HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS APPELLANT

AND

JI DONG WANG RESPONDENT

Minister for Immigration and Multicultural Affairs v Wang
[2003] HCA 11
12 March 2003
S295/2001

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court made on 3 April 2001 and, in their place, order that the application to that Court pursuant to the liberty reserved by the order of 10 November 2000 be dismissed.*

On appeal from the Federal Court of Australia

Representation:

J Basten QC with N J Williams SC for the appellant (instructed by Australian Government Solicitor)

J T Gleeson SC with M R Speakman for the respondent (instructed by Stuart & Mills)

CATCHWORDS

Minister for Immigration and Multicultural Affairs v Wang

Immigration – Review – Refugee Review Tribunal – Orders made by Federal Court on application for review – Where Tribunal erred in law in making earlier decision – Power of Court to refer matter to Tribunal constituted by member who made earlier decision – Power of Court to give direction as to constitution of Tribunal – Proper considerations in exercise of such discretion – Whether direction in the interests of justice – Whether necessary to do justice to preserve Tribunal's findings of fact on first review.

Immigration – Review – Refugee Review Tribunal – Nature of proceedings before – How Tribunal in second hearing should regard findings of fact made in first hearing.

Words and phrases – "necessary to do justice".

Migration Act 1958 (Cth), s 481(1)(b), s 481(1)(d).

1 GLEESON CJ. The Full Court of the Federal Court, after allowing an appeal from a single judge of that Court, who had dismissed an application for review of a decision of the Refugee Review Tribunal ("the Tribunal"), set aside the decision of the Tribunal and then ordered that the matter be remitted to the Tribunal as previously constituted. The appellant challenges the order as to the constitution of the Tribunal on the grounds of lack of power or, alternatively, error in the exercise of discretion.

2 The facts are set out in the reasons of Gummow and Hayne JJ. I will refer to them only to the extent necessary to explain my conclusion.

3 The power of deciding the constitution of the Tribunal for the purpose of a particular review proceeding was vested in the Principal Member of the Tribunal by the *Migration Act* 1958 (Cth) ("the Act"), (ss 420, 420A, 421, 422, 422A). It was the Principal Member who had the primary responsibility of deciding what was in the interests of the efficient conduct of the review. In the ordinary case, it would be the Principal Member who would be in possession of the information necessary for a proper discharge of that responsibility. The Principal Member allocates work among Tribunal members, is aware of their commitments and availability, and makes administrative arrangements within the Tribunal.

4 At the relevant time, s 481 of the Act empowered the Federal Court, on an application for a review of a decision of the Tribunal, to make various orders, including an order setting aside the decision in whole or in part, and referring the matter to which the decision related to the person who made the decision for further consideration, "subject to such directions as the Court thinks fit". The "person who made the decision" was the Tribunal. The power to give directions included, in a proper case, a power to direct that, on a further hearing, the Tribunal should be differently constituted from the original Tribunal whose decision was under review. So much was conceded by the appellant[1]. To that extent, at least, the powers of the Principal Member were subject to those of the Federal Court. Once it is accepted that it was within the power of the Federal Court, under s 481, in some circumstances to give a direction as to the constitution of the Tribunal on a further hearing, it is difficult to see a basis, as a matter of statutory construction, for limiting the power to any particular circumstances, or any particular kind of direction. Accordingly, I am prepared to accept that there was a power in the Federal Court to direct that a matter be remitted to the member who constituted the original Tribunal. However, the propriety of the exercise of such a power, as a matter of judicial discretion, and comity, is another matter. To take the most obvious considerations that might arise, the Federal Court would ordinarily be unaware of the availability of the member who conducted the original hearing, or of other facts or circumstances

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1 cf *Smith v NSW Bar Association* (1992) 176 CLR 256.

that might bear upon matters relevant to the internal administration of the Tribunal. However, the principal reason for the exercise by the Full Court of the power in the present case was clear; and it had nothing to do with administrative convenience or efficiency.

5 On 10 November 2000, the Full Court of the Federal Court[2] (Wilcox, Gray and Merkel JJ) allowed an appeal from Lindgren J[3], set aside the decision of the Tribunal (constituted by Ms Boland) on the ground of error of law, and ordered that the matter be remitted to the Tribunal.

6 One of the powers of the Federal Court, under s 481(1)(c) of the Act, was to make an order declaring the rights of the parties in respect of any matter to which the Tribunal's decision related. The Tribunal's decision related to an application by Ji Dong Wang ("the respondent") for a protection visa. It was reviewing an unfavourable decision by a delegate of the Minister for Immigration and Multicultural Affairs. The basis of the application was a claim that the respondent, being outside the country of his nationality, the People's Republic of China, was unwilling to return to it because of a well-founded fear of being persecuted for reasons of religion. The Tribunal's reasons for decision set out in some detail its view of the facts. The findings of fact were not in all respects clear, but to a substantial extent they accepted the respondent's assertions in support of his claim for refugee status. The Full Court found that the Tribunal made an error of law. However it did not hold that a correction of the error of law necessarily entitled the respondent to a protection visa. Indeed, the Full Court expressed some reservations as to the correctness of the Tribunal's approach to some issues of fact. Gray J questioned the manner in which the Tribunal tested the respondent's claim to religious belief by reference to the adequacy of his knowledge of religious doctrine. Merkel J criticised the Tribunal for giving "only scant attention" to the available information as to the penalties in the respondent's country of nationality for practising his religion. His Honour also considered that the Tribunal's findings as to his intentions about religious observance if he returned to his country of nationality were unclear. In brief, although the Full Court observed that the Tribunal's findings of fact were generally favourable to the respondent, there were said to be some respects in which they were deficient. The Full Court ordered that the decision of the Tribunal be set aside, and the matter be remitted to the Tribunal to be determined in accordance with law.

7 The consequence of that order was that the Tribunal, in dealing with the remitted matter, would be obliged to determine, in the light of the circumstances

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2 *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548.

3 *Wang v Minister for Immigration and Multicultural Affairs* [2000] FCA 511.

existing at the date of such new determination, and of the information before the Tribunal at that time, all questions of fact and law relevant to the respondent's claim to refugee status. However, the members of the Full Court expressed concern about the possibility that the Tribunal, on the further hearing, might make findings less favourable to the respondent than had been made by Ms Boland. The existence of such a possibility resulted from the provisions of the Act, and from the terms of the order made by the Full Court. Two members of the Full Court, Wilcox and Merkel JJ, were content, at that stage, to leave the question of the constitution of the Tribunal on remittal unresolved, subject to liberty to apply. However, they made clear what they thought should happen, subject to unforeseen difficulties. Merkel J, with whom Wilcox J agreed, said:

> "Although the Court has power to direct that the matter be heard by a differently constituted RRT, that direction may not be appropriate in the present case as to do so might deprive the appellant of findings that were favourable to the outcome of his application. However, I would also desist from directing that the matter be referred back to the RRT constituted by the member who made the decision the subject of the review as there may be circumstances, including a view by the appellant that that was not appropriate, that ought to be considered before that course is ordered. In the circumstances it is appropriate to reserve liberty to apply on the issue of the constitution of the RRT that is to determine the outcome of the appellant's application for a protection visa."

8 The references to "the appellant" are to the present respondent. Presumably, the reference to the possibility that he might have a "view" that it was "not appropriate" for Ms Boland further to hear his matter was intended to mean that he might wish to make submissions on that question.

9 Gray J would have gone further. He thought that justice required, at that stage, an order referring the matter back to Ms Boland. He said:

> "If the RRT were to be reconstituted, there is a danger that the appellant might lose the benefit of the favourable findings of fact to which I have referred. There is a risk that a differently constituted RRT might take a different view as to the appellant's credit, or as to the weight of the evidence, and arrive at findings of fact that would be unfavourable to him. If that were to occur, the appellant would be deprived of the fruits of his successful appeal and the result would be unjust to him."

10 The concerns of all three members of the Full Court were plain. They were not suggesting that considerations of cost or efficiency dictated that the further hearing be by Ms Boland. (We were told that the original hearing lasted one day.) They thought that the present respondent should not be subject to the risk that a freshly constituted Tribunal might take a view of the facts less favourable to him than the view that had been taken by Ms Boland. Whether that

was a proper discretionary basis for the order that was ultimately made is a question that must be faced squarely. In the light of the clear statements of the members of the Full Court, it would be disingenuous to suggest that the order was made to save expense, or for other reasons related to administrative efficiency.

11 At that stage, the views of Wilcox and Merkel JJ prevailed. Because they recognised that there may be reasons, unknown to them, why the matter could not go back to Ms Boland, the order included the following:

> "4. In the event there is a dispute over the constitution of the Refugee Review Tribunal that is to determine the matter the parties have liberty to apply on that issue."

12 The legal nature of the "dispute over the constitution of the … Tribunal" envisaged is unclear. Who would be the parties to the dispute? Would they include the Principal Member of the Tribunal? In ordinary adversarial litigation, the parties do not choose their judge. Where it is the function of a Chief Justice to assign members of a court to hear particular cases, the capacity to exercise that function, free from interference by, and scrutiny of, the other branches of government is an essential aspect of judicial independence. The limits on the power to enquire into the reasons for a decision to assign a judge to a case were examined by the Supreme Court of Canada in *MacKeigan v Hickman*[4]. If one party takes objection to a judge hearing a case, then that objection will be determined in accordance with ordinary procedures and, if unsuccessful, may ultimately constitute a ground of appeal[5]. However, it is one thing for a party to litigation to object to a judge hearing a case. It is a different matter for a party to claim a right to have, or an interest in having, a particular judge hear a case. The proceedings in the Tribunal were not adversarial litigation, and the Tribunal is not part of the judicial branch of government. Whether a decision of the Principal Member as to the constitution of the Tribunal to hear a particular matter might itself be the subject of judicial review is not a question that was argued in the present case; the Principal Member was not a party to the proceedings before the Full Court, and there was no suggestion that any decision of the Principal Member was under review. Rather, the Full Court, on 10 November 2000, contemplated that either party, pursuant to the liberty to apply, might restore the matter to its list, so that the Full Court, if necessary and appropriate, could make an order concerning the constitution of the Tribunal on the future hearing of the remitted matter.

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4 [1989] 2 SCR 796. See also *Rajski v Wood* (1989) 18 NSWLR 512 at 526 per Hope AJA.

5 See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 348 [19]-[22].

13 When the matter was remitted to the Tribunal, the respondent applied to have the matter relisted before Ms Boland. He was told by the Deputy Registrar that, because Ms Boland was based in Melbourne, and because the matter was being handled by the Sydney Registry, a member based in Sydney would be assigned to the case. The respondent then exercised his liberty to apply. The matter came back before the Full Court, which, on 3 April 2001, ordered that the matter be remitted to the Tribunal as originally constituted[6]. It is that order that is the subject of the present appeal. The Full Court inferred that the decision that the matter be assigned to a Sydney-based member had been made by the Principal Member. Merkel J commented that the decision appeared to reflect a "Kafkaesque" preference for efficiency over justice. However, he went on immediately to point out that the Full Court was not reviewing any decision of the Principal Member. It might be added that the Principal Member, and the Tribunal, were not parties to the proceedings in the Full Court, and were not represented by counsel, and that the Full Court had no evidence before it as to the reasons for the assignment of a member of the Tribunal other than Ms Boland to hear the matter other than the statement that had been made by the Deputy Registrar.

14 Wilcox J inferred that there was no difficulty about Ms Boland being available to hear the remitted matter, and said that, this being so, and for the additional reasons expressed in the original reasons of the members of the Full Court, the matter should be remitted with an order that it be heard by Ms Boland. Gray J concurred, for the reasons given in his earlier judgment. Merkel J said that, in their earlier reasons, all members of the Court expressed the view "that the appellant was entitled to have the matter remitted to the originally constituted RRT", although he and Wilcox J had reserved consideration of any reason that might later emerge as to why that was not an appropriate course. He concluded, after referring to the interests of justice:

> "It is to be recalled that the decision of the original RRT was set aside by reason of errors of law and not by reason of any challenge to any of the factual findings made by it. Further, for the reasons set out in the reasons for judgment of each of the members of the Court, it seemed desirable that the same member re-hear the matter on the remittal. No valid reason has been put forward on behalf of the Minister as to why that should not occur."

15 It is clear that the reason for the order finally made by the Full Court was a view that the interests of justice required that the respondent should be protected

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6 *Wang v Minister for Immigration and Multicultural Affairs (No 2)* (2001) 108 FCR 167.

as far as possible from the contingency that, on the hearing of the remitted matter, the Tribunal might take a view of the facts less favourable to the respondent than had been taken by Ms Boland.

16 The content of the interests of justice, in the events that occurred, is to be determined in the light of the provisions of the Act, pursuant to which the respondent made his application for a protection visa, and pursuant to which the delegate of the Minister, the Tribunal, and the Federal Court were acting. Under the statutory scheme, and in consequence of the other orders made by the Full Court, the Tribunal is now obliged to undertake a further review of the delegate's decision. The Tribunal's decision upon that review is to be made on the basis of the facts as they appear in the course of that review. To what extent the information before the Tribunal will differ from the information that was originally before Ms Boland is not known. The findings made by Ms Boland will have no legal status in that further review. Neither Ms Boland, if she undertakes the further review, nor any other member of the Tribunal, if the Tribunal is differently constituted, will be bound by them. The most that can be said is that, as a practical matter, if Ms Boland undertakes the review, then, unless there is a significant change in the information before the Tribunal, she is unlikely to alter the view of the facts she took previously, whereas a fresh decision-maker might see the matter differently even if the information remains substantially the same. If that be regarded properly as a risk, does justice require that the respondent be protected from it?

17 It is tempting, but dangerous, to seek analogies in the field of adversarial litigation. An appeal court, pursuant to statutory power, may order a re-trial limited to particular issues. But where the issues on a re-trial are at large, it would come as a surprise to see a court of appeal order a re-trial before a particular judge for the reason that the judge is thought to be more, or less, likely than others to resolve the issues in a particular fashion. The Full Court, having set aside the Tribunal's decision, appears to have contemplated that the further hearing would in some way be limited, but it made no order to that effect; it attempted to achieve the same practical result by indirect means. Whether it could have achieved the intended result by making different orders, or giving different directions, is not a matter that arises for decision.

18 Proceedings before the Tribunal are not adversarial. No issues are joined. There is an ultimate question to be answered, and a statutory consequence attaching to the answer to that question. The question is whether the Tribunal is, or is not, satisfied of the matters set out in s 65 of the Act which, in the case of the respondent, concern his claim that he has a well-founded fear of being persecuted for reasons of religion. That state of satisfaction must exist at the time of the decision following the hearing of the remitted matter, and must be formed on the basis of all the information before the Tribunal at that time. Justice requires that the respondent's claim be considered fairly, and on its substantial merits. It does not require that the hearing be conducted on the basis

that any favourable findings of fact, made in the course of the decision that was set aside by the Full Court, be somehow preserved for his benefit. Nor does it require the selection, if possible, of a decision-maker who has already shown herself to be willing to accept parts of the respondent's case. Fairness to a person seeking a visa may require that, in a given case, he or she be protected against the possibility, or the appearance, of adverse pre-judgment. It does not require protection against the risk that open-minded judgment will result in a view of certain facts less favourable than that of an earlier decision-maker whose decision has been set aside completely.

19 In making its order as to the constitution of the Tribunal for the purpose of securing for the respondent the benefit of such favourable views as had previously been formed by Ms Boland, the Full Court erred.

20 The appeal should be allowed. I agree with the orders proposed by Gummow and Hayne JJ.

21 McHUGH J. At the relevant time, s 481(1)(b) of the *Migration Act* 1958 (Cth) enacted that the Federal Court of Australia may make "an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit". After allowing an appeal against a decision by a single judge to affirm a decision of the Refugee Review Tribunal, the Full Court of the Federal Court, purporting to exercise the power conferred by s 481(1)(b), ordered that "[t]he matter be remitted to the ... Tribunal as previously constituted for the ... application for review". The order appears to have been made to achieve the object of preserving findings of fact that the Tribunal had made in favour of the respondent who was the appellant in the Full Court. The issue in this appeal is whether the Full Court had power to make the order and, if so, whether, having regard to the facts of the case, it erred in the exercise of its discretion in making the order.

22 In my opinion, the Full Court had the power to make an order of the kind that it did, but it erred in making the order. It erred because s 481(1)(d) of the Act was the provision that authorised orders concerning the composition of the Tribunal, not s 481(1)(b) as the Full Court thought. It also erred because it did not properly address the issue posed by s 481(1)(d) – whether it was "necessary to do justice" that the matter should be heard by the person who presided at the original hearing. Instead the Full Court appears to have thought that the matter should go back to that person because she was more likely than not to make the same findings, favourable to the respondent, Mr Wang, as she had made at the original hearing.

Statement of the case

23 Mr Ji Dong Wang claims that he is a refugee because he has a well-founded fear that he would be persecuted for his religious beliefs if he returned to China. He claims that the fear of persecution had forced him to flee from China. The Tribunal rejected his claim for refugee status. It was not satisfied that the respondent was a non-citizen to whom Australia owed protection obligations under the Convention Relating to the Status of Refugees 1951 as amended by the 1967 Protocol Relating to the Status of Refugees. The Tribunal found that, although the religious practices and beliefs of the respondent would be subject to state controls, if he returned to China, those controls were "insufficient to deprive him of his right to religious freedom".

24 Mr Wang applied to the Federal Court under s 476(1) of the *Migration Act* for a review of the Tribunal's decision. The primary judge held that the Tribunal had not erred in law in holding that Mr Wang was not a refugee. Mr Wang then appealed to the Full Court of the Federal Court. It unanimously held that the Tribunal had erred in law[7].

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7 *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548.

25 Merkel J held that the Tribunal had failed to determine whether the difficulties that the respondent had encountered with the Chinese authorities concerning worshipping in an unregistered church constituted persecution. His Honour said that the Tribunal had determined a different question – whether the laws regulating religious practice were persecutory. Although his Honour remitted the matter to the Tribunal for further hearing, he made no order directing the Tribunal as to how it should be constituted for the rehearing. His Honour expressed the view, however, that, if the matter were heard by a differently constituted Tribunal, it "might deprive the [respondent] of findings that were favourable to the outcome of his application"[8]. He said that "[i]n the circumstances it is appropriate to reserve liberty to apply on the issue of the constitution of the [Refugee Review Tribunal]"[9].

26 Wilcox J substantially agreed with the reasons of Merkel J. Wilcox J also agreed with the orders made by Merkel J. The third member of the Full Court, Gray J, also held that the Tribunal had erred in law. His Honour said that justice could only be done if the matter were referred to the Tribunal constituted by the member whose decision had been set aside. Gray J also said that he expected the Tribunal to "make an express finding that accord[ed] with its implicit finding and hold that, in consequence, the [respondent] is entitled to a protection visa"[10].

27 After the Full Court made its order, the respondent's solicitor wrote to the Tribunal asking for the matter to be heard by the member who had previously decided the application. This request does not appear to have been answered. Instead, the Tribunal informed Mr Wang that his case would be "handled by the Sydney Registry of the Tribunal".

28 Mr Wang brought the matter back before the Full Court under the "liberty to apply" order. The Full Court then referred the matter to the Tribunal, as previously constituted. The reasons of the Full Court show that it thought that it was in the interests of justice that the matter should be remitted to the Tribunal,

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8 *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 at 571 [112].

9 *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 at 572 [112].

10 *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 at 554 [27].

as originally constituted, to preserve those findings, favourable to Mr Wang, that the Tribunal made at the first hearing[11].

The power of the Federal Court to direct that the Tribunal be constituted by a particular person

29 Section 481(1) of the Act relevantly provided:

> "On an application for review of a judicially-reviewable decision, the Federal Court may, in its discretion, make all or any of the following orders:
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> (a) an order affirming, quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or such earlier date as the Court specifies;
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> (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit;
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> ...
>
> (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Federal Court considers necessary to do justice between the parties."

30 In the present case, it was the Tribunal, and not the member constituting it, who was "the person who made the decision" within the meaning of s 481(1)(b). That is because the power conferred by that paragraph is exercisable in reviewing a "judicially-reviewable decision". And s 475 of the Act defined such a decision as a decision of the Immigration Review Tribunal, the Refugee Review Tribunal or other decision made under the Act, or the regulations, relating to visas. No doubt decisions made under the Act or regulations include decisions by individuals. Such a decision would be a "judicially-reviewable decision" for the purpose of s 475. But it does not follow that the person who constituted the Tribunal is a decision-maker for the purpose of s 481(1)(b). The terms of s 475 indicate that there are three classes of decision-makers: the Immigration Review Tribunal, the Refugee Review Tribunal and individuals who are *persona designata*.

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11 *Wang v Minister for Immigration and Multicultural Affairs (No 2)* (2001) 108 FCR 167 at 171-172 [18]-[22].

31 At common law, when a decision, made by a tribunal, attracts the operation of the prerogative writs, the writ is directed to the tribunal and not to the person constituting the tribunal, and that is so whether or not the tribunal is a legal entity[12]. The drafter of Pt 8 of the Act which contains ss 475 and 481 has self-evidently taken the same approach and regarded the Immigration Review Tribunal and the Refugee Review Tribunal as entities that can be made the subject of orders under s 481. Because that is so, it was the Tribunal that made the decision, not the individual who constituted it. In this case, therefore, the "judicially-reviewable decision" was made by the Tribunal. Thus, s 481(1)(b) only authorised the Federal Court to refer the matter back to the Tribunal.

32 But the power to remit includes the power to give "such directions as the Court thinks fit". Does this include a direction that the Tribunal be constituted by a particular member? All members of the Full Federal Court thought that it did[13]. But in my opinion, they erred in thinking that the power to give directions under s 481(1)(b) extended to giving a direction as to how the Tribunal should be constituted. This Court has said more than once in recent years that powers conferred on superior courts should not be read down or confined[14]. But that is a general rule. In a particular statutory setting, it may be overridden by the terms of the legislation.

33 The power to give directions under s 481(1)(b) is wide. It should be read literally and widely, so far as it is possible to do so. But wide as the power is, it is not possible to read it as conferring a power to give a direction that is inconsistent with an express provision of the Act. It is an elementary rule of statutory construction that powers conferred by general words are not intended to

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12 *Brown v Rezitis* (1970) 127 CLR 157 at 169; *Kerr v Commissioner of Police* [1977] 2 NSWLR 721 at 723-725.

13 *Wang v Minister for Immigration and Multicultural Affairs (No 2)* (2001) 108 FCR 167 at 168-170 [1]-[13].

14 *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284, 290; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185, 202-203, 205; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; *PMT Partners Pty Ltd (in Liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313; *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 279 [17].

overrule or supersede powers conferred in specific terms[15]. This is particularly so, where the specific power is conferred subject to limitations or qualifications[16].

34 This Act contains a specific power concerning directions about the constitution of the Tribunal, and it is a power that contains qualifications or limitations in the sense that it must be exercised by a particular person and in writing. Section 421(2) of the Act authorises the Principal Member of the Tribunal to "give a written direction about who is to constitute the Tribunal for the purpose of a particular review".

35 In accordance with the rule of construction to which I have referred, the power to give directions in s 481(1)(b) cannot be read as conferring power on the Federal Court to order the Tribunal to be constituted by a particular person. That power is to be exercised "as the Court thinks fit". It is a general power that is not directed to any specific end. Its general language cannot be construed as authorising a direction that would conflict with the specific power that s 421(2) confers on the Principal Member.

36 That it is the Tribunal to whom the directions may be given reinforces this conclusion. The direction is given to the entity known as the Tribunal. In a particular case, the power to direct may extend to directing *the Tribunal* to treat certain facts as established. But even then, it may need to be qualified by an "unless" clause. And in determining whether the Tribunal can or should be given a direction, the Federal Court must take into account that the Tribunal is not a court; nor does it exercise judicial power. Care must be taken not to confuse the role of the Tribunal with that of a court which must necessarily find or rely on facts that are relevant to defined issues between the parties, issues that concern facts that have occurred in the past.

37 The proceedings before the Tribunal are not adversarial in nature. There is no contradictor, and there are no issues between parties. Whatever findings the Tribunal makes, they are no more than the findings that the Tribunal considers are necessary to explain its decision[17]. Under s 430(1), the Tribunal is bound to prepare a written statement that sets out the reasons for its decision and its

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15 *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1 at 29; *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Live-Stock Corporation* (1980) 29 ALR 333 at 347.

16 *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672.

17 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 330 [3], 338 [35], 340 [44].

findings on material questions of fact and the evidence or other material on which those findings are based. The statement of reasons reflects the decision that the Tribunal makes. It shows the findings of fact and the reasoning for the Tribunal's decision as at the date of that decision. Those facts may or may not be the facts that existed at the time of the Tribunal's earlier decision. But the Tribunal is not required to make any particular findings of fact although its failure to do so in a particular case may indicate jurisdictional error on the part of the Tribunal[18].

38 There may be cases where the Federal Court can find that no material change has occurred in the conditions in the country that give rise to the applicant's fear of persecution. In such a case, it may be open to the Federal Court to direct the Tribunal only to decide the point in respect of which the Court has found legal error. It may also be open to the Federal Court to direct the Tribunal to make a finding as a matter of law. But ordinarily a direction by the Federal Court that the Tribunal must act on facts found at a previous hearing imposes a duty that the Act itself does not impose upon the Tribunal when hearing the matter. Such a direction is also likely to conflict with the Tribunal's duty to decide the applicant's claim for protection at the time that the Tribunal makes its decision. In many cases, such a direction is likely to embarrass the Tribunal by hampering its ability to determine the case as at the date of its decision.

39 It is unnecessary in this case to decide how far the Federal Court has power to direct the Tribunal to treat certain matters as established. It made no attempt to do so in this case. Perhaps it thought that it had no power to do so. In any event, directing the Tribunal as to how it treats facts is not the same as directing it as to how it is to be constituted when it rehears the matter. That is a matter of no concern of the Federal Court unless the matter comes within s 481(1)(d). When a question arises as to whether a particular person should or should not constitute the Tribunal, it is s 481(1)(d) and not s 481(1)(b) that is the potential source of the Federal Court's power to make an order concerning the constitution of the Tribunal.

40 Section 481(1)(d) is a more specific power than s 481(1)(b). It authorises an order that is "necessary to do justice between the parties". The order must be directed to a party. The Tribunal is ordinarily, and in all cases ought to be, a party to the proceedings in the Federal Court. In a bias case, for example, s 481(1)(d) enables the Federal Court to direct the Tribunal that a particular person shall not constitute the Tribunal. To the extent that a direction under s 481(1)(d) would conflict with a direction under the specific power conferred by

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18 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 329 [1], 337-339 [33]-[38], 346 [68]-[69].

s 421(2), the meanings of the two provisions must be adjusted "to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions"[19]. The purpose of s 421(2) is to give the power of assignment to the Principal Member. The express purpose of s 481(1)(d) is to enable the Federal Court to do justice between the parties. The power to ensure that justice is done must trump the power to assign who shall constitute the Tribunal on a particular occasion. Where the two provisions conflict, s 481(1)(d) is the leading provision to which s 421(2) as the subordinate provision must give way[20].

41 In the present case, the issue was not whether a particular person should not hear the case but whether a particular person should constitute the Tribunal for the rehearing. The words of s 481(1)(d) are wide enough to authorise the Federal Court to direct that a particular member should hear the matter being remitted – if it is "necessary to do justice between the parties". Where the need for a decision is urgent, and the original hearing was lengthy, for example, s 481(1)(d) may authorise the Federal Court to direct that the Tribunal be constituted by the person who presided at the original hearing. But in determining what is necessary to do justice, it must be kept in mind that in most cases it is for the Principal Member, not the Federal Court, to determine who shall hear the case. Moreover, the Federal Court must bear in mind that, if the Tribunal is reconstituted, the new member "may ... have regard to any record of the proceedings of the review made by the member who previously constituted the Tribunal"[21]. The cases where it is necessary in the interests of justice that a particular person should constitute the Tribunal are likely to be small in number compared with those where it is necessary in the interests of justice that a particular person should not hear the case.

42 In the present case, the Full Court had power to make an order of the kind that it did. But it could only do so if it was "necessary to do justice between the parties".

The exercise of the power

43 Unfortunately, the Full Court's reasons do not address the issue whether justice made it *necessary* for the Tribunal to be constituted by the member who

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19 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70].

20 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70].

21 Section 422A(3).

decided the case at the original hearing. Instead, the Full Court became diverted by the question whether its power to give directions under s 481(1)(b) overrode the "general powers reserved to the Principal Member under ss 421 and 422A of the Act"[22]. It is true that, at one stage of its reasons, Merkel J (with whom Wilcox and Gray JJ agreed) said that if it "determines that it is appropriate in the exercise of its discretion to remit the matter to the RRT that heard the matter originally, because it is in the interests of justice to do so, then (putting aside issues of unavailability etc) there is no power in the Principal Member to exercise a discretion to determine that a different course is to be followed"[23].

44 But the Full Court made no decision that it was *necessary* to do justice to have the matter heard by the Tribunal member who made the earlier decision. The power conferred by s 481(1)(d) is not triggered because it is "desirable" or "in the interests of justice" to have the matter heard by the original decision-maker. It must be necessary to do justice to make the order. Many procedures are desirable or in the interests of justice. But not all of them are necessary for justice to be done.

45 Although the Full Court appears to have made the order that it did to ensure that Mr Wang got the benefit of the previous factual findings, it did not direct the Tribunal, in rehearing the application, to apply or accept the findings that it had made in the original hearing. It seems to have assumed that, because the matter would go back to the same person, Mr Wang would receive the same favourable findings on certain issues. That may or may not have been a safe assumption. But whether it was or was not, the Tribunal was not bound to make the same findings as it did on the first occasion. To send the matter back to the Tribunal on the basis that it was desirable that the same Tribunal member should hear the matter because she could be expected to make findings favourable to Mr Wang is not an order that was "necessary to do justice". It did not even give Mr Wang the benefit of the previous findings assuming that it was open to the Federal Court to make an order under s 481(1)(b) that had that effect. With great respect to the members of the Full Court, the order that the Court made achieved nothing for Mr Wang but the chance that the Tribunal would again make findings in his favour.

46 In all the circumstances, I have reluctantly concluded that the Federal Court erred when it exercised its power. It has not considered the matter according to law. Its order must be set aside. As I can see no basis upon which

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22 *Wang v Minister for Immigration and Multicultural Affairs (No 2)* (2001) 108 FCR 167 at 171 [21].

23 *Wang v Minister for Immigration and Multicultural Affairs (No 2)* (2001) 108 FCR 167 at 171 [22].

the Full Court could make the order that it did, it would be pointless remitting the matter to the Full Court to re-exercise its discretionary power.

Order

47 The appeal should be allowed. The orders of the Full Court of the Federal Court made on 3 April 2001 should be set aside. In lieu of the Full Court's orders, there should be substituted an order that the application to the Full Court under the liberty to apply order of 10 November 2000 be dismissed. In accordance with the Minister's Notice of Appeal in this Court, there should be no order as to costs in this Court or in the proceedings in the Full Court.

48 GUMMOW AND HAYNE JJ. The respondent, a national of the People's Republic of China, came to Australia in 1997. He applied for a protection visa. In 1998, a delegate of the Minister refused to grant the respondent the visa he sought and the respondent applied to the Refugee Review Tribunal ("the Tribunal") for review of that decision. The Tribunal affirmed the decision not to grant a protection visa.

49 Pursuant to the then applicable provisions of Pt 8 of the *Migration Act* 1958 (Cth) ("the Act"), in particular s 476, the respondent applied to the Federal Court of Australia for review by that Court of the Tribunal's decision. By his amended application the respondent sought orders that the Tribunal's decision be set aside and that "[t]he matter be referred back to the … Tribunal in order for the Tribunal to determine the matter in accordance with the law".

50 The primary judge (Lindgren J) dismissed the application for review[24]. The respondent appealed to the Full Court of the Federal Court. That Court (Wilcox, Gray and Merkel JJ) allowed the appeal[25]. The issues which arise in this Court concern a consequential order which the Full Court made after it had published its reasons for decision in the appeal and made an order allowing the appeal[26]: an order that "[t]he matter be remitted to the … Tribunal *as previously constituted* for the … application for review" (emphasis added). Was there power to make that order? If there was, did the Court err in making it? These reasons will seek to demonstrate that, although the Court may well have had power to make the order, it erred in doing so in this case.

51 It is necessary to say something more about the course of proceedings both in the Tribunal and in the courts below.

The Tribunal

52 The respondent claimed that he fled from his home town, and then from China, out of fear of persecution for reasons of his religious belief. The Tribunal said that it found "his knowledge of Christianity to be somewhat basic" and that he had "provided sufficient information on his beliefs and activities for it to *be feasible* that he has a rudimentary knowledge of the Christian faith" (emphasis added). It accepted that the respondent may have been detained as many as five

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24 *Wang v Minister for Immigration and Multicultural Affairs* [2000] FCA 511.

25 *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548.

26 *Wang v Minister for Immigration and Multicultural Affairs (No 2)* (2001) 108 FCR 167.

times between December 1995 and October 1996 on account of his attending unregistered religious meetings.

53 The Tribunal concluded, however, that the respondent could practise as a Protestant Christian in China and that, although resumption in China of his religious practices and beliefs would be "subject to some state controls", that would be "insufficient to deprive him of his right to religious freedom". The Tribunal was, therefore, not satisfied that he was[27] a non-citizen to whom Australia owed protection obligations under the Refugees Convention[28] as amended by the Refugees Protocol[29].

The Federal Court at first instance and on appeal

54 On the application to the Federal Court for review, the primary judge concluded[30] that the Tribunal was to be understood as having made four findings:

(a) that the respondent could practise as a Protestant Christian in China in both official and unofficial churches;

(b) that the respondent did not hold any significant religious belief that would prevent him from doing so;

(c) that his level of understanding of his Protestant faith was not such that he would encounter religious difficulty in worshipping in an official church; and

(d) that were the respondent to resume worshipping in an unregistered church, difficulties that he might again encounter with the authorities would be due to the enforcement of a regime of government control over the organisation of religious institutions, not the inhibition of the respondent's religious beliefs and practices.

Understanding the Tribunal's decision in this way, the primary judge rejected the submission that the Tribunal had addressed a wrong question, thereby erring in law.

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27 *Migration Act* 1958 (Cth), s 36(2).

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

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

30 [2000] FCA 511 at [34].

55 In the Full Court, Merkel J, with whom Wilcox J substantially agreed, concluded[31] that, although the Tribunal had posed the right question (whether the treatment the respondent had faced, and could expect to face if he returned, was persecutory), it had not answered that question. Rather, so Merkel J concluded, the Tribunal had answered a separate question – whether the laws regulating religious practice were persecutory. Accordingly, Merkel J and Wilcox J held that the appeal should be allowed, the Tribunal's decision set aside, and consequential orders made. Their Honours did not then favour the making of any direction about the way in which the Tribunal should be constituted for the rehearing. Merkel J said that to direct rehearing by a differently constituted Tribunal "might deprive the [respondent] of findings that were favourable to the outcome of his application"[32] but that he might wish to contend that reference back to the Tribunal constituted by the same member would be inappropriate[33]. That being so, with the concurrence of Wilcox J, consequential orders were made remitting the matter to the Tribunal to be determined in accordance with law and reserving liberty to the parties to apply "[i]n the event there is a dispute over the constitution of the … Tribunal that is to determine the matter".

56 The third member of the Court, Gray J, took a different path to the conclusion that the appeal should be allowed, and would then have made a different consequential order. His Honour considered that the Tribunal had implicitly found that there was a real chance that the respondent would be subjected to persecution if he were returned to China and carried out his intention of practising his religion in the way in which he wished to practise it[34]. In his Honour's view[35], justice to the respondent could be done only by setting aside the Tribunal's decision and making an order referring the matter to the Tribunal, constituted by the member whose decision was set aside, for further consideration according to law. Gray J went on to say[36] that he would expect the Tribunal to "make an express finding that accord[ed] with its implicit finding and hold that, in consequence, the [respondent] is entitled to a protection visa".

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31 (2000) 105 FCR 548 at 549 [1] per Wilcox J, 568 [96] per Merkel J.

32 (2000) 105 FCR 548 at 571 [112].

33 (2000) 105 FCR 548 at 572 [112].

34 (2000) 105 FCR 548 at 553 [24].

35 (2000) 105 FCR 548 at 554 [27].

36 (2000) 105 FCR 548 at 554 [27].

Reference back to the Tribunal and exercise of liberty to apply

57 The order for reference back having been made, the respondent's solicitor wrote to the Tribunal asking for the matter to be heard by the member whose decision had been set aside. So far as the evidence reveals, there was no reply to this request. Rather, the Deputy Registrar of the Tribunal wrote to the respondent a letter, which it might be thought was in common form, saying that, because the respondent's address was in New South Wales, "your case is now being handled by the Sydney Registry of the Tribunal" and that the case had been "constituted" to a member other than the member who made the decision that had been set aside.

58 Pursuant to the liberty to apply which the Full Court had reserved, the respondent in this Court (the appellant in that proceeding) brought the question of the constitution of the Tribunal before the Full Court for further hearing. The reservation of liberty to parties to apply to the court making orders is a provision "directed essentially to questions of machinery which may arise from the implementation of [those] orders"[37]. In that connection it is as well to notice that the condition for the exercise of that liberty to apply was expressed by the Full Court's order in terms that are at best awkward and, on one view of that order, would be inappropriate. To speak of a "dispute over the constitution of the ... Tribunal" suggests either that there could be a dispute between the *Tribunal* (not a party in the Federal Court proceedings) and one of the parties to that litigation, or that there could be some agreement (or, therefore, a dispute) between the parties to the litigation about the composition of the Tribunal. Subject to whatever may be the powers of the Federal Court to direct a particular composition of the Tribunal, it was the responsibility of the Principal Member of the Tribunal to allocate the work of the Tribunal among its members[38] and to give a written direction about who was to constitute the Tribunal for the purpose of a particular review[39]. It was not a matter for agreement between the parties to the litigation in the Federal Court and there was no proceeding in that Court seeking to challenge a decision by the Principal Member to constitute the Tribunal in any particular way.

59 All this being so, no reference should have been made in the order to a "dispute over the constitution of the … Tribunal". Rather, as subsequent proceedings revealed, the intention of the order was to reserve liberty to apply if

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37 *Abigroup Ltd v Abignano* (1992) 39 FCR 74 at 88.

38 s 460(2)(b).

39 s 421(2).

the parties to the litigation could not agree upon what consequential orders the Full Court should make. Only in that sense could there be any dispute over the constitution of the Tribunal with which the Federal Court could deal.

Power to direct the constitution of the Tribunal

60 Section 481(1) of the Act, as it stood at the relevant time, provided that the Federal Court might, in its discretion, make all or any of a number of orders. One (specified by par (b) of s 481(1)) was "an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit". That power was given to the Federal Court in relation to an application for review of a "judicially-reviewable decision", an expression defined in s 475 of the Act as decisions of the Immigration Review Tribunal, the Refugee Review Tribunal and[40] other decisions made under the Act, or regulations made under the Act, relating to visas. This last category of judicially-reviewable decisions included decisions made by individual decision-makers (for example, the Minister or a delegate of the Minister).

61 Even without reference to s 22(1)(a) of the *Acts Interpretation Act* 1901 (Cth), and its provision that a number of expressions, including "person", "include a body politic or corporate as well as an individual", the definition of "judicially-reviewable decision", read with the powers given to the Federal Court by s 481, requires that the word "person" in s 481(1)(b) is read distributively to apply to each of the decision-makers identified in the definition of judicially-reviewable decision – the two identified Tribunals and persons making other decisions of the kinds identified in that definition. In this case, the relevant decision-maker was the Tribunal, not the individual who constituted it for the particular review. It was a decision of the Tribunal which was the relevant form of "judicially-reviewable decision". It follows that the Court's power to refer the matter for further consideration was a power to refer it to the Tribunal.

62 That does not conclude the question of power. Account must be taken of, and meaning given to, the further provision of s 481(1)(b) that an order referring the matter for further consideration, in this case by the Tribunal, may be made "subject to such directions as the Court thinks fit". The amplitude of that power should not be unnecessarily confined[41]. It is a power that includes directing that

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40 s 475(1)(c).

41 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *PMT Partners Pty Ltd (in Liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313 per Brennan CJ, Gaudron and McHugh JJ;

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the matter be heard by the Tribunal constituted differently from its constitution for a decision that was set aside. On its face there seems, therefore, no reason to think that it would not extend to confer power on the Court to direct the converse – that the Tribunal be constituted in a particular way rather than *not* be constituted in a particular way.

63 It is, however, not necessary to reach a final conclusion about that question. For the reasons that follow, if the Court had the power to direct that the Tribunal be constituted by the member who constituted it in making the decision that was set aside, it should not have exercised it in this case.

Should a direction have been made?

64 On the second hearing of the matter by the Full Court, pursuant to the liberty to apply that was reserved, each of the members of the Full Court gave reasons[42] for joining in an order that the matter be referred back to the Tribunal as previously constituted. Wilcox J said[43] that the Court had not made such an order when the matter was first before the Court because "it was not known whether that member was available to deal with the matter within a reasonable time" and expressed general agreement with the reasons of other members of the Court. As we have noted earlier, Gray J had dealt with the matter in the reasons first published[44] where he said, among other things, that[45] were the Tribunal to be reconstituted "there is a danger that the [respondent] might lose the benefit of the favourable findings of fact" to which his Honour had referred in his reasons and that[46] there was "a risk that a differently constituted [Tribunal] might take a different view as to the [respondent's] credit, or as to the weight of the evidence, and arrive at findings of fact that would be unfavourable to him".

65 Merkel J proceeded from the premise that in the earlier reasons all members of the Court had "clearly expressed [the view] that the [respondent] was

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Australasian Memory Pty Ltd v Brien (2000) 200 CLR 270 at 279 [17] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ.

42 (2001) 108 FCR 167.

43 (2001) 108 FCR 167 at 168 [2].

44 (2000) 105 FCR 548 at 553-554 [25]-[27].

45 (2000) 105 FCR 548 at 553 [25].

46 (2000) 105 FCR 548 at 553 [25].

entitled to have the matter remitted to the originally constituted [Tribunal]"[47] (emphasis added). For our own part, we do not read the reasons first published as expressing that view. Putting that aside, neither in those reasons, nor in the reasons published when the second order was made, is any basis for such an entitlement spelled out. None was proffered in argument in this Court. Rather, in his second set of reasons, Merkel J appears to have put the matter rather differently, basing the order not on any *entitlement* to it but upon the dictates of the interests of justice[48], and thus discretionary considerations.

66 Be that as it may, all three members of the Court appear to have based the decision to direct that the Tribunal be constituted by the member whose decision had been set aside on the conclusion that it was desirable, perhaps even necessary, to preserve some findings that had been made at the first, failed, review by the Tribunal. Not only was the conclusion wrong, the Court's order did not give effect to it.

67 The Court's direction that the Tribunal be constituted in a particular way said nothing about how the Tribunal, so constituted, should regard findings made in the course of the first review. The Court's orders, taken as a whole, provided for the Tribunal to begin again its statutory task of reviewing the decision to refuse the respondent a protection visa. The direction therefore cannot be justified by reference to the requirements of s 420, that the Tribunal pursue the objective of providing a mechanism of review that is, among other things, economical, informal and quick.

68 Whether any findings from the first review would be preserved would entirely depend upon the view formed by the Tribunal in conducting the second review. On that second review the respondent, as applicant for a visa, could be expected to appear to give evidence and present arguments[49], and, so far as the Court's orders were concerned, it was a review to be conducted in the ordinary way. At best, then, any preservation of findings was speculative and depended upon an assumption that the member constituting the Tribunal would be unlikely to depart from views formed earlier despite considering any further evidence or argument. This may be reason enough to conclude that the Full Court's discretion miscarried. There are, however, more fundamental reasons why the conclusion that it was desirable to preserve findings made at the first review was wrong. To explain why that is so, it is necessary to examine both the task that

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47 (2001) 108 FCR 167 at 170 [17].

48 (2001) 108 FCR 167 at 171 [22].

49 s 425.

the Tribunal had performed in preparing its first reasons for decision and the task that it was required to perform on the matter being remitted to it.

69 For the purposes of conducting the review of the decision to refuse the respondent a protection visa, the Tribunal could exercise all the powers and discretions that were conferred by the Act on the person who made the decision[50]. It was empowered (among other things) to affirm the decision, vary it or set it aside and substitute a new decision[51].

70 When the Tribunal made its decision (in this case to affirm the decision not to grant a protection visa) it was bound to prepare a written statement that, among other things, set out the reasons for its decision, set out the findings on any material questions of fact, and referred to the evidence or other material on which the findings of fact were based[52]. For present purposes, then, it may be assumed that the written statement prepared by the Tribunal in this matter complied with those requirements and it may, therefore, be assumed that it would be possible to identify the findings which the Tribunal made on any material question of fact. As it happens, that assumption may not be right, and identification of the findings made by the Tribunal in this case may not be free from controversy. To give only one example, mentioned earlier, the Tribunal spoke of it as "feasible" that the respondent had a rudimentary knowledge of the Christian faith and that he spent some time as a member of an unregistered congregation. Exactly what that finding amounts to is not perspicuously clear. However, whether or not the identification of the Tribunal's findings would be controversial, there is a more deep-seated problem that is presented by seeking to identify findings made by the Tribunal and have the Tribunal then rely on them in a later review.

71 In adversarial litigation, findings of fact that are made will reflect the joinder of issue between the parties. The issues of fact and law joined between the parties will be defined by interlocutory processes or by the course of the hearing. They are, therefore, issues which the parties have identified. A review by the Tribunal is a very different kind of process[53]. It is not adversarial; there are no opposing parties; there are no issues joined. The person who has sought the review seeks a particular administrative decision – in this case the grant of a

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50 s 415(1).

51 s 415(2).

52 s 430(1).

53 *Mahon v Air New Zealand Ltd* [1984] AC 808 at 814; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282.

protection visa – and puts to the Tribunal whatever material or submission that person considers will assist that claim. The findings of fact that the Tribunal makes are those that it, rather than the claimant, let alone adversarial parties, considers to be necessary for it to make its decision. Those findings, therefore, cannot be treated as a determination of some question identified in any way that is distinct from the particular process of reasoning which the Tribunal adopts in reaching its decision.

72 The Tribunal's written statement of its reasons and, in particular, its statement of the findings on any material questions of fact, must be understood in this way. Indeed, so much follows from *Minister for Immigration and Multicultural Affairs v Yusuf*[54], where six members of the Court held that the Act's requirement for the Tribunal to set out findings of fact was a requirement that focussed upon the subjective thought processes of the Tribunal, not some objectively determined set of "material" facts. That is, it was held that the Act required the Tribunal to set out the findings it *did* make rather than findings it ought to have made.

73 Necessarily, the findings that are recorded in the Tribunal's written statement of its decision and reasons will reflect the matters that the applicant for review will have sought to agitate. No less importantly, the findings that are recorded will reflect what the Tribunal considered to be material to the decision which it made on the review. And what was material to that decision will depend upon the view that the Tribunal formed about the relevant legal questions that the review presented.

74 It follows, therefore, that to attempt to divorce the Tribunal's statement of its findings on what it considered to be a material question of fact, from the decision it made and, in particular, from its reasons, may be dangerous in cases like the present where it is accepted that the Tribunal made an error of law. There are several reasons why it may be a dangerous process. First, there is the notorious difficulty of disentangling findings of fact from conclusions about applicable legal principle. Secondly, assuming that those difficulties can be surmounted, the findings of fact which the Tribunal makes after hearing and assessing the body of material and submissions will necessarily reflect the Tribunal's conclusions about applicable legal principle and will be directed to the questions that those principles present. If, in that review, the Tribunal makes an error of law and a subsequent review is ordered, what is the Tribunal then to do if further findings are to be made about subjects with which the first Tribunal dealt? For it to take, as its starting point, findings that were made on that earlier review

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54 (2001) 206 CLR 323 at 329 [1] per Gleeson CJ, 337-338 [33]-[34] per Gaudron J, 346 [68] per McHugh, Gummow and Hayne JJ, 392 [217] per Callinan J.

under a misapprehension of applicable legal principles may, indeed often would, skew the second factual inquiry by the Tribunal.

75 By contrast, if no more findings need be made on the second review, because only one conclusion was lawfully open to the Tribunal on the findings made at the first, the difficulties to which we have referred would be much reduced, if not eliminated. In the present case, however, only Gray J considered that what he identified as an implicit finding of fact by the Tribunal required a particular outcome on the matter returning to the Tribunal. The other members of the Full Court did not form that view. Even if a majority of the Court had formed that view, it may well have been unnecessary, even inappropriate, to direct reference back to the Tribunal as originally constituted.

76 The considerations we have mentioned so far all relate to the task that the Tribunal was required to perform in its first review of the decision to refuse the respondent a protection visa. There is a further important consideration which bears upon the correctness of the direction which the Full Court gave about the constitution of the Tribunal. It relates to the task that the Tribunal will have to perform on a reference back.

77 When the Tribunal reviews a decision to refuse a protection visa it must decide whether the applicant is, *at the time of the Tribunal's decision*, a person to whom Australia owes protection obligations[55]. So much follows from the fact that the Tribunal exercises afresh the powers of the original decision-maker. Seeking to "preserve" some findings of fact made at an earlier review assumes that no circumstance relevant to those facts has changed in the intervening time. It assumes, for example, that conditions in the country of origin have not changed and, in a case like the present, that the beliefs and intentions of the person who has sought protection have not changed in any material way.

78 There was no evidence before the Full Court which would enable it to conclude that there had been no material change in circumstances. Indeed, given that the proceeding before the Federal Court was in the nature of judicial review, it would not be expected that the Court would have had such material before it.

79 For these reasons, the conclusion that it was desirable to preserve some findings of fact made in the course of the first review was wrong. If the Full Court had power to give the direction it did about the constitution of the Tribunal, its discretion miscarried. There being no other basis advanced, whether in the courts below or in this Court, for making such a decision, it follows that

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55 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at 354-355 [28].

the appeal to this Court should be allowed. The orders of the Full Court of the Federal Court made on 3 April 2001 should be set aside and in their place there should be an order that the application to that Court pursuant to the liberty reserved by the order of 10 November 2000 be dismissed. By its Notice of Appeal the appellant sought no order as to the costs of the appeal in this Court, or the costs of the proceedings before the Full Court which led to the order of 3 April 2001 and there should, therefore, be no order for those costs.

80 KIRBY J. In *Park Oh Ho v Minister for Immigration and Ethnic Affairs*[56], this Court examined the template[57] from which the provision in question in this appeal was copied[58]. In a unanimous opinion[59], the Court made it clear that the purpose of the provision was "to allow flexibility in the framing of orders so that the issues properly raised in the review proceedings can be disposed of" in a way that "avoid[s] unnecessary re-litigation between the parties of those issues". Those words guide my approach to the problem presented by this appeal.

81 The Minister for Immigration and Multicultural Affairs ("the Minister") appeals from a judgment of the Full Court of the Federal Court of Australia[60]. It upheld that Court's power under s 481 of the *Migration Act* 1958 (Cth) ("the Act") to order, or direct, that, following a successful challenge to a decision of the Refugee Review Tribunal ("the Tribunal"), the matter should be remitted for review to the Tribunal as previously constituted[61]. The Minister submits that the Federal Court had no power to so order. Alternatively, he contends that, if there was power, the order made represented an erroneous exercise of the discretion of the Federal Court.

The facts

82 Mr Ji Dong Wang ("the respondent") is a national of the People's Republic of China. He arrived in Australia in 1997. He promptly applied for a protection visa as a refugee[62]. He asserted that he was unwilling to return to his country of

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56 (1989) 167 CLR 637 ("*Park Oh Ho*") at 644. See also *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 ("*Thiyagarajah*") at 355-356 [32].

57 *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"), s 16(1).

58 *Migration Act* 1958 (Cth), s 481. The section has since been repealed. It continues to operate in respect of the decision of the Tribunal affecting the respondent: *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth), Sched 1.

59 Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.

60 *Wang v Minister for Immigration and Multicultural Affairs (No 2)* (2001) 108 FCR 167 ("*Wang (No 2)*"). See also *Wang v Minister for Immigration and Multicultural Affairs* (2000) 105 FCR 548 ("*Wang (No 1)*").

61 Order of the Full Court, 3 April 2001.

62 The Act, s 36. In particular, s 36(2) provided: "A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has

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nationality because of a well-founded fear of being persecuted for reasons of his religion[63]. A delegate of the Minister refused to grant such a visa. The respondent then sought review of that decision by the Tribunal. For the purpose of the review, the Tribunal was constituted by Ms Kerry Boland.

83 In conducting the review, in accordance with s 430 of the Act, the Tribunal was required to prepare a written statement setting out its decision, the reasons for the decision and the findings of any material questions of fact as well as providing references to the evidence or other material on which the findings were based. On 10 December 1999, Ms Boland's decision was handed down[64]. In accordance with the foregoing requirements, the written statement set out the respondent's claims and the evidence adduced before the Tribunal. It concluded with what were described as "findings and reasons".

84 Some of the findings, either expressly or implicitly, accepted a number of assertions that had been made by the respondent during the hearing. He had been closely questioned about his knowledge concerning Christianity and his claimed adherence to the Protestant faith[65]. Ms Boland concluded that the respondent's knowledge of the Bible and of the basic doctrines of Christianity was "rudimentary". Nonetheless, she accepted that, in following his religious practices in China, the respondent had been subject to a "stiff penalty", including detention on five occasions between December 1995 and October 1996 "because the authorities wanted him to stop attending unregistered religious meetings". Arguably, Ms Boland implicitly found that there was a real chance that the respondent would be persecuted if he continued to practise his religion in China otherwise than at registered churches approved, and monitored, by the Chinese government.

85 Having reviewed the evidence and expressed her opinions about the resulting inferences, Ms Boland posed what everyone agreed was the correct question for the Tribunal to answer. This was whether the treatment to which the respondent had been subject in China was persecutory and, if it was, whether he could expect to face similar persecution were he to return and continue practising his religion[66]. Instead of answering those questions, the respondent complained

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protection obligations under the Refugees Convention as amended by the Refugees Protocol."

63 Art 1A(2) of the Refugees Convention.

64 The Act, ss 430A, 430B.

65 *Re Ji Dong Wang*, decision of the Refugee Review Tribunal, 10 December 1999.

66 *Wang (No 1)* (2000) 105 FCR 548 at 568 [94]-[95].

that Ms Boland had "answered the separate question of whether *the laws* regulating religious practice [in China] were persecutory"[67].

86 From the decision of the Tribunal answering the latter question in the negative (and affirming the delegate's decision) the respondent applied to the Federal Court for an order of review. That application was heard by Lindgren J who dismissed it[68]. The respondent then appealed to the Full Court. That Court, in its first decision[69], upheld the respondent's appeal. It set aside the orders of the primary judge and the decision of the Tribunal. It ordered that "the matter be remitted to the [Tribunal] to be determined in accordance with law". However, the Full Court further ordered that "[i]n the event there is a dispute over the constitution of the [Tribunal] that is to determine the matter the parties have liberty to apply on that issue". The Minister brought no application to this Court seeking to appeal from the further order (order 4).

87 Soon after the judgment of the Full Court had been entered, the respondent's solicitor wrote to the Principal Member of the Tribunal ("the Principal Member") requesting that the respondent's application for review be listed before Ms Boland "in order for her to determine this matter in accordance with the decision of the Federal Court". However, in January 2001, a letter from the Deputy Registrar of the Sydney Registry of the Tribunal informed the respondent that:

> "The Tribunal is now ready to consider your case, which was remitted to the Tribunal by the Federal Court on 10th November 2000. Because your address is in NSW, your case is now being handled by the Sydney Registry of the Tribunal. Your case has been constituted to member Blount."

88 The foregoing letter did not expressly indicate that the Principal Member had exercised any powers belonging to him under the Act to direct "who is to constitute the Tribunal for the purpose of a particular review"[70]. Furthermore, the letter did not state that the Principal Member had determined that any previous direction given by him, that Ms Boland should constitute the Tribunal for the purposes of the review, should be revoked or had made a direction that the Tribunal should be reconstituted[71]. However, the matter subsequently proceeded

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67 *Wang (No 1)* (2000) 105 FCR 548 at 568 [96] (emphasis added).

68 *Wang v Minister for Immigration and Multicultural Affairs* [2000] FCA 511.

69 *Wang (No 1)* (2000) 105 FCR 548.

70 The Act, s 421(2).

71 The Act, ss 422 and 422A.

before the Full Court on the assumption that the Principal Member had determined that the Tribunal should be reconstituted for a fresh hearing of the respondent's application for review of the delegate's decision[72].

89 A number of further letters to the Tribunal on the respondent's behalf requested that the matter be relisted before Ms Boland. Those letters were not answered. There was no suggestion that the Minister had urged a different view on the Tribunal. Subsequently, an application was made to the Full Court on 3 April 2001 pursuant to the liberty reserved by order 4 of the Full Court's orders. In the result, the Full Court added to its previous orders an order that "[t]he matter be remitted to the [Tribunal] as previously constituted for the [respondent's] application for review". It is from that supplementary order that, by special leave, the Minister has appealed to this Court.

The two Full Court decisions

90 *The first Full Court decision*: Because this appeal concerns the Full Court's power, and if there be power, the occasion of its exercise, it is unnecessary to examine much more of the Full Court's reasons about the substance of the respondent's challenge to the Tribunal's decision. In the second Full Court decision the judges, in response to arguments addressed to the points now in issue, stated their reasons for reserving their power and for their conclusion that it should be exercised in this case.

91 In the first Full Court decision, each of the judges considered that an available (and in this instance the proper) course to be followed was for the application, when remitted to the Tribunal, to be determined by Ms Boland. Wilcox J agreed with Merkel J that "in the particular circumstances of this case" such a course was "not inappropriate" and indeed "desirable"[73]. Merkel J only desisted initially "from directing that the matter be referred back to the [Tribunal] constituted by the member who made the decision the subject of the review as there may be circumstances, including a view by the [respondent] that that was not appropriate, that ought to be considered before that course is ordered"[74]. Wilcox J was of the same view, saying that "there may be some reason, not known to us, why the previous member cannot, or should not, deal with the matter"[75].

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72 *Wang (No 2)* (2001) 108 FCR 167 at 171 [20]-[21].

73 *Wang (No 1)* (2000) 105 FCR 548 at 551 [11].

74 *Wang (No 1)* (2000) 105 FCR 548 at 571-572 [112].

75 *Wang (No 1)* (2000) 105 FCR 548 at 551 [12].

92 In an earlier case, Gray J had expressed a view that an order pursuant to s 481(1)(b) remitting the matter for further consideration had to be directed to the Tribunal member who made the original decision[76]. Within the Federal Court that opinion has not prevailed. The contrary opinion, expressed by Merkel J in *Nguyen v Minister for Immigration and Multicultural Affairs*[77], has been preferred. This was that s 481(1) of the Act was "intended to confer broad power on the [Federal] Court to make orders that are appropriate, in all the circumstances of the case, on an application for judicial review"[78]. In this case, in the first Full Court, Gray J accepted that s 481 empowered the Federal Court to make an order that a matter be remitted to the Tribunal, as distinct from the particular member who had made the original decision[79]. However, in his Honour's view in the particular case, "justice to the [respondent could] only be done" by "making an order referring the matter to which the decision relates to the [Tribunal] constituted by the member who made the decision set aside"[80].

93 In the first Full Court decision, the approach of Wilcox and Merkel JJ prevailed. Orders were made simply remitting the matter to the Tribunal. However, the judges sufficiently indicated that, given the limited ground that was held to warrant disturbance of Ms Boland's decision, the application to the Tribunal would be returned to her for further consideration. Had that happened, the Full Court and this Court would not have been troubled. It was the reconstitution of the Tribunal, notwithstanding these indications, that reawakened the involvement of the Full Court, pursuant to the liberty that it had reserved.

94 *The second Full Court decision*: When the Full Court relisted the matter, it unanimously concluded that it should add to its orders what Wilcox J described as a "direction"[81]. It did so pursuant to the power reserved in the original orders.

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76 *Kathiresan v Minister for Immigration and Multicultural Affairs* unreported, Federal Court of Australia, 4 March 1998 at 13-14, 19. This view was later adopted by Ryan J in *Rajalingam v Minister for Immigration and Multicultural Affairs* unreported, Federal Court of Australia, 14 September 1998 at 20. In his approach, Gray J accepted that directions could be given that, in a particular case, the Tribunal be constituted by a different member.

77 (1998) 88 FCR 206 ("*Nguyen*") at 215-217. See also *Minister for Immigration and Multicultural Affairs v Yusuf* (1999) 95 FCR 506 at 515-516 [40].

78 (1998) 88 FCR 206 at 216.

79 *Wang (No 1)* (2000) 105 FCR 548 at 553 [23]. See also *Wang (No 2)* (2001) 108 FCR 167 at 168 [4].

80 *Wang (No 1)* (2000) 105 FCR 548 at 554 [27].

81 *Wang (No 2)* (2001) 108 FCR 167 at 168 [2].

Wilcox J was of the opinion that there was "no difficulty about the original member hearing the remitted matter"[82]. His Honour favoured the making of an order to that effect[83]. So did Gray J[84]. It was Merkel J who gave the principal reasons for the second Full Court decision.

95 By reference to the language of s 481(1) of the Act, Merkel J had no doubt that there was power, under par (b) of the sub-section, to order that the matter "should be heard by the same, or a differently constituted, [Tribunal]"[85]. He rejected the contention that doing so represented an illegitimate review of a decision of the Principal Member to make directions for the constitution of the Tribunal[86]. He held that the Principal Member's powers were subject to the particular powers to make appropriate orders on review, reserved by the Act to the Federal Court.

96 In considering whether such power should be exercised in the present case, Merkel J went on to ask "whether there is any reason why the Court should not order that the matter be heard by the originally constituted [Tribunal]"[87]. His Honour considered that, in the decision of the first Full Court, the reasons of each of the judges had "clearly expressed" the view that "the [respondent] was entitled to have the matter remitted" to Ms Boland. He said[88]:

> "It is to be recalled that the decision of the original [Tribunal] was set aside by reason of errors of law and not by reason of any challenge to any of the factual findings made by it. Further, for the reasons set out in the reasons for judgment of each of the members of the Court, it seemed desirable that the same member re-hear the matter on the remittal. No valid reason has been put forward on behalf of the Minister as to why that should not occur."

97 A consideration informing Merkel J's reasons was the instruction in s 420(1) of the Act that the Tribunal is "to pursue the objective of providing a

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82 *Wang (No 2)* (2001) 108 FCR 167 at 168 [3].

83 *Wang (No 2)* (2001) 108 FCR 167 at 168 [1].

84 *Wang (No 2)* (2001) 108 FCR 167 at 168-169 [5]-[6].

85 *Wang (No 2)* (2001) 108 FCR 167 at 170 [16].

86 *Wang (No 2)* (2001) 108 FCR 167 at 171 [21].

87 *Wang (No 2)* (2001) 108 FCR 167 at 170 [17].

88 *Wang (No 2)* (2001) 108 FCR 167 at 172 [23].

mechanism of review that is fair, just, economical, informal and quick". His Honour recalled that in the first decision all members of the Full Court had expressed views "to the general effect that it appeared to be fair and just that the [Tribunal] not be reconstituted"[89]. All that had been offered as an explanation for reconstituting the Tribunal was the fact that the respondent lived in New South Wales and Ms Boland was attached to the Melbourne Registry[90]. But that had always been so. Although the Federal Court was not, as such, reviewing the decision of the Tribunal or the Principal Member on the reassignment of the matter to another member, the fact that the location of the respondent and Ms Boland had not changed since the original hearing gave the reassignment what Merkel J described as "a *Kafkaesque* quality"[91]. Against such a background, his Honour was of the view that it was proper for the Federal Court to exercise the powers reserved in the first decision. Hence the supplementary order now before this Court.

The applicable legislation

98 The exercise by the Federal Court of its jurisdiction to receive an application for review of a judicially reviewable decision[92], including a decision of the Tribunal[93], enlivened the powers in s 481 of the Act to make appropriate orders. Section 481(1), which is relevant, is set out in the reasons of McHugh J[94]. Sub-section (3) of that section further provided:

> "(3) The Federal Court may, at any time, of its own motion or on the application of any party, revoke, vary, or suspend the operation of, any order made by it under this section."

99 The Federal Court also enjoys general powers conferred on it when exercising its "appellate jurisdiction"[95]. The Full Court was exercising that jurisdiction in the appeal from the primary judge. However, the respondent did not rely on such general powers. He submitted that the source of the power of

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89 *Wang (No 2)* (2001) 108 FCR 167 at 171 [20].

90 *Wang (No 2)* (2001) 108 FCR 167 at 169 [11].

91 *Wang (No 2)* (2001) 108 FCR 167 at 171 [20] (original emphasis).

92 The Act, s 476(1).

93 The Act, s 475(1)(b).

94 Reasons of McHugh J at [29].

95 See *Federal Court of Australia Act* 1976 (Cth), s 28.

the Full Court in the present case was s 481(1) of the Act. I will proceed on that basis.

100 It is useful to notice the powers of the Principal Member under the Act. That office holder is empowered to give directions in writing, not inconsistent with the Act or the regulations, as to the operations of the Tribunal and the conduct of reviews[96]. He can "give a written direction about who is to constitute the Tribunal for the purpose of a particular review"[97]. He is obliged to direct another member to constitute the Tribunal "for the purpose of finishing the review" where the member who constituted the Tribunal for the purposes of the particular review "stops being a member" or "for any reason, is not available for the purpose of the review at the place where the review is being conducted"[98]. If the Principal Member thinks that reconstitution "is in the interests of achieving the efficient conduct of the review", in accordance with the objectives set out in s 420(1) of the Act, he may direct that "the member constituting the Tribunal for a particular review be removed" and that "another member constitute the Tribunal for the purposes of that review"[99]. However, such power of reconstitution is not available unless "the Tribunal's decision on the review has not been recorded in writing or given orally"[100] and certain other conditions are fulfilled[101]. In the event of reconstitution of the Tribunal, it is provided that "the member constituting the Tribunal in accordance with the direction is to continue and finish the review and may, for that purpose, have regard to any record of the proceedings of the review made by the member who previously constituted the Tribunal"[102].

Power: the Minister's arguments

101 The Minister submitted that the supplementary order made by the Full Court was beyond the power of the Federal Court. He advanced five principal arguments.

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96 The Act, s 420A.

97 The Act, s 421(2).

98 The Act, s 422(1).

99 The Act, s 422A(1).

100 The Act, s 422A(2)(a).

101 See the Act, s 422A(2)(b) and (c).

102 The Act, s 422A(3).

102 First, it was urged that s 481(1)(b) of the Act did not authorise the Full Court to make the supplementary order. According to the Minister, this was so for two reasons. The "person who made the decision" to whom the order may be directed was a reference to the Tribunal where, as here, the impugned decision was one of the Tribunal. Further, the additional reference to the giving of directions as the Court thinks fit did not empower the Court to direct that the Tribunal be constituted by the original member.

103 Secondly, the Minister argued that the order setting aside the decision pursuant to par (a) – which had been the principal relief given by the Full Court in its first decision – left nothing in the matter to be subject to a further order or direction of the Federal Court. There was nothing left for "further consideration". The matter was returned to the Tribunal, in effect, to start again. This being so, it was open to, in fact necessary for, the Principal Member to constitute the Tribunal for the remitted proceedings. He might, in some circumstances, do so by appointing the same member as had conducted the earlier review. But he was not obliged to do so. Often such an assignment would be inappropriate or impossible.

104 Thirdly, where, as here, the Federal Court inferred that the Principal Member had decided to reconstitute the Tribunal for the hearing of the proceedings remitted to it, that exercise of power drew its authority from powers conferred on the Principal Member by the Act. In the face of such powers, and the exercise of them by the Principal Member, the Minister argued that the Federal Court's general powers under s 481 of the Act did not extend to an interference or the making of orders to the contrary. Under the Act, the internal operations of the Tribunal belonged to the Tribunal itself, not to the Federal Court. The powers of the Federal Court were limited to the performance of the circumscribed functions of review conferred on it by the Parliament. Save for these, the prerogatives of the other branches of government were to be respected by that Court, relevantly the prerogatives to make decisions about the constitution of the Tribunal for the conduct of a second review within the Executive branch[103].

105 Fourthly, the very limits imposed on the jurisdiction and powers of the Federal Court, in its conduct of judicial review under the Act, were said to confirm the conclusion that the orders that the Federal Court might make in discharge of those powers were strictly limited. They were confined to the carrying into effect of the functions of judicial review[104]. Only to that extent could that Court interfere in the performance by the Tribunal of the functions that

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103 cf *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 38 per Brennan J.

104 cf *Thiyagarajah* (2000) 199 CLR 343 at 357 [34].

the Parliament had assigned to it. The Federal Court did not have a roving power to do justice "in the particular case as it saw fit". The doing of "justice" envisaged by the conferral of powers on the Federal Court was not at large. It was limited to justice according to law, including as expressed in the Act[105]. Specifically, this left the determination of the facts exclusively to the Tribunal itself. It was no function of the Federal Court, by fashioning orders limiting the constitution of the Tribunal, to dictate or try to influence the fact-finding processes of the Tribunal.

106 Fifthly, in so far as the Full Court had derived encouragement for the view of the power that it adopted from the statutory injunction that the mechanism of review was to be "fair, just, economical, informal and quick", the Minister pointed out that these were matters of administrative judgment addressed to the Tribunal, not to the Federal Court for the performance of its limited role.

Power: the Full Court's order was valid

107 *Finding the preferable construction*: As is common when a contested issue of statutory construction reaches this Court, our function is to identify the preferable construction and to state the considerations that lead us to that conclusion. Ordinarily, where an appellate court sets aside a decision of another court or tribunal and remits proceedings to that court or tribunal for redetermination, freed from any error identified on appeal or judicial review, the reconstitution of the court or tribunal concerned is left to it[106]. This is so because the court of appeal or review usually conserves its orders to the discharge of its own functions. Considerations of comity and mutual respect between institutions are involved. So is an acknowledgment of the range of considerations that may need to be taken into account in constituting, or reconstituting, the relevant court or tribunal having regard to the availability of personnel, considerations of the death or retirement of members, leave and workload requirements, circuit duties, economies of listing and the like.

108 The respondent did not contest the relevance of these considerations. His primary contention was limited to the Minister's attack on the Full Court's *power* to order as it did in its second decision. He argued that there was power and that the *discretionary* considerations particular to his case were for the Federal Court and in any case sustained, or justified, the order made. So far as the *power* is concerned, the respondent's submission should be preferred. It is necessary to

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105 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 433-434.

106 *Steedman v Baulkham Hills Shire Council [No 2]* (1993) 31 NSWLR 562 at 576-577 with reference to *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39 at 42.

clarify the source and scope of the power before considering the attack on the exercise of the power. Unless its perimeters are identified, the suggestion that they have been exceeded cannot be accurately decided.

109 *An order under s 481(1)(b)*: I have already made reference to the division of opinion in the Federal Court in relation to the nature of an order under s 481(1)(b) where the decision under review is one of a tribunal. The issue is whether the reference to the "person who made the decision" is a reference to the original individual decision-maker or to the tribunal as a body. In *Nguyen*[107], Merkel J expressed his preference for a broader interpretation of the term "person" to include a tribunal. The language of the provision is clearly broad enough to make either course permissible. An order under s 481(1)(b) could be directed either to a tribunal or to the individual who originally constituted it.

110 In the opening words of s 481(1), reference is made to "a judicially-reviewable decision". This expressly includes decisions of the Tribunal[108]. However, the "person who made the decision" includes, where the "decision" has been made by the Tribunal, the person who constituted the Tribunal for that purpose. True, the phrase is broad enough to include other individuals, who are not members of a tribunal and who make judicially reviewable decisions under the Act or the regulations[109]. Such a "person" would include a delegate of the Minister. But this simply explains why the drafter used a generic term, broad enough to include tribunals and individual decision-makers alike.

111 Where a decision of a tribunal or board is set aside on judicial review, the usual course is indeed to refer the matter back to that body for a decision to be made free of error and according to law. In that context, the supervisory writs at common law were ordinarily directed to the body that made the decision, rather than to the individual member[110]. However, that has been described as the ordinary course to follow where there was no reason for the "tribunal [to be] constituted by a particular person or by particular persons"[111].

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107 (1998) 88 FCR 206 at 217.

108 The Act, s 475(1)(b).

109 The Act, s 475(1)(c).

110 *Brown v Rezitis* (1970) 127 CLR 157 at 169 per Barwick CJ; *Kerr v Commissioner of Police and Crown Employees Appeal Board* [1977] 2 NSWLR 721 ("*Kerr*") at 724 per Moffitt P.

111 *Kerr* [1977] 2 NSWLR 721 at 725 per Moffitt P. See also *R v Commissioners of the Court of Requests in the City of London* (1806) 7 East 292 at 295 [103 ER 112 at 114] per Lord Ellenborough CJ.

112 This Court warned in *Park Oh Ho*[112] that the equivalent provision in the ADJR Act should not be interpreted with "undue technicality". This is particularly so in light of its purposes. Such purposes represent an important reason for rejecting a narrow reading of the term "person" in par (b) of s 481(1) of the Act. The ordinary course of remitting the matter to the Tribunal following review is consistent with s 481(1)(b). However, within the statutory scheme par (b) may also have other work to do. Specifically, it would be consistent with its language that a decision be returned to the member who originally constituted the Tribunal. This would be particularly appropriate where, due to the nature of the identified error in the original decision, the matter is sent back for "further consideration" as part of the continuing review. A case such as the present, where the identified error occurred in performing the very last step of the decision-making process, is an instance where the latter course might be appropriate and preferable.

113 *Power to give a direction*: Further, as Merkel J[113] pointed out, the reference in s 481(1)(b) to "such directions as the Court thinks fit" includes, in particular circumstances, a power to direct that the Tribunal be constituted by the member who made the original decision[114]. There are a number of reasons for my conclusion that the Full Court's interpretation was correct.

114 First, s 481(1) is designed to confer specified powers on the Federal Court. That Court is a superior court created under the Constitution. It has been repeatedly held that legislative conferral of such powers on a court is not to be narrowly construed[115]. This is so because the receptacle of the power can be trusted to exercise it only where such exercise is warranted. A superior court must normally be afforded a large field of discretionary power with which to respond to the myriad circumstances coming before it. It would be contrary to

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112 (1989) 167 CLR 637 at 644.

113 *Wang (No 2)* (2001) 108 FCR 167 at 170 [16]. See also at 168 [1] per Wilcox J agreeing.

114 Gray J agreed with this analysis, while at the same time maintaining his view that an order under par (b) could be directed to the actual person who made the decision: *Wang (No 2)* (2001) 108 FCR 167 at 168-169 [5].

115 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185, 202-203, 205; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420-421; *CDJ v VAJ* (1998) 197 CLR 172 at 201 [110]; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 586-587 [221]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 423-424 [110]; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 479 [134].

legal authority and principle to read the scope of the power conferred by s 481(1)(b) narrowly.

115 Secondly, the suggestion that the power in s 481(1)(b) can have no work to do after an order setting aside the whole of a decision previously made by the Tribunal cannot stand with the clear statement in the opening words of s 481(1). By those words, the Parliament has conferred on the Federal Court power to "make all or any of the [specified] orders". This phrase makes it plain that an order under par (b) may coexist with an order quashing or setting aside an earlier decision of the Tribunal.

116 Thirdly, this reading of the power in s 481(1)(b) is also consistent with the observations of this Court in *Park Oh Ho*[116] with which I began these reasons. Although that case was addressed to a different paragraph in the equivalent sub-section of the ADJR Act, the desirability of avoiding unnecessary re-examination of the issues for decision is an equally relevant consideration in fashioning an order under s 481(1)(b). The whole spirit of s 481(1) is one that embraces flexibility and the adjustment of the orders in a way that is appropriate to the circumstances of the particular case, specifically the correction of the identified error in the decision-making process. Such an approach is compatible with the closing words of par (d), by which the Federal Court is empowered to make an order of the specified kind that it "considers necessary to do justice between the parties".

117 No doubt the powers conferred by s 481(1) must be exercised judicially and for the purpose of completing the judicial review for which they are afforded. But within those broad strictures, there is no reason to read down the powers as stated. Approached in this way, s 481(1)(b) envisages an order directed to the original decision-maker within the Tribunal that limits the interference of the Federal Court to the correction of some particular aspect of the original decision. It permits an order to be made that that decision should receive "further consideration" in the light of such correction and subject to a direction requiring reconsideration by the original decision-maker. It may be possible for the Court, on review, to achieve a similar result through fashioning an order under another paragraph of the sub-section, say par (d). In the present proceedings the Tribunal had not been joined as a party. Yet the avenue provided by par (b) was available and was utilised.

118 Fourthly, an order of such a kind under s 481(1)(b) was not incompatible with the general powers of the Principal Member to constitute or reconstitute the Tribunal in accordance with the Act. The Principal Member retains his general powers. But where, in special circumstances, a decision of the Tribunal has been

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116 (1989) 167 CLR 637 at 644.

subject to review in the Federal Court and has been quashed or set aside by that Court (which, in its discretion, makes, additionally, an order under s 481(1)(b)) the specificity of the Federal Court's consequential powers overrides the generality of the Principal Member's powers. The successive provisions of the Act must be read so as to work together harmoniously[117]. The exercise by the Federal Court of its powers is not an interference with the exercise by the Principal Member of his. In the case where the Court's order includes a direction with respect to the constitution of the Tribunal, any exercise of the power by the Principal Member must conform to that order.

119 Fifthly, it may be accepted that the Federal Court's functions are limited to those of judicial review and, under the Act, at the relevant time, were significantly circumscribed so as to narrow them even further[118]. However, these limitations are irrelevant to the present problem. The decision was reviewed. No application has been made to this Court to challenge the substance of that decision.

120 Normally the determination of questions of fact is a matter exclusively for the Tribunal. But nothing in the Full Court's supplementary order purports to deny this. The question is not whether the Tribunal should, or should not, make relevant decisions of fact. The question is whether, in the particular circumstances, the Federal Court was *empowered* to direct that, for the purposes of finishing the review according to law, the Tribunal be constituted by the original decision-maker, in effect for further consideration of the facts in the light of the limited error of law which the Full Court found. This does not amount to an impermissible dictation to the Tribunal of how it will *find* facts. On the contrary, it accepts fully that it is for the Tribunal to make the relevant factual findings based on the evidence before it.

121 Sixthly, it is true that the statutory prescription to pursue the objective of providing a mechanism of review that is "fair, just, economical, informal and quick" is addressed to the Tribunal itself. Ordinarily, it would be for it to decide how those objectives should be attained. Presumably, the Principal Member will have those objectives in mind in making directions for constitution or reconstitution of the Tribunal for a particular review. However, once these are stated as the statutory objectives for the review procedures of the Tribunal, I see no inconsistency in the Federal Court's adapting its orders, in the exercise of its own powers, in a way that is most compatible with the attainment of such objectives.

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117 *Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J.

118 The Act, ss 475(2), 476(2), (3) and (4).

122 In the present case, there might have been some additional cost following a return of the matter for reconsideration by Ms Boland, such as the provision of a videolink[119]. But every other element of the Parliament's instruction about the way the Tribunal was to operate was advanced by the Federal Court's supplementary order. At least, it was open to the Federal Court to so conclude. The Act is to be read as a whole. To suggest that, in its review of a decision of the Tribunal and consequent orders, the Federal Court is to ignore the parliamentary injunctions about the way the Tribunal is to operate, is to slip into the error of reading s 481 in isolation from its place in the legislative scheme.

123 Seventhly, it was conceded by the Minister (correctly in my view) that it was competent for the Federal Court, in making an order under s 481(1)(b), upon returning a judicially reviewable decision to the Tribunal, to give directions to the effect that the application should be reheard before a *differently* constituted Tribunal. Such a direction is not uncommon in the exercise of appellate or judicial review jurisdiction where a conclusion is reached that a rehearing by the same decision-maker would be *unlawful* (where a decision is set aside for reasons of actual or apparent bias) or otherwise *undesirable* (in the interests of justice)[120]. In the exercise of its appellate and review jurisdiction under the Constitution, this Court does not hesitate to so provide[121].

124 Once it is conceded that it is open to the Federal Court, reviewing a decision of the Tribunal, to give a *negative* direction concerning the composition of the Tribunal on return of the matter to it, it is impossible as a matter of statutory language and legal principle to justify restricting the power to give directions of an *affirmative* character. The directions that may be given are stated to be such "as the Court thinks fit"[122]. There is no basis in the conferral of power to adopt such a disjointed construction. The power is not, of course, entirely at large. It remains an incident to the judicial review powers of the Court. Its exercise is both guided and circumscribed by the nature of the error identified in the decision of the Tribunal.

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119 That was how the original Tribunal hearing was conducted.

120 *Smith v NSW Bar Association* (1992) 176 CLR 256 at 269; cf *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39 at 42-43; *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78 at 122; *Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608 at 615.

121 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 266; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 300.

122 The Act, s 481(1)(b).

125 *Conclusion: there was power*: It follows that the conferral by the Parliament on the Federal Court of a discretionary power under s 481(1)(b) sustained the supplementary order made by the Full Court in its second decision. The making of such an order had been expressly reserved by that Court's first decision.

126 I do not doubt that the Full Court's preference was known to the Tribunal at the time a decision was made to reassign the matter to another member. However that may be, the power to make the supplementary order was reserved by the Federal Court. The power was exercised within a reasonable time and in a way that accorded procedural fairness to both parties. The purported reassignment, if there was such an action on the part of the Principal Member, was a nullity. It was inconsistent with a judicial order that formed part of the completion by the Federal Court of its determination of the appeal in the matter before it.

Discretion: the Minister's arguments

127 In the event that the arguments on the existence of power failed, the Minister submitted that the Full Court's exercise of the discretion envisaged by the power had miscarried. Before this Court his arguments to this effect were not developed orally. Presumably this was so because the Minister recognised how exceptional it would be to succeed in a challenge to a discretionary decision, made within a determined power. A number of arguments were mentioned in his written submissions.

128 First, it was said that the exercise of any such power was limited to the attainment of the purpose for which the power existed. Relevantly, this could only be to complete the judicial review of a decision of the Tribunal[123]. Because the Tribunal, however constituted, would be obliged to reach its conclusion on the application on the basis of the materials before it at the time of its decision (and because such materials might in a given case necessitate reconsideration of an earlier conclusion) no issue estoppel could arise to prevent the Tribunal deciding facts relevant to the respondent's entitlements[124]. On this basis, the return of the matter to the same decision-maker, in the hope of preventing a reopening of, or preserving, earlier factual findings and inferences, would be futile. In so far as the Full Court has sought to achieve such an objective, it had exercised its discretion by reference to an irrelevant consideration.

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123 *Thiyagarajah* (2000) 199 CLR 343 at 356-358 [34]-[36]; cf *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 433-434; *Minister for Immigration and Ethnic Affairs v Gungor* (1982) 42 ALR 209 at 220.

124 cf *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 306-307 [41]-[42].

129 Secondly, in its criticisms of the purported reassignment of the application to a new member of the Tribunal, the Full Court had taken into account what it considered to be unconvincing reasons contained in the Deputy Registrar's letter to the respondent. The Minister submitted that this too was an irrelevant consideration. There was no obligation for the Tribunal, or the Principal Member, to justify publicly the considerations that lay behind such decisions. They were internal to the Tribunal and immune from judicial examination[125]. The Tribunal was not a party to the proceedings in the Federal Court. It was therefore said that the Full Court had no business reviewing the reassignment decision in the course of disposing of the review proceedings.

130 Thirdly, attention was drawn to the statement in the second Full Court's reasons to the effect that the question was "whether there is any reason why the Court *should not* order that the matter be heard by the originally constituted [Tribunal]"[126]. This appeared to reverse the onus from the normal rule of disposition that would ordinarily leave the constitution of a court or tribunal to its own proper processes. The Minister complained that the Full Court's approach evidenced an impermissible pursuit by the Full Court of a collateral purpose which was calculated to deprive the Tribunal of its statutory function of determining, on the material available and at the date of its decision, whether it was satisfied that the respondent had a Convention-based fear of persecution[127]. This Court was told that, since the Full Court's order in the present matter, similar orders had been made in Federal Court proceedings, intruding (as it was put) into the fact-finding functions of the Tribunal in a way that was incompatible with the statutory presumption that such functions would be performed with even-handedness by the Tribunal itself[128].

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125 The Act, s 435. See *Herijanto v Refugee Review Tribunal* (2000) 74 ALJR 698 at 700-701 [13], [16] per Gaudron J; 170 ALR 379 at 382, 383; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966; 190 ALR 601.

126 *Wang (No 2)* (2001) 108 FCR 167 at 170 [17] (emphasis added).

127 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 76 ALJR 667 at 681 [88]; 187 ALR 574 at 594.

128 *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154 at 178-179 [92]-[95]; *Aala v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 204 at [61]. See also *Minister for Immigration and Multicultural Affairs v Villa* (2001) 115 FCR 16 at 19-20 [15]-[17] per Tamberlin J.

The exercise of discretion was unassailable

131 The arguments about the exercise of the Federal Court's powers are unconvincing. Doubtless this explains why the main attack by the Minister was on the issue of *power*. This Court has now held[129] (or assumed[130]) that such attack fails. If power is established, a challenge in this Court to its discretionary exercise would ordinarily be an unpromising endeavour and unlikely on its own to attract a grant of special leave. Where the Parliament has conferred discretionary powers in broad terms on a court to allow their flexible deployment in a great number of cases and in a variety of circumstances, a court such as this should hesitate long before intervening.

132 Secondly, once it is accepted that the power to make an order existed, it is irrelevant to complain that its exercise involved an intrusion into the powers of the Principal Member. The very purpose of providing such a power was to allow the Tribunal, in appropriate circumstances, to pick up its consideration of the matter, at the point at which the earlier decision was reached. The decision-maker is then obliged to give "further consideration" to the earlier decision, freed from the error of law identified by the Federal Court. The inquisitorial character of the Tribunal is completely untouched. How it goes about its decision-making on remitter is a matter entirely for it in light of the evidence and material placed before it.

133 It is precisely because the Tribunal is obliged to make findings of fact, and to state them in its reasons for decision, that such findings may afford the foundation for the "further consideration" by the decision-maker. Because of delays in litigation, it may be expected that in some cases the "further consideration" of the case would require the making of supplementary determinations of fact. One example in refugee cases may be determinations in relation to country information. The conditions in the country of the applicant's nationality may have altered significantly in the intervening period. Yet, in some cases, the "further consideration" contemplated by s 481(1)(b) of the Act may, as a practical matter, involve little more than a re-examination of the factual determinations, freed from the legal error identified by the supervisory court. Such an approach promotes the statutory objectives for the review procedures of the Tribunal.

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129 Reasons of Gleeson CJ at [4], reasons of McHugh J at [22] and my own reasons at [125].

130 Reasons of Gummow and Hayne JJ at [62].

134 This is not the occasion to explore the question of issue estoppel in administrative proceedings[131]. The respondent did not assert that he was entitled to such an estoppel. I do not read the Full Court's second decision as suggesting otherwise. The most that was assumed, correctly in my view, was that, upon return of the matter to "the person who made the decision", absent any new evidence, or material that obliged different conclusions, the "further consideration" could be economically and quickly concluded. Such a course was arguably warranted. The Full Court had decided that Ms Boland had asked herself the correct question but then had proceeded to answer another, different and irrelevant, one. The purport of the supplementary order and direction was to require "further consideration" which might be limited to Ms Boland's simply addressing, and answering, the correct question, as the Federal Court had found the law to require.

135 Thirdly, the complaint that the discretion miscarried because the Federal Court, in effect, conducted a review of what it inferred to have been the Principal Member's decision to reconstitute the Tribunal is also unconvincing. The Full Court made it clear that it was not doing this[132]. In any case, it is far from clear that any such decision existed, although the Full Court proceeded on that assumption.

136 Fourthly, it is incorrect to say that, by making an order under s 481(1)(b), the Full Court exceeded the proper boundaries of judicial review, pursued a collateral purpose and unfairly promoted the interest of one side in the fact-finding of the Tribunal. Once it is accepted that power existed to make a supplementary order under s 481(1)(b), it must also be accepted that such orders were contemplated by the Parliament. It is unsurprising that they should be. They fit comfortably into the identified statutory objectives that the Tribunal's processes of review should be "fair, just, economical, informal and quick"[133].

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131 cf *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 453-456, 460. See Hall, "Res Judicata and the Administrative Appeals Tribunal", (1994) 2 *Australian Journal of Administrative Law* 22 and McEvoy, "Res Judicata, Issue Estoppel and the Commonwealth Administrative Appeals Tribunal: A Square Peg into a Round Hole?", (1996) 4 *Australian Journal of Administrative Law* 37.

132 *Wang (No 2)* (2001) 108 FCR 167 at 171 [21].

133 cf *Comcare v Grimes* (1994) 50 FCR 60 at 66-67; *Re Quinn and Australian Postal Corporation* (1992) 15 AAR 519 at 525-526.

137 Fifthly, the suggestion that the Full Court reversed the onus is only superficially attractive. In stating the issue as he did[134], Merkel J should be understood as continuing the consideration of the issues relevant to the proper exercise of the Court's discretion. For reasons that they severally stated, all of the judges had earlier expressed the opinion that, in order to do justice to the respondent, the matter should be referred back to Ms Boland, especially given the nature of the fact-finding process and the limited error identified in her decision. In that context, the reference to "[t]he remaining question" must be understood as an examination, no doubt proper, of the existence of considerations against making the direction. Merkel J went on to conclude that no such convincing considerations had been proffered[135].

138 The Parliament has stated that the proceedings before the Tribunal must be "fair" and "just". That would, in any case, normally be a presumption imputed to its operations. In furthering the objectives of fair and efficient review it may, in certain circumstances, be appropriate for the Federal Court to make an order or direction (affirmative or negative) in relation to the constitution of the Tribunal for the purposes of reconsidering the matter. Here, there had been a significant factual contest about whether the respondent was indeed a Protestant Christian, whether he had been incarcerated and whether he had effectively been limited to worship in government-regulated churches in which the congregants were allegedly subject to official propaganda. The respondent had been tested on his knowledge of Christian doctrine and about the books of the Old Testament. He appears to have been asked questions about his religion that many Australian Christians might not be able to answer. The findings of the Tribunal, constituted by Ms Boland, arguably amounted to acceptance of the respondent's assertions on these points. The error identified was purely an error of law – and a limited one.

139 In fashioning its orders in the present appeal, the Full Court sought to provide the necessary flexibility to the Tribunal to perform its decision-making function as envisaged by the Act. This was one of the reasons why Wilcox and Merkel JJ refrained from making the direction in the Full Court's first decision. One of the objects of the Full Court's supplementary order was to save the respondent the ordeal of having to go through the same fact-finding process again before a differently constituted Tribunal if this were unnecessary. Members of this Court, faced with the same question, might not have made such an order. But once *power* is established, and it is remembered that the power is broadly stated so as to be used flexibly, it is legally erroneous to give effect to a different view on the *use* of that power. The Full Court's exercise of its

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134 *Wang (No 2)* (2001) 108 FCR 167 at 170 [17].

135 *Wang (No 2)* (2001) 108 FCR 167 at 171-172 [18]-[22].

discretion should be respected. No error of principle has been shown. The reasons for hesitation in the disturbance of discretionary decisions are too well known to require elaboration[136]. A mere "difference of opinion"[137] as to the way to exercise the discretion is not a sufficient justification for disturbance. We should respect this Court's repeated authority on this point just as we constantly insist that other courts do so[138].

Conclusion and orders

140 If, contrary to my view, any of the challenges by the Minister disclose an error in the exercise of the power and discretion conferred on the Federal Court, it would remain for this Court to exercise the discretion afresh or to return the matter to the Full Court for redetermination. If, on this footing, it was necessary and appropriate to exercise the discretion afresh, for the reasons that I have given I would come to the same conclusion as the Full Court did. Apart from everything else, the power provided was intended to contribute to the expedition of the process of decision-making and the reduction of the costs and other burdens on the respondent and on the Australian community that are only too well illustrated by these proceedings.

141 In the end, this appeal represents an extraordinary challenge by the Executive Government to a procedural direction made by a superior court within its powers and discretion. This Court should not respond to that challenge by undermining the breadth of the power or the width of the discretion reposed in the Federal Court by law enacted by the Parliament. This Court should be the upholder of the independent decisions of the courts. Not least should it be so in an area of jurisdiction where the weak and the vulnerable come before the courts in conflict with the resourceful and determined.

142 The appeal should be dismissed with costs.

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136 *House v The King* (1936) 55 CLR 499 at 504-505; *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 176-178; *Norbis v Norbis* (1986) 161 CLR 513 at 517-519.

137 *Norbis v Norbis* (1986) 161 CLR 513 at 518.

138 *U v U* (2002) 76 ALJR 1416 at 1431 [93]-[94]; 191 ALR 289 at 309.