189 The plaintiffs also complain that the Secretary failed to give the Tribunal certain documentary materials ("the Part B documents") which had been considered by the delegate. Those materials are said to contain information

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applications were made to the Tribunal pursuant to s 412 of the Act. By s 414 of the Act, the Tribunal was obliged to review the primary decisions in accordance with the powers conferred on it by s 415 of the Act.

61 In accordance with the Act, s 424 (since repealed and replaced).

62 The Act, s 424(1).

63 Pursuant to the Constitution, s 75(v) (prohibition and mandamus) and the *Judiciary Act* 1903 (Cth), ss 32 and 33.

64 cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 75 ALJR 848 at 858 [53], 860 [64]; 179 ALR 296 at 309-310, 312; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah ("Miah")* (2001) 75 ALJR 889 at 923-924 [188], [190]-[191]; 179 ALR 238 at 284, 285-286.

65 cf *Miah* (2001) 75 ALJR 889 at 925 [196]; 179 ALR 238 at 287.

supporting the plaintiffs' contentions that Indonesia, by its authorities could or would not protect ethnic Chinese citizens. The plaintiffs submit that such withholding not only constituted a breach of the requirements of the Act governing the Secretary (thereby invalidating what followed in the Tribunal's procedures). It also led to the performance by the Tribunal of its functions in an unjust way that denied each of them procedural fairness. The plaintiffs emphasised the importance of compliance by the Secretary and the Tribunal with the Act, designed to ensure conformity by Australia with its international obligations in respect of vulnerable people like themselves[66]. By reference to the facts of the case, one of the plaintiffs also emphasised the importance of affording to a person facing an adverse determination on such a claim, a fair opportunity to be aware of the materials upon which the Tribunal would base its decision and, specifically, any new and adverse materials to which critical importance might be attached[67].

Questions reserved – three issues for decision

190 *Confining the questions*: In managing the proceedings prior to their hearing in the Court, Gaudron J decided a number of interlocutory questions[68]. Her Honour was persuaded to refer to the Full Court[69] the questions that are set out in other reasons[70]. On the face of things[71], those questions are to be answered upon the facts contained in statements of facts agreed by the parties and in accordance with any inferences that may properly be drawn from such facts. As necessary for these reasons, I will make reference to the statements of facts although most of the facts necessary to my conclusions are set out by other members of the Court[72].

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66 *Miah* (2001) 75 ALJR 889 at 913-915 [146]; 179 ALR 238 at 271-274.

67 *Miah* (2001) 75 ALJR 889 at 924 [193]; 179 ALR 238 at 286.

68 *Herijanto v Refugee Review Tribunal* (2000) 74 ALJR 698; 170 ALR 379; *Herijanto v Refugee Review Tribunal [No 2]* (2000) 74 ALJR 703; 170 ALR 575; *Herijanto v Refugee Review Tribunal [No 3]* (2000) 74 ALJR 1398; 174 ALR 681.

69 Pursuant to the *Judiciary Act* 1903 (Cth), s 18.

70 Reasons of Gleeson CJ at [35]; reasons of Gaudron J at [69]; reasons of McHugh J at [74]; reasons of Callinan J at [279].

71 cf reasons of McHugh J at [103]; reasons of Hayne J at [263].

72 Reasons of Gleeson CJ at [14], [16]; reasons of McHugh J at [76]-[94], [142]-[153]; reasons of Callinan J at [303]-[306], [317].

191 Because of the detail and complexity of the facts in each case, the limited questions referred to the Full Court and the different opinions in this Court expressed in separate reasons, I will confine these reasons to the issues of principle that must be addressed at this stage of the proceedings. The burden upon this Court resulting from the imposition upon its original jurisdiction of disputes arising under the Act that may not effectively, or at all, be remitted to another court for first determination or fact-finding[73], is so onerous that the efficient use of time suggests avoiding obligations that are not absolutely essential to the proper discharge of this Court's jurisdiction[74].

192 *Three critical issues*: As appears from the questions referred, and from the analysis of them in other reasons, there are three categories of issue that must be decided. In the order of the questions asked, they are:

(1) Whether the plaintiffs, and each of them, were denied natural justice (procedural fairness) because they were misled by official communications into believing that the Part B documents that had been before the delegate would be given to the Tribunal whereas it is now shown that they were not so given. (The procedural fairness – misleading communication issue).

(2) Whether, in each case, the Secretary and the Tribunal have been shown to have failed to comply with ss 418(3) and 424(1) of the Act. (The statutory procedures issue).

(3) Whether, in relying upon new materials adverse to the plaintiffs relating to the country situation in Indonesia, without first disclosing those materials for rebutting evidence and submission, the Tribunal was, in Mr Muin's case, in breach of the rules of natural justice (procedural fairness) on that ground. (The procedural fairness – adverse materials issue).

193 Various consequential questions arise, depending upon the resolution of the foregoing issues. Although there is logic in dealing with the statutory procedures issue first (as other members of this Court have done[75]), I propose to follow the order of the questions reserved.

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73 The Act, ss 476, 485 and 486.

74 cf reasons of McHugh J at [99].

75 Reasons of Gleeson CJ at [5]-[17]; reasons of Gaudron J at [38]-[57]; reasons of McHugh J at [100]-[112], [163]-[165]; reasons of Hayne J at [241]-[251]; reasons of Callinan J at [297]-[305].

The procedural fairness – misleading communication issue

194 *Inferred failure to give documents*: The facts relevant to the first issue, in each plaintiff's case, are stated in other reasons[76]. I agree with the conclusions of Hayne J that, on the basis of the agreed facts, both Mr Muin and Ms Lie were misled into refraining from placing before the Tribunal materials (such as were contained in the Part B documents) favourable to their respective applications.

195 The agreed facts accept that each plaintiff believed that the Part B documents were sent to, and looked at by, the Tribunal both in making the review "on the papers" and in the final decision following the hearings of their respective applications. The agreed facts also accept that, had the plaintiffs been aware of the fact (if it be the fact) that the Secretary never physically transferred or sent to the Registrar of the Tribunal all of the Part B documents prior to the making of the Tribunal's decision, each plaintiff would have:

- Arranged for further written submissions to be made to the Tribunal;
- Sought to appear at the oral hearing with a representative or agent to make submissions to the Tribunal respecting the contents of the Part B documents;
- Sought to place additional evidence before the Tribunal; and
- Undertaken research and submitted additional information, including decisions of the Tribunal (differently constituted) which had upheld applications for refugee status made by other ethnic Chinese nationals of Indonesia prior to the Tribunal's decisions in the plaintiffs' cases[77].

196 *Failure of Tribunal members to give evidence*: In reaching my conclusion favourable to the plaintiffs on this first issue, I have not been influenced by the arguments put on their behalf that an adverse finding concerning the materials relied on by the Tribunal should be drawn because the respective Tribunal members failed, or declined, to give evidence concerning the matters which they had taken into account[78]. The plaintiff advanced this argument in reliance upon

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76 Reasons of Gleeson CJ at [22]-[27]; reasons of Gaudron J at [59], [62]; reasons of McHugh J at [121].

77 The agreed facts relevant to Ms Lie's case are set out in the reasons of McHugh J at [142]-[153].

78 I agree in the similar conclusions of Gleeson CJ at [25] and Callinan J at [299].

the evidentiary principle stated in *Jones v Dunkel*[79]. It was submitted that this Court would draw the suggested inferences because the respective Tribunal members, in the best position to settle any doubts as to the materials they had actually taken into account, had not provided an affidavit to resolve such doubts.

197 Tribunal members, as such, enjoy the same protection and immunity in the performance of their functions as does a Justice of this Court[80]. Justices of this Court enjoy the protection and immunity that, at common law, attached to a judge of a superior court of record in England. Such judges, although competent as witnesses, are not compellable to testify as to matters in which they have been judicially engaged[81]. They never do. Members of the Tribunal are required by the Act to give reasons for their decisions and to provide certain other information[82]. On the face of the Act, this appears to state the entire ambit of the *duty* of Tribunal members to explain and justify their decisions. It would be destructive of the scheme of the Act and inconsistent with the purpose of the Parliament to conclude otherwise. Further, it would be demeaning to the office of the Tribunal member and potentially damaging to the independence of the Tribunal, if members were effectively obliged to offer testimony in proceedings such as the present for fear that, if they did not, they would be subject to criticism and to inferences adverse to their probity and compliance with the law.

198 I would refrain from expressing any more general principle on this issue than the foregoing. Each case depends upon its own facts and the legislation under which the decision-maker in question operates[83]. But on the present facts, concerning the inferences available about the access to, and use by, the relevant Tribunal members of the Part B documents, I would reject the plaintiffs' submission that inferences adverse to such access and use should be drawn because the Tribunal members failed to establish the facts in affidavits read in these proceedings.

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79 (1959) 101 CLR 298 at 321.

80 The Act, s 435(1) and *Administrative Appeals Tribunal Act* 1975 (Cth), s 60(1).

81 *Hennessy v Broken Hill Pty Co Ltd* (1926) 38 CLR 342 at 349; cf *Duke of Buccleuch v Metropolitan Board of Works* (1872) LR 5 HL 418; *Zanatta v McCleary* [1976] 1 NSWLR 230 at 233-234, 237-239.

82 The Act, s 368.

83 cf *R v Marks; Ex parte Australian Building Construction Employees Builders Labourers' Federation* (1981) 147 CLR 471 at 483; *Xiang Sheng Li v Refugee Review Tribunal* (1994) 36 ALD 273 at 279-280; *Guo Wei Rong v Minister for Immigration and Ethnic Affairs* (1995) 38 ALD 38 at 43-45.

199 The stance that each Tribunal member took conformed to the practice which this Court has encouraged, namely that administrative tribunals and their members do not ordinarily take an active part in judicial proceedings in which their decisions and actions are reviewed[84]. Because there are sound reasons of legal principle to justify the absence of evidence from Tribunal members, it would be erroneous for this Court to draw any adverse inference from their omission to proffer such evidence in these cases. Accordingly, I will not do so.

200 In the result, the first issue must be determined by this Court based on the agreed statements of facts and the inferences, if any, to be drawn from them. Confined in that way, I would draw the inferences that Hayne J has done[85]. I would, therefore, for like reasons, answer the first question in the affirmative.

201 *Affirmative answer and remaining questions*: It follows that an affirmative conclusion that the plaintiffs, and each of them, had been denied natural justice in the conduct by the Tribunal of its proceedings is fatal in the circumstances to the validity of such proceedings. Non-compliance with the requirements of natural justice constitutes jurisdictional error[86]. Upon the assumption that an error of law of such a kind is required to attract the constitutional writs mentioned in s 75(v) of the Constitution[87], the essential relief sought by the plaintiffs in their proceedings would have to follow, unless the plaintiffs, or either of them, were disentitled on a discretionary ground[88]. That relief involves the issue in each case of a writ of prohibition to forbid the Secretary, and the Commonwealth, from acting upon the decision of the Tribunal, a writ of certiorari to quash that decision and mandamus directing the Tribunal to hear and determine the review applications in accordance with law.

202 Ordinarily, where an aggrieved party establishes a want or excess of jurisdiction, the writ of prohibition issues almost as of right[89]. In my view, there

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84 *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35-36.

85 Reasons of Hayne J at [256]-[257].

86 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 99-100 [38], 101 [41].

87 *Miah* (2001) 75 ALJR 889 at 927 [211]; 179 ALR 238 at 290-291.

88 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5], 124 [111], 134-135 [141]-[142], 143 [170].

89 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 214; cf reasons of McHugh J at [165]; reasons of Callinan J at [326].

is no discretionary reason for refusing the plaintiffs the relief that they each seek. Although, strictly speaking, this is a result that would formally occur only after the return of the proceedings to a single Justice, with the affirmative answer to question 1, it is proper for the Full Court to take that result into account in deciding the approach of the Full Court to the remaining questions.

203 Because, in the conclusions that I reach, the foregoing is sufficient to provide each of the plaintiffs with complete relief it would follow, in the normal course, that the questions asked by Gaudron J would be returned without responding to questions 2 and 3 (concerning the statutory procedures issue) and without addressing the additional issue of procedural fairness raised for Mr Muin (concerning the adverse materials issue). This Court does not answer legal questions unnecessarily. Nor does it provide advisory opinions[90]. The substantial burden of the migration jurisdiction adds a further reason for sparing ourselves the resolution of unnecessary questions. So does the fact that, since these proceedings arose, the Act has been amended on several occasions, one of which amendments is relevant in that it abolished the provision for review by the Tribunal "on the papers", the conduct of which arises in connection with the statutory procedures issue[91].

204 However, the present are not ordinary proceedings. The plaintiffs have each brought representative proceedings. Other members of the Court have expressed their opinions on the remaining questions. They have done so in differing ways. It would not, therefore, be appropriate for me merely to answer questions 2 and 3 "unnecessary to answer". In respect of other persons included in the plaintiffs' applications, it is conceivable that the statutory procedures issue and even the adverse materials issue might be determinative of their entitlements. It is therefore appropriate to answer the questions raised in respect of those issues. I do not regard them as hypothetical.

The statutory procedures issue

205 *Purpose of the statutory scheme*: The Act, as applicable at the relevant time[92], envisaged that the primary decision on applications by persons such as the

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90 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264-265; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612.

91 The Act, s 424 was repealed with effect from 1 June 1999 by the *Migration Legislation Amendment Act (No 1)* 1998 (Cth). However, s 418 has not been amended.

92 The relevant time was the date of the making of the Tribunal's decision. In the case of Mr Muin this was 25 November 1998. In the case of Ms Lie it was 6 January 1998.

plaintiffs would be made by the Minister, usually acting by his or her delegate[93]. The delegate is an officer of the Department of Immigration and Multicultural Affairs. In performing such functions the delegate is a repository of powers conferred by the Act. Unsurprisingly, given the importance of the decisions made by delegates in this regard, and the obligations towards refugees imposed by domestic and international law, the Act provides a formal procedure with which the delegate (and when its jurisdiction is invoked, the Tribunal) and indeed all other named repositories of power must comply.

206 The Act specifically envisages that the delegate, being "the person who made the [primary] decision"[94] will prepare formal documents supporting that decision. Such documents conform to what is now a standard, and reasonably uniform, federal bench mark[95]. The documents must contain a statement setting out "the findings of fact"; referring "to the evidence on which those findings were based"; and giving "the reasons for the decision"[96].

207 Inferentially, these are duties of the Minister or his delegate because, under the Act, once application for review is made to the Tribunal, the Registrar must promptly notify the Secretary of the application and, within ten working days, the Secretary must "give to the Registrar" a "statement about the decision under review" setting out the foregoing three matters – findings, evidence and reasons.

208 What is the purpose of this statutory scheme? It is not to fill the archives of the Commonwealth with useless records or to pander to a bureaucratic sense of neatness. It is to inform the applicant who may then be satisfied by the primary decision, even if it is adverse. It is also to make effective the "review" by the Tribunal where an applicant seeks review of the primary decision. As the Tribunal has no contradictor, no respondent party, normally allows no legal representation and acts in an inquisitorial fashion, the importance of the foregoing materials is obviously magnified[97]. Unless the statement contains the

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93 The Act, s 496.

94 The Act, s 418(2)(a).

95 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 646 [117]; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 75 ALJR 1105 at 1124-1125 [109]-[116]; 180 ALR 1 at 28-29.

96 The Act, s 418(2)(a), (b) and (c).

97 *Miah* (2001) 75 ALJR 889 at 910 [125]; 179 ALR 238 at 266; cf *Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 982 at 990 [28]-[31]; 179 ALR 425 at 434-435.

three specified matters – findings, evidence and reasons – not only is the Act breached but the chances of the Tribunal's review being a "review" as the Parliament envisaged, are diminished. How can one body "review" the decision of another effectively and justly when it does not have at least the same materials upon the basis of which the primary decision was made?

209 *Access to databases and the statute*: Good administration in contemporary Australia obviously involves the use by administrators of databases containing information in electronic form. It would be astonishing if, in making relevant decisions under the Act, the Minister, his delegate and the Tribunal did not have access to such databases, containing up to date information about past, present and likely future persecutions reported in the countries from which claimants for refugee status in Australia commonly derive.

210 Doubtless, the Act could provide explicitly for the maintenance of such databases by the Commonwealth and fair access to their contents by officials and by, or on behalf of, visa applicants. By s 489 of the Act, provision is made for the Minister, by notice in the *Gazette*, to declare "a data base containing information kept for the purposes of this Act … to be a notified data base for the purposes of this section". However, that section is confined to databases "in relation to the entry of persons into, and departure of persons from, Australia". No equivalent provision is made in respect of a database of country information relevant to applications for protection visas by persons claiming to be refugees. Instead, the Act is expressed in terms that require the Secretary to "give" to the Registrar first the statement containing the three crucial items mentioned and secondly "each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision"[98]. This is a specific requirement laid down by the Parliament. It goes beyond the federal template requiring the provision of findings, evidence and reasons. It must be obeyed according to its terms. It cannot, in my view, be waived away with reference to considerations of practicability or by invoking the general injunction in the Act that the Tribunal act with fairness, accessibility, informality and speed[99].

211 Clearly enough, the Secretary's consideration of relevance in accordance with the foregoing requirement is not left to a subjective or idiosyncratic standard[100]. What is "relevant to the review of the decision" means what is

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98 The Act, s 418(3).

99 cf reasons of McHugh J at [97].

100 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 75 ALJR 1105 at 1125 [113]; 180 ALR 1 at 29; *Re Patterson; Ex parte Taylor* (2001) 75 ALJR

(Footnote continues on next page)

reasonably or objectively relevant to ensure that the "review" involves a substantive reconsideration of the merits of the application, as contemplated by the Act[101]. The impression that this is so is reinforced by the provisions of the Act, operative at the applicable time, contemplating a preliminary step by which the primary decision-maker's decision was to be reviewed, as the Act pertinently described it, "on the papers"[102].

212 Given that the foregoing procedure was intended to be a real "review", contemplating the possibility of occasionally producing a "decision or recommendation … that is most favourable to the applicant"[103], it is unthinkable that the evidentiary foundation for such "review" should involve materials more limited than those available to the primary decision-maker. The obvious purpose of the review "on the papers" was to save the costs, inconvenience and delay that a full review with a hearing would require, as where an obvious mistake or misjudgment had occurred justifying immediate administrative correction. Such a conclusion would normally necessitate "review" by the Tribunal of the same "material" as had been before the primary decision-maker, ie the "papers". Unless the identity of that "material" were known, it would never be certain that the reviewing Tribunal was taking into account at least the materials that had been before the primary decision-maker.

213 It is in this context that that part of the "material" forwarded by the Secretary to the Registrar which includes "each other document, or part of a document"[104] falls to be construed. It is an error of statutory construction to construe words in isolation, as if their meaning can be assigned by reference to nothing more than the words used together with a dictionary, whether of the general or statutory variety. In recent years, that approach to statutory interpretation has been rejected by this Court in favour of the "purposive" approach[105]. The latter seeks out the meaning of words in the context in which they appear and to achieve the purpose revealed by that context.

1439 at 1502 [330]; 182 ALR 657 at 742 referring to *Liversidge v Anderson* [1942] AC 206; *South Australia v O'Shea* (1987) 163 CLR 378 at 418-419.

101 The Act, Pt 7, Div 4.

102 The Act, s 424.

103 The Act, s 424(1).

104 The Act, s 418(3).

105 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424.

214 In the present cases, the context and purpose involve the reconsideration by an independent, expert tribunal of the primary decision of a delegate of the Minister based on the materials ("papers") including relevant "documents", that were before the primary decision-maker.

215 *"Documents" may include electronic documents*: What, then, does the word "document" mean in such a context? Today, in ordinary speech, one can readily refer to a "document" in a database, although such a document may never have been reduced to tangible form. Typically, a database will yield information that appears in paginated format, as did the country reports in the CISNET computer system of the Department of Immigration and Multicultural Affairs. Certainly, each of the primary decision-makers determining the applications of Mr Muin and Ms Lie, viewed the Part B materials as "documents". They so described them[106]. As the agreed facts state, they were "*documents* relevant to the position in Indonesia of Indonesian nationals of ethnic Chinese background and, also, to the ability and willingness of the Indonesian authorities to provide for their protection".

216 It is agreed that such "documents" were in the possession and control of the Secretary. They were no less so because they were in electronic format. It is also agreed that the Secretary considered such documents to be relevant to the review of the primary decision by the Tribunal. Were they, then, "given" to the Tribunal as the Act requires? If not, does it matter?

217 Perhaps it would have been sensible to provide in the Act for ongoing access by the Tribunal, and by an applicant, to a constantly updated database. However, the Act is expressed in terms of "statements"[107] and "documents"[108]. Moreover, the Act provides for the Secretary to "give" to the Registrar identified "documents"[109]. This statutory expression postulates a delivery or handing over of "documents" in some form. It contemplates an identified step in respect of something that answers to the description of a "document". It is impossible to reconcile this language with the more passive hypothesis urged for the respondents, namely that it was sufficient to comply with the obligation to "give" documents to make available access to the relevant materials in the CISNET database, inferentially of constantly changing content, or to provide access to unidentified books and other materials in the Tribunal's library, unknown and unknowable to an applicant unless specified and drawn to notice. That

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106 In conformity with the Act, s 418(3).

107 The Act, s 418(2).

108 The Act, s 418(3).

109 The Act, s 418(3).

construction would stretch the statutory language past breaking point. There is a limit to the entitlement of courts to re-write statutes to say what they think the legislature meant but did not say. In this case that limit is reached and cannot be exceeded.

218 *Meaning of the obligation to "give" documents*: Reinforcement for the view that the "giving" of "documents" contemplated by the Act, involved something akin to delivery of identified documents may be found in the surrounding provisions of the Act. The same verb ("give") is used in the immediately preceding sub-sections of the Act in respect of the giving of a notice of application and the giving of a statement about the decision in terms that obviously contemplate the physical transfer of the specified documents at an identifiable time. Thus the imposition of the duty upon the Secretary to "give" the "documents" to the Registrar "as soon as practicable" suggests that sufficient time has been provided to allow the identification and handing over of identified tangible "documents". The duty imposed by the Act on the Tribunal to return the "documents" so "given" to the Secretary after the Tribunal has made its decision[110] makes even clearer that the legislative scheme is one involving the movement of identified "documents" not mere provision of availability to an intangible database insusceptible, as such, to being "given".

219 Once this conclusion is reached, it is plain from the agreed facts that the "documents" categorised by the primary decision-makers as "the Part B documents", although in the Secretary's possession or control and accepted to be "relevant to the review of the decision" were not, as the Act required[111], "given" to the Registrar for use by the Tribunal. The "documents", including those in electronic form, were not "given" to the Tribunal "as soon as … practicable" or at all. The plaintiffs were misled by the letters they received into believing that the documents identified by the delegate would be "given" to the Tribunal. That was not done.

220 The problem for the Secretary is compounded still further by the fact that some of the Part B "documents" relevant to the plaintiffs' cases were not even available in the CISNET database. The plaintiffs make no complaint about the failure to "give" legal reference documents to the Tribunal. However, in addition to their contentions about the CISNET database, they complain that a number of the items mentioned in the delegates' decisions were not included in the CISNET database. Three named items, for example, were held only in the New South Wales State Library. One was not held by any party or library in Australia. Yet these items had been in the possession of the delegate, were referred to in the

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110 The Act, s 430(3)(a).

111 The Act, s 418(3).

primary decision and mentioned by apparent reference in the letters from the Registrar to each of the plaintiffs assuring them that a copy of the "documents about this case" had been forwarded to the Tribunal.

221 With respect to the contrary view[112], I see no relevant distinction between the official letters sent to Mr Muin and Ms Lie concerning the transmission of the documents to the Tribunal. In Mr Muin's case, the letter said that the Tribunal would "look at the documents". In Ms Lie's case the letter said that the Tribunal had asked the Department of Immigration and Multicultural Affairs to send it a copy of the documents. In Mr Muin's case there was, it is true, an express assurance that the Tribunal had "looked at all the papers". But what other purpose could the Tribunal have had in Ms Lie's case, in asking for the Department of Immigration and Multicultural Affairs' documents to be forwarded, than to read and consider them? The implication is exactly the same. The difference between the assurances is illusory.

222 To the argument that, if a "document" had not been reduced to tangible form, either in the form of a paper hard copy or computer disk, there was no obligation upon the Secretary to "give" it to the Registrar, the answer in my view is clear. No definition of a "document" in the *Acts Interpretation Act* 1901 (Cth)[113] can alter the particular requirements of the Act, having regard to the context. True, the word "document" does not always include documents appearing as intangible electronic signals. Sometimes it can include them. But that is not the question here. The "documents", including those in electronic form, were relevant to the delegate's decision in each case. They were therefore relevant to the "review" of such decisions by the Tribunal. Most especially, they were essential to the review "on the papers", being contemplated as a review on at least the same materials as had been before the delegate. In any case, some of the "documents" were not in electronic form at all. Although considered and referred to by the delegate they were not, despite the Act, "given" to the Tribunal in any form: actual or copy, printed or electronic.

223 *Conclusion: statute not complied with*: To exempt the Secretary from "giving" materials, including such "documents", to the Registrar because they were not reduced to tangible form and did not have to be – would in my view impose on the word "document" a narrow and artificial meaning. It would frustrate the achievement of the stated purposes of the Act. It would be like requiring this Court to perform its "review" of the Tribunal's decision with only part of the Tribunal's record. Indeed, it would be worse because at least in courts

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112 Reasons of Gleeson CJ at [31]-[34]; reasons of Callinan J at [303]-[305], [315]-[316].

113 s 25. See reasons of Hayne J at [247]-[250]. See also s 25A.

there is normally a contradictor and there are usually contesting parties who are legally represented.

224 The absence of these features in the Tribunal requires that, at a minimum, it be given the "documents" that were before the primary decision-maker. The fact that some of those "documents" were in electronic form is neither here nor there. Electronic "documents" could perhaps be "given" by separate identification and annexure to an electronic transmission. Yet even that was not done in the present case. Merely making such "documents" (or some of them) "available" in a mass of undifferentiated material in a database of constantly changing content does not comply with the language and particular design of the Act.

225 The plaintiffs have therefore made good their complaint that the Secretary failed to conform to the statutory procedures. There is no discretionary reason to ignore such non-compliance with the Act. Involved in the statutory scheme is a presumption that the Tribunal reviewing the delegate's decision would, in every case, have at least the same documents as the Minister or his delegate had. That presupposition was not shown to have occurred in the plaintiffs' cases. Because it did not, the Tribunal in each case conducted its review otherwise than in the way required by the Act. The error, in my view, goes to the jurisdiction of the Tribunal because it affects the completion of the Tribunal's central functions as the Parliament required. Questions 2 and 3 must therefore, likewise, be answered in the affirmative.

The procedural fairness – adverse materials issue

226 *The implication of procedural fairness*: The third issue concerns only Mr Muin's case. The main facts are set out in other reasons[114]. The applicable principles were considered, in respect of the decision of a delegate of the Minister, in *Miah*[115]. Most of the principles of fair procedure identified in that decision are equally applicable to the conduct of a "review" by the Tribunal. The statutory code is not exhaustive of the requirements of natural justice[116]. The Parliament has not excluded "the justice of the common law" which remains applicable to the making of the relevant decisions[117]. In determining precisely

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114 Reasons of Gleeson CJ at [27]-[30]; reasons of McHugh J at [120]; reasons of Hayne J at [259]-[263].

115 *Miah* (2001) 75 ALJR 889; 179 ALR 238.

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

117 *Miah* (2001) 75 ALJR 889 at 922 [183]; 179 ALR 238 at 283.

what procedural fairness requires, it is necessary to form a view about the nature and purposes of the Tribunal as appearing from the statutory context.

227 It is obviously important to avoid rigid rules and the over-judicialisation of the Tribunal's proceedings. Yet it is equally important to recognise the significance of the decisions it makes both for the applicants and for the composition of the Australian population. The fundamental postulate of the Act is that the decisions made under it will be both informed and just[118]. Ordinarily, therefore, an opportunity ought "to be given to the person concerned to respond to adverse information that is credible, relevant and significant to the decision … "[119]. In some cases, adverse information considered by an administrator might be withheld from the person affected, where there is a compelling need for confidentiality, secrecy or speed in the making of the decision[120]. No such exemption was suggested in Mr Muin's case.

228 The right to respond to significantly adverse evidence is one of the most important aspects of natural justice. It is deeply embedded in our legal system[121]. It is grounded in basic notions of fair procedure. As has been famously said, even God gave Adam the opportunity to be heard before expelling him from Paradise[122]. In the context of modern administrative decisions, the entitlement to respond to adverse evidence and materials contributes to better informed decisions and improved public administration.

229 *The decision in Miah*: The inquisitorial character of the Tribunal, and the fact that, for most practical purposes its decision represents the last chance of an applicant for a review on the merits and to influence factual determinations, enlarge, rather than diminish the need to afford the person affected a chance to respond to new evidence that is relevant, credible and significant. That opportunity will ordinarily be enlivened where the considerations mentioned in *Miah* are present. Those considerations included[123]:

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118 *Miah* (2001) 75 ALJR 889 at 923-924 [190]; 179 ALR 238 at 285.

119 *Miah* (2001) 75 ALJR 889 at 923-924 [191]; 179 ALR 238 at 285.

120 *Miah* (2001) 75 ALJR 889 at 923-924 [191]; 179 ALR 238 at 285-286 citing *Kioa v West* (1985) 159 CLR 550 at 629.

121 *Miah* (2001) 75 ALJR 889 at 924 [192]; 179 ALR 238 at 286.

122 *Cooper v The Wandsworth Board of Works* (1863) 14 CB (NS) 180 at 195 [143 ER 414 at 420] per Byles J.

123 *Miah* (2001) 75 ALJR 889 at 924 [193]; 179 ALR 238 at 286.

- The absence of any element of confidentiality or secrecy in the information concerned;

- A long delay between the application and the review;

- The potential benefits to the decision-maker of receiving contrary evidence and argument;

- The fact that the information is of crucial importance and even determinative of the outcome of the decision; and

- The effective finality of the decision for most purposes and its importance to the person affected.

230 *The Tribunal's Practice Direction*: As Hayne J has explained[124], the Tribunal received written submissions from the Secretary attaching a cable from the Department of Foreign Affairs and Trade ("DFAT") concerning alleged circumstances in Indonesia. Neither the letter nor the cable was provided to Mr Muin for his response. Not only was this contrary to the principles of natural justice accepted by the majority in *Miah*, it was also contrary to the Practice Direction of the Tribunal itself. That Direction is set out elsewhere, so I will not repeat it. [125]

231 Here, no suggestion is made that it would have been impossible to convey to Mr Muin the "substance of the material" as stated in the Practice Direction. Had that been done, the pace of the "review" would not have been seriously retarded. In the nature of things Mr Muin would not otherwise have had available to him the opinion and materials of DFAT. So what excuse is offered for not calling the new adverse materials to the notice of Mr Muin?

232 *Propounded excuses for non-disclosure*: Two propositions are advanced. The first is that there has to be finality and the Tribunal is entitled to rely on the applicant and the Secretary each to put forward their respective best cases, each knowing the issue to be decided in the "review". Otherwise, so it is suggested, there would be an infinite regression of submissions as the applicant and the Secretary commented successively on each other's evidence and arguments.

233 In some cases, that might be a fair point. Certainly, the character and procedures of the Tribunal are not controlled by the formalities of a court trial. But the notion that the Tribunal may act upon crucial new and adverse material,

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124 Reasons of Hayne J at [259].

125 Reasons of McHugh J at [124].

received in secret, is alien to the presupposition of the Act (save for the limited circumstances where secrecy can be fully justified)[126]. The Practice Direction recognises this. To that extent it, naturally enough, mirrors the justice of the common law.

234 In Mr Muin's case, effectively the undisclosed communication from the Secretary to the Tribunal proved decisive. Especially in the circumstance that the documents favourable to Mr Muin's proposition (the Part B documents) had not been "given" to the Tribunal, as the Act contemplated, the communication distorted the fairness of the Tribunal's decision-making process. It deprived Mr Muin of the effective chance to respond to the cable from DFAT with his own sources and arguments to contradict the Secretary's submission and the cabled information. His submissions might, for example, have called in aid several recent decisions of the Tribunal, differently constituted, that had upheld submissions similar to his own[127]. Necessarily, such decisions turned on their own facts. However, Mr Muin could have asserted the relevance to his case of the factual findings recorded in those decisions.

235 Secondly, it is said that the materials, although adverse, did not need to be disclosed because the Tribunal is inquisitorial in character and expert in constitution. Thus, it is suggested, the Tribunal is constantly gathering information about countries in a way that would make it impossible, or at least impracticable, to draw the substance of all of its ever-changing country information to the notice of an applicant. One day, it may be necessary to consider that argument. But it is irrelevant in this case. The complaint here is not about the use by the Tribunal of adverse materials gathered from a multitude of sources at a high level of abstraction. It is a specific complaint about the failure to disclose, as the Tribunal's Practice Direction indicated would be done, a specifically adverse submission concerning suggested conditions in Indonesia said to have occurred under that country's new government and particular evidence tendered in support of that submission, comprising the DFAT cable.

236 *Conclusion: notification of adverse materials required*: It follows that Mr Muin's case is indistinguishable, in this respect, from *Miah*. What the law required in Mr Muin's case depended on the nature of the claims made by him and the information provided by the Secretary to the Registrar[128]. Mr Muin was

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126 The Act, ss 437-439.

127 Six decisions of the Tribunal were referred to in argument. They were made between 21 May 1998 and 18 December 1998 by the Tribunal consisting of three different members. See reasons of Gleeson CJ at [16].

128 *Miah* (2001) 75 ALJR 889 at 905-906 [97]; 179 ALR 238 at 260 per Gaudron J.

not given the opportunity to put the case that he wished in relation to the change of government in Indonesia or to answer the case made against him by reference to materials presented about that change with the authority of the DFAT cable. This constitutes a breach of a "basic principle" of procedural fairness[129]. Further, the information "was decisive of the outcome of the application"[130]. Accordingly, the Tribunal ought to have informed Mr Muin of the new material. It should have offered him an opportunity to respond to it before acting on the material[131]. The Tribunal's procedure rendered it substantially unjust for it to proceed in the way that it did[132]. In Mr Muin's case, these conclusions provide an additional ground for finding jurisdictional error based on the breach of the rules of natural justice.

Conclusion and answers to questions reserved

237 The questions reserved should be answered in each case:

(1) Yes.

(2) Yes.

(3) Yes.

(4) (a) Yes.

238 (b) Certiorari to quash the decision of the Tribunal, prohibition to the second and third respondents to prohibit further proceeding on the purported decision and mandamus directing the Tribunal to hear and determine the plaintiffs' review applications in accordance with law.

(5) The second and third defendants.

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129 *Miah* (2001) 75 ALJR 889 at 906 [99]; 179 ALR 238 at 260.

130 *Miah* (2001) 75 ALJR 889 at 915 [147]; 179 ALR 238 at 274.

131 *Miah* (2001) 75 ALJR 889 at 915 [147]; 179 ALR 238 at 274.

132 *Miah* (2001) 75 ALJR 889 at 915 [147]; 179 ALR 238 at 274.

239 HAYNE J. Questions have been referred to a Full Court, pursuant to s 18 of the *Judiciary Act* 1903 (Cth), in two proceedings. The questions are identical, but the facts which give rise to them differ in some respects. The actions are representative proceedings but the agreed facts, and the questions, relate only to the plaintiff in each action – Mr Muin in one action and Ms Lie in the other. The questions and the facts that give rise to the questions are recorded in the reasons of other members of the Court. I do not repeat the facts, except to the extent necessary to explain the conclusions that I have reached.

240 Before doing that, however, it is necessary to consider the relevant provisions of the *Migration Act* 1958 (Cth) ("the Act"). Only once that is done is it possible to consider what the Refugee Review Tribunal ("the Tribunal") was required to do in order to give procedural fairness. What emerges from a consideration of the provisions of the Act, as in force at the time relevant to these proceedings, can be summarised as follows.

The relevant provisions of the Act

241 An applicant for a protection visa was entitled to the grant of a visa if the Minister was satisfied that the criteria for the visa, prescribed by the Act, had been satisfied[133]. For present purposes, the relevant criterion[134] was that the applicant for the visa was a non-citizen, in Australia, to whom Australia had protection obligations under the Refugees Convention[135] as amended by the Refugees Protocol[136]. When the Minister (or in these cases a delegate of the Minister) refused the plaintiffs' applications for a visa the Minister or delegate was bound, among other things, to provide to each a written statement of reasons which set out the delegate's findings on material questions of fact and referred to the evidence or other material on which those findings were based[137].

242 An applicant for a protection visa which the Minister or his delegate had refused to grant could, if certain conditions were met, apply to the Tribunal for review of that decision[138]. (There is no issue in the present cases about

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133 *Migration Act* 1958 (Cth), s 65.

134 s 36(2).

135 Convention relating to the Status of Refugees done at Geneva on 28 July 1951.

136 Protocol relating to the Status of Refugees done at New York on 31 January 1967.

137 *Migration Act*, s 66(2), as understood in the light of *Acts Interpretation Act* 1901 (Cth), s 25D.

138 s 412.

satisfaction of the applicable conditions.) A valid application having been made under s 412 for review of the decision refusing to grant a protection visa, subject to an exception not now material, the Tribunal was bound to "review the decision"[139]. For the purposes of that review, the Tribunal was empowered to exercise all the powers and discretions conferred by the Act on the person who made the decision[140] and it was not disputed that the Tribunal exercised afresh the Minister's power to grant or refuse to grant a visa. The Tribunal was empowered to affirm the decision, vary it, or set it aside and substitute a new decision[141].

243 In carrying out its functions under the Act the Tribunal was "to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick"[142] and, in reviewing a decision, it was not bound by technicalities, legal forms or rules of evidence but was to "act according to substantial justice and the merits of the case"[143].

244 Before dealing with the provisions governing the transmission of material by the Secretary of the Department to the Tribunal (upon which the second and third questions referred to the Full Court focus) it is convenient to notice the provisions which, at the relevant time, regulated the conduct of the review. There were two distinct steps in the process of review – the review "on the papers"[144], and what followed if the review "on the papers" did not give the applicant the most favourable result sought. If the section of the Act providing for review "on the papers" (s 424) did not apply, the Tribunal was bound to "give the applicant an opportunity to appear before it to give evidence"[145] and was empowered, but not obliged, to obtain other evidence[146] whether requested by the applicant[147] or of its own motion.

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139 s 414(1).

140 s 415(1).

141 s 415(2).

142 s 420(1).

143 s 420(2).

144 s 424.

145 s 425(1)(a).

146 s 425(1)(b).

147 s 426.

245 Section 423(1) provided that an applicant for review might give the Registrar of the Tribunal:

> "(a) a statutory declaration in relation to any matter of fact that the applicant wishes the Tribunal to consider; and
>
> (b) written arguments relating to the issues arising in relation to the decision under review."

Section 423(2) provided that the Secretary of the Department might "give the Registrar written argument relating to the issues arising in relation to the decision under review". It was these provisions of s 423, and the obligation under s 425(1) to give the applicant an opportunity to appear before the Tribunal to give evidence, which together provided for a "hearing" by the Tribunal. Those provisions were to be understood in the light of s 425(2) that, subject to the obligation to give the applicant an opportunity to appear before it to give evidence, "the Tribunal is not required to allow any person to address it orally about the issues arising in relation to the decision under review". Thus the "hearing" for which the Act provided was partly written, by the reception of a statutory declaration by the applicant and any written arguments of the applicant and the Secretary of the Department, and partly oral – but only to the extent of receiving oral evidence from the applicant and oral evidence from any other person whom the Tribunal, in its discretion, saw fit to hear.

246 The ultimate question for the Tribunal was whether it was satisfied, at the time of its decision, that Australia owed protection obligations to the applicant. Although the Secretary of the Department might make submissions to the Tribunal about issues arising on the application, the Secretary was in no sense a contradictor of the claim which the applicant made. Unlike a court proceeding, no issue was joined between parties to a proceeding. The applicant for a protection visa made a claim; it was for the Tribunal to decide whether it was satisfied of the conditions for the grant of the visa sought. It was to do so by procedures that were both informal and inquisitorial, as opposed to the formal, adversarial procedures of a court.

The provisions for transmission of documents

247 When an application for review was made to the Tribunal, the Secretary of the Department was bound, within a limited time, to give to the Registrar copies of a statement about the decision under review that set out the findings of fact made by the decision-maker, referred to the evidence on which those findings were based and gave the reasons for the decision[148]. In addition, as soon as

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148 s 418(2).

practicable after being notified of the application, the Secretary was bound, by s 418(3), to "give to the Registrar each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision". It was the documents transmitted to the Registrar that would form the basis for the review "on the papers" for which s 424 provided.

248 In each of the present cases, the delegate of the Minister (who made the initial decision refusing to grant the plaintiff a protection visa) set out in the written record of the decision the evidence that had been used in making the decision. In each case the evidence consisted of the Department's file and a variety of other items, all of which could be, and in some cases were, printed. They included reported decisions of this Court, textbooks, Department of Foreign Affairs and Trade cables, articles from newspapers and other periodicals, and items distributed by newsagencies, such as Reuters and Agence France-Presse. In the present litigation these items were referred to as the "Part B documents".

249 Electronic records of some, but not all, of the Part B documents were held in a computer database maintained by the Department and known as CISNET. ("CIS", it seems, is an abbreviation for "Country Information Service".) Members of the Tribunal had access to CISNET. Some of the Part B documents (such, for example, as textbooks to which reference was made in the delegate's decision) were not held in electronic form but were held in a library which members of the Tribunal could use.

250 The parties have agreed that, in each of the present cases, the Secretary sent to the Registrar the departmental file relating to the plaintiff but did not send any of the Part B documents. Further, facts are agreed from which it would be open to infer, in each case, that, neither before the Tribunal conducted its review "on the papers", nor before it made its decision to affirm the decision refusing the grant of a protection visa, did it examine those Part B documents. In each case it is agreed that, if the plaintiff had known that the Tribunal had not considered all the Part B documents to which the delegate had referred, the plaintiff would have taken various steps to place the information in the Part B documents and submissions about its significance before the Tribunal.

251 I agree with Gummow J that, for the reasons he gives, it is inappropriate to answer the second and third questions reserved (which concern the operation of ss 418(3) and 424(1) of the Act). The answers to be given to the other questions reserved will entitle the plaintiffs to relief of the kind they seek. What the plaintiffs allege to have been a want of compliance with s 418(3) or a failure to make a decision under s 424(1) would not.

Procedural fairness

252 Was there a want of procedural fairness? In that respect, it is necessary to consider what each plaintiff was told about the material that would be, or had been, sent to the Tribunal for, in essence, each plaintiff alleged that he or she was misled about the material that the Tribunal had before it.

253 In Mr Muin's case, he was told by the Deputy Registrar of the Tribunal that the Tribunal had asked the Department "to send a copy of its documents about your case to the Tribunal" and that when the Tribunal "receive[d] the Department's documents [it would] look at them along with any other evidence on the Tribunal file to determine whether it can make a decision in your favour immediately". Later, the Deputy Registrar wrote to Mr Muin saying that:

> "The Tribunal has looked at all the material relating to your application but it is not prepared to make a favourable decision on this information alone."

254 The Tribunal's letters to Ms Lie were a little different. She was told that the Tribunal had asked the Department "to send a copy of its documents about your case to the Tribunal" and, then, after the review on the papers, she was told that the Tribunal had looked at "all the papers relating to your application". Unlike Mr Muin, she was not told that after the Tribunal received the Department's documents it would look at them "along with any other evidence on the Tribunal file".

255 In each case it was agreed that the plaintiff believed that the Tribunal had the Part B documents and it was also agreed (as I have earlier mentioned) that if the plaintiff had known that the Tribunal did not have them, he or she would have acted to correct that. The statements made to each plaintiff by a Deputy Registrar of the Tribunal, when understood in the light of the express references to the Part B documents in the written reasons for decision by the Minister's delegate, provided the foundation for each plaintiff holding the belief which it is agreed was held.

256 The parties' agreement about these facts obviates, indeed it forecloses, any need to consider the difficult factual and evidentiary issues that otherwise would arise about these aspects of the matters and presumably will arise in the case of each of the persons whom it is said is represented by the plaintiff. In particular, given what has been agreed between the parties, it is not necessary to consider whether the differences in the statements made by the Tribunal to Mr Muin or Ms Lie about what it had received, and what it would consider, might be significant. The consequence of what has been agreed between the parties to each of the present actions is that each plaintiff was led to believe, by what the Tribunal said, that it had material relevant to that plaintiff's claim which it did not.

257 The agreed facts are silent about whether the Tribunal was aware of the information and opinions contained in the Part B documents. It may have been, but more importantly, it may not. It follows, therefore, that in each case, the plaintiff was denied procedural fairness. Neither plaintiff was given an opportunity to place before the Tribunal the material and submissions which, on the agreed facts, it is accepted that he or she would have submitted if not mistaken about what was before the Tribunal[149]. Moreover, it also follows from the parties' agreement that each plaintiff would have made further submissions and sought to adduce further evidence that the Tribunal did not comply with the statutory provisions governing its conduct of the reviews of the plaintiffs' cases. It did not give each plaintiff the opportunity to make the submissions[150] or give the evidence[151] which the plaintiff wished to make and give. For these reasons, Question 1 of the questions reserved should, in each case, be answered "yes".

258 Because the two proceedings that give rise to the questions that have been referred are representative proceedings, and the facts that have been agreed include facts about the particular state of mind of only Mr Muin and Ms Lie, it is necessary to go on to consider the other aspects of the issues about procedural fairness that were debated on the hearing of the questions reserved.

Adverse materials

259 In both Mr Muin's and Ms Lie's case, the Tribunal referred, in its decision, to sources of information which, in the Tribunal's opinion, supported the conclusion that the government of the country of nationality of the plaintiff (in each case Indonesia) was willing and able to protect the plaintiff from persecution on account of his or her ethnic origin. In Mr Muin's case the Tribunal received written submissions from the Secretary of the Department to which were attached a cable from the Department of Foreign Affairs and Trade ("DFAT") about the circumstances in Indonesia. Neither the submissions from the Secretary nor the contents of the cable from DFAT were brought to the attention of Mr Muin before the Tribunal made its decision. In his case this circumstance was advanced as a further reason for concluding that there was a want of procedural fairness. It was submitted that to fail to draw to the attention of a claimant material that was adverse to the claim made departed from requirements of procedural fairness. In addition, it was submitted that this conclusion was supported when account was taken of the fact that the Tribunal

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

150 s 423(1)(b).

151 ss 423(1)(a), 425(1)(a).

had published a Practice Direction stating that an applicant before the Tribunal would "be given an opportunity to respond to any relevant and significant material which is or may be adverse to his or her case". No similar issue about use of adverse material arises in Ms Lie's case.

260 In deciding what procedural fairness required, it is necessary to consider the nature of the Tribunal's task and the material which it is said should have been drawn to the attention of Mr Muin.

261 The willingness and ability of the country of citizenship to provide protection to its citizens is always central to an inquiry about a claim by one of those citizens to protection by Australia. Accordingly, a central question for the Tribunal in Mr Muin's case was whether it should conclude that the government of Indonesia was either unable or unwilling to provide adequate protection to Indonesian citizens of Chinese origin from persecution on account of their race. That question required the Tribunal to make a judgment about what a government, with which Australia sought to maintain friendly relations, could and would do within its own boundaries. Necessarily, it involved making a judgment about matters such as the political will of the foreign government and its capacity to transform intention into effective action.

262 Those are not questions which lend themselves to evidence about particular events so much as to evidence of opinions formed as a result of prolonged, careful and detailed study of the history, the institutions and the social and political mores of a country over a long time. Press and other reports of what has happened in a country may have a place in the formation of such an opinion but it may be doubted that material of that kind would sufficiently disclose all that could, or ordinarily would, be taken into account.

263 Unlike a court, the Tribunal was not restricted to acting only on material that was expressly referred to in the course of a particular review[152]. It was not bound by rules of evidence and its members were obviously expected to develop and rely on knowledge of affairs in the countries from which claimants come. It may very well be, therefore, that, as individual Tribunal members heard accounts given to them by a series of applicants for protection visas who came from a particular country, and as those Tribunal members read more widely about the country concerned, they developed a body of knowledge upon which their views about the country were formed. And as they become more knowledgeable their capacity comprehensively to identify the particular sources of their knowledge would ordinarily diminish.

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152 Allars, "Neutrality, the Judicial Paradigm and Tribunal Procedure", (1991) 13 *Sydney Law Review* 377.

264 There is, therefore, a very practical reason to doubt that procedural fairness required the Tribunal to identify the source, and the general nature, of every piece of material that led the member to form a view that a particular country was willing and able to protect its citizens. So to hold would impose an obligation that could not readily be performed and in some cases would be impossible[153]. But the difficulty in the argument advanced by Mr Muin is even more deep-seated than that.

265 Procedural fairness required that Mr Muin have a reasonable opportunity to place before the Tribunal any submission and any material that he wished to advance in support of his claim. Unlike *National Companies and Securities Commission v News Corporation Ltd*[154] and *Mahon v Air New Zealand*[155] there was no question of allowing a person an opportunity to meet some adverse finding that might later be published. In such a case an investigating body may be obliged to provide an opportunity for rebuttal because the issue emerges with sufficient definition only at the stage where the body forms a tentative view that the adverse finding may be made. But that is not this case. As has already been pointed out, the issue of the willingness and ability of his country of citizenship to afford Mr Muin protection from persecution on Convention grounds was central to his claim. The Tribunal was not obliged to tell Mr Muin that it was minded to reach a view about that question, which was contrary to the view he sought to have it form, and then ask him whether he wished to contradict that view. That he had to make out his claim about this matter was apparent from the outset of the Tribunal's review. Indeed, it was apparent from the moment he made his claim to a protection visa. This was not some issue that emerged only in the course of the Tribunal's proceedings.

266 Nor was the Tribunal bound to draw attention to the material which it considered to be persuasive of the view that he was not a refugee and then ask him whether he wanted to contradict it. Of course he wanted to put the opposite view. Again, so much was clear from the moment he made his claim for a protection visa. But it is fundamentally wrong to speak, in this context, in terms of "contradiction" if that is to suggest some competition between cases put by adversaries. Here there was no adversary to Mr Muin's claim. It was for him to make good his claim that he was entitled to Australia's protection.

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153 cf *Castillo-Villagra v Immigration and Naturalization Service* 972 F 2d 1017 (1992).

154 (1984) 156 CLR 296.

155 [1984] AC 808.

267 Nor was this some aspect of his personal circumstances about which it might be expected that he had special knowledge or to which his answer might have some particular significance[156]. It was a question about the general political situation in Indonesia – a matter about which his personal knowledge could fairly be expected to have been fully revealed (or at least revealed to the extent that he considered useful) in whatever evidence or submissions he had made to the Tribunal.

268 Yet in essence the plaintiff's case in relation to adverse material was, first, that he could legitimately expect the Tribunal to tell him that it was minded to find against him and, secondly, that he could legitimately expect the Tribunal to tell him what material, adverse to his claim, the Tribunal either was minded to accept or was considering accepting and, before concluding the matter, seek his comment about that predisposition and that material. Procedural fairness does not go so far. To accept these contentions would amount to casting the Tribunal in the role of an adversary to a claimant's claim to refugee status. Not only were the procedures prescribed by the Act not adversarial proceedings, the Tribunal is *not* to be cast in the role of contradictor.

269 Nor did the Tribunal's publication of the Practice Direction upon which Mr Muin's argument relied require some different conclusion. First, as the respondent rightly submitted, the Practice Direction, taken as a whole, was cast in such general terms that it was to be understood as no more than a statement of what would ordinarily be necessary to give procedural fairness to an applicant. It did not go beyond what otherwise would have been required of the Tribunal. Secondly, and no less importantly, it described its subject-matter as being "relevant and significant material which is or may be adverse to [a claimant's] case".

270 It was the plaintiff's contention that the generality of this description embraced anything and everything which later turned out to have been thought by the Tribunal to be contrary to a claim made. Two points must be made about that formulation. First, the Practice Direction was not to be understood as dealing with material about which the claimant already knew. Secondly, when pressed to identify what would have been necessary or sufficient to draw a claimant's attention to material of the kind with which the Practice Direction dealt, the plaintiff submitted that all that was necessary was to identify the *substance* of the material in question. Where, as is the case here, the material in question related only to the general state of political affairs in the country of the claimant's citizenship, there is an obvious difficulty in stating the "substance" of the material except at a high level of abstraction.

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156 cf *Aala* (2000) 204 CLR 82.

271 It must be accepted that saying to a claimant only that the Tribunal had material available to it which suggested that the government of Indonesia could and would sufficiently protect citizens of Chinese origin may well convey no information to a claimant that was not already readily apparent from the delegate's refusal of a visa. By contrast, telling a claimant that the Tribunal had material available suggesting that a claimant's statement about his or her *personal* experiences or circumstances was not to be accepted, would give that claimant a real and useful opportunity to make further submissions or give further evidence in support of the claim.

272 Once it is accepted, however, as the plaintiff did, that the statement in the Practice Direction suggested no greater obligation than an obligation to draw the claimant's attention to the *substance* of the adverse material, it followed, in this case, that there was no breach of that obligation. The delegate's decision had made abundantly plain that there was material from which it could be concluded that Indonesia could and would sufficiently protect its citizens of Chinese origin. There was, therefore, no point which emerged in the Tribunal's review which was in any sense a new point. Secondly, because of the centrality of the question of protection by the State of citizenship, and because that was the basis upon which the delegate had resolved to refuse the grant of a protection visa, there was no requirement for the Tribunal to take any further step to draw attention to it.

273 In these circumstances, it is not necessary to consider what legitimate expectations the Practice Direction might engender or whether it was necessary for the plaintiff to demonstrate actual knowledge of and reliance upon the Practice Direction[157].

274 Particular reliance was placed on the decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[158] where a decision of a delegate of the Minister was quashed because, in reaching the decision, the delegate attached importance to a then recent change in the political circumstances in the applicant's country of origin and did not seek comment about it from the applicant. The change of government occurred after Mr Miah had made his submissions to the delegate. Despite the significance the delegate attached to the fact of the change, Mr Miah was given no opportunity to make any submission about it.

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157 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 670 per Toohey J; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 313 per McHugh J.

158 (2001) 75 ALJR 889; 179 ALR 238.

275 In Mr Muin's case the Tribunal made its decision in November 1998. This was some months after the government of Indonesia had changed but the decision was made only days after Mr Muin had given evidence to the Tribunal. The Tribunal referred to the change of government in its reasons and noted various statements that had subsequently been made by the then President of Indonesia, and the then Chief of its Armed Forces, about protection of Indonesians of Chinese origin. Although, in the Tribunal's view, the change of government was an important fact and the statements made after the change of government were important enough to warrant noting in the Tribunal's reasons, it may be doubted that these events and statements were critical to the reasoning of the Tribunal. Even if, as Mr Muin contended, they were, there was no obligation on the Tribunal to draw them to his attention for his comment.

276 Not only had the change of government in Indonesia taken place some months before Mr Muin gave evidence to the Tribunal, the change of government and the circumstances in which the change occurred were very well known, and it was not, and could not have been, suggested that both Mr Muin and the Migration Agent whom he had retained to assist him in the preparation of materials submitted to the Tribunal were unaware of these matters at the time that Mr Muin appeared to give evidence. So notorious were these matters that in the absence of positive demonstration that Mr Muin and his adviser were either unaware of them, or were misled about their relevance to the claim he was making, the absence of some formal notification of their relevance would not constitute a breach of procedural fairness. Because the ability and willingness of Indonesia to afford protection to Mr Muin was critical to his claim, there could be no doubt that the change in government, and the circumstances attending and following that change, were relevant to his claim to Australia's protection. Unlike Mr Miah, Mr Muin had a full opportunity to put his case to the Tribunal by reference to the changes that had occurred[159].

Conclusions

277 In neither case, for the reasons given earlier, did the Tribunal accord the plaintiff procedural fairness. But in neither case would it be right to refuse relief on discretionary grounds. Even if it may appear that the claims of either Mr Muin or Ms Lie are weak, their assessment is a matter for the Tribunal. It follows that, in each case, certiorari should issue to the Secretary to quash the decision and prohibition issue to prohibit further proceeding upon it. Mandamus should issue to the Tribunal requiring it to determine the review according to

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159 cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 906 [99] per Gaudron J, 912 [140] per McHugh J, 922-923 [187] per Kirby J; 179 ALR 238 at 260, 269, 284. See also *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100 at 129-130.

law. There would be no purpose served by granting declaration or injunction. It also follows that, in each case, the plaintiff should have the costs of the action.

278 In each case I would therefore answer the questions reserved as follows:

1. Yes.

2. Inappropriate to answer.

3. Inappropriate to answer.

4. (a) Yes.

   (b) Certiorari to quash the decision of the Tribunal, prohibition to the Secretary to prohibit further proceeding on it, and mandamus requiring the Tribunal to determine according to law the application for review made under ss 412 and 414 of the Act.

5. The second and third defendants.

CALLINAN J.

Muin

279 Five questions have been referred by Gaudron J to the Full Court pursuant to s 18 of the *Judiciary Act* 1903 (Cth) in proceedings brought by the plaintiff under s 75(v) of the Constitution. The questions are as follows:

> "Upon the facts set out in the agreed statement of facts and the inferences, *if any*, to be drawn from those facts …
>
> (1) Was there a failure to accord the Plaintiff procedural fairness?
>
> (2) Was there a failure to comply with s 418(3) of the *Migration Act*?
>
> (3) Was there a failure to comply with s 424(1) of the *Migration Act*?
>
> (4) If the answer to any of questions (1) to (3) is yes,
>
> (a) Was the decision of the First Defendant to affirm the refusal of the delegate to grant a protection visa for that reason invalid?
>
> (b) What declaratory, injunctive or prerogative writ relief, *if any*, should be ordered?
>
> (5) By whom should the costs of the proceedings in this Court be borne?"

280 The plaintiff is one of numerous persons who have brought proceedings in circumstances said to be similar to his. Whatever the precedential effect of a decision in his case, this judgment has application to him only.

The statutory framework

281 The plaintiff's claims arise out of a review of his application for a protection visa by the Refugee Review Tribunal ("the Tribunal"). The relevant rights of the plaintiff and the obligations of the defendants are prescribed by ss 414 to 440 of the *Migration Act* 1958 (Cth) ("the Act") as it stood on 25 November 1998. Not all of these provisions need detailed reference, but discussion of some of them will serve to define the nature of the hearing or hearings to which the plaintiff was entitled, and which he contends he was denied.

282 The plaintiff refers first to s 418 which provides as follows:

"(1) If an application for review is made to the Refugee Review Tribunal, the Registrar must, as soon as practicable, give the Secretary written notice of the making of the application.

(2) The Secretary must, within 10 working days after being notified of the application, give to the Registrar the prescribed number of copies of a statement about the decision under review that:

(a) sets out the findings of fact made by the person who made the decision; and

(b) refers to the evidence on which those findings were based; and

(c) gives the reasons for the decision.

(3) The Secretary must, as soon as is practicable after being notified of the application, give to the Registrar each other document, or part of a document, that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of the decision."

283 Section 420 eschews technicalities but requires that substantial justice be done and that an application be decided on its merits.

284 Section 423 entitles an applicant to provide a statutory declaration of facts relating to his or her application for review. It is in the following form:

"(1) An applicant for review by the Tribunal may give the Registrar:

(a) a statutory declaration in relation to any matter of fact that the applicant wishes the Tribunal to consider; and

(b) written arguments relating to the issues arising in relation to the decision under review.

(2) The Secretary may give the Registrar written argument relating to the issues arising in relation to the decision under review."

285 Pursuant to s 424(1) as it was in force at the relevant time, the Tribunal may make a decision in favour of the applicant without taking oral evidence. Two other matters should be noticed about the section. It contemplated that the Tribunal would have before it the documents which were in the possession or control of the Secretary (of the Department of Immigration and Multicultural Affairs) and which were considered by the Secretary to be relevant to the review of the decision. And it further contemplated that a final decision adverse to an

applicant would not be made without taking oral evidence if an applicant wished to adduce it. Section 424 provided:

> "(1) If, after considering the material contained in the documents given to the Registrar under sections 418 and 423, the Tribunal is prepared to make the decision or recommendation on the review that is most favourable to the applicant, the Tribunal may make that decision or recommendation without taking oral evidence.
>
> (2) For the purposes of subsection (1), a decision or recommendation made on a review is taken to be the decision or recommendation most favourable to the applicant if there is no other decision or recommendation that:
>
> (a) the Tribunal could make; and
>
> (b) in the Tribunal's opinion, the applicant would prefer the Tribunal to make."

286 Section 425 provides in terms that where s 424 does not apply the Tribunal must give the applicant an opportunity to give evidence. The section is as follows:

> "(1) Where section 424 does not apply, the Tribunal:
>
> (a) must give the applicant an opportunity to appear before it to give evidence; and
>
> (b) may obtain such other evidence as it considers necessary.
>
> (2) Subject to paragraph (1)(a), the Tribunal is not required to allow any person to address it orally about the issues arising in relation to the decision under review."

287 But the Tribunal is not obliged to call or hear oral evidence from anyone except an applicant. This follows from s 426, which provides:

> "(1) Where section 424 does not apply, the Tribunal must notify the applicant:
>
> (a) that he or she is entitled to appear before the Tribunal to give evidence; and
>
> (b) of the effect of subsection (2) of this section.
>
> (2) The applicant may, within 7 days after being notified under subsection (1), give the Tribunal written notice that the applicant

wants the Tribunal to obtain oral evidence from a person or persons named in the notice.

(3) If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice."

By so providing, the section gives a clear indication that any "hearing" that the Tribunal may conduct is essentially inquisitorial in nature and therefore quite different from conventional adversarial proceedings in a court.

288 The Tribunal, in its discretion, is not, however, obliged to confine oral evidence to that of an applicant or a person named in a notice given pursuant to s 426. This appears from s 427, which sets out the powers of the Tribunal in undertaking a review as follows:

"(1) For the purpose of the review of a decision, the Tribunal may:

(a) take evidence on oath or affirmation; or

(b) adjourn the review from time to time; or

(c) subject to sections 438 and 440, give information to the applicant and to the Secretary; or

(d) require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination.

(2) The Tribunal must combine the reviews of 2 or more RRT-reviewable decisions made in respect of the same non-citizen.

(3) Subject to subsection (4), the Tribunal in relation to a review may:

(a) summon a person to appear before the Tribunal to give evidence; and

(b) summon a person to produce to the Tribunal such documents as are referred to in the summons; and

(c) require a person appearing before the Tribunal to give evidence either to take an oath or affirmation; and

(d) administer an oath or affirmation to a person so appearing.

(4) The Tribunal must not summon a person under paragraph (3)(a) or (b) unless the person is in Australia.

(5) The oath or affirmation to be taken or made by a person for the purposes of this section is an oath or affirmation that the evidence that the person will give will be true.

(6) A person appearing before the Tribunal to give evidence is not entitled:

(a) to be represented before the Tribunal by any other person; or

(b) to examine or cross-examine any other person appearing before the Tribunal to give evidence.

(7) If a person appearing before the Tribunal to give evidence is not proficient in English, the Tribunal may direct that communication with that person during his or her appearance proceed through an interpreter."

289 Section 430 requires the Tribunal to give a written decision. It provides as follows:

"(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:

(a) sets out the decision of the Tribunal on the review; and

(b) sets out the reasons for the decision; and

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based.

(2) The Tribunal must give the applicant and the Secretary a copy of the statement prepared under subsection (1) within 14 days after the decision concerned is made.

(3) Where the Tribunal has prepared the written statement, the Tribunal must:

(a) return to the Secretary any document that the Secretary has provided in relation to the review; and

(b) give the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based."

290 What a tribunal must do, by contrast with what it may do, is very much affected by the functions it has to perform and the statute under which it operates. Gibbs J in *Salemi v MacKellar [No 2]*[160] put the matter this way:

> "The question whether the principles of natural justice must be applied, and if so what those principles require, depends on the circumstances of each case. In the case of a statutory power, the question will depend on the true construction of the statutory provision in light of the common law principles (cf *Durayappah v Fernando*[161])."

291 There are also these aspects of the jurisdiction of the Tribunal. There is no contradictor in the ordinary sense. As I have observed, the proceedings are essentially inquisitorial. The Tribunal is not bound by the rules of evidence. As this case shows, it goes to many sources of information and acts upon material that courts would not ordinarily receive and use. The Tribunal is a specialist tribunal: its members hear many cases and can be expected to have accumulated a great deal of knowledge, so far as it is ascertainable, about other peoples and other countries. And the Act makes clear distinctions, in the ways to which I have referred, between what the Tribunal must do and what it may, in its discretion, do in relation to the gathering, hearing and use of evidence.

The plaintiff's submissions

292 The basic submissions of the plaintiff are three in number. First, the plaintiff contends that the Tribunal took into account material adverse to the plaintiff's case without the knowledge of the plaintiff, thereby depriving him of an opportunity to meet that adverse material by evidence and submissions. This failure, it is said, was a breach of procedural fairness.

293 Secondly, the plaintiff contends that the Tribunal failed to receive or consider relevant material (Part B documents) in documentary form that contained information favourable to the plaintiff's case. Had the Tribunal properly received and considered this information, the plaintiff would have had better chances of obtaining a favourable decision. It was submitted that this failure was also a breach of procedural fairness. Related to that submission was a contention that the plaintiff was misled by letters written to him on behalf of the Tribunal.

294 Thirdly, the failure identified in the preceding paragraph constituted a breach of ss 418(3) and 424(1) of the Act, rendering the decision ultra vires.

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160 (1977) 137 CLR 396 at 419.

161 [1967] 2 AC 337 at 350.

295 I will refer in these reasons to the "Part B documents". Because of the view I take of this case, it is unnecessary for me to go into the detail of them. These comments may, however, be made about them. Part B documents were 31 in number. They consisted largely of commentaries by journalists and others on public affairs in Indonesia and the position of ethnic Chinese in that country, including the disposition and capacity of the Indonesian authorities to protect those people. Another document, the departmental file on the plaintiff, assumes no relevance in this case. Some of the matters contained in the Part B documents were adverse to the plaintiff's case, some favourable. The Tribunal made some findings, both adverse and favourable to the plaintiff's case, that were not expressly referable to the Part B documents, but were to the same effect as matters contained in them. And some matters contained in the Part B documents, both helpful and unhelpful to the plaintiff, were not referred to in the Tribunal's reasons. It would be impossible to say whether this was because the Tribunal was not provided with the documents, or because it knew of, but was not persuaded or influenced by, those matters.

296 The plaintiff submits that he has established that, in making its decision, the Tribunal did not have before it and therefore had no regard to many of the Part B documents which were in the possession of the Secretary and were relevant to the plaintiff's case. I interpolate that I do not think that this case depends upon whether material stored in and transmissible by a computer can be regarded as a document. The sense intended here in the letters to which I will refer was clearly of a document or documents being matter written on paper. Without so deciding, I would not readily conclude that in some situations in modern times a "document" might not take an electronic form. The documents were certainly not sent to the Registrar of the Tribunal before the making of the delegate's decision. This is a matter of Agreed Fact. That the Tribunal did not have regard to the documents follows, it is submitted, from the absence of reference in the Tribunal's decision to most of them, and from the fact that discovery and inspection which have since taken place in this case have not revealed any note or memorandum suggesting that the Tribunal did have regard to the documents.

297 In these proceedings the Court is sitting in its original jurisdiction. This is no impediment to the finding of facts by the Court: indeed the contest between the parties as to the inferences open on the Agreed Facts makes it necessary for the Court to make inferential findings. So too, the Court may grant any relief of the kind for which s 75(v) of the Constitution makes provision and which is better adapted to the case than the relief originally sought (here, an injunction)[162].

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162 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

298 It seems to me that the plaintiff has at least established, as a matter of inference, that the Tribunal in all likelihood did not receive and did not have separate and reasonably contemporaneous regard to the documents in making its decision. The plaintiff has not, however, established that the Tribunal did not know and did not take into account the matters to which the documents referred. The Tribunal may well have done so because of the Tribunal's general and specialised knowledge of such matters.

299 I would reject the plaintiff's submission that the contrary should be inferred from a failure on the part of the Tribunal to adduce evidence, either as to what was taken into account, or even as to what documents the Tribunal had in its possession, electronically or on paper, then or on other occasions. On the one hand, the plaintiff's submission would seek to require the Tribunal to act as if it were a court sitting in conventional adversarial proceedings; on the other, the plaintiff would require the Tribunal to participate in these proceedings as if it were a partisan body. The notion that it would be appropriate that the Tribunal should take these contradictory stances at the same time should be rejected. The entire, general, protective immunity of a Justice of the High Court is conferred on the member of the Tribunal by s 435(1) of the Act[163]. The rationale for immunity from compulsory disclosure is the assurance that judges should be free in thought and independent in judgment. That rationale naturally extends to an immunity from disclosing any or all aspects of the decision-making process itself[164].

300 To the extent that *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia*[165], *ARM Constructions Pty Ltd v Commissioner of Taxation*[166], *Prasad v Minister for Immigration, Local Government and Ethnic Affairs*[167], *Xiang Sheng Li v Refugee Review Tribunal*[168], and other cases cited by the plaintiff might suggest otherwise, I would, with respect, disagree with them. If it were otherwise, the Tribunal would risk an appearance of partisanship. To find for the plaintiff on this argument would inhibit the performance of the Tribunal's functions. Additionally, it could have the capacity to inhibit the use, that is, the proper use, by a specialist tribunal of the special knowledge that it has

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163 "A member has, in the performance of his or her duties as a member, the same protection and immunity as a member of the Administrative Appeals Tribunal."

164 *Herijanto v Refugee Review Tribunal* (2000) 74 ALJR 698; 170 ALR 379.

165 (1996) 67 FCR 40.

166 (1986) 10 FCR 197 at 205 per Burchett J.

167 (1991) 101 ALR 109 at 123.

168 (1994) 36 ALD 273.

accumulated in carrying out its functions. It would encourage the active participation of a defendant of the Tribunal in collateral challenges to its decisions in this Court and the Federal Court[169]. It would effectively compel the Tribunal to do more than what it is required to do under the Act, which is, in substance, to make a decision in accordance with the procedures prescribed by the Act and to commit that decision to writing. And it would mark a departure from the well-established principle that, in general, a court or tribunal is taken to have exposed its thinking and reasoning, or indeed has failed to do so when it should have, in its reasons for decision.

301 I would reject the first two basic submissions of the plaintiff. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*, McHugh J described totally new material bearing on the applicant's case which heavily influenced the decision-maker's adverse decision, and which the applicant was given no opportunity to deal with, as "decisive"[170]. His Honour added that the material there was not of such a kind that the applicant could reasonably have expected it to be used. In my view, neither feature is necessarily present in this case.

302 Nonetheless, the plaintiff's subsidiary submission with respect to the way in which he was misled and his conduct was affected should be accepted. This case has features in common with *Re Refugee Review Tribunal; Ex parte Aala*[171]. There the Tribunal had caused the applicant to believe that a particular state of affairs relating to the manner in which he might choose to conduct his case existed, when in fact that state of affairs did not exist[172]. This case is relevantly indistinguishable. By the Deputy Registrar's letter of 30 March 1998, the plaintiff was advised that the Tribunal *would look at the documents* about the plaintiff's case along with any other evidence on the Tribunal file. Because the documents were not sent to the Tribunal, I infer that that did not in fact happen.

303 There are Agreed Facts about the belief that the letter engendered in the mind of the plaintiff as follows:

> "After reading the Tribunal's letter dated 30 March 1998, the Plaintiff was then under the clear belief that the Tribunal would be sent all the documents about his case which were then held including:

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169 See *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35-36.

170 (2001) 75 ALJR 889 at 912-913 [142]; 179 ALR 238 at 270.

171 (2000) 204 CLR 82.

172 (2000) 204 CLR 82 at 152 [206] per Callinan J.

(a) the decision of the delegate dated 9 March 1998; and

(b) a copy of each [of] the Part B documents;

and that the Tribunal would look at all that material in the making of its review on the papers.

On or about 1 April 1998 the Department dispatched its file concerning the Plaintiff to the Registrar of the First Defendant. The file did not include hard copies of any of the Part B documents or copies in electronic form."

304 In view of the letter, I would conclude that the plaintiff's belief was an entirely reasonable one.

305 The Deputy Registrar of the Tribunal, on 13 October 1998, advised the plaintiff as follows:

"The Tribunal has looked at all the papers relating to your application but it is not prepared to make a favourable decision on this information alone. You now have an opportunity to come to a hearing of the Tribunal to give oral evidence in support of your claims."

For the reasons I have given, the Tribunal had not looked at all the papers relating to the application. Once again, therefore, the plaintiff was misled.

306 It was further agreed that the plaintiff received the Tribunal's letter dated 13 October 1998 and that, after the plaintiff had read, completed and signed an accompanying "Response to Hearing Offer" form, he was under the clear belief that the Tribunal had already conducted a review on the papers in relation to his application and had looked at all of those papers referred to in the preceding paragraph. That too was a reasonable belief for the plaintiff to have held. Further, it is agreed that, had the plaintiff known that the Tribunal had not been provided with all of the documents, he would have prepared and conducted his case before the Tribunal differently.

307 The fact that some of the documents would undoubtedly have been on a database to which both the Department and the Tribunal had electronic access, and that the Tribunal resorted to the database from time to time does not, in the circumstances of this case, including the misleading statements in the letters to the plaintiff, the fact that not all of the Part B documents were on that database at the relevant time, and the fact that the Tribunal's decision does not disclose whether all of the Part B documents were before it in any form, avail the defendants.

308 I adhere to what I said in *Aala* and would adopt the same approach here as I did there[173]:

> "In some respects this case is also similar to *R v Muir; Ex parte Joyce*[174] which was decided before the doctrine of legitimate expectation had evolved to the extent that it now has. In *Muir* the respondent Board had, by its actions, led the prosecutor to believe that certain measures might be adopted in relation to his application, which in fact it had no intention of adopting. In the circumstances the prosecutor was unable to present his case in full[175]. In a case of such a kind, of which this is an example, it is probably not even necessary to invoke and apply a principle of legitimate expectations. McHugh J was in dissent in *Teoh*, but his Honour's observations, regarding procedural fairness, are not, I think, affected by that. His Honour said[176]:
>
> > 'I think that the rational development of this branch of the law requires acceptance of the view that the rules of procedural fairness are presumptively applicable to administrative and similar decisions made by public tribunals and officials. In the absence of a clear contrary legislative intention, those rules require a decision-maker "to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it"[177]. If that approach is adopted, there is no need for any doctrine of legitimate expectations. The question becomes, what does fairness require in all the circumstances of the case?'
>
> The case may be contrasted with *Abebe*[178] and *Eshetu*[179]. It is not one in which the Tribunal may have failed to record some factual findings in reaching its conclusions. And, the case is far removed from *Abebe* in which, even though the Tribunal was not bound to do so, it repeatedly

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173 (2000) 204 CLR 82 at 155-156 [213]-[214].

174 [1980] Qd R 567.

175 [1980] Qd R 567 at 579 per Dunn J.

176 (1995) 183 CLR 273 at 311-312.

177 *Kioa v West* (1985) 159 CLR 550 at 587.

178 (1999) 197 CLR 510.

179 (1999) 197 CLR 611 at 629 [54]-[55] per Gleeson CJ and McHugh J, 656-657 [143]-[145] per Gummow J.

stressed matters that might be of importance to the plaintiff in the determination of her entitlement to a visa[180]."

309 The plaintiff was misled. He not unreasonably acted on the basis of what he had been told. In the circumstances, he was not accorded natural justice.

310 It follows that I would answer the questions as follows:

(1) Was there a failure to accord the Plaintiff procedural fairness?

Yes.

(2) Was there a failure to comply with s 418(3) of the *Migration Act*?

Unnecessary to answer.

(3) Was there a failure to comply with s 424(1) of the *Migration Act*?

Unnecessary to answer.

(4) If the answer to any of questions (1) to (3) is yes,

(a) Was the decision of the First Defendant to affirm the refusal of the delegate to grant a protection visa for that reason invalid?

Yes.

(b) What declaratory, injunctive or prerogative writ relief, *if any*, should be ordered?

Certiorari to quash the decision. Mandamus requiring the first defendant to hear the plaintiff's application according to law. Prohibition to prevent the second and third defendants from acting on the Tribunal's decision.

(5) By whom should the costs of the proceedings in this Court be borne?

The second and third defendants.

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180 (1999) 197 CLR 510 at 607-608 [294]-[296] per Callinan J.

Lie

311 This case was argued at the same time as *Muin* and, as with that case, there are said to be other applicants in the same position as Ms Lie. The issues raised are, in several respects, the same as in *Muin*. There is no suggestion here, however, that material adverse to the interests of the plaintiff was taken into account without her being given an opportunity to respond to it, and it is known that every one of the items identified in Part B of the delegate's discussion record was available to the Tribunal, either electronically or in hard copy.

312 Some other differences in the detail are also relevant and important. The delegate explained his practice and the system in this way:

> "I [the delegate] have on earlier occasions attached to the file copies of the information I had regard to in making decisions. I did so thinking it would assist rejected applicants to understand my decision if they made an FOI application, and that it would assist auditors to understand my decisions when I approved applications. When I did so, the file would invariably become very thick with paper, and this would sometimes also necessitate the creation of a second file to hold all the information. It often became a laborious, time consuming and cumbersome administrative exercise to manage such a large volume of material on departmental files to which all such material was attached. As a result I was discouraged by management from including such information on file, especially if such information was readily available 'public domain' information or was contained in the CISNET computer system.
>
> As noted above, my practice was that the information relied upon, and its source, was listed in Part B of the decision record. I understood that the RRT would have a copy of my decision and had access to all the country information sources that I did including library resources and the CISNET computer system.
>
> By contrast, I recall that information which was specific or personal to the protection visa applicant or which was supplied by them was usually to be retained on that applicant's file.
>
> …
>
> I cannot specifically recall preparing the Departmental file in the Plaintiff's case for transfer to the 'Onshore Refugee (NSW) Put Away Area' and possible RRT review. However, from reading exhibit 'ANH-1', I believe that I acted in accordance with the practice and understanding outlined in the previous paragraphs of this affidavit."

313 It was an Agreed Fact that members of the Tribunal could easily obtain access to the Part B documents:

"Each of the Part B documents was available to Members and the Registry and administration staff of the Tribunal from the dates, and from the source, set out in Schedule 1 hereto in and to the extent that:

(a) They could each go to their own desktop computer (if they had one) or a computer terminal or a computer somewhere at the Tribunal's offices, manually access the CISNET database, download the information to the Tribunal's computer screen, and then, view the relevant Part B documents on the computer screen;

(b) They could each apply to the Department's CIS Library in Canberra for an inter-library loan or to be provided with a copy of the relevant Part B document;

(c) They could each physically attend the Tribunal library to view or copy the relevant Part B documents by way of a computer terminal, a computer, or in hard copy form and they could each request the Tribunal Library staff to obtain a copy for them; and

(d) They could each physically attend the New South Wales State Library to view or copy the relevant Part B documents by way of a computer terminal, a computer, or in hard copy form and they could each request the Tribunal Library staff to so obtain a copy for them."

314 Sometime between 17 April 1997 and 21 April 1997 the Department dispatched its file concerning the plaintiff to the Registrar of the Tribunal. The file did not include copies on paper of any of the Part B documents or copies in electronic form that were transmissible from one computer to another.

315 The Deputy Registrar wrote a somewhat different letter to this plaintiff from the one written to Mr Muin following the decision of the delegate:

"The Tribunal has asked the Department of Immigration and Multicultural Affairs to send a copy of its documents about your case to the Tribunal.

We will get in touch with you when the Tribunal is ready to deal with your case."

316 The plaintiff said that her state of mind was as follows:

"After reading the Tribunal's letter dated 17 April 1997, the Plaintiff was under the clear belief that the Tribunal would be sent all the

documents about [her] case which were then held by the Department including:

(a) the decision of the delegate dated 13 March 1997; and

(b) a hard copy of the Part B documents

and that the Tribunal would look at all that material in the making of its review on the papers."

That may not have been an unreasonable belief. It was not, however, a necessary or an inevitable one, and it reads a great deal into the letter.

317 It was an Agreed Fact that the plaintiff would have acted in the following way:

"Had the Plaintiff been aware of the fact, if it be the fact, that the Department or the Third Defendant did not ever physically transfer to or send to the Tribunal all of the Part B documents at any time prior to the making of the Tribunal's decision on 6 January 1998 then she would have:

(a) arranged to have a migration agent or a solicitor/migration agent act for her in order to make written submissions to the Tribunal and seek to appear at the oral hearing with her or on her behalf;

(b) made submissions to the Tribunal going to the content of the Part B documents highlighting the passages in those documents which assisted her case concerning the then bad situation of ethnic Chinese people in Indonesia and challenging the correctness of that part of the Part B documents which was adverse to her case before the Tribunal;

(c) sought to bring forward before the Tribunal additional evidence to that which she sent to the Tribunal by way of documents, statements, further witnesses or country information which went to the question of the true position in [her] home country, Indonesia, to the effect that it was unsafe for [her] to return home and supporting her claims that her stated fears of persecution in Indonesia were reasonable at the time; and/or

(d) would have undertaken research or further research and submitted to the Tribunal additional information or documents of the type or kind referred to or contained in [various identified] examples of Tribunal decisions which

> were favourable to ethnic Chinese persons from Indonesia seeking refugee status in Australia and which contain references to other material dated before the date of the delivery of the Tribunal's decision of 6 January 1998 …"

318 For reasons that will appear, the failure of the plaintiff to do what she said she would do did not result in either procedural or substantive unfairness. Any breaches of s 418 and s 424 were, at most, extremely technical and insignificant. The Part B documents were clearly identified to both the Tribunal and the plaintiff. The delegate had thought them relevant and had identified them as such in his decision. The plaintiff knew that. The documents were also readily accessible to the Tribunal. Whether the Tribunal actually physically received or was sent them is thus beside the point. It would not have been difficult for the plaintiff, or an agent on her behalf, to obtain copies of the documents had she wished and to make submissions on them.

319 There was nothing misleading about the Tribunal's conduct. The Deputy Registrar's letter of 17 April 1997 did not state that the Tribunal would review, read or necessarily rely on the Department's documents. There was, unlike in the case of *Muin*, only one letter. It said that the Tribunal had asked the Department for copies of the documents, and that it would be in touch. That was all. It hardly amounted to a misleading representation.

320 The plaintiff knew what the issues were. It was obvious from the reasons of the delegate that the current and future situation in Indonesia with respect to Chinese people would be a relevant matter in the Tribunal's decision. The delegate had accepted that there had been both discrimination and violence towards people of Chinese ethnicity in Indonesia, but that the Indonesian government had acted to contain such violence and had prosecuted the perpetrators. The plaintiff could not fail to know that this was what the Tribunal would focus upon and that she could respond to it as she saw fit. She was given a full opportunity to bring forward to the Tribunal whatever material she wished on that issue. The Tribunal was not obliged to give the plaintiff notice in advance of all or any particular matters to which it might have regard. The plaintiff could not point to anything in the material that was decisive or critical, and to which she could have usefully responded. No breach of natural justice has therefore occurred.

321 This case is quite different from *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[181] in significant respects. *Miah* was concerned with the decision of the delegate. The information there was directly relevant to the applicant; it was new; it was critical; and it could, and should,

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181 (2001) 75 ALJR 889; 179 ALR 238.

readily have been brought to the applicant's attention so that it could be dealt with.

322 In this case, the Tribunal summarized the claims put forward by the plaintiff in documents prepared by her migration agent under the heading "Claims and Evidence". Those claims were to a considerable extent abandoned by her in the course of the hearing by the Tribunal. Her evidence was described by the Tribunal in this way: she was a Buddhist, not a Christian; she was a street seller, not a secretary; and she had not suffered any violence causing personal injury. The Tribunal concluded that she had "suffered neither discrimination nor persecution" on the basis of her religion, and had been subject "at the most to discrimination, not persecution" on the basis of her Chinese ethnicity. The Part B documents dealt with the public situation and there was nothing in them that had a particular bearing on her personal history.

323 The Tribunal went even further. It considered whether there was independent information available which suggested that, as a Buddhist of Chinese background, she had a well-founded fear of persecution. In considering that matter, the Tribunal made factual findings which were favourable to the plaintiff:

> "There is no question that Chinese in Indonesia have been subject to periodic episodes of violence over a long span of time."

The Tribunal also considered "whether there [was] a real chance that at some time in the foreseeable future she could experience violence of sufficient seriousness to be classified as persecution". The Tribunal's conclusion on that was as follows:

> "Therefore, while acknowledging the very real threats under which some Chinese in Indonesia evidently live, the Tribunal concludes that the present Indonesian Government is not itself anti-Chinese, and is willing and able to act to protect Chinese when they come under threat from private individuals or groups. It is true that they may not always be 100% effective in doing so. However, no government is able to offer a 100% guarantee of protection to all its citizens. On the evidence available to the Tribunal, the Indonesian Government is willing and able to offer the level of protection to Chinese which a citizen is entitled to expect from his or her government."

As I noted earlier, the relevance of the situation of Chinese people in Indonesia was apparent from the delegate's reasons. The plaintiff could not fail to know that the Tribunal would deal with it. She lost no opportunity to present her case in such a way as to meet that issue.

324 The Tribunal expressly referred to documents that supported the plaintiff. Reference need be made to one document only: an article by David Jenkins in the *Sydney Morning Herald* of 2 May 1994, which dealt both with anti-Chinese riots and with anti-Chinese feeling in the Indonesian armed forces. This was a clear example of a document in the plaintiff's favour. That the Tribunal took it into account is evident from the fact that it was referred to on no fewer than four occasions in the Tribunal's reasons.

325 In relation to inferences, I would say this. It is very difficult to accept that applicants or their advisers would fail to understand that there would readily be available to decision-makers a quantity of country information, regularly updated, to which access would be made. The major pieces of information, such as country profiles prepared by the Department of Foreign Affairs and Trade, country reports prepared by the US State Department, the Minority Rights Group International report, "The Chinese of East Asia", the Human Rights Watch–Asia report, "Indonesia: The Medan Demonstrations and Beyond", together with some of the ephemeral media articles, are the very sorts of materials to which decision-makers would look.

326 I summarize my reasons in this way. The letter in this instance was not misleading; unlike in *Muin*, there were not two explicitly misleading letters. Accepting as I do that the plaintiff believed that she would have acted differently but for the letter, I cannot accept that she would have been acting reasonably in doing so. The plaintiff did not identify any critical or decisive matters in any of the documents. Indeed, the defendants have effectively established the contrary. The matters with which the documents dealt were matters in no way peculiar to the plaintiff. They were matters within the first defendant's general and specialized knowledge. The plaintiff at all material times knew what the issues were and knew that it was open for her to address them. And a number of claims made by the plaintiff to the first defendant were not accurately made. There was therefore no failure to accord the plaintiff procedural fairness, and she suffered no substantive unfairness. Because of what I have said, it is unnecessary for me to decide whether any breaches of ss 418 and 424 occurred. If they did, it would be because "documents" within the meaning of the Act (as opposed to what the authors of the letters may have been describing or referring to) must always mean matter written on paper (an issue which I do not decide one way or another); and if, in consequence, the plaintiff had an arguable case for relief under s 75(v) of the Constitution, for the reasons summarized in the paragraph, I would still, on discretionary grounds, refuse relief.

327 Accordingly I would answer the questions as follows:

(1) Was there a failure to accord the Plaintiff procedural fairness?

No. But if there were relief it should be refused on discretionary grounds.

(2) Was there a failure to comply with s 418(3) of the *Migration Act*?

Unnecessary to answer but if there were its extreme technicality would not provide a ground for relief in the circumstances of this case.

(3) Was there a failure to comply with s 424(1) of the *Migration Act*?

Unnecessary to answer but if there were its extreme technicality would not provide a ground for relief in the circumstances of this case.

(4) If the answer to any of questions (1) to (3) is yes,

(a) Was the decision of the First Defendant to affirm the refusal of the delegate to grant a protection visa for that reason invalid?

No.

(b) What declaratory, injunctive or prerogative writ relief, *if any*, should be ordered?

None.

(5) By whom should the costs of the proceedings in this Court be borne?

The plaintiff.