HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

RE PHILLIP RUDDOCK IN HIS CAPACITY AS MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS & ANOR — RESPONDENTS

EX PARTE APPLICANT S154/2002 — APPLICANT/PROSECUTRIX

Re Minister for Immigration and Multicultural Affairs;
Ex parte Applicant S154/2002
[2003] HCA 60
8 October 2003
S154/2002

ORDER

1. *Order nisi, granted on 7 November 2002, discharged.*

2. *Prosecutrix to pay second respondent's costs.*

Representation:

J M Patel for the applicant/prosecutrix (instructed by the applicant/prosecutrix)

No appearance for the first respondent

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

CATCHWORDS

Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002

Immigration – Refugees – Refugee Review Tribunal – Procedural fairness – Whether Tribunal misled applicant into believing factual claim had been accepted as true – Whether Tribunal relied on evidence tendered earlier to disbelieve factual claim without giving applicant opportunity to demonstrate evidence was not inconsistent with factual claim – Whether Tribunal relied on belated disclosure of rape incident to disbelieve factual claim in circumstances where belated disclosure might have been explicable – Whether subsequent hearing and provision of written submissions cured any earlier breach of requirements of procedural fairness – Inquisitorial hearing by Tribunal – Whether failure by Tribunal to afford procedural fairness amounting to jurisdictional error.

Constitution, s 75(v)
Migration Act 1958 (Cth), s 420(2).

1 GLEESON CJ. The facts of the case are set out in the reasons for judgment of Gummow and Heydon JJ ("the joint reasons"). I agree with those reasons, and would add only two observations.

2 First, the Tribunal Member's remark that he did not need to ask any further questions about an incident said by the prosecutrix to involve rape was a response to her statement that "I cannot tell this", indicating that she did not wish to be pressed for further details. It is improbable that the Tribunal Member intended to use legal jargon indicating an acceptance of that part of the case for the prosecutrix, as when a judge says to counsel: "I do not need to hear you further". It is improbable in the extreme that the prosecutrix would have been familiar with such legal jargon, and would have understood the remark in that light. In any event, as the joint reasons demonstrate, even if such a misapprehension had been created, it must have been dispelled by what followed.

3 Secondly, the particulars in the order nisi complain of a denial of procedural fairness by the creation of a wrong and misleading impression and a false belief that the Tribunal had accepted part of the prosecutrix's evidence. I do not accept that contention. Additionally, however, it should be noted that what is alleged is materially different from a complaint that, apart from the creation of a misleading impression or a false belief, the Member in some way, by his conduct of the proceedings, prevented the prosecutrix, and the migration agent who was assisting her, from presenting her case as they wished, or from saying everything they wanted to say. Further, there is no complaint that the prosecutrix received insufficient assistance or encouragement from the Tribunal Member. If any such complaint were made, there would be a serious question to be considered as to the relationship between a complaint of that nature and the requirements of procedural fairness.

4 The order nisi should be discharged with costs.

GUMMOW AND HEYDON JJ.

The nature of the proceedings

5 On 17 July 2001 the Refugee Review Tribunal ("the Tribunal"), which is the first respondent, affirmed the decision of a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister"), who is the second respondent, refusing the prosecutrix a protection visa under the *Migration Act* 1958 (Cth) ("the Act") on the ground that it was not satisfied that the prosecutrix was a person to whom Australia owed protection obligations under the Refugees Convention.

6 On 7 November 2002, a Justice of this Court (Gaudron J), on an application made by the prosecutrix in the original jurisdiction conferred by s 75(v) of the Constitution, ordered that the Tribunal and the Minister show cause why in respect of the decision of 17 July 2001 certiorari should not issue to remove that decision into this Court to be quashed and mandamus should not issue directing the Tribunal to rehear and determine the matter according to law. The argument which led to the Order Nisi and which was advanced to this Court was that the prosecutrix was denied natural justice. The Tribunal rejected a claim by the prosecutrix that she had been raped by police officers in Sri Lanka while in their custody. The prosecutrix complained that after she had made this claim to the first respondent, she was told by the Tribunal Member conducting the hearing: "Ok. I don't need to ask you any further question about that particular incident."

7 Counsel for the prosecutrix adopted as the essence of her case a statement made by Gaudron J about that observation:

> "If I had been appearing for the applicant and the presiding member had said that to me, I would have thought that has been accepted as fact ….
>
> It is not a question of what the Tribunal was thinking. I am not in the least bit concerned what the Tribunal is thinking. The question from a procedural fairness point of view is what the applicant, but perhaps more significantly her representative, thought was indicated by that. Ordinarily, if a court says that to you, a wink is as good as a nod and you sit down."

The background to the proceedings

8 The prosecutrix is Sri Lankan in citizenship, Tamil in ethnicity, and Christian in religion. She was born on 18 January 1974 in Kandy. In 1994 she went to live in Colombo. In 1995 she moved to Nilambe, a town near Kandy. In 1996 she moved to the Maldives and lived in a de facto relationship with her

employer, a Pakistani national of Muslim religion. She made several return trips to Sri Lanka in 1996-1998. She married her employer on 20 December 1998 and they arrived in Australia on 31 December 1998, together with the prosecutrix's mother.

9 On 9 February 1999 the prosecutrix applied for a protection visa. Her contention was that she was a Tamil suspected by the authorities of being a member of the Liberation Tigers of Tamil Eelam ("LTTE"), a Tamil separatist group. On 12 March 1999 a delegate of the second respondent refused the application. He did so on the ground that she was not regarded as being associated with the LTTE, had never been arrested or detained under anti-terrorist legislation, had been free to leave and return to Sri Lanka in the past, was of no interest to the Sri Lankan authorities, had no well-founded fear of persecution, and hence was not owed protection obligations by Australia.

10 On 29 March 1999 the Tribunal received an application to review the delegate's decision. Among the material relied on to support the application was a report by a consultant psychologist with whom the prosecutrix had had ten consultations in 1999-2000, "mostly with her mother … sometimes with her husband and, more rarely, alone". On 29 March 2000 the Tribunal, after a hearing conducted by Mr J Vrachnas on 8 February 2000, affirmed the delegate's decision. On 31 August 2000 the Federal Court of Australia set aside the decision of 29 March 2000 on the ground that the Tribunal had failed to make findings about a claim made by the prosecutrix for the first time at the hearing on 8 February 2000 that she feared being recruited by the LTTE. The matter was remitted to the Tribunal.

11 An oral hearing of the Tribunal was arranged for 1 June 2001 and conducted by another Member, Mr J C Blount. The prosecutrix's evidence was given in Tamil and translated into English by an interpreter. The prosecutrix was assisted by a migration agent ("prosecutrix's adviser").

12 At that hearing the Tribunal Member said he would have regard to evidence previously provided by the prosecutrix. He questioned her about her movements from Sri Lanka to the Maldives and back in 1996-1998. He then questioned her about her claims to have moved about Sri Lanka from 1984 on. After asking some questions seeking to clarify whether the prosecutrix had stayed in Colombo in the period before moving to the Maldives in 1996, and being told that she had been staying at Nilambe, the Tribunal Member asked the following questions[1]:

---

1 "M" refers to the Tribunal Member, and "I" to the interpreter.

"M Did your mother arrange the travel and employment in the Maldives for you?

I No Sir I ...

M Do you want me to repeat the question?

I Yes Sir I ...

M I was asking whether when you went to the Maldives whether it was your mother who arranged your travel and employment there?

I In the meantime there was an incident that happened in my life.

M Which was in Nilambe?

I Yes.

M When was this?

I In 95.

M When in 95 you recall? In the middle of the year, the end of the year?

I It should be I think in the end of the year.

M Ok. What was that happened?

I This has not been described in the statement. My mother doesn't know. Nor does my husband know.

M Please continue.

I I have described in the statement the saying that one night some boys came and knocked at the door. Later mother came no no that elderly lady. That elderly lady came and she scolded and wanted them to go. I have described this in the statement. Later, the following day police came there. Police came and asked are you trying to threaten us with Tamil boys? Are you in the LTTE? They took me. *Later I was kept in the police. One thing happened to me Sir. So far I have not revealed this to my mother because my mother has pressure problems. And in the future she should not know about this. They raped me. Owing to this fear, I asked my mother to take me away. I cannot tell this.*

M *Ok. I don't need to ask you any further question about that particular incident. Now, after that you went to the Maldives and you became established there with employment and after a period with a relationship with a person who later became your husband?*

I Yes."

The italicised sections of the transcript above ("italicised passages") were relied on in the particulars included in the Order Nisi.

13 It is common ground that this claim of rape had not been mentioned to the Minister's Department, to the delegate, to the psychologist, at the first Tribunal hearing or at any time before it was volunteered in the manner just set out.

14 A little later the prosecutrix made a second fresh claim, namely that she had been asked by agents of the LTTE to join that organisation. This became linked to the rape allegation, since the prosecutrix said: "It was in relation to this matter that when I was taken by police in 95 they accused me of having contacts with the LTTE."

15 Later the following exchange, also relied on in the particulars given in the Order Nisi, took place:

"M *Did you when you had the problem with the local police in 95, you didn't seek to make a complaint or carry that forward by through lawyers, through courts, through more senior authorities.*

I *They threatened me and warned me that I shouldn't tell anything outside. Then they even to a doctor I couldn't go I got just a native treatment.*

M *Ok is there anything else?*"

16 The hearing continued for some time, and it is necessary to return below to some aspects of it. It concluded with a request by the prosecutrix's adviser for liberty to put in written submissions because "so many issues" had arisen that day. Those written submissions repeated the prosecutrix's claim to have been raped while in custody.

17 On 7 August 2001 the Tribunal handed down its decision. It affirmed the delegate's decision. In particular it rejected the two new claims which the prosecutrix had made on 1 June 2001. It said:

"Although in her original statement the Applicant had referred to some Singhalese youths coming to her house in Nilambe and being scolded away by her elderly maid, she made no mention of being taken to

> the police station the next day because of this, let alone that she had been accused by the police of LTTE contacts or that she was raped in police custody. The Applicant stated that she had not mentioned the rape previously because her former husband and mother did not know about it and so she had not referred to it. However, that does not adequately explain why the matter was not raised at the previous Tribunal hearing at which neither her husband nor mother was present (and does not explain why being taken to the police station was not mentioned at all). Nor was the rape referred to in a psychological report submitted by the Applicant to the first Tribunal in February 2000, prepared by a consultant psychologist from the Queensland Program of Assistance to Survivors of Torture and Trauma after some ten appointments with the Applicant (some without her mother or husband present)."

The Tribunal continued by stating that its:

> "… concerns about this were strengthened by the Applicant's linking this alleged detention and rape with her other new claim, that she had been approached that same year to join the LTTE and that the police had asked her specifically about those persons who had approached her. The Tribunal found the Applicant's evidence about this particular claim to be most unsatisfactory. It is evidence that one would have expected to have been provided at the hearing before the previous Tribunal when the Applicant was asked specifically about her claim that she fears the LTTE because she believes that they might try and recruit her. However, notwithstanding the previous Tribunal's question, the Applicant on that occasion made no reference at all to the claim now advanced that in 1995 two persons had come to her house on more than one occasion and had asked her to join the LTTE. Nor did the Applicant mention this matter when she first referred at the most recent hearing to being taken in by the police for allegedly threatening the Singhalese youths, whereas later in that hearing she claimed that the two matters were linked and that this was the reason she was taken in and questioned. At one point in the hearing the Applicant stated that it was the two teachers who had approached her in 1995 and asked her to join the LTTE but later she stated that it was two friends of the teachers who came to see her and asked her to join the LTTE."

The Tribunal stated its conclusions as follows:

> "The way in which this claim was presented and developed at hearing led the Tribunal to conclude that this did not represent the Applicant's own actual experience. Further, the Tribunal found it most implausible that two persons who the Applicant had met through teachers when she was a young girl should suddenly come to her house eight years

later seeking to recruit her to the LTTE. The Tribunal was satisfied that this claim was not true but was presented solely for the purpose of bolstering the Applicant's claims. The Applicant's insistence that this circumstance was the reason she was taken and questioned (on the occasion when she said she was raped) leads the Tribunal to conclude that the detention (if it occurred at all) did not occur in the manner and for the reason claimed.

Having carefully considered the Applicant's evidence about these particular matters, the Tribunal does not accept that the Applicant was approached by LTTE members in 1995, or that she was asked or pressed to join the LTTE, or that she was for that reason detained by the police or that she was raped when detained by the police. These findings must affect the Tribunal's view of the Applicant's credibility on other matters, especially where her stated fears are inconsistent with her actions in repeatedly returning to Sri Lanka."

The grant of the Order Nisi

18 The prosecutrix, through counsel, advanced various grounds for the making of an Order Nisi in oral hearings before Gaudron J on 11 June, 8 July, 30 August and 1 November 2002. The one ground on which the order was granted asserted jurisdictional error by reason of failure to accord procedural fairness[2]. The ground was expressed thus:

1. The Applicant was denied natural justice and procedural fairness required to be observed by the Tribunal with respect to its review of the delegate's decision and in reaching its ultimate decision.

PARTICULARS:

1. The Tribunal during and in the course of the hearing conveyed to the Applicant wrong and misleading impression which misled and induced a false belief on the part of the Applicant that the Tribunal had accepted her claim and evidence given by her that she was raped and there was no need for her to give any further evidence or make any representations regarding the incident of rape. In the circumstances the Applicant was disadvantaged by the conclusion and findings reached by the Tribunal that it could not accept her claim and evidence that she was raped. The conclusion and findings reached by the Tribunal were

---

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

improper, unfair and not in keeping with the rule and principles of natural justice.

2. The wrong and misleading impression and false belief referred to in paragraph 1 herein was caused by the following exchange that occurred at the hearing between the Tribunal member and the Applicant:"

[The italicised passages set out above were then quoted.]

"3. The Tribunal drew unfair and improper adverse inference and conclusion against the Applicant that she was not raped on the basis that the incident of rape was not mentioned in the psychological report that was tendered at the earlier hearing. In as much as the Tribunal had not made any inquiry and had not asked the author or the Applicant for any other plausible explanation as to why the incident was not mentioned in the report, the adverse inference and conclusion drawn by the Tribunal in all the circumstances was not in keeping with the rule and principles of natural justice."

19 The prosecutrix relied on three affidavits in this Court. They were dated 22 April 2002, 15 August 2002 and 6 September 2002. For at least part of the period covered by those dates the prosecutrix had access to counsel. In paragraph 4 of the 15 August 2002 affidavit she said:

"4. I was denied natural justice in as much as the Tribunal did not put to me any questions or make any reasonable inquiry with respect to why there was not any specific mention made of the rape incident in the psychological report that was submitted by the Applicant to the first Tribunal and did not give me opportunity to respond, why the inference the Tribunal sought to draw was wrong."

20 In paragraphs 9-10 of the affidavit of 6 September 2002 she said:

"9. The Tribunal relied on the psychological report I had tendered in evidence to draw an adverse inference against me with respect to the incident of rape without giving me opportunity to comment and without the benefit of any explanation from the author of the report.

10. Had I been given the opportunity to comment, or had the Tribunal sought comments from the author of the report, the Tribunal would have appreciated that the author of the report had taken care not to disclose any sensitive details of the confidential communications that passed between the parties. The Tribunal would have also appreciated that the subject matter of the meeting and the purpose of the meeting had between the psychologist and the applicant when her husband and her

mother were not present, had no relation or any connection with the incident of rape."

21 In none of the affidavits did the prosecutrix state that she understood from what had been said to her in the italicised passages that the Tribunal Member had accepted her claim of rape and that there was no need for her to give further evidence or make any representations about it.

The prosecutrix's arguments

22 Underpinning the prosecutrix's arguments was the contention that the rape claim was of critical importance to her application for refugee status. It may be accepted that this is so. Its rejection was inevitably damaging to the prosecutrix's credibility on other issues. Had it been accepted, it would have advanced the substance of her claim powerfully.

23 The first three arguments of the prosecutrix were directed to Particulars 1 and 2 of the Order Nisi. The fourth argument of the prosecutrix was directed to Particular 3.

24 The primary argument advanced by the prosecutrix was that the Tribunal Member misled her and induced a false belief in her that the Tribunal had accepted her claim of rape and that there was no need to go further.

25 A second and related argument was that the Tribunal Member did not at any time express any concerns or reservations about the rape claim and did not afford the prosecutrix a fair opportunity to respond to any concerns or reservations or to adduce further evidence in relation to them.

26 A third argument was that whatever new information the prosecutrix gave, it was elicited by the Tribunal Member, not volunteered by the prosecutrix. It was submitted that the hearing was inquisitorial, that the prosecutrix's answers were responsive to the questions put to her by the Tribunal Member in his interrogation, and that the information given was largely influenced by the questions and comments of the Tribunal Member.

27 Finally, it was submitted that the Tribunal Member was wrong to employ the lack of reference to the rape in the psychological report as a step in rejecting the prosecutrix's claim to have been raped. The Tribunal Member had erred in not inquiring of the author of the report or the prosecutrix whether there was any explanation as to why the incident was not mentioned.

The prosecutrix's principal argument considered: was she misled?

28 If counsel addressing a judge is stopped in the middle of a submission on a matter of fact, it is safe for counsel to assume that, unless notice to the contrary is given, the submission will be accepted: if the judge later rejects that submission, an appeal will succeed unless it is shown that a properly conducted trial could not possibly have produced a different result[3]. And if, as is illustrated by *Re Refugee Review Tribunal; Ex parte Aala*[4], the Tribunal tells the applicant for refugee status that it will take material into account and does not and if in reliance on that statement the applicant does not elaborate on that material, there will have been a denial of a fair hearing.

29 But the prosecutrix here was not counsel addressing a judge. It is highly unlikely that the prosecutrix fell within the limited number of those persons without legal training and experience who would understand what a judicial officer means when that officer "stops counsel". Nor, in any of her three affidavits, did the prosecutrix say she had been misled or that she would have taken a different course if she had not been misled by the Tribunal Member's statement that he did not need to ask any further questions about the rape claim.

30 However, had the subject of the rape never been mentioned again after the Tribunal Member acquiesced in the prosecutrix's desire not to talk about the matter further, the prosecutrix's argument that the hearing was unfair may have been strengthened. It is understandable that any human being who had been the victim of rape would be reluctant to talk about it to strangers. Without deciding the point, it may also be assumed, as counsel for the prosecutrix urged, that a Christian Sri Lankan Tamil married to a Pakistani Muslim would be particularly reluctant to talk about the matter, whether to her mother, her husband, the psychologist or the Tribunal Member. Though this Court did not see the prosecutrix's testimony or any video recording of it, it may be assumed that the prosecutrix was showing signs of distress at the time when she said "I cannot tell this".

31 Hence an argument may have been open that procedural fairness had been denied the prosecutrix because of what happened when the Tribunal Member said he would not question the prosecutrix about the rape, if that episode were considered in isolation. But what happened later negated any such argument.

---

3 *Stead v State Government Insurance Commission* (1986) 161 CLR 141.

4 (2000) 204 CLR 82 at 88 [3] per Gleeson CJ, 122 [103] per McHugh J, 130 [128] per Kirby J, 150 [200] per Callinan J.

32 After some further questioning, the hearing was adjourned for an interval. On resumption, the Tribunal Member began raising problems he was experiencing in assessing the prosecutrix's story.

33 First, the Tribunal Member said it was difficult to see how the prosecutrix was suspected of involvement with the LTTE, since she had not been detained or charged, since she had been able to travel out of and return to Sri Lanka openly on a passport in her own name, and since she did not fit the usual profile of those whom the security forces suspected of involvement with the LTTE. The prosecutrix then gave her account, for the first time, of being asked to join the LTTE by two friends of two of her teachers who were in the LTTE. In the course of this explanation she referred, in answer to non-leading questions, to the "matter … when I was taken by police in 95", and several times to the "incident" at the police station, which post-dated the attempt to recruit her. The Tribunal Member's questioning, which revealed some incredulity, led to exchanges which, by reason of their importance, it is necessary to set out in full:

> "M I don't understand what the connection of this incident? There is nothing else happened. I don't understand the connection of that when police took you to the police station?
>
> I This is the issue, Sir, because the Singhalese people living around my house in the neighbourhood – normally no one comes to my house. In case if someone comes they note and inform the police that this is taking place. Because of this reason when I was taken to police they asked about this and threatened a lot.
>
> M Previously when you were talking about the incident with the police you told me it happened because the Singhalese boys who would come to your place had been sent away. And you said nothing. You said nothing when you described it. I asked what the police had said. You said nothing about them asking you about this incident. I don't understand.
>
> I In the police station, Sir, they asked me about this whether I had any connections with the LTTE.
>
> M Did they ask you specifically about these two people coming to your house?
>
> I They asked this and in fact as a result of this that incident happened.
>
> M Did they specifically ask referring to the two persons coming to the house?

I How could I have spoken because they were beating me they asked me whether I had any connections with the LTTE?

M Did they specifically ask you whether these two people had come to your house? Did they specifically refer to them?

I Yes.

M Why didn't you mention previously when you were talking about what police said to you when they took you to the police station?

I Because I don't remember very well and this is not a pleasant thing to speak about?

M Well well this question about these two people coming to your house if it is something that you may attach significance to it was not mentioned in your very detailed written statement. It was not mentioned in [your] detailed evidence to the tribunal at the first hearing. It was not mentioned today when you were speaking about that period and only mentioned in the last few minutes. I have some difficulty with that. I have to say.

I All these things are related to that police incident and therefore in the statement, because my mother doesn't know anything, and in fact, she should not know anything about this.

M I don't understand why that would stop you from mentioning that the LTTE people had come to your house and asked you to join if that was the case particularly since at the previous hearing you mentioned briefly a fear that you might be asked to join the LTTE and did not say that you have ever been asked. I don't see how that would involve talking about the police itself.

I All these events are related to that incident and therefore I didn't wish to tell anyone.

M Even when you told me about the other incidents an hour ago.

I Even to think about this I find it very difficult for my own self."

34 After further questioning, the Tribunal Member said:

"… I have to say also that I have to think very carefully about these matters that have been raised today for the first time. And they are really two separate matters in that regard even though there may be some link between them. The first one is the question of your treatment by the police at the police station in 1995. The second issue which is much more

> difficult to understand because the issue was actually discussed with you in the previous tribunal hearing is the alleged approach to you to join the LTTE in 1995. I have to consider whether it is reasonable to accept that each of these was raised on previous occasions including before the tribunal at the last hearing.[5] Do you want to say anything about that?"

The prosecutrix responded but did not say anything more specific about the rape incident.

35 A little later the Tribunal Member extended an even more open invitation:

> "Is there anything else you would like to say to the tribunal about any of these matters you think are relevant while you have the opportunity?"

Again, the prosecutrix's response did not refer to the rape incident.

36 After some discussion of anti-Tamil riots, the Tribunal Member advanced yet another invitation: "Are there any other particular matters that you want to raise?" The transcript continues:

> "I Those who provide security or protection did not provide me with security.
>
> M Did you when you had the problem with the local police in 95, you didn't seek to make a complaint or carry that forward by through lawyers, through courts, through more senior authorities.
>
> I They threatened me and warned me that I shouldn't tell anything outside. Then they even to a doctor I couldn't go I got just a native treatment.
>
> M Ok is there anything else?
>
> I While you are thinking about that I might ask your adviser whether he would like to say anything to the tribunal at this point?"

Counsel for the Minister submitted that what was said in the last question suggested there had been a pause after the further invitation in the second last question.

---

5 As was pointed out during the argument in this Court, the context requires that these words be read as meaning "it is reasonable to accept having regard to the fact that each of these was not raised …".

37 After a short discussion between the Tribunal Member and the prosecutrix's adviser about written submissions, the Tribunal Member extended a final invitation:

> "But in the meantime is there anything else you would like to say while you have the opportunity in this hearing which is to close very soon?"

The prosecutrix answered:

> "I am scared to return to Colombo. I do not have anyone. Even my husband has abandoned me. I won't be able to bear up the torture hereafter. I am scared to go by myself and get a house and live."

38 It is necessary to reject the prosecutrix's argument that the Tribunal Member had misled her and induced a false belief in her that it had accepted her claim of rape, and that there was no need to go further for the following reasons.

39 First, the prosecutrix gave no direct evidence of any such beliefs on her part. This contrasts with the fact that the prosecutrix did give direct evidence about some aspects of what did and did not happen at the hearing in relation to the psychologist's report. Nor was there any direct evidence of what the prosecutrix would have said but which she thought the Tribunal Member's statement had rendered it unnecessary to say. An inference can be drawn that there was no direct evidence she could have given which was favourable to the existence of those beliefs.

40 Secondly, there is objective material pointing against the existence of the beliefs asserted by the prosecutrix. If these beliefs were ever entertained, their continued existence was inconsistent with the Tribunal Member's evident scepticism about the rape claim and the Tribunal Member's evident desire to examine and test it. As a result of that scepticism the Tribunal Member gave the prosecutrix several opportunities in the form of invitations to say more about the rape claim, and this must have stimulated in the prosecutrix a consciousness that the Tribunal Member had not accepted the rape claim as a fact.

41 Thirdly, in response to one of those invitations, prefaced with the words "Are there any other particular matters that you want to raise?", the prosecutrix did allude to the rape claim by saying that those responsible for providing her with security had not done so, but without any further details.

42 Fourthly, there is evidence that the prosecutrix's camp was conscious that the rape claim had not been accepted. One piece of evidence is that the reason advanced by the prosecutrix's adviser for requiring written submissions was that "so many issues" had arisen that day, that is, had been identified for the first time that day, and one of these was the rape claim. Another is that the written

submissions which the Tribunal Member granted the prosecutrix leave to file in fact dealt with that subject.

Did the Tribunal Member fail to express, or afford the prosecutrix a chance to deal with, his concerns or reservations about the rape claim?

43 The passages quoted above show that on several occasions the Tribunal Member explicitly revealed his scepticism about the rape claim and asked the prosecutrix to say anything further she wished to on that subject. The grant of liberty to file written submissions afforded another opportunity to do this, and the prosecutrix took advantage of it. There was no relevant failure on the part of the Tribunal Member.

Did the Tribunal Member wrongly influence the form in which the prosecutrix gave information?

44 The contention that the prosecutrix's new claim of rape was not volunteered, but was influenced by the form of the Tribunal Member's questions, is to be rejected. That part of the transcript in which the rape claim was initially made commenced with a question about whether the prosecutrix's mother had arranged her travel to and employment in the Maldives. The prosecutrix did not answer that question, but rather volunteered material about the incident in Nilambe in late 1995 which led to her arrest and alleged rape by the police. It was she, not the Tribunal Member, who raised the subject.

45 The same thing happened when the Tribunal Member, after a break, began to communicate the difficulties he was experiencing with the prosecutrix's evidence. The Tribunal Member said he did not understand the connection between the attempt to recruit her into the LTTE and the fact that the police brought her to the police station. It was the prosecutrix, not the Tribunal Member, who mentioned the different topic of the rape (the "incident" or "thing") four times. The only reference the Tribunal Member made to the incident ("the problem with the local police in 95") was responsive to the prosecutrix's complaint that she had not been provided with security.

46 The Minister's submission that the questioning of the Tribunal Member was entirely open-ended and non-leading is correct.

Was the Tribunal Member wrong to use the absence of reference to rape in the psychologist's report as a step towards rejecting the rape claim?

47 The prosecutrix's complaint is that the Tribunal Member failed to ask the author of the psychologist's report or the prosecutrix about any explanation for the rape not being mentioned in the report, and in this light it was wrong to rely

on the silence about rape in the psychologist's report as a step towards rejecting the rape claim.

48 This argument appears to rely on the principle that the rules of natural justice are contravened when a decision-maker fails to advise an affected person "of any adverse conclusion which has been arrived at which would not obviously be open on the known material"[6].

49 The Tribunal Member made it plain to the prosecutrix that one of the difficulties he was experiencing both with the rape claim and with the recruitment claim was the fact that each was being advanced for the first time. The Tribunal Member also made it plain that he was concerned about why no earlier complaint had been made. The Tribunal Member during the second hearing queried why neither had been raised at the first hearing. The Tribunal Member also queried why the prosecutrix had not made a complaint about the rape through lawyers, or through the courts or through more senior authorities.

50 The scepticism of the Tribunal Member about the rape claim was so natural a reaction to the lateness with which it was put forward that the prosecutrix herself anticipated and attempted to deal with the criticism. Just before she made the rape claim she said that neither her husband nor her mother knew of it, and she had not so far "revealed this to my mother because my mother has pressure problems." This assertion was repeated later. The Tribunal Member in effect later retorted that the claim could have been made at the first hearing. The Tribunal Member found, in the decision under challenge, that neither the husband nor the mother was present at the first hearing. That was a mistake, for the parties have agreed that the husband was present, though the mother was not. That mistake, of course, is not a ground of challenge in itself, and it is not supportive of the ground of challenge under consideration. The reasons which might exist for the prosecutrix not mentioning a rape to her mother or husband did not apply to her failure to mention to them the police interrogation about the alleged attempt to recruit her into the LTTE, about which the Tribunal Member was equally curious. The failure to mention the rape in the statement used before the Tribunal Member at the first hearing, or at the first hearing itself on 8 February 2000, is in the same category as the failure to mention the rape claim to the psychologist who had seen the prosecutrix ten times in 1999-2000, and whose report was dated 17 January 2000, just before the first hearing.

---

6 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592.

51 It was the prosecutrix who had provided the psychologist's report to the first respondent, and the Tribunal Member was entitled to assume that she was familiar with what it did and did not say. The Tribunal Member was also entitled to assume, in view of the prosecutrix's proleptic attempt to explain why she had not complained earlier by reference to the attitude of her mother and husband, that she was aware of a similar difficulty with the psychologist's report. Yet the prosecutrix never attempted to explain the silence of the psychologist's report in this respect.

52 In all the circumstances it was open to the Tribunal Member to use the silence of the psychologist as a reason for inferring that the prosecutrix had not raised the rape claim with the psychologist, and further to infer that the reason why the psychologist had not been told of the rape was because it had never happened.

53 The relevant adverse inferences were of the same kind as the inferences to be drawn from the failure to insert the rape claim (as well as the recruitment claim) into the prosecutrix's statement, or to raise them at the first hearing, or to raise them on any occasion before they eventually were raised at the second hearing.

54 The explanations which the prosecutrix gave for her conduct were not accepted by the Tribunal Member, and this course was open despite the one factual error which he made as to the presence of the prosecutrix's husband during the first hearing. The Tribunal Member was not obliged to set out every detail of the reasoning process which he eventually employed for the prosecutrix's consideration[7].

The rule in *Browne v Dunn*

55 On occasion the submissions advanced for the prosecutrix were couched in the language of a contention that the rule in *Browne v Dunn* had not been complied with[8]. Where a complaint is made about the failure of a questioner to put to a person giving oral answers a particular question, it is natural for a lawyer's mind to turn to the rule in *Browne v Dunn*. In essence, and subject to numerous qualifications and exceptions, that rule requires the cross-examiner of a witness in adversarial litigation to put to that witness the nature of the case on

---

7 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 117-118 [194] per Kirby J.

8 (1893) 6 R 67; *R v Birks* (1990) 19 NSWLR 677 at 686-692 per Gleeson CJ.

which the cross-examiner's client proposes to rely in contradiction of that witness.

56 However, the rule has no application to proceedings in the Tribunal. Section 420(2) of the Act states:

> "The Tribunal, in reviewing a decision:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and
>
> (b) must act according to substantial justice and the merits of the case."

The purpose of a provision such as s 420(2) is to free bodies such as the Tribunal from certain constraints otherwise applicable in courts of law which the legislature regards as inappropriate[9]. Further, as was emphasised in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[10], administrative decision-making is of a different nature from decisions to be made on civil litigation conducted under common law procedures. There, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have considered it in their respective interests to adduce at trial.

57 Accordingly, the rule in *Browne v Dunn* has no application to proceedings in the Tribunal. Those proceedings are not adversarial, but inquisitorial; the Tribunal is not in the position of a contradictor of the case being advanced by the applicant[11]. The Tribunal Member conducting the inquiry is not an adversarial cross-examiner, but an inquisitor obliged to be fair. The Tribunal Member has no "client", and has no "case" to put against the applicant. Cross-examiners must not only comply with *Browne v Dunn* by putting their client's cases to the witnesses; if they want to be as sure as possible of success, they have to damage the testimony of the witnesses by means which are sometimes confrontational and aggressive, namely means of a kind which an inquisitorial Tribunal Member could not employ without running a risk of bias being inferred. Here, on the other hand, it was for the prosecutrix to advance whatever evidence or argument

---

9 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 628 (49], 635 [74]-[77], 642-643 [108], 668 [179]. See also *Sue v Hill* (1999) 199 CLR 462 at 485 [42], 520 [147]-[148].

10 (1996) 185 CLR 259 at 282. See also *Mahon v Air New Zealand* [1984] AC 808 at 814.

11 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 576 [187] per Gummow and Hayne JJ; *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 146 [52] per Kirby J.

she wished to advance, and for the Tribunal to decide whether her claim had been made out[12]; it was not part of the function of the Tribunal to seek to damage the credibility of the prosecutrix's story in the manner a cross-examiner might seek to damage the credibility of a witness being cross-examined in adversarial litigation.

58 It would have been erroneous for the Tribunal to have represented at the hearing that a particular piece of evidence or argument had been accepted and then to have rejected it in the decision in circumstances where, but for the representation, the prosecutrix could have mended her hand. It would also have been erroneous for the Tribunal to have relied on a particular conclusion about the material before it which was not open on the material. But it was not erroneous for the Tribunal not to have pressed the prosecutrix more than it did about the rape claim. A cross-examiner in a notional criminal case in which the Crown was charging a man with rape might, if that cross-examiner wanted to be as sure of success as possible, have had to have adopted a much more detailed and forceful style of questioning than the Tribunal Member did here. But in proceedings of the type which he was conducting, the Tribunal Member was not obliged to go further than he did. In particular he was not obliged to go even further than a cross-examiner endeavouring to comply with the rule in *Browne v Dunn* would have to do, and seek a detailed amplification of the prosecutrix's account of the rape including the fullest and most minute particulars she could remember, together with an explanation of her failure to give that account on every earlier occasion when that account might conceivably have been given. The Tribunal conducting an inquisitorial hearing is not obliged to prompt and stimulate an elaboration which the applicant chooses not to embark on.

Orders

59 The following orders should be made.

1. The order nisi is discharged.

2. The prosecutrix is to pay the costs of the second respondent.

---

12 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 576 [187] per Gummow and Hayne JJ.

60 KIRBY J. A tribunal member, with obligations to perform his functions in an inquisitorial manner, failed to elicit facts relevant to the exercise of the tribunal's jurisdiction. Moreover, he did so by diverting the evidence away from a pertinent matter raised by the applicant. On one view, he even stopped the applicant from elaborating her story, relevant to that matter. Thereafter, that story was not fully told. In such circumstances there was a departure from the requirements of procedural fairness. This amounts to jurisdictional error. It enlivens the provision of relief by way of the constitutional writs and certiorari. There is no discretionary reason to refuse relief. The orders nisi should be made absolute.

The facts

61 The prosecutor, known as Applicant S154 of 2002, is a national of Sri Lanka. She is of Tamil ethnicity. She is now aged 29 years. She arrived in Australia in December 1998. In February 1999 she lodged an application for a protection visa. This was refused by a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister") (the second respondent). There ensued an application by the prosecutor to the Refugee Review Tribunal ("the Tribunal") (the first respondent) for a review of the delegate's decision. This resulted in a hearing before the Tribunal in March 2000 ("the first Tribunal"). However, the first Tribunal affirmed the delegate's decision.

62 The prosecutor then sought an order of review from the Federal Court of Australia. Her application came before Beaumont J ("the first Federal Court hearing"). His Honour upheld the application. He set aside the first Tribunal's decision and remitted the matter to the Tribunal to be reconsidered in accordance with law.

63 It was in these circumstances that the prosecutor's application for a review of the delegate's decision came before the second Tribunal. So constituted, the second Tribunal heard the application on 1 June 2001. The Tribunal refused it on 17 July 2001.

64 Nothing daunted, the prosecutor again sought an order of review from the Federal Court ("the second Federal Court hearing"). That application came before Wilcox J. In accordance with the terms of s 476(1) of the *Migration Act* 1958 (Cth) ("the Act") as then applying, the grounds of relief were confined. As Wilcox J pointed out, the reasons of the second Tribunal were lengthy "mainly because there has been quite a history to this claim"[13]. The complaint in the second Federal Court hearing was that the second Tribunal had failed to explore the difficulties the prosecutor faced as a Christian who had married a Muslim.

---

13 [2001] FCA 1512 at [3].

Unsurprisingly, on this complaint, Wilcox J dismissed the application. There was no mention before the second Federal Court that the second Tribunal had failed to accord the prosecutor procedural fairness. However, it was common ground before this Court that within s 476 of the Act, as it stood at the time of the second Federal Court hearing, it was not open to the prosecutor to seek relief in that Court against the orders of the second Tribunal on the basis of departure from the requirements of natural justice or procedural fairness.

65 The prosecutor then began her proceedings in this Court. She sought the constitutional remedies of mandamus and an injunction against the Tribunal and the Minister as well as a writ of certiorari to make those remedies effective by quashing the decision of the second Tribunal so that the application could be returned to the Tribunal for rehearing.

66 On 7 November 2002 Gaudron J granted orders nisi. One ground was nominated, namely that the prosecutor was "denied natural justice and procedural fairness required to be observed by the Tribunal with respect to its review of the delegate's decision and in reaching its ultimate decision". The proceedings now before this Court are the return of the orders nisi. The Tribunal submits to the orders of this Court. The Minister resists the grant of relief.

Common ground

67 *Exhaustion of remedies*: Various matters can be treated as common ground. It was accepted by the Minister that the prosecutor had exhausted her remedies before the Federal Court before seeking relief from this Court. It was not suggested that she should first have pursued an appeal against the order of Wilcox J or that the availability of any other relief in the Federal Court was a reason of a discretionary kind to refuse the relief she now seeks. It is accepted that the constitutional relief sought by the prosecutor, and relief by way of the writ of certiorari to make the constitutional relief effective, are discretionary in character[14]. There is no discretionary impediment to the grant of relief.

68 *Procedural unfairness and jurisdictional error*: It was also common ground that, if the prosecutor could make good her complaint that the second Tribunal had departed from the requirements of procedural fairness, she would thereby demonstrate jurisdictional error on the part of the second Tribunal[15]. By

---

14 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5], 107 [54], 136-137 [145]-[148], 156 [217]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 88 [106], 124 [217].

15 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5], 91-92 [17], 104 [46], 135 [142].

the authority of this Court, the existence of jurisdictional error is required for the grant of relief of the kind mentioned in s 75(v) of the Constitution[16]. Whatever uncertainty may exist about the boundaries of jurisdictional error, it is accepted that a demonstrated departure from the requirements of natural justice or procedural fairness, fall on the right side of the line. Such a case entitles a person in the position of the prosecutor to relief.

69 *Merits and errors of jurisdiction*: Relief of the kind sought is not concerned, as such, with the merits of the prosecutor's claim. Under the Act, these are exclusively questions for the Minister, his delegate and the Tribunal, playing their respective parts under the Act. This Court is not concerned with the ultimate disposition of the prosecutor's application. If a departure from the requirements of natural justice or procedural fairness is established, the evaluation of those merits would be a matter for the Tribunal, at a third hearing. The only function of this Court, if grounds for relief are established, is to quash the decision of the second Tribunal and remit the matter to be heard afresh without the flaw of a jurisdictional kind that the prosecutor set out to prove. Even where a defect of such a kind is shown, occasionally relief will be refused if it is clear that the default complained of is insubstantial or that the application is futile. The present was not such a case.

70 *Rejection of claim of bias*: During the hearing in this Court, a suggestion was made for the prosecutor that the member constituting the second Tribunal was biased against the prosecutor in the relevant legal sense[17]. No such claim had been made in the initial application for orders nisi before Gaudron J; nor was this the basis upon which her Honour granted the orders nisi to the prosecutor. Nor was an evidentiary basis for such a claim established. When it became clear in argument that any such claim was unsustainable, counsel for the prosecutor prudently retreated. He made it clear that the only "bias" that was alleged was in failing to accord procedural fairness to his client.

71 I deprecate unjustified contentions of bias[18]. Such allegations should not be lightly made or made without appropriate supporting evidence. There was no such evidence in the present case. The member constituting the second Tribunal may have made errors in the manner in which he conducted the second hearing in the Tribunal. However, I reject any suggestion that bias towards the prosecutor

---

16 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 209 [32], 226-229 [78]-[85].

17 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 147-149 [57]-[61].

18 *Fox v Percy* (2003) 77 ALJR 989 at 997 [41]; 197 ALR 201 at 212.

should be imputed to him[19]. Still less was any actual bias shown. On the contrary, it is my conclusion that it was the attempted sensitivity to the issue that the prosecutor raised, and the desire of the member to spare the prosecutor unnecessary distress in that regard, that led the second Tribunal into error. That alone warrants this Court's intervention.

The second Tribunal's errors

72 *Curtailing evidence about a rape*: There were, in fact, two connected errors in the conduct of the second Tribunal hearing. They amount to procedural unfairness and require that the orders nisi be made absolute.

73 The first arose at a point when the prosecutor was being questioned by the Tribunal and when she was identifying the grounds upon which she claimed to have a "well-founded fear of being persecuted for reasons of race"[20] and that "owing to such fear, [she] is unwilling to avail [herself] of the protection of [the] country [of her nationality and therefore] … is unwilling to return to it"[21].

74 A common factual element in the establishment of a "well-founded fear" of the stated kind is the existence, for reasons of a prohibited ground, of an inability on the part of the person claiming to be a refugee to rely upon the police or other governmental officials of the country of that person's nationality to provide basic protection[22]. Clearly, if an applicant could show that, on such grounds, he or she was subjected to violence, oppression and deprivation of basic rights by police or other officials of the government of the country, that would be a relevant evidentiary step in establishing the "well-founded fear" necessary to enliven the right to protection.

75 In the present application, it is the prosecutor's case that, before the second Tribunal, she endeavoured to recount what had happened to her when she was raped by police after she had been taken to a police station. Her removal to the police station resulted in her interrogation by police about whether she had any

---

19 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1182 [100]-[101]; 198 ALR 59 at 81-82.

20 Explained in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559.

21 Article 1A(2) of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

22 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 12 [26], 28-29 [84]-[87], 35 [107], 38-40 [114]-[118].

connections with the revolutionary Tamil organisation in Sri Lanka commonly known as the "Tamil Tigers" (the LTTE). In the second Tribunal there followed the critical exchange of which the prosecutor complains[23]:

> "M: Ok. What was [it] that happened?
>
> I: This has not been described in the statement. My mother doesn't know. Nor does my husband know.
>
> M: Please continue.
>
> I: I have described in the statement the saying that one night some boys came and knocked at the door. Later mother came no no that elderly lady.
>
> That elderly lady came and she scolded and wanted them to go. I have described this in the statement. Later, the following day police came there. Police came and asked are you trying to threaten us with Tamil boys? Are you in the LTTE? They took me.
>
> Later I was kept in the police. One thing happened to me Sir. So far I have not revealed this to my mother because my mother has pressure problems. And in the future she should not know about this.
>
> They raped me. Owing to this fear, I asked my mother to take me away. I cannot tell this.
>
> M: Ok. I don't need to ask you any further question about that particular incident. Now, after that you went to the Maldives and you became established there with employment and after a period with a relationship with a person who later became your husband?
>
> I: Yes."

76 The prosecutor argues that, instead of permitting and encouraging her to tell her story about the rape by Sri Lankan police that she had said had happened to her at the police station, the member at the second Tribunal hearing had pursued the matter no further. He had said that he did not need to ask further questions about the "incident". He then proceeded to address a completely

---

23 "M" means "Tribunal member" and "I" means "Interpreter" translating the responses of the prosecutor. Further passages from the transcript of the hearing before the second Tribunal appear in the reasons of Callinan J at [119]-[121].

different issue concerning the prosecutor's life in the Maldives. Her complaint is that this course of events cut her off from an elaboration of the rape that she would otherwise have provided. It failed to elicit from her even the rudimentary details of a matter she had disclosed that was relevant to her application for protection. It also misled the prosecutor into believing that it was unnecessary for her to elaborate the point.

77 On the face of the record, there is merit in this complaint. The course that the hearing took effectively stopped the prosecutor from giving evidence about an event that was relevant to her entitlements under the Convention and the Act. Instead of saying that he did not need to ask further questions about the incident, the Tribunal member should, within the boundaries of relevance, have probed the issue further in order to secure whatever additional information the prosecutor was willing to give about it. This was not what he did.

78 *Adverse inferences from unmentioned reports*: The prosecutor raised a second complaint. It is based on the reasons given by the second Tribunal concerning the alleged incident of rape. In those reasons, the Tribunal said[24]:

> "Although in her original statement the Applicant had referred to some Singhalese youths coming to her house in Nilambe and being scolded away by her elderly maid, she made no mention of being taken to the police station the next day because of this, let alone that she had been accused by the police of LTTE contacts or that she was raped in police custody. The Applicant stated that she had not mentioned the rape previously because her former husband and mother did not know about it and so she had not referred to it. However, that does not adequately explain why the matter was not raised at the previous Tribunal hearing at which neither her husband[25] nor mother was present (and does not explain why being taken to the police station was not mentioned at all). Nor was the rape referred to in a psychological report submitted by the Applicant to the first Tribunal in February 2000, prepared by a consultant psychologist from the Queensland Program of Assistance to Survivors of Torture and Trauma after some ten appointments with the Applicant (some without her mother or husband present)."

79 As to these explanations for the concern of the Tribunal about the veracity of the prosecutor's complaint of rape in police custody, she made three complaints.

---

24 Fuller extracts appear in the reasons of Callinan J at [123]-[124].

25 The prosecutor's husband was in fact present at the first Tribunal hearing: see the reasons of Gummow and Heydon JJ at [50].

80 First, the prosecutor said that, before the second Tribunal acted upon the record of the first Tribunal hearing and the psychologist's report tendered to the second Tribunal to disbelieve her statement that she had been raped, such evidence should have been put to her so that she could give her version of why these documents were not inconsistent with her statement about the rape. Secondly, the prosecutor suggested that even a moment's thought about her predicament would have afforded an explanation of why she had been loathe to mention an incident of rape earlier. Thirdly, she contended that, to rely on such materials after effectively having stopped her from elaborating her complaint of the rape, was doubly unfair. Had she been encouraged, or permitted, to continue her statement about the rape (instead of being told that there was no need for further questions about that particular incident) she could have provided the necessary details to add flesh and bones to the accusation she was making against the Sri Lankan police.

81 *Analysis of the prosecutor's complaints*: The Tribunal is not in the position of a contradictor. Ordinarily, it is for the applicant to advance whatever evidence or argument he or she wishes to offer in support of the claim[26]. The Tribunal proceeds by inquisitorial methods[27]. This imposes additional burdens on Tribunal members[28]. They are somewhat different from those borne by most courts and tribunals in Australia which operate by adversarial procedures. A court conducting a proceeding by way of judicial review, addressed to a tribunal so operating, should not be overly fastidious about the course of questioning. It is the substance and not peripheral matters of detail to which a court will look when considering a complaint about a departure by the Tribunal from the requirements of procedural fairness.

82 Nevertheless, on the face of the record, there were obvious reasons why the disclosure of the rape by police might have been particularly difficult for the prosecutor, a young woman. Her ethnicity (Tamil), religion (Christian), relationship with her husband (who was Islamic), her age, and general predicament in Sri Lanka could make it more difficult than usual for such a matter to be raised, elaborated and explained[29]. In fairness, the second Tribunal member appeared to appreciate some of these issues. I believe that they lie

---

26 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 576 [187].

27 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 576 [187].

28 See Kneebone, "The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role?", (1998) 5 *Australian Journal of Administrative Law* 78.

29 Some details of the hardships of the prosecutor's life in Sri Lanka are set out in the reasons of Callinan J at [114]-[115].

behind his well intentioned, but ultimately mistaken, intervention to divert the prosecutor from telling her story.

83 The statement belatedly made by the prosecutor might, or might not, have been true. Ultimately, the Tribunal member concluded that it was not true. Yet the possibility that the Tribunal would so decide made it all the more important that the Tribunal should afford the prosecutor a proper opportunity to disclose what she said had happened to her. In the course that he adopted, the member failed to do this. In then relying upon the previous Tribunal record and the history in the psychologist's report, without putting these evidentiary matters to the prosecutor as matters tending to disprove her claim, the member enlarged the unfairness of the first exchange.

84 Allowing for a substantial degree of informality and unstructured discourse in the Tribunal, and reminding myself that this Court should not adopt an overly pernickety scrutiny of the record, what happened after the prosecutor raised the accusation of rape fell short of fair procedures. It was essential that the prosecutor should have been given a proper opportunity to tell her story. In particular, she should not have been stopped from doing so. She should not have been disbelieved by reference to documents available to the second Tribunal but not drawn to her notice so that she could explain (if that was possible) why they were compatible with her accusation of rape.

85 *The hearing rule and its object*: The "hearing rule" applicable to administrative decision-making in Australia requires that the decision-maker, in a tribunal such as this, must afford an applicant for administrative relief a fair opportunity to present relevant evidence and submissions in support of his or her case. It is not obligatory for the tribunal member to expose for comment or submissions or rebutting evidence, every development in the decision-maker's thinking before, at or after a hearing[30]. But where an issue is clearly important for the decision, it is impermissible to abbreviate the attempt of an applicant to give evidence or to curtail important evidence relevant to that issue.

86 The extent of the duty to indicate a relevant piece of apparently adverse evidence for comment obviously depends upon the importance that may be attached to that evidence and whether the importance was so obvious that it did

---

30 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592; *Pilbara Aboriginal Land Council Aboriginal Corporation Inc v Minister for Aboriginal and Torres Strait Islander Affairs* (2000) 103 FCR 539 at 557; *York v General Medical Assessment Tribunal* [2003] 2 Qd R 104 at 113-114 [26].

not need to be underlined[31]. In a body proceeding by inquisitorial methods, procedural fairness may require bringing the attention of the applicant to critical facts that appear to contradict, or cast doubt on, his or her claim. Where an observation about an applicant's case is one that is obvious and natural to the circumstances that evoked it, it is usually unnecessary for it to be specifically called to notice[32].

87 The object of the foregoing rules is not only to ensure compliance with technical obligations of law. The rules have a utilitarian purpose. Sometimes, if confronted with an apparent flaw in the case, an applicant will be able to provide a full explanation that satisfies the decision-maker and dispels initial doubts. The apparent flaws in a case may only emerge after the hearing, in the light of a closer examination of the record and lengthier reflection on its content. But even then, care must be taken before elevating to a critical status a fact or feature of the evidence that was not fairly put to an applicant, where it is possible that the perceived defect could be answered or it is desirable that the applicant should at least have the opportunity of doing so.

88 In an adversarial proceeding a decision-maker is normally entitled to look to the legal representatives of the respective parties to bring out the relevant evidence and submissions. In an inquisitorial proceeding a somewhat heavier burden is assumed by the decision-maker in relation to adducing the evidence. In their reasons[33], Gummow and Heydon JJ cite s 420(2) of the Act, which states that the Tribunal "must act according to substantial justice". To fulfil this mandate, the use of inquisitorial techniques, such as the clarification of points raised by an applicant in the course of answering questions put by the Tribunal, might be required to ensure that the decision reached is made on the basis of the most probative evidence available[34]. Thus, in the case of a vulnerable, anxious applicant, with a poor command of English, little understanding of the procedures and an imperfect appreciation of the law being applied, it would not be enough for the Tribunal simply to leave it to the applicant to prove the case

---

31 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592.

32 *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 at 108; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 117-118 [194].

33 Reasons of Gummow and Heydon JJ (with whom Gleeson CJ agrees) at [56].

34 Kneebone, "The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role?", (1998) 5 *Australian Journal of Administrative Law* 78 at 82, 95.

unaided. That would reduce the hearing to a charade. It is not what the Act contemplates. What is required depends on the facts of each case.

89 *Inhibitions and sexual offence complaints*: The prosecutor knew of the earlier proceedings, because she had been at them. She also knew of the psychologist's report and of its contents. What she did not know was that, following the initial exchange with the Tribunal member, these records, and the history they contained, would be used *against* acceptance of her claim of rape. It is possible that the prosecutor could have explained satisfactorily, by reference to cultural, religious, marital and personal factors her failure to mention the rape earlier. In Australian criminal process we are now aware of the reasons that can occasion an omission, on the part of a victim of a sexual offence, to make an immediate complaint and accusation[35]. In the context of criminal law and procedure, this subject has been fully researched. It has been recognised by the courts[36]. It has resulted in amendments that have replaced the earlier law, based upon now discarded legal presuppositions.

90 How much more readily understandable might be the omission of a person in the position of the prosecutor to make her accusation of a coerced sexual incident involving powerful men employed in the government of the country of her nationality and exposing her, within her family and marriage, to the possible stain of defilement, risk of divorce and even expulsion? Of course, none of these considerations might have been applicable to the prosecutor. But we now know enough about sexual assault in its social setting to appreciate that, before an accusation is disbelieved or treated as suspect on the basis of delay or reticence in its making, regard must be had to the circumstances that can sometimes explain such matters.

91 *Conclusion – breach of procedural fairness*: I would not wish to be thought of as unduly critical of the member constituting the second Tribunal in what he said and did. However, in my view, the procedures he adopted involved a departure from the standards of procedural fairness required in this case. On the face of things, this conclusion invites the intervention of this Court. So what arguments are put on the other side?

---

35 See Bronitt, "The rules of recent complaint: Rape myths and the legal construction of the 'reasonable' rape victim", in Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture*, (1998) 41 at 52-56; Hunter and Mack, "Exclusion and silence: Procedure and evidence", in Naffine and Owens (eds), *Sexing the subject of law*, (1997) 171 at 179-181.

36 *M v The Queen* (1994) 181 CLR 487 at 515; *Jones v The Queen* (1997) 191 CLR 439 at 464; cf *R v Seaboyer* [1991] 2 SCR 577 at 648-650.

The supposed explanations are inadequate

92 *Interpretation of the transcript*: It was suggested that it was impossible for this Court to conclude that the prosecutor had been stopped in her description of the rape by the Tribunal member's statement "I don't need to ask you any further question about that particular incident". It is true that this Court did not have access to a sound recording of the hearing before the second Tribunal. Thus, we could not tell whether there was a substantial pause between the accusation of rape and the impugned intervention of the Tribunal member. Likewise, it is impossible to say whether (as might have been the case) the prosecutor broke down at that point, causing the member to say what he did in order to progress the hearing.

93 These considerations are not ultimately relevant. Certainly, they are not considerations adverse to the prosecutor's claim to relief. The complaint is not that the Tribunal member jumped in to stop the prosecutor from elaborating the story of the rape. It is that, by stating that there was no need to ask further questions on the subject, he misstated his own duty. Moreover, by proceeding to other questions about the Maldives, he diverted the attention of the prosecutor from an issue that she said was one difficult and painful for her to raise and recount. In such circumstances, it was the Tribunal member's duty, the accusation of rape by governmental officials having been stated and being relevant if proved to the case propounded, to inform the prosecutor that, if she wished to rely on that matter, she would have to state what occurred, at least in a detail sufficient to allow the claim to be evaluated and to explain why she had never mentioned it before in the earlier protracted proceedings. This was not done.

94 *Sufficiency of the allegation*: It was then suggested that the prosecutor had said enough by claiming to have been raped and that the precise details of the sexual acts were not, of themselves, relevant. In that sense, so it was said, the intervention of the Tribunal member had done the prosecutor no injustice.

95 I do not accept this interpretation of events. Once the accusation of rape was made, if it was to be considered properly, it was necessary to have at least sufficient detail of what the prosecutor alleged had happened to her to decide whether her evidence in this respect rang true. In the end, the Tribunal member effectively disbelieved the allegation of rape. But he reached his conclusion about it without the benefit of a statement by the prosecutor in sufficient detail to express her real version of events.

96 *The prosecutor's interpretation*: During the application for the orders nisi, Gaudron J pointed to the consequences that are normal during a formal hearing in Australia, where the decision-maker indicates to an advocate that he or she does "not need to ask any further question[s]" about an incident. Her Honour said (and it is the case) that, typically, this signals that the relevant fact had been

accepted. Counsel appearing for the Minister before Gaudron J agreed that this was normally a reasonable inference for an advocate to draw. He insisted, however, that it was necessary to look at the entire transcript where, it was said, "a different picture appears".

97 There is no doubt that stopping a party to a hearing from presenting further evidence or argument upon an issue and then deciding the case upon a basis that might have been the subject of such evidence or argument will normally be regarded as unfair. It will usually attract relief from the courts[37]. Similarly, where, although not stopped, an applicant is effectively misled by conduct on the part of the decision-maker, relief may be granted to prevent a procedural unfairness[38].

98 Before this Court it was suggested that only a lawyer would interpret the statement by the decision-maker in the way that Gaudron J described. It was doubted that the prosecutor, a person without legal training, extensive English language skills or sophistication, communicating through an interpreter, would have so understood the impugned statement of the member constituting the second Tribunal.

99 Obviously, the prosecutor would not have been aware of the conventions of legal advocacy. But the fact remains that the prosecutor had brought herself to open up the issue of rape by government officials, self-evidently a serious matter. Once this was done, it was important that she should have been allowed, and properly encouraged, to tell her story. Instead, she was told that no further questions "about that particular incident" were needed. The questioner immediately turned elsewhere. It is not the formula of words used by the Tribunal member that matters. Nor is it the familiarity on the part of the prosecutor in the ways of the law. What matters is the course that the hearing then took.

100 *The state of the prosecutor's evidence*: The Minister complained that the prosecutor had not sworn an affidavit in these proceedings to state what had occurred to her so as to indicate what she would have said had she not been interrupted by the Tribunal member[39].

---

37 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145; cf *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1980) 144 CLR 300 at 303.

38 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 122 [103]; cf at 88 [3], 94-95 [28], 150 [200].

39 cf *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82. See also *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966; 190 ALR 601.

101 In many areas of litigation, this argument would be a telling one. The prosecutor's proceedings are in the original jurisdiction of this Court. This Court is, therefore, effectively, conducting a trial. The prosecutor bears the burden of proof. She did swear an affidavit. It consisted of little more than the complaints that founded the orders nisi. Nevertheless, the affidavit does contain the statement that the Tribunal did not at any time bring to the prosecutor's attention the specific evidence cited in its decision which the Tribunal relied on to disbelieve her; did not give her a fair opportunity to express comments in respect of that evidence; and relied on the psychologist's report to draw an adverse inference against her with respect to the incident of rape without giving her an opportunity to comment and without the benefit of any explanation from the author of the report. The affidavit goes on:

> "Had I been given the opportunity to comment, or had the Tribunal sought comments from the author of the report, the Tribunal would have appreciated that the author of the report had taken care not to disclose any sensitive details of the confidential communications that passed between the parties. The Tribunal would have also appreciated that the subject matter of the meeting and the purpose of the meeting had between the psychologist and the applicant when her husband and her mother were not present, had no relation or any connection with the incident of rape."

102 This affidavit was read without objection. No request was made on behalf of the Minister to cross-examine the prosecutor upon it. Whilst it might have been elaborated in greater detail, I am not inclined to impose on a person in the position of the prosecutor the requirements that might be expected of other more well resourced litigants. In any case, if the prosecutor were to succeed in this Court, there would be a full opportunity for the factual issues to be explored where they should be, namely before the Tribunal in a hearing that was procedurally fair.

103 *The subsequent course of the hearing*: It was finally submitted that, in subsequent exchanges between the Tribunal and the prosecutor, and in permitting the prosecutor's migration agent to file a written submission "because there are so many issues [that arose] today", the member constituting the second Tribunal had repaired any error that had occurred when he stated that he did not need to ask the prosecutor further questions on the rape incident.

104 It is certainly true that, in later questions, the Tribunal member returned to what had happened at the police station[40]. But throughout his questioning he described the rape obliquely and by circumlocution as the "incident" or "event".

---

40 The passages in the transcript appear in the reasons of Callinan J at [120].

This delicacy may have been adopted to protect the feelings of the prosecutor or to shield the member's own feeling of discomfort. However, in proceeding as he did, he compounded the error of failing to give the prosecutor the opportunity (or inform her of the necessity) to tell her version of what had happened if she wished to rely on it. To take the course of delicacy and then effectively to disbelieve the prosecutor because she had not established the truth of what she claimed was, in substance, unfair, particularly in an inquisitorial hearing.

105 Moreover, having told the prosecutor at the time she raised it that the Tribunal did not need to question her about "that particular incident", the later interrogation must be read in the context of that statement. So too the grant of the request to provide a written submission must be read in that context. Whilst the Tribunal member did ask the prosecutor on a number of occasions whether she wished to say anything further concerning her "treatment by the police at the police station", the opportunity for the provision of the prosecutor's version of what had happened to her had effectively passed. Certainly, the Tribunal member did not make it plain that he found it difficult to accept the prosecutor's statement of rape on the basis of the record of the first Tribunal and the history recorded in the psychologist's report.

106 One gets an impression in this case of two cultures passing each other, like ships in the night, in the midst of a polite hearing. To the contrary of the opinion of others, there was *much* to "prevent [the prosecutor] from explaining earlier that societal prejudice, and the shaming that would follow in her homeland, as well as her ingrained modesty had been the reason for her previous silence"[41]. The inhibitions that made mentioning and explaining such things difficult may seem irrational and self-defeating to others whose life's experience has been different. But they were, at least potentially, the source of the prosecutor's disadvantage before the Tribunal. Sometimes in such matters silence, a pause and just a little proper encouragement, will help empower a witness to open up a most painful and difficult subject. That was missing in the second Tribunal hearing. The delicacy of the Tribunal, in the result, did the prosecutor a (doubtless unintended) injustice. It is to repair the resulting unfairness that the prosecutor now moves this Court.

107 *Conclusion – the excuses fail*: None of the claimed explanations or justifications for the course that the proceedings took before the second Tribunal is therefore persuasive.

---

41 Reasons of Callinan J at [129].

Conclusion: constitutional writs should issue

108 It is true that a third hearing before the Tribunal would be a misfortune. However, as this Court has repeatedly said, the issues raised by applications of this kind are serious and important for the applicant, for the Australian population and for the nation, fulfilling its obligations under international law[42]. High standards of procedural fairness are required, and usually observed, by the Tribunal.

109 In this case a mistake occurred. The obligation to repeat the exercise does not ensure that the prosecutor will ultimately succeed on the merits. Nor is that its object. But it would ensure that she be allowed to recount her story about being raped by police officers of the Sri Lankan government as a factual foundation for her claim of having a well-founded fear of persecution. Further, she would not then have her allegation disbelieved, if it is, without a full opportunity to elaborate it as she wishes; nor have her allegation discounted on the basis of her failure to mention the rape in earlier records without being fairly told that such considerations inclined the decision-maker to an adverse conclusion about the truth of that allegation. She could then give her answer, a chance that was denied to her by the course taken in the hearing in the second Tribunal.

110 The prosecutor is entitled to succeed.

Orders

111 The orders nisi granted by Gaudron J should be made absolute. A writ of certiorari should issue to the Tribunal to remove into this Court the decision of the Tribunal of 17 July 2001 so that the decision might be quashed. A writ of mandamus should issue to the Tribunal requiring it to rehear and determine the prosecutor's application according to law. The prosecutor should have leave to apply for any other relief, by way of injunction or otherwise, as might be needed, to give effect to the foregoing orders. The Minister should pay the prosecutor's costs in this Court, except for the special interlocutory costs ordered by Gaudron J in favour of the Minister.

---

42 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 69-70 [196]-[198].

112 CALLINAN J. The question in this case is whether the refusal of a grant of a protection visa to the prosecutor involved a denial of natural justice to her, specifically, by an alleged intimation by the first respondent, the Refugee Review Tribunal ("the Tribunal") that the prosecutor had satisfied it of a matter, and in respect of which the Tribunal subsequently made a finding adverse to her.

Facts

113 The prosecutor is a Christian Tamil Sri Lankan who was born in Kandy in 1974. She entered Australia accompanied by her husband and mother in 1998. She applied for a protection visa in 1999. A delegate of the second respondent refused the application. She sought a review of that refusal by the Tribunal.

The prosecutor's claims

114 The prosecutor gave this account of her life in Sri Lanka to the Tribunal. In 1983 her parents' property was looted during riots in the course of which she suffered injuries in fleeing from the looters. On 18 January 1987, the prosecutor's thirteenth birthday, police officers raided her family home, and assaulted and arrested the guests who were however released the next day. In 1989 there was an attack upon the prosecutor's family by the Janatha Vimukthi Peramuna, a left-wing Singhalese group, at their house. Her father was injured. He was ill and bedridden until he died in 1992. In 1991 one of the prosecutor's brothers disappeared and did not return until 1998. In 1992, another brother was beaten by the police. He died in 1994. Some time afterwards she went to live and work in Colombo, residing there with her uncle and another brother. The prosecutor returned to the family home at Nilambe, near Kandy, to live in 1995. It is there, as she has subsequently claimed, that she was raped.

115 During 1996 political tension increased in Sri Lanka. The prosecutor felt increasingly insecure. She arranged to take a position in the Maldives where she lived in a de facto relationship with her future husband, a Pakistani Muslim, until they married in late 1998. The prosecutor was rejected by her husband's family who threatened to harm her if she were to go to Pakistan with him. She was ostracized by her own family. She said she feared harm and persecution if she were to return to Sri Lanka. After her arrival in Australia with her husband and mother, the former abandoned her and has returned to Pakistan to live.

The first Tribunal hearing

116 Included in the evidence before the first Tribunal which dealt with her claim was a report by a psychologist by whom the prosecutor had been treated, sometimes, but not always in the company of members of her family. There had been ten consultations. The psychologist's task was to treat the prosecutor for "the psychological and emotional sequelae of her traumatic experiences chronically throughout most of her life in Sri Lanka and more acutely in recent

years prior to her ... departure for Australia". The report sets out in some, but not by any means complete detail, the events and matters which have distressed the prosecutor over the years, and have caused her to suffer a post traumatic stress disorder. The report makes no mention of rape.

117 On 8 February 2000, the prosecutor attended a hearing before the Tribunal constituted by Mr Vrachnas. Towards the end of the hearing, the prosecutor made a claim that she had a fear of being recruited by the Liberation Tigers of Tamil Eelam ("LTTE"). She did not identify any particular event to support that claim. The Tribunal pointed out that her fear was contrary to its understanding of the position, which was that the LTTE did not seek to recruit Christian Tamils. She did not claim to have been raped by any policemen. On 29 March 2000, the Tribunal made a decision affirming the decision of the delegate. On 24 May 2000, the prosecutor made an application for an order of review to the Federal Court. On 31 August 2000, the Court (Beaumont J) made orders setting aside the decision of the Tribunal and remitting the matter for reconsideration according to law. His Honour held that the Tribunal had made a reviewable error in failing to make findings in relation to the prosecutor's further claim, made at the hearing, that she feared recruitment by the LTTE. The matter was duly remitted to the Tribunal for a second hearing.

The second Tribunal hearing

118 On 2 January 2001, the Tribunal sent a letter to the prosecutor stating that it had looked at all of the relevant materials but that it was not prepared to make a favourable decision on that information alone. It invited her to attend a hearing to give oral evidence. On 17 January 2001, the prosecutor requested the Tribunal to transfer the matter from the Melbourne Registry to the Sydney Registry so that she could appear personally. On 23 January 2001, the Tribunal agreed to this request.

119 At the outset of the postponed hearing the Tribunal, constituted by Mr Blount, made it clear that it would have regard, but not exclusively, to the material previously provided by and on behalf of the prosecutor. The first part of the hearing was taken up with questions and answers about the prosecutor's movements before she came to Australia. A little later this exchange (the "first exchange") occurred[43]:

> "M I was asking whether when you went to the Maldives whether it was your mother who arranged your travel and employment there?
>
> I In the meantime there was an incident that happened in my life.

---

43 M denotes Tribunal Member. I denotes Interpreter.

M Which was in Nilambe?

I Yes.

M When was this?

I In 95.

M When in 95 you recall? In the middle of the year, the end of the year?

I It should be I think in the end of the year.

M Ok. What was that happened?

I This has not been described in the statement. My mother doesn't know. Nor does my husband know.

M Please continue.

I I have described in the statement the saying that one night some boys came and knocked at the door. Later mother came no no that elderly lady.

That elderly lady came and she scolded and wanted them to go. I have described this in the statement. Later, the following day police came there. Police came and asked are you trying to threaten us with Tamil boys? Are you in the LTTE? They took me.

Later I was kept in the police. One thing happened to me Sir. So far I have not revealed this to my mother because my mother has pressure problems. And in the future she should not know about this.

They raped me. Owing to this fear, I asked my mother to take me away. I cannot tell this.

M Ok. I don't need to ask you any further question about that particular incident. Now, after that you went to the Maldives and you became established there with employment and after a period with a relationship with a person who later became your husband?

I Yes."

120 Subsequently during a second exchange, the rape, referred to as the "police incident", was obliquely mentioned.

"M Why didn't you mention previously when you were talking about what police said to you when they took you to the police station?

I Because I don't remember very well and this is not a pleasant thing to speak about?

M Well well this question about these two people coming to your house if it is something that you may attach significance to it was not mentioned in your very detailed written statement. It was not mentioned in your detailed evidence to the tribunal at the first hearing. It was not mentioned today when you were speaking about that period and only mentioned in the last few minutes. I have some difficulty with that. I have to say.

I All these things are related to that police incident and therefore in the statement, because my mother doesn't know anything, and in fact, she should not know anything about this.

M I don't understand why that would stop you from mentioning that the LTTE people had come to your house and asked you to join if that was the case particularly since at the previous hearing you mentioned briefly a fear that you might be asked to join the LTTE and did not say that you have ever been asked. I don't see how that would involve talking about the police itself.

I All these events are related to that incident and therefore I didn't wish to tell anyone.

M Even when you told me about the other incidents an hour ago.

I Even to think about this I find it very difficult for my own self."

121 The respondent submits that the prosecutor was given an appropriate opportunity which she did not take to enlarge upon the rape during two subsequent exchanges:

"M ...

I have to say also that I have to think very carefully about these matters that have been raised today for the first time. And they are really two separate matters in that regard even though there may be some link between them. The first one is the question of your treatment by the police at the police station in 1995. The second issue which is much more difficult to understand because the issue was actually discussed with you in the previous tribunal hearing is the alleged approach to you to join the LTTE in 1995.

> I have to consider whether it is reasonable to accept that each of these was raised on previous occasions including before the tribunal at the last hearing. Do you want to say anything about that?
>
> I One thing is I am scared to go back to Colombo. The LTTE will recruit. Police and army have already threatened me not to come. I won't be able to go in the same manner I did previously while travelling from the Maldives, that is to pay money. And I won't be able to face the torture that I had already faced. No one will give accommodation in Colombo. And the Singhalese thugs and mobs - they will cause me problems. Even to get house, that is accommodation, I got to get myself.
>
> ...
>
> M Is there anything else you would like to say to the tribunal about any of these matters you think are relevant while you have the opportunity?
>
> I That is the thing. It is very difficult for me to go and get accommodation get a house and Tamils and Singhalese mobs."

122 One further factual matter should be noted. At the end of the hearing the prosecutor's solicitor and migration agent said that he wished to make a further written submission. This he accordingly did setting out in some detail other assertions and arguments. Included in them was an explanation of her earlier reticence about being raped:

> "The [prosecutor] was raped on one occasion while she was in custody. This matter was kept secret from her mother and ex husband. Consequently, because of this reluctance to tell her relatives she decided to not disclose this matter in her previous submission and hearing.
>
> ...
>
> [I]t must be noted that the [prosecutor] is a young Tamil girl and victim of domestic violence. Her husband left her. She was previously raped, tortured and extorted by people working for the authorities. For many years she had been a victim of persecution by Singhalese thugs. The [prosecutor] is ostracised by her relatives and friends."

123 In affirming the delegate's decision the Tribunal on this second occasion said this:

"The [prosecutor] stated that during this period in Nilambe there had been an incident at the end of 1995, which had not been described in her earlier statement and of which neither her mother nor her husband were aware.

The [prosecutor] stated that she had described in her statement how one night some boys had come and knocked at the door. She said that her elderly maid had scolded them and warned them to go, and the following day the police had come and accused them of threatening the Singhalese with Tamil boys and asked if she was in the LTTE and had taken her and detained her at the police station. The [prosecutor] stated that the police had raped her and this is why she had asked her mother to help her leave Sri Lanka (for the Maldives). The Tribunal asked the [prosecutor] later in the hearing why she did not lodge a complaint or take the matter further with lawyers or courts or more senior authorities. The [prosecutor] stated that she had been threatened not to tell and could not even go to a doctor.

...

The Tribunal again referred to the question of claims raised for the first time at this hearing which had not been mentioned before, in relation to the alleged approaches by the LTTE and the police detention and rape, all in 1995. The [prosecutor] stated that she was scared to go back to Colombo because the LTTE will recruit her. She claimed that the police and army had already asked her not to return and she would not be able to enter as she had before by paying money. She would not be able to face again the torture she had already faced and no-one will give her accommodation in Colombo as she no longer has any relatives there and everyone has abandoned her (including her relatives in Australia) because she married a Muslim."

124 The Tribunal then relevantly made these findings:

"There were some problems with differing evidence by the [prosecutor] in her application and statement and at hearings, which suggested that her recollections might be unreliable. For example, in her application the [prosecutor] had stated that she worked in Colombo from August 1994 to December 1995, but at the last hearing stated that she was in Colombo for only six to seven months. Also at the hearing, the [prosecutor] played down the frequency of her visits back to Sri Lanka until she was prompted by reference to her passport and, similarly, overstated the frequency of accommodation moves in the mid to late 1980s until reminded of documentary evidence previously submitted by her mother.

The Tribunal had more serious difficulties with the new claims which emerged at the hearing before the present Tribunal, not having been mentioned at all in her original lengthy statement or at the hearing before the previous Tribunal.

> Although in her original statement the [prosecutor] had referred to some Singhalese youths coming to her house in Nilambe and being scolded away by her elderly maid, she made no mention of being taken to the police station the next day because of this, let alone that she had been accused by the police of LTTE contacts or that she was raped in police custody. The [prosecutor] stated that she had not mentioned the rape previously because her former husband and mother did not know about it and so she had not referred to it. However, that does not adequately explain why the matter was not raised at the previous Tribunal hearing at which neither her husband nor mother was present (and does not explain why being taken to the police station was not mentioned at all)[44]. Nor was the rape referred to in a psychological report submitted by the [prosecutor] to the first Tribunal in February 2000, prepared by a consultant psychologist from the Queensland Program of Assistance to Survivors of Torture and Trauma after some ten appointments with the [prosecutor] (some without her mother or husband present).
>
> The Tribunal's concerns about this were strengthened by the [prosecutor's] linking this alleged detention and rape with her other new claim, that she had been approached that same year to join the LTTE and that the police had asked her specifically about those persons who had approached her. The Tribunal found the [prosecutor's] evidence about this particular claim to be most unsatisfactory. It is evidence that one would have expected to have been provided at the hearing before the previous Tribunal when the [prosecutor] was asked specifically about her claim that she fears the LTTE because she believes that they might try and recruit her. However, notwithstanding the previous Tribunal's question, the [prosecutor] on that occasion made no reference at all to the claim now advanced that in 1995 two persons had come to her house on more than one occasion and had asked her to join the LTTE. Nor did the [prosecutor] mention this matter when she first referred at the most recent hearing to being taken in by the police for allegedly threatening the Singhalese youths, whereas later in that hearing she claimed that the two matters were linked and that this was the reason she was taken in and questioned. At one point in the hearing the [prosecutor] stated that it was the two teachers who had approached her in 1995 and asked her to join the LTTE but later she stated that it was two friends of the teachers who came to see her and asked her to join the LTTE.

---

44 The prosecutor's husband was in fact present at the first Tribunal hearing but the mistake is not material to the present application: see the reasons of Gummow and Heydon JJ at [50].

> The way in which this claim was presented and developed at hearing led the Tribunal to conclude that this did not represent the [prosecutor's] own actual experience. Further, the Tribunal found it most implausible that two persons who the [prosecutor] had met through teachers when she was a young girl should suddenly come to her house eight years later seeking to recruit her to the LTTE. The Tribunal was satisfied that this claim was not true but was presented solely for the purpose of bolstering the [prosecutor's] claims. The [prosecutor's] insistence that this circumstance was the reason she was taken and questioned (on the occasion when she said she was raped) leads the Tribunal to conclude that the detention (if it occurred at all) did not occur in the manner and for the reason claimed.
>
> Having carefully considered the [prosecutor's] evidence about these particular matters, the Tribunal does not accept that the [prosecutor] was approached by LTTE members in 1995, or that she was asked or pressed to join the LTTE, or that she was for that reason detained by the police or that she was raped when detained by the police. These findings must affect the Tribunal's review of the [prosecutor's] credibility on other matters, especially where her stated fears are inconsistent with her actions in repeatedly returning to Sri Lanka."

125 The prosecutor sought and failed to obtain a review of the Tribunal's decision by the Federal Court (Wilcox J) on grounds that are of no relevance to these proceedings which are in the original jurisdiction of this Court. The respondent does not suggest that the fact of them provides any discretionary basis for the refusal of the relief which the prosecutor seeks in this Court if she can make out her case for it.

The proceedings in this Court

126 On 7 November 2002 the Court (Gaudron J) made an order nisi on the prosecutor's application for relief under s 75(v)[45] of the Constitution as follows:

---

45 "**Original jurisdiction of High Court**

> **75** In all matters:
>
> ...
>
> (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
>
> the High Court shall have original jurisdiction."

"**IT IS ORDERED THAT:**

1. The first and second respondents show cause why, in respect of decision of first respondent made on 17 July 2001 that the prosecutor was not entitled to a protection visa:

    1) A Writ of Mandamus should not be issued out of this Court directed to the first respondent to rehear and determine the matter according to law.

    2) A Writ of Certiorari should not be issued out of this Court directed to the first respondent to remove into this Court the decision to be quashed; and

    3) If the above Writs of Mandamus and Certiorari are issued, an Injunction should not be issued out of this Court directed to the second respondent restraining the second respondent from removing the prosecutor from Australia until the matter has been reheard and redetermined by the first respondent.

UPON THE GROUNDS THAT:

1. The Applicant was denied natural justice and procedural fairness required to be observed by the Tribunal with respect to its review of the delegate's decision and in reaching its ultimate decision.

PARTICULARS:

1. The Tribunal during and in the course of the hearing conveyed to the Applicant wrong and misleading impression which misled and induced a false belief on the part of the Applicant that the Tribunal had accepted her claim and evidence given by her that she was raped and there was no need for her to give any further evidence or make any representations regarding the incident of rape. In the circumstances the Applicant was disadvantaged by the conclusion and findings reached by the Tribunal that it could not accept her claim and evidence that she was raped. The conclusion and findings reached by the Tribunal were improper, unfair and not in keeping with the rule and principles of natural justice.

2. The wrong and misleading impression and false belief referred to in paragraph 1 herein was caused by the [statements made in the first exchange and subsequently] ...

3. The Tribunal drew unfair and improper adverse inference and conclusion against the Applicant that she was not raped on the basis that the incident of rape was not mentioned in the psychological report that was tendered at the earlier hearing. In as much as the Tribunal had not made any inquiry and had not asked the author or the Applicant for any other plausible explanation as to why the incident was not mentioned in the report, the adverse inference and conclusion drawn by the Tribunal in all the circumstances was not in keeping with the rule and principles of natural justice.

IT IS FURTHER ORDERED THAT:

...

3. That there be an enlargement of time to permit the prosecutor to commence proceedings for the relief specified in this Order Nisi.

4. That the second respondent his agents and delegates be restricted from removing the prosecutor from Australia until the determination of these proceedings in the High Court.

IT IS FURTHER ORDERED THAT:

1. The applicant/prosecutor pay the respondent's costs of High Court proceeding No S154/2002 up to and including 30 August 2002.

... ."

127 In my opinion the order nisi should be discharged. First, there is not the slightest evidence from the prosecutor that she was in fact misled, or that she believed that the Tribunal had accepted her claim of having been raped. This distinguishes her case from *Re Refugee Review Tribunal; Ex parte Aala*[46] and *Muin v Refugee Review Tribunal*[47].

128 This is not surprising for the following reason, which is another substantial reason why the order nisi should be discharged. There was no denial of natural justice. The Tribunal's language taken as a whole was not even ambiguous. If there were any misapprehension arising out of the Tribunal's statement during the first exchange, that it did "[not] need to ask ... any further question about that particular incident", it should have been dispelled by the

---

46 (2000) 204 CLR 82.

47 (2002) 76 ALJR 966; 190 ALR 601.

explicit question during the second exchange, "why didn't you mention previously when you were talking about what police said to you when they took you to the police station?" The Tribunal was not only troubled by the failure of the prosecutor on the earlier occasion to refer to a rape at the police station, but it also made it clear that this was so during the subsequent exchanges. It was then that the Tribunal said that very careful thought would have to be given to the two matters, (of which the rape was one) "raised today for the first time". A little later the Tribunal asked "Do you want to say anything about that?" And yet another opportunity was given to the prosecutor by the asking of a final question, "Is there anything else ... you think ... relevant [about any of these matters] while you have the opportunity?" And finally, there is the additional fact that the prosecutor's advisers wrote a letter to the Tribunal after the hearing actually elaborating on the points raised during it and expressly attempting to deal with the omission that the Tribunal made clear was troubling it.

129 A factual foundation, that she was denied natural justice, for the relief claimed by the prosecutor has not been laid. The Tribunal was entitled to find the facts that it did. Courts and tribunals do, not infrequently, gauge the reliability of a party or a witness by the incompleteness of their accounts on other occasions. That is so even though, and as with all exercises of assessing credit, it is a method which on occasions may have its limitations. It was said here, that delicacy, and a natural cultural reticence had deterred the prosecutor from mentioning on other occasions that she had been raped. So much may be accepted. But the prosecutor's failure to persuade the Tribunal of her claims did not simply depend upon that. She did in fact, belatedly, refer to the rape. Natural delicacy may have deterred her from going into the details of it, but it was its occurrence and her failure even to mention it earlier, which caused the Tribunal to reject her assertion. There was nothing to prevent her from explaining earlier that societal prejudice, and the shaming that would follow in her homeland, as well as her ingrained modesty had been the reason for her previous silence.

130 It is not a question whether this Court might have decided the purely factual question before the Tribunal differently. The only question for this Court is whether there has been jurisdictional error by way of denial of natural justice entitling the prosecutor to the relief claimed. To that question the answer is a negative one for the reasons I have given.

131 The order nisi should be discharged with costs.