HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

APPLICANT NAFF OF 2002 APPELLANT

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS & ANOR RESPONDENTS

Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] HCA 62
8 December 2004
S112/2004

ORDER

1. *Appeal allowed.*

2. *Orders of the Full Court of the Federal Court of Australia made on 31 March 2003 set aside, and in their place order that:*

   (a) *the appeal to the Full Federal Court be allowed; and*

   (b) *the order of Tamberlin J in the Federal Court of Australia made on 22 July 2002 be set aside.*

3. *Order absolute for a writ of certiorari directed to the second respondent, quashing the decision of the second respondent in matter N00/32904 dated 19 March 2002.*

4. *Order absolute for a writ of mandamus directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 15 March 2000.*

5. *The first respondent pay the appellant's costs of the proceedings in the Federal Court of Australia before Tamberlin J, in the Full Federal Court and in this Court.*

On appeal from the Federal Court of Australia

Representation:

M N Allars for the appellant (instructed by the appellant)

N J Williams SC with J D Smith for the first respondent (instructed by Sparke Helmore)

CATCHWORDS

Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs

Immigration – Refugees – Refugee Review Tribunal – Decision – Judicial review – Procedural fairness – Non-compliance with statutory duties – Tribunal concerned by inconsistencies in applicant's evidence at oral hearing – Tribunal said it would give the applicant a chance to respond in writing to its concerns – Whether Tribunal's failure to do so involved a failure to complete the review process – Whether failure involved a breach of the duty to conduct a review under s 414(1) of the *Migration Act* 1958 (Cth) – Whether failure involved a breach of the duty to hear from the applicant under s 425(1) – Whether reviewable error where absence of evidence from the applicant about effect of failure.

Migration Act 1958 (Cth), ss 56, 414(1), 415(1), 425(1), 427(1)(b), 420, Pt 7 Divs 2-7A.

McHUGH, GUMMOW, CALLINAN AND HEYDON JJ.

Background

1 On 1 September 1999, the appellant, a citizen of India but not of Australia, entered Australia.

2 *The appellant's application for a protection visa.* On 30 September 1999, the appellant applied to the Department of Immigration and Multicultural and Indigenous Affairs ("the Department") for the grant of a protection visa. He claimed to be a Muslim Tamil who had a well-founded fear of political persecution in India, and hence was a non-citizen to whom Australia owed protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees. He therefore claimed that he fell within s 36(2) of the *Migration Act* 1958 (Cth) ("the Act").

3 The appellant advanced the following history. He was an active member of the Indian Union Muslim League and of a committee of the Jihad Movement. He was president of an organisation in his village in Tamil Nadu associated with a movement led by a benevolent Muslim industrialist, Dawood Ibrahim, whom he had met in Bombay. He was arrested with 30 other Muslims on 4 December 1998 and accused of planning to plant bombs. He was severely beaten before being released on 10 December 1998. He decided to flee India to save his life. He was arrested again some time after 11 January 1999 and beaten by the police, who unsuccessfully demanded his passport. He appeared to say that he had also been arrested on 15 April 1999, following the destruction of the local Hindu Temple, detained for two weeks, and tortured.

4 On 15 March 2000, pursuant to s 65 of the Act, an officer of the Department, acting under delegation from the first respondent ("the Minister"), refused the appellant's application for a protection visa. That delegate rejected the appellant's contentions that he had met Dawood Ibrahim in India, that he was involved with the Jihad Movement, and that he was involved with Dawood Ibrahim's movement.

5 *The appellant's application for review of the delegate's decision.* On 10 April 2000, the appellant applied to the Refugee Review Tribunal ("the Tribunal") for review of the delegate's decision pursuant to s 412 of the Act.

6 With respect to the conduct of that review, s 425(1) of the Act provided:

> "The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review."

Section 425(2)(a) provided:

> "Subsection (1) does not apply if:
>
> (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it …"

Thus, s 425(1) created a duty on the Tribunal to invite the appellant to a hearing for the purposes described, unless s 425(2)(a) was satisfied.

7 On 13 December 2001, the Tribunal wrote a letter to the appellant in which he was informed that the Tribunal was not prepared to decide the review in the appellant's favour on the material so far supplied. Hence, s 425(2)(a) was not satisfied. The letter went on to say that if the appellant wanted to come to a hearing, it would be held on 5 February 2002. In that manner the Tribunal complied with s 425(1).

8 On 4 February 2002, in response to an invitation in the letter of 13 December 2001, a written submission prepared by a firm of lawyers and migration agents, together with supporting documents, was sent to the Tribunal.

9 *"Inconsistencies" in what the appellant said on 5 February 2002.* At the proceedings on 5 February 2002, the appellant spoke in Tamil. An interpreter and a migration agent were present. Although some of the relevant events of that day are recorded in the decision of the Tribunal member, and although there is an audio recording of what was said, it has not been played to any of the courts that have considered this case, and there is no transcript of what was said. It is clear from the Tribunal member's reasons for decision that she engaged in close and sceptical questioning of the appellant. This questioning revealed inconsistencies in the appellant's evidence on various topics, one of which was the detentions to which the appellant claimed to have been subjected. The Tribunal member certainly appeared to form the view that there were inconsistencies in what the appellant had said about the dates on which he was detained and the number of times he was detained. Thus at one point in her reasons for decision she said:

> "The [appellant] stated that his second detention was in March 1999. He then stated that the second detention was in January 1999. The [appellant] stated that it was on the fourth Friday of January – he then stated that it was the fourth Friday in December. He then stated that the second

detention was from 12 January 1999 for four or five days and then he was released on or around 14 or 15 January."

10 Later she said:

"[The appellant] stated that he was on bail at the time he left the country. He stated that he was released on 12 January 1999. The tribunal asked if January was the last time he was arrested by the Indian authorities. The [appellant] stated that he was not arrested after this time, he stated that he was living in hiding.

The tribunal asked the [appellant] why he wrote in his statement to the [Department] that he was arrested on 14 April 1999 when he had just stated that the last time he was arrested was January and that he was in hiding after January? The [appellant] stated that he was arrested on two occasions. The tribunal pointed out that he was arrested on three occasions – December 1998, January 1999, and April 1999. The [appellant] stated that it is confusing."

11 *The conclusion of events on 5 February 2002.* The parties agreed[1] that proceedings before the Tribunal member on that day came to an end in the following way. The Tribunal member said:

"Given that there are some inconsistencies with regard to the dates of the detentions and the number of detentions, I will have to write to you about those."

After that statement had been interpreted, the Tribunal member said:

"So what I will do is to write to you in the next couple of days and you will have 21 days in which to respond to my questions and to put any more information that you wish to the Tribunal."

In fact, contrary to the procedure indicated on 5 February 2002, the Tribunal member did not write putting any questions to the appellant within a couple of days, or at all. On 25 February 2002, the Tribunal sent the appellant a letter saying that it had "considered all the material relating to your case" and had "made its decision", and that the decision would be handed down on 19 March

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1 The agreement was not made until the Full Court hearing: *NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 127 FCR 259 at 271 [52].

2002. On 19 March 2002, the Tribunal member handed down her reasons for affirming the delegate's decision not to grant a protection visa. The date of the decision for the purposes of the Act was 19 March 2002 (s 430B(4)), although the front page of the decision stated that it had been made on 22 February 2002.

12 *The Tribunal member's reasoning.* First, the Tribunal member rejected various claims of the appellant in relation to Dawood Ibrahim and the Jihad Movement.

13 She said that Dawood Ibrahim was regarded by the Indian authorities as a gangster whom they wished to arrest and who was resident in Dubai and Karachi, and who thus would be unlikely to have travelled to India and met the appellant. She noted an inconsistency between the appellant's claim to have been involved since 1993 at a high level in Dawood Ibrahim's movement, an organisation of "serious concern" to the Indian authorities, and the appellant's claim not to have attracted adverse attention until the end of 1998.

14 She saw an inconsistency between the appellant's claim that he did not support violence and his claim to be involved with the Jihad Movement, a violent organisation. She suggested that, when she pointed this out to the appellant, he then shifted ground to a claim of having severed links with the Jihad Movement. She pointed to the appellant's claim to have been involved with the executive committee of the Jihad Movement at a time when it had not been established.

15 Secondly, the Tribunal member accepted that the appellant was involved in the Muslim League, but said it was a moderate party, and that it was unlikely that the appellant had been persecuted for being involved in it.

16 Thirdly, she pointed out that the appellant left India on a valid passport, and this would probably not have taken place if the Indian security forces had been concerned about the appellant. Hence the Tribunal member found that the appellant was not "of any adverse interest to the authorities in India".

17 But the Tribunal member concluded that even if he had been, the difficulties he faced were only local difficulties, and he would not face them in any other part of India except his home town. She decided that he was free to move to many other places in India without risk of persecution, and that his financial position and employment prospects made it not unreasonable for him to do so.

18 *The appellant's application to the Federal Court of Australia.* On 9 April 2002, the appellant filed an application in the Federal Court seeking orders under s 39B of the *Judiciary Act* 1903 (Cth) quashing the Tribunal's decision and

requiring the Tribunal to redetermine the appellant's application for review of the delegate's decision to refuse a protection visa. On 22 July 2002, Tamberlin J dismissed the application[2]. On 31 March 2003, the Full Court (Lindgren and Stone JJ, Downes J dissenting) dismissed an appeal against that order[3]. The appellant was not represented in either court. The application under s 39B joined the Minister as the first respondent and the Tribunal as second respondent. But the Notice of Appeal to the Full Court joined only the Minister.

19 *The grant of special leave.* On 12 March 2004, the appellant was granted special leave to appeal to this Court. At the hearing of the appeal, leave was granted to the appellant, who now was represented, to file an Amended Notice of Appeal joining the Tribunal as second respondent. Although various other matters had been agitated in the courts below, the only grounds of appeal to which the grant of special leave related concerned the statements of the Tribunal member on 5 February 2002 quoted above.

The nature of the debate in this Court

20 The affidavit which the appellant filed in the Federal Court did no more than annex the Tribunal's decision and repeat the grounds of relief set out in the application. It did not say that as a result of what he had been told on 5 February 2002 he did anything or abstained from doing anything; it did not say that he had been misled in any way; and it did not say what he would have done if the promised letter had been received. In his Notice of Appeal to the Full Federal Court against the order of Tamberlin J, the appellant said that if he had been given an opportunity to make submissions he would have dealt with the "[i]nconsistencies regarding the evidence".

21 Because of this, the Minister advanced the following arguments for the view that there had been no denial of procedural fairness[4]. The appellant was on notice that his claims to have been involved with the Jihad Committee and Dawood Ibrahim's movement were highly controversial, since the Minister's

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2 *NAFF v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 946.

3 *NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 127 FCR 259.

4 The appellant placed no reliance on s 424A of the Act, and no issue in the appeal arises in relation to it.

delegate had rejected them. The appellant's adviser had responded to the delegate's reasoning by providing submissions and documents to the Tribunal before the hearing which were in part directed to those questions. The appellant gave evidence that was internally inconsistent, inconsistent with his own earlier claims, and inconsistent with independent information. The appellant had been given an opportunity to be heard about the inconsistencies, including the inconsistencies relating to the dates and number of detentions referred to at the close of proceedings on 5 February 2002. At that point, the Tribunal member had fully discharged her obligations to accord procedural fairness. A later failure to do this could only be found if there was evidence that the appellant had been led by what was said on 5 February 2002 to do or forbear from doing anything; but there was no evidence of that kind. In any event, the inconsistencies mentioned at the close of proceedings on 5 February 2002 were not taken into account by the Tribunal in upholding the delegate's decision.

The nature of the proceedings before the Tribunal

22 The provisions governing the Tribunal's review of the decision by the Minister's delegate were in Pt 7 Divs 2-7A of the Act. The legislation provided for an inquisitorial, merits-based review by an independent tribunal. As might be expected in view of the importance of the proceedings, particularly for persons in the position of the appellant, the legislation was detailed, and it provided for procedures of some solemnity.

23 Once an applicant had made a valid application for review of a delegate's decision, the Act imposed on the Tribunal a duty to review that decision: s 414(1). It provided that the Tribunal might exercise all the powers and discretions conferred by the Act on the delegate: s 415(1). It obliged the Tribunal to "pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick": s 420(1). The Secretary of the Department was obliged to give the Tribunal a statement about the decision under review setting out the findings of fact made by the delegate, referring to the evidence on which the findings were based, and giving the reasons for the decision: s 418(2). The Secretary was also obliged to give the Tribunal all other documentary material in the Secretary's possession or control, which the Secretary considered to be relevant to the review: s 418(3). There were provisions by which the applicant for review might supply, and the Tribunal might seek, information: ss 423 and 424. The Act also imposed duties on the Tribunal to supply the applicant with certain information for comment: ss 424A-424C. Section 425(1) compelled the Tribunal to invite the applicant to appear before it and detailed provision was made about the terms of that invitation: ss 425A and 426.

24 Section 427 of the Act set out the powers of the Tribunal in conducting a review. They included powers to require the Secretary of the Department to make investigations and conduct medical examinations, to summon persons to appear to give evidence or produce documents, to require persons appearing to give evidence to take an oath or affirmation, and to direct the use of interpreters. Witnesses were obliged to attend, take an oath or make an affirmation and answer the Tribunal's questions on pain of criminal sanctions: ss 432 and 433. The Tribunal, its members and witnesses were given various forms of protection and immunities: ss 434 and 435. There were also detailed provisions for the handing down, recording and publication of decisions: ss 430-431.

25 No party challenged the Tribunal member's power to make her closing statement. What was its source? Section 427(1)(b) granted a power to adjourn the review from time to time. The scope of that power must be considered against the background of s 420 which obliged the Tribunal to pursue an objective of acting fairly and according to substantial justice without being bound by technicalities. In that statutory context, the power to grant adjournments must have included a power to grant adjournments on conditions. In substance what happened here was that an adjournment was granted on condition that further material in writing was supplied on matters to be indicated by the Tribunal's questions. Another source of power may be found in a combination of ss 415(1)[5] and 56[6]. Section 56(2) conferred on the Minister a power, in considering an application for a visa, to invite, in writing, an applicant to give additional information in a specified way (for example, by answering questions), and s 415(1) conferred on the Tribunal the same power.

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5 Section 415(1) provided:

> "The Tribunal may, for the purposes of the review of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision.

6 Section 56 provided:

> "(1) In considering an application for a visa, the Minister may, if he or she wants to, get any information that he or she considers relevant but, if the Minister gets such information, the Minister must have regard to that information in making the decision whether to grant or refuse the visa.
>
> (2) Without limiting subsection (1), the Minister may invite, orally or in writing, the applicant for a visa to give additional information in a specified way."

The Tribunal's duty to allow the appellant to give evidence and present argument

26 Although the Tribunal was obliged to provide an informal mechanism of review (s 420(1)), and although the Tribunal was not bound by "technicalities, legal forms or rules of evidence" (s 420(2)(a)), the Act established important requirements of a substantive kind, several of which were designed to ensure that applicants for review received procedural fairness. The duty of the Tribunal under s 414(1) to review the delegate's decision (which arose once the appellant had applied for review) continued until one of the outcomes described in s 415(2) was arrived at, for example, the affirming, the varying or the setting aside of the decision.

27 One aspect of the overall duty to review was the duty to invite the appellant to give evidence and present arguments: s 425(1). The duty to review therefore entailed a statutory duty to consider the arguments presented and in that way to afford the appellant procedural fairness. That implied that if the Tribunal thought that the arguments had been presented so inadequately that the review could not be completed until further steps had been directed and performed, it could not be peremptorily concluded by the making of a decision before that direction was complied with or withdrawn.

What happened on 5 February 2002?

28 In the absence of access either to the recording or to a transcript, it is not easy for this Court to appreciate the detail of everything that happened on 5 February 2002. However, some key events appear to be clear.

29 The questioning of the Tribunal member was detailed. It was based on a thorough examination of the written materials available to her, both the material supplied by the appellant and the "country information" obtained from the Department of Foreign Affairs and Trade. She appeared to have considerable familiarity with these materials. Her questioning revealed various apparent contradictions in the appellant's position, and caused him to alter that position from time to time. The difficulties to which the questioning directed attention were described, and to some extent highlighted, in the Tribunal's reasons for decision. After the point at which the Tribunal member's summary of her questioning appears in her reasons for decision, she recorded a statement by the appellant that "the fact of the matter is that he is confused by certain dates but that he has been telling the truth." The Tribunal member then recorded that the "adviser stated that he had some concerns with some of the interpreting."

Inferences from the events of 5 February 2002

30 There are some inferences which may reasonably be drawn from the Tribunal member's final statements when they are set against the background recorded in her reasons for decision. One is that she regarded the appellant's evidence about the detentions as having potential significance in the review. Another is that she had formed the belief that, despite her detailed questioning, the appellant had not done himself justice in circumstances where he had twice said he was confused and where doubts about interpretation had arisen – perhaps because he had not fully understood the questions which she had put to him, perhaps because in the stress of the moment he had not been able fully to communicate appropriate answers to them, perhaps because of the difficulty in assessing the credibility of evidence given through an interpreter. A third inference is that she believed that, as a result, the procedure had not been satisfactory because it had not been wholly fair to the appellant. In consequence, she thought that the process of review – so far as the appellant was to participate in it – should not be brought to a close, and that it was appropriate to hear more from him about the detentions. It can also be inferred that she had decided that a fair technique by which to take the matter forward was for the difficulties arising from the apparent inconsistencies to be explained to the appellant in written questions to be formulated by her, and to be calmly answered by the appellant in less stressful conditions.

31 The case, then, is an unusual one. In her closing remarks on 5 February 2002, the Tribunal member was herself acknowledging that the purposes of the review had not been completely fulfilled by the documents supplied before 5 February 2002 or by the events of 5 February 2002. She was indicating that she had not yet finished receiving the presentation of arguments by the appellant which he had been invited to make, pursuant to s 425(1) of the Act, by the letter of 13 December 2001. She was saying that procedural fairness required some further steps to be taken, so that the matters indicated could be ironed out one way or the other. It is clear that the Tribunal member was in the best position to judge whether the review process was incomplete. Her conduct is only consistent with the formation of a firm impression that it was.

32 It is possible that the reason why the Tribunal member failed to send the promised questions was that, on reflection, she thought that everything she required had in fact already been put before her, or that a resolution of the perceived inconsistencies in the appellant's statements was not crucial in deciding the review against him. If either of these explanations, or any other explanation, existed, it is to be expected that the Tribunal member would have advanced it, either by a letter to the appellant or in her detailed reasons for decision. She did not do so. It is probable, when the workload under which the Tribunal labours is

borne in mind, that the Tribunal member did not send the promised questions because she had forgotten or overlooked the fact that she had made the promise to send them. Her failure to give any indication otherwise suggested that her original impression that the review process was incomplete had not altered on reflection, and was soundly based. It would not be complete until the steps which she had thought could remedy its defects had been carried out. The failure to complete the review process was a failure to comply with the duty imposed by s 414(1) to conduct the review and the duty under s 425(1) to hear from the appellant.

33 Whatever the source of power to do what was done, its existence, in the context of the other powers listed in Pt 7 Divs 2-7A of the Act, suggests that its exercise was a serious matter. Thus the course contemplated by its exercise in the manner in which it was exercised in the present case, once embarked on, was not lightly to be departed from. There was no provision permitting the making of a decision affirming the delegate's decision, and the handing down of reasons for that decision, before the course contemplated was complete. Hence whether the Tribunal member was relying on s 427(1)(b) or s 415(1) read with s 56, that part of the process of review which involved participation by the appellant, as provided for in s 425(1), had not been concluded.

34 The entitlement of the appellant to complain about the failure of the Tribunal to complete the review process does not depend on the tender of evidence that he was misled or prejudiced. It is true that in some cases it may be necessary for disappointed applicants for review to file evidence about what steps they would have taken if the alleged breach of procedural fairness had not occurred. But the failure of the present appellant to file evidence about what he would have done had the Tribunal member's promise been fulfilled is not fatal to the appeal for at least one reason specific to the present case. While the appellant knew that the foreshadowed questions would relate to inconsistencies in what he had said about the detentions, it would not have been possible for him to file an affidavit stating what answers he would have given to particular questions without knowing what the questions would have been. He could not anticipate what material he would be asked to supply, nor could he anticipate how any particular material to be requested would relate to the potential lines of reasoning of the Tribunal member, and hence he could not anticipate what he might usefully say on the subject generally.

Did the detention question become immaterial?

35 The Minister argued that there had been no material breach of a duty to give procedural fairness because the controversies about the number of detentions, and the internal inconsistencies in what the appellant said about them,

were not crucial to the reasoning process employed by the Tribunal member. The Minister argued that the appellant's evidence about the Jihad Movement and Dawood Ibrahim's movement was rejected because of its inconsistency with "independent evidence", not because of its internal inconsistencies. The Minister also argued that the appellant's contention that membership of the Muslim League placed him at risk of persecution was rejected partly because of the appellant's evidence about the other movements and partly because of independent evidence that the Muslim League was a legal and moderate party. According to the Minister, where the Tribunal member had not referred to a factual matter such as self-contradiction (and in particular self-contradiction about the number and duration of the periods of detention), it indicated that the Tribunal member had decided that the point was immaterial. Finally, the Minister argued that the Tribunal member had found that even if the appellant did have difficulties in India, they were local only, and could be avoided by relocation: to that issue, self-contradiction about detention was irrelevant.

36 To some extent these submissions fail in their own terms. To some extent they fail because they take no account of matters which probably underlay the Tribunal member's thinking when she made her closing statements on 5 February 2002.

37 The submissions depend on a reading of the reasons for decision as turning only on the independent information, not the implausibility in the appellant's claims arising from self-contradiction.

38 The courts have often warned against excessively fine scrutiny of the language of executive bodies and administrative tribunals, and the reading advanced by the Minister is certainly unduly close and confined. The reasons for decision, under the heading "FINDINGS AND REASONS", contain language suggesting that the Tribunal member was not relying only on contradiction of the appellant's evidence by independent information. Thus the Tribunal member said:

> "The Tribunal has grave doubts about the [appellant's] credibility in regard to his claims to have been involved with Dawood Ibrahim and the Jihad Committee. His claims and evidence in regard to these organisations [are] so far fetched as to be fanciful, and moreover, his claims and evidence are inconsistent with independent evidence."

Here the Tribunal member advanced two distinct reasons for her grave doubts about the appellant's claims in evidence: their far-fetched and fanciful character, and their inconsistency with independent information. In the context of the review under consideration, one reason for concluding that the appellant's

evidence was "so far fetched as to be fanciful" was its self-contradictory character.

39 The Tribunal member also said:

> "There are notable inconsistencies between the [appellant's] claims and evidence on the one hand, and the independent evidence on the other. The Tribunal gives weight to the independent evidence over and above that of the [appellant]. In light of these inconsistencies, and further, in light of the significant implausibility in his claims surrounding his involvement with the Dawood Ibrahim Movement, the Tribunal cannot be satisfied [that] the [appellant] has ever been involved with Dawood Ibrahim and *gives this claim no weight*."[7]

Here the Tribunal member again advanced two reasons for not giving the appellant's specific claim to have been involved with Dawood Ibrahim any weight: inconsistencies with independent information, and "significant implausibility". Again, one clear reason for the implausibility of the claim was its self-contradictory character.

40 While the "far fetched", "fanciful" or "implausible" character of the appellant's claims of involvement with Dawood Ibrahim were not explicitly linked by the Tribunal member to the appellant's self-contradictions about his detention, the material dealt with by the Tribunal under the heading "FINDINGS AND REASONS" set out above must be considered in context. When it is read as a whole in the light of the Tribunal member's summary of her questioning and the appellant's answers, it is clear that her scepticism about particular parts of the appellant's evidence existed to some extent because of her scepticism about other parts of it. The tone in which the Tribunal member recorded the evidence of the appellant, and identified internal inconsistencies in it, reveals that she was troubled not only by the fact that it was contradicted by "independent information" but also by the fact that several parts of it were internally contradictory, including the parts dealing with the detentions. The number and duration of the occasions on which the appellant was detained were matters that were peculiarly within the appellant's knowledge and on which the independent information cast no light. If he were disbelieved on those matters, the chances of him being disbelieved on other matters were greatly increased.

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7 Emphasis in original.

41 The concluding remarks of the Tribunal member on 5 February 2002 reveal that she thought the appellant's cause might be retrieved or at least aided by an explanation of the inconsistencies about his detention. At that stage she must have thought that it was not possible fairly to conclude the review adversely to the appellant merely by resort to independent information, or by saying that his difficulties could be overcome by internal relocation. She might have thought, for example, that if the appellant clarified his account of the detentions, he could have restored his credibility on other questions – difficult though the independent information might have made that task – and that if he had done so, the relocation reasoning would not have prevailed. If the appellant's answers to the written questions about detention caused his general credibility to improve, his evidence about Dawood Ibrahim might have been accepted.

42 As the Minister conceded, the independent information did not suggest that the concern of the Indian authorities about Dawood Ibrahim made the appellant's problems in that regard only local ones, curable by moving to another part of India – Dawood Ibrahim was of concern to the national authorities, and anyone closely connected with his movement would have been of concern to them as well. At times the Minister's argument appeared to assume that once independent information exists, no contrary evidence from an applicant, however intrinsically credible, can be accepted. That assumption overlooks the fact that independent information can sometimes be vague, fluid or out of date, and that acceptance of a witness on some points can assist in reaching a conclusion that the witness is acceptable on others as well. While the fact that the Tribunal member made no finding on a matter may indicate that she did not consider it to be material, it does not follow that she must have considered it to be immaterial.

43 The Tribunal member at one important stage had the impression that there might be a benefit for the appellant in the review as a whole in having a further opportunity to answer her questions in writing on the subject of detention; she never explained why that impression was wrong or whether it had changed; it is thus a likely inference that the impression was sound. Hence the appellant's deprivation by the Tribunal member of that opportunity is a breach of procedural fairness going to jurisdiction.

44 In view of this conclusion, it is unnecessary to consider a dispute between the parties as to whether a failure to accord procedural fairness in relation to an immaterial part of the relevant proceedings is a breach of procedural fairness at all, and, if it is, whether the Court's discretion to refuse relief under the constitutional writs should be exercised unfavourably to the appellant.

Construction of the Tribunal member's final words

45 There was a dispute below and in this Court about whether the Tribunal member's final statement on 5 February 2002 meant that she was giving an opportunity to the appellant only to answer her questions about detention and to put any further information relevant to those questions before her, or whether she was in addition giving him an opportunity to put any further information on any relevant subject. It is not necessary to resolve that dispute, since even if her final statement bore only the former meaning, the appellant would have been deprived of procedural fairness for the reasons given above. But there is force in the opinion of Downes J, in dissent in the Full Court, that the final statement should be construed expansively in favour of the appellant[8]. Further, it is difficult to see what work the words "and to put any more information that you wish to the Tribunal" did, unless they conveyed a promise that the appellant would not be limited to conveying information responsive to the Tribunal's questions but would be permitted to put "more information" as well on any relevant subject.

Orders

46 The judgment of the Full Court of the Federal Court of Australia, dismissing with costs the appellant's appeal from Tamberlin J's order dismissing his application to the Federal Court with costs, should be set aside. In lieu thereof, there should be an order upholding the appeal to the Full Court and setting aside the order of Tamberlin J. There should be an order absolute for a writ of certiorari directed to the second respondent, quashing the decision of the second respondent in matter N00/32904 dated 22 February 2002 and handed down on 19 March 2002. There should also be an order absolute for a writ of mandamus directed to the second respondent requiring it to determine the application made to it for review of the decision of a delegate of the first respondent dated 15 March 2000 according to law. The first respondent should be ordered to pay the appellant's costs of the proceedings in the Federal Court of Australia before Tamberlin J, in the Full Federal Court, and in this Court.

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8 *NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 127 FCR 259 at 273 [60].

47 KIRBY J. This appeal comes from a judgment that followed a split decision of the Full Court of the Federal Court of Australia[9]. By majority, that Court declined to disturb the orders of the primary judge (Tamberlin J)[10] who, in turn, had refused relief under s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") directed to the Refugee Review Tribunal ("the Tribunal"). The Tribunal had affirmed the decision of the delegate of the Minister refusing NAFF ("the appellant") a protection visa under the *Migration Act* 1958 (Cth) ("the Act")[11].

48 In the Federal Court, and in this Court, the only issue that remains alive is the appellant's complaint that the Tribunal failed to accord him procedural fairness. That complaint arises from statements made at the end of the hearing in the Tribunal in which it was agreed that the Tribunal member said[12]:

> "TRIBUNAL: Given that there are some inconsistencies with regard to the dates of the detentions and the number of detentions, I will have to write to you about those (interpreted).
>
> TRIBUNAL: So what I will do is to write to you in the next couple of days and you will have 21 days in which to respond to my questions and to put any more information that you wish to the Tribunal."

49 The Tribunal did not write to the appellant. Nor did it otherwise contact him or his agent about the "inconsistencies" referred to, or anything else. Without having done so, it delivered a comprehensive decision adverse to the appellant's claim to refugee status. The appellant's complaint that this procedure was fundamentally unfair and a breach of the requirements of procedural fairness applicable to the Tribunal's hearing[13] was rejected by the Federal Court. By special leave, the appellant now appeals to this Court.

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9 *NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 127 FCR 259.

10 *NAFF v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 946.

11 The Act, s 36, giving effect to the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, [1954] *Australian Treaty Series* No 5; Protocol relating to the Status of Refugees done at New York on 31 January 1967, [1973] *Australian Treaty Series* No 37.

12 *NAFF* (2003) 127 FCR 259 at 265 [22], 270-271 [49]-[52].

13 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.

50 Substantially, the appellant supported the dissenting reasons of Downes J in the Full Court. His Honour considered that the Tribunal's closing words were not to be given a narrow interpretation[14]. He said that they effectively constituted an undertaking, relevant to the outcome of the hearing, that should have been observed. The failure to do so was a departure from the requirements of procedural fairness. It required a fresh hearing of the appellant's claim before the Tribunal. The approach of the dissenting judge was correct. The appellant is entitled to the amended relief that he claimed[15]. The appeal should be allowed.

The facts and applicable legislation

51 The reasons of McHugh, Gummow, Callinan and Heydon JJ ("the joint reasons") set out the history and nature of the proceedings; the relevant provisions of the Act governing the hearing before the Tribunal; and the decisional background of the attempts to secure judicial review from the Federal Court. I will not repeat any of these matters. No question arises concerning the privative provisions of the Act, having regard to the character of the appellant's complaint against the Tribunal, which was one of jurisdictional error, as that expression has been explained[16].

52 Since the appellant's application to the Tribunal was lodged, in April 2000, the Act has been amended in terms apparently intended to exclude the residual operation of the common law requirements of "natural justice" (procedural fairness). The amendments state that the specified provisions of the Act are an "exhaustive statement of the requirements of the natural justice hearing rule"[17]. However, that provision commenced operation on 4 July 2002, and so does not apply to this application.

53 The appeal must be decided in terms of the requirements of the general law of procedural fairness, either as that law was implicitly incorporated in the

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14 *NAFF* (2003) 127 FCR 259 at 272-273 [60]. See also reasons of McHugh, Gummow, Callinan and Heydon JJ at [45].

15 The relief claimed in this Court was amended to take into account the fact that the proceedings were brought under the Judiciary Act, s 39B and invoked the constitutional writ of *mandamus* and the supplementary writ of *certiorari*. The Tribunal was, by order of the Court, added as a party to the proceedings and submitted to this Court's orders.

16 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 508 [83].

17 The Act, s 422B, inserted by *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth), Sched 1, item 6.

Act before s 422B took effect or as it applies as a rule of the common law that had not, to that time, been abolished or diminished by statute[18].

54 That provision is expressed in mandatory terms, obliging the Tribunal to invite the applicant for review to appear before the Tribunal "to give evidence and present arguments relating to the issues arising in relation to the decision under review". Certainly, the Tribunal did invite the appellant to appear. The appellant gave evidence and presented arguments relating to issues arising in the review. The question, expressed in statutory terms, is therefore whether, in the procedure which the Tribunal followed, including the statements made at the end of the hearing, it fulfilled the requirements of s 425 of the Act as envisaged by the Parliament.

The issues

55 *Appellant's complaint of procedural unfairness*: The issues raised by the arguments of the parties before this Court require that chief attention be paid to submissions made on behalf of the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister").

56 On the face of things, in the light of the statement made to the appellant by the Tribunal, and the failure to fulfil the intended action foreshadowed there, the course of the proceedings involving the appellant was unfair. At the end of the proceedings, the appellant had pronounced himself confused over questions addressed to him by the Tribunal member concerning dates and events affecting the foundation of his claim for a protection visa. Certain difficulties had arisen from the use by the Tribunal of a Tamil-speaking national of Sri Lanka as the interpreter. It seems that the Tamil language in Sri Lanka may contain some differences from that spoken in the part of India from which the appellant derived. The appellant's agent expressed concern over this.

57 The Tribunal member, by her statements, acknowledged "some inconsistencies" and, at least at the closing stage of the hearing, foreshadowed a legally unnecessary and unusual course of writing to the appellant about the inconsistencies, so as to afford him the opportunity to respond to questions and to put more information before the Tribunal as he wished. When this was not done, and the subsequent decision proved adverse, the claim of procedural unfairness became virtually inevitable.

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18 See *Kioa v West* (1985) 159 CLR 550 at 584-586, 615; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 553-554 [112]-[113]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 99-101 [38]-[42], 142-143 [168]-[169]; *Miah* (2001) 206 CLR 57 at 108-109 [171]-[172].

58 The appellant did not suggest that the course adopted by the Tribunal was one of deliberate unfairness or a wilful endeavour to mislead him, to prevent him from dealing with an issue or to stop him saying something that might have persuaded the Tribunal to reach a different conclusion. Instead, the appellant was prepared to accept that, for whatever reason, the Tribunal had forgotten or overlooked its indication that it would write to him and afford him the opportunity to deal with outstanding concerns about inconsistencies. However that may be, the failure to do so represented a procedural injustice because the "inconsistencies" remained relevant. They proved important to the outcome. They should have been followed up as the Tribunal had indicated. The failure to do so involves procedural unfairness.

59 *Minister's arguments and issues*: The Minister nevertheless denied that the statement of the Tribunal member gave rise to relief. The Minister's arguments presented the real issues to be determined in the appeal. They were:

1. *The no-obligation issue*: That the Tribunal had no legal obligation to follow up the hearing with written questions, that the Tribunal member's statements were superfluous to the lawful completion of the hearing and did not alter the fact that such completion in accordance with the Act had occurred;

2. *The legitimate expectation issue*: That in so far as the appellant's arguments were based upon a suggested foundation grounded in the contention that he had a "legitimate expectation", as a result of the Tribunal member's closing comments, that he would be given an opportunity to respond to concerns over inconsistencies in the evidence, any such departure from his "expectations" was of no legal consequence following the decision of this Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*[19];

3. *The absence of proof of reliance issue*: That it was for the appellant to establish his entitlements before the Tribunal and in the Federal Court. If he contended that, by the course of proceedings that followed the Tribunal member's closing statement, he was denied procedural fairness, the burden was upon him, by relevant evidence available to be tested, to prove the content of the evidence and arguments that he was denied the opportunity of presenting. In default of such proof, a court should not draw an inference that there was any substance in the complaint made by the appellant merely from the appellant's bald assertions;

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19 (2003) 214 CLR 1.

4. *The irrelevance of the inconsistencies issue*: That, in the event, the Tribunal had been able to resolve the merits of the appellant's application for review, as it was entitled to do under the Act, without reliance upon particular "inconsistencies" with regard to the dates of the detentions and the number of detentions, being the only "inconsistencies" about which the Tribunal had indicated that it would write to the appellant. Therefore, any defect in the fulfilment of the Tribunal's indication that it would write to the appellant was ultimately irrelevant to the outcome of the proceedings. Accordingly, no substantive unfairness occurred in the result;

5. *The factual merits issue*: That the Tribunal's decision was an extremely detailed, painstaking and careful one indicating, upon numerous grounds, the unsatisfactory character of the appellant's evidence sustaining the Tribunal's conclusion that his claim was far-fetched and inconsistent with the other evidence before the Tribunal. Weighed against the disclosed merits of the claim, the suggested procedural unfairness arising from the closing words of the Tribunal member was inconsequential. It lent no ultimate support to the complaint that the hearing had failed because flawed by jurisdictional error;

6. *The over-statement of approach issue*: That the judge in the minority in the Full Court (Downes J) had adopted an incorrect approach in so far as he suggested that undertakings such as those made by the Tribunal to the appellant "should always be strictly observed … ideally … recorded in a document, and … couched in careful terms"[20]. The only basis that would warrant judicial intervention would be where conduct amounted to a denial of procedural fairness that would otherwise call for relief from the courts[21]; and

7. *The discretionary refusal of relief issue*: That, even if some technical slip was demonstrated in the course which the Tribunal had followed, substantively it had completed its hearing as contemplated by the Act. It fully justified its conclusion adverse to the appellant. Relief in the form of the constitutional writs, and the supplementary writ of *certiorari* to make such writs effective, should be denied as the provision of such relief was discretionary, not as of right[22].

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20 *NAFF* (2003) 127 FCR 259 at 273 [60].

21 See *Lam* (2003) 214 CLR 1 at 9 [25], 48 [149].

22 *Aala* (2000) 204 CLR 82 at 136-137 [145]-[150].

60 In my view, none of the foregoing issues should be resolved in favour of the Minister. The appellant is entitled to relief.

The no-obligation argument is not determinative

61 It may be accepted that the Tribunal had no obligation under the Act, or otherwise, to say what was said at the conclusion of the hearing. So much is acknowledged for the appellant. It may also be accepted that if the Tribunal had said nothing about writing to the appellant (but had privately contemplated doing so but later overlooked that thought or determined that it was not necessary) no ground for relief could arise. The Minister argued that the appellant had been afforded a full chance to put his case. He and his agent must have anticipated the necessity of clarifying the circumstances of his alleged detentions. So much was shown by the extensive oral and documentary submissions addressed to the Tribunal by the agent on that issue.

62 However, the words used by the Tribunal member cannot be expunged from the agreed record. Applications for judicial review are commonly based on the record. The fact that the words need not have been said is immaterial. They exist on the record and were available to the appellant in endeavouring to construct his case of procedural unfairness.

63 Judicial review cases of this kind normally involve scrutiny of what is said and done in the court or tribunal the subject of the proceedings. For example, the record may show that a party was not given a distinct opportunity to address on penalty before the decision-maker proceeded to a conclusion[23]. Or the decision-maker may have proceeded to an order without hearing evidence and submissions at an adjourned hearing[24]. In such cases, the issue of supposed procedural unfairness is determined on the facts as they are proved from the record or otherwise. It is not determined, as such, merely from the powers of the decision-maker or what that person might have done if acting fairly.

64 Nor is it to the point to complain that the Tribunal did not prevent the appellant from saying anything he wished or from volunteering additional matter after the hearing, addressed to the inconsistencies that had emerged to which the Tribunal member had referred. Prevention or obstruction or deception was not the way the appellant argued his case. The fact that the Tribunal had powers to act in a different way is also immaterial. So is any suggestion that to hold the Tribunal to the closing words of the member would discourage the Tribunal, where it would otherwise be relevant to do so, from following up its concerns

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23 See *Hall v NSW Trotting Club Ltd* [1977] 1 NSWLR 378 at 388 per Samuels JA.

24 See *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343.

with requests in writing. There was nothing wrong in the Tribunal's action in signalling that intention. Nor should it be discouraged from doing so where there are residual doubts[25]. The error of the Tribunal was proceeding to a decision without either writing to the appellant as stated or, at the least, informing him in advance of the decision that such a course was no longer considered necessary or intended[26]. Had that been done, the appellant would at least have known where he stood.

65 As it was, when the date of the Tribunal's decision was notified, the appellant was entitled to conclude that the decision would be favourable to him (and needed no further submissions) because the Tribunal member had not felt it necessary to elucidate the "inconsistencies" to which she had referred at the end of the hearing. There is therefore no substance in the Minister's first argument.

The legitimate expectation argument is immaterial

66 Nor is this a case in which to explore the notion of legitimate expectations in Australian legal doctrine and to what extent it continues to play a part in resolving instances of procedural unfairness.

67 Talk of "expectation" in this context has been criticised as a legal fiction[27]. However, in this area of legal discourse, fictions abound. They are used as a means to assist judges to explain what the law requires in a particular case. Thus, in connection with the bias rule, it is common for courts to invoke the fiction of the reasonable observer, in assessing the impugned action (or neglect of action) on the part of the decision-maker[28]. That is essentially how the notion of "legitimate expectation" came to be used in cases of alleged procedural unfairness. In effect, the phrase usually meant nothing more than that a reasonable person, in the position of the applicant for relief, would have expected something to occur or not to occur, having regard to all of the circumstances. The failure to meet such expectations was a way of explaining why the omission constituted procedural unfairness: why it amounted to a departure from what would otherwise have been "the natural course of events"[29].

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25 *Mahon v Air New Zealand Ltd* [1984] AC 808 at 820-821; *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 314-315.

26 See joint reasons at [32].

27 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 310-314 per McHugh J.

28 See eg *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

29 *R v Muir; Ex parte Joyce* [1980] Qd R 567 at 578.

68 There are various arguments against the use of this fiction, just as there are of other fictions well beloved of lawyers – such as the one that seeks to explain questions of statutory interpretation in terms of the "intention" of Parliament. There is nothing in this Court's decision in *Lam* that obliges abandonment of reference to "legitimate expectations" as a tool of judicial reasoning[30]. However, given the expanded notion of procedural fairness in Australia[31] I accept that the utility of this particular fiction is now somewhat limited[32].

69 If the law requires a particular course to be followed, such as was the case in the present proceedings, the true legal issue is not, or is not only, whether the person adversely affected by a decision has had his or her legitimate expectations disappointed. That may be a *consequence* of the departure from the legal standard; but it is not the invalidating *cause*. The failure to observe proper procedures itself amounts to a legal defect in the performance of the task conferred by law as the law requires. In this sense, the invalidating element is not the disappointment but the anterior failure to conform to the law. That failure is, in a sense, a legal wrong against the whole community. The duty to accord procedural fairness is part of the public law. It is upheld to ensure that the element of governance contemplated by law will (absent lawful exceptions) be discharged fairly.

70 In the end, the Minister's arguments addressed to supposed issues of legitimate expectation represented a distraction in this case. The remarks of Gleeson CJ in *Lam*[33], on the way in which a specific representation can give rise to an expectation[34], are nonetheless worth recalling. They have direct application to the facts of this case:

> "[I]t is clear that the content of the requirements of fairness may be affected by what is said or done during the process of decision-making, and by developments in the course of that process, including

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30 Thus Gleeson CJ in *Lam* accepted that in some circumstances a representation to a party might generate a legitimate expectation. See *Lam* (2003) 214 CLR 1 at 11-12 [31]-[33].

31 *Kioa* (1985) 159 CLR 550; *Annetts v McCann* (1990) 170 CLR 596 at 598; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 576.

32 A point made in *Lam* (2003) 214 CLR 1 at 16 [47], 27-28 [81]-[83] per McHugh and Gummow JJ, 45-46 [140] per Callinan J.

33 (2003) 214 CLR 1 at 12-13 [34]-[35].

34 See *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629.

> representations made as to the procedure to be followed. So, for example, if a decision-maker informs a person affected that he or she will hear further argument upon a certain point, and then delivers a decision without doing so, it may be easy to demonstrate that unfairness is involved. But what must be demonstrated is unfairness, not merely departure from a representation. Not every departure from a stated intention necessarily involves unfairness, even if it defeats an expectation."

71 It follows that there is no substance in the Minister's second argument.

The absence of evidence is not determinative

72 The passage from *Lam* shows that it is not sufficient for the appellant in this case to prove the "representation" made by the Tribunal member at the end of the hearing. It remains for the appellant to show that he has suffered a relevant unfairness.

73 The Minister submitted that the omission of the appellant to prove precisely what evidence or submissions he would have addressed to the Tribunal, had it followed up the hearing with specific questions on the inconsistencies mentioned, was fatal. Certainly, in proceedings by way of judicial review (as distinct from certain proceedings by way of appeal[35]), it will usually be open to a person complaining to tender evidence of what would have been done, or done differently, if the hypothesised course had been taken[36]. But can it be said that this is a universal rule? Or that Downes J, in the Full Court, erred in referring as he did to the appellant's attempt to foreshadow, in an unsworn ground of appeal, the matters that he would have dealt with had the Tribunal given him the opportunity to make a follow-up submission[37]? The Minister criticised the use of the ground of appeal as reliance by Downes J on "untested assertions". However, such criticism is unconvincing in this case.

74 It is not a universal rule that a party, seeking judicial review for alleged departure from the requirements of procedural fairness, must always prove, as a price of relief, what that party would have done had the procedural defect not occurred. It is in the nature of the failure of the Tribunal to follow up the stated

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35 eg in the High Court of Australia: *Eastman v The Queen* (2000) 203 CLR 1 at 13 [18], 51 [158], 63 [190], 96-97 [290].

36 *Aala* (2000) 204 CLR 82 at 88 [3], 113-114 [70], 122 [103], 130 [128], 144 [172], 150 [200], 153-154 [211]. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 77 ALJR 1909 at 1910 [1], 1914 [29]; 201 ALR 437 at 438, 444.

37 *NAFF* (2003) 127 FCR 259 at 270 [50].

"inconsistencies", with questions of the kind foreshadowed, that the appellant was left in the dark as to the precise matters that caused the Tribunal to foreshadow such a course. The existence of such concerns was sufficiently indicated by the proposal of an exceptional post-hearing communication as was mentioned. Before the decision was published, the appellant was uninformed of the Tribunal's exact concerns. After the decision became known, the appellant's task was to overcome the legal barrier which the decision presented. Only if that barrier could be overcome would any detailed response of the appellant be legally material.

75 In some cases, where it is clear that a simple mistake or misunderstanding has occurred, the tender of corrective evidence, supported by well-focused arguments, will be a sensible course to adopt[38]. In most cases, it may be expected that the applicant for relief will be able to show, at least in a general way, what material would have been placed before the decision-maker if the opportunity had been given[39]. However, in a case such as the present, where the evidence was wide-ranging and the points of inconsistency and difficulty numerous and diffuse, the absence of detailed supplementary evidence from the appellant could not be regarded as fatal to judicial review. It was not the function of the Federal Court on judicial review (still less of this Court) to retry the merits of the appellant's application. It was sufficient for the appellant, in the circumstances, to establish that a procedural default had occurred which was not immaterial but might have affected the outcome of the proceedings before the Tribunal.

76 This the appellant sufficiently did. The third argument also fails.

The inconsistencies were not irrelevant to the outcome

77 Nor is it persuasive to suggest, as the Minister did, that the point of unfairness of which the appellant complains was, in the result, irrelevant to the Tribunal's actual conclusion. The fundamental principle to be applied by the Federal Court was that "a person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his or her interests that the repository of the power proposes to take into account in deciding upon its exercise"[40]. This principle was not in dispute. Did the Tribunal comply with it in the circumstances of this case?

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38 See *Aala* (2000) 204 CLR 82 at 130 [128].

39 *Re Minister for Immigration and Multicultural Affairs; Ex parte "A"* (2001) 185 ALR 489 at 501 [54].

40 *Miah* (2001) 206 CLR 57 at 96 [140], citing *Kioa* (1985) 159 CLR 550 at 628 per Brennan J.

78 The Minister suggested that, by an analysis of the way in which, in its reasons, the Tribunal had resolved the claim adversely to the appellant, it was clear that particular inconsistencies with regard to the dates of the appellant's detentions and the number of detentions ultimately played no part in the outcome. Accordingly, so it was said, the failure to follow up any residual uncertainty about those matters was inconsequential. It did not affect the outcome. Thus it did not amount to a breach of the requirements of procedural fairness.

79 This submission fails for two reasons. First, the rejection of the appellant's claim by the Tribunal was clearly affected by the Tribunal's assessment of the appellant's credibility. At various points in its reasons, the Tribunal indicated its scepticism concerning the appellant's evidence on a number of issues including his procurement of a passport to depart from India; the suggested difficulty of relocation within India; and his personal involvement in the Moslem League and other Islamic activities within India[41]. To put the matter beyond doubt, the Tribunal addressed the applicant's credibility specifically. It did so in an extended passage in its decision[42] which concluded that his "claims and evidence in regard to these organisations is so far fetched as to be fanciful"[43].

80 There is also an express reference to inconsistencies in respect of the appellant's involvement in an identified organisation. It was "in light of these inconsistencies"[44] and the suggested implausibility of the appellant's claims that the Tribunal concluded that it could give such claims "*no weight*"[45]. In a case in which credibility and inconsistencies were so obviously important, it cannot be said that the opportunity to clear up particular "inconsistencies", identified by the Tribunal at the end of the hearing, was immaterial to the eventual outcome of the hearing.

81 Secondly, and in any case, decision-making is a complex mental process. Disbelief of a litigant or witness on one point might carry over to affect the

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41 Refugee Review Tribunal, Reference N00/32904, 19 March 2002 ("RRT decision") at 8-13.

42 RRT decision at 14-15.

43 RRT decision at 15.

44 RRT decision at 15.

45 RRT decision at 16 (emphasis in original).

decision-maker's disbelief of the same person on other points[46]. Contrary-wise, establishing that an initial disbelief of a person's credibility on one matter was erroneous might convince a decision-maker of the need to revisit other conclusions and to look at the person's entire evidence in a new light.

82 When these considerations are taken into account, it cannot be said that the omission to afford the appellant the opportunity foreshadowed at the end of the hearing was immaterial to its outcome having regard to the terms in which that outcome is expressed. The Minister's fourth argument also fails.

The merits arguments do not cure procedural error

83 On similar grounds, the submission that the decision of the Tribunal was strongly reasoned in a way that overwhelmed the procedural default complained of is unpersuasive in this case. Fair and lawful procedures are upheld by the courts for their own sake, not just for their consequences[47]. This is because of the experience of the common law that, out of fair and lawful procedures, fair and lawful outcomes will more commonly emerge.

84 It is not the function of judicial review to retry the merits or, as such, to re-assess the merits of the case and excuse an established departure from fair procedures because the merits seem strongly one way. If the departure from procedural fairness might have affected the outcome, the function of judicial review is to say so. Subject to the consideration of any residual discretion to deny relief, the courts will set aside the flawed decision. This is because, in the eye of the law, it is not a "decision" as contemplated by law[48].

85 Every person, in respect of whom material decisions are made by a repository of public power conferred by the Parliament, is ordinarily entitled to have such power exercised in accordance with law. That includes, relevantly to this case, in accordance with the requirements of procedural fairness. The ultimate outcome of such insistence on fair procedures might eventually be the same. But where the issue is whether additional evidence and submissions might have affected the outcome of the decision-maker's consideration of the matter, it

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46 *Kioa* (1985) 159 CLR 550 at 629 per Brennan J.

47 Bayles, *Procedural Justice: Allocating to Individuals*, (1990) at 127-135; Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*, (1996) at 65-68.

48 *Plaintiff S157* (2003) 211 CLR 476 at 506 [76]. See also *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 635.

cannot normally be said with certainty that affording such an opportunity was futile.

86 That is why, in *Re Refugee Review Tribunal; Ex parte Aala*[49], in the context of judicial review, this Court affirmed the strong principle earlier stated in *Stead v State Government Insurance Commission*[50]. In *Stead*, the test applied to deny relief for established procedural unfairness was whether the Court could say that a properly conducted hearing "could not possibly have produced a different result"[51]. A similar approach was adopted in *Aala* by all members of the Court[52]. Gleeson CJ explained why this was so in words applicable to the present case[53]:

> "It is possible that, even if the prosecutor had been given an opportunity to deal with the point, the Tribunal's ultimate conclusion would have been the same. But no one can be sure of that. Decisions as to credibility are often based upon matters of impression, and an unfavourable view taken upon an otherwise minor issue may be decisive."

87 The Minister's fifth argument therefore fails.

The minority's reasoning about the approach is immaterial

88 The Minister's complaint concerning the suggestion of Downes J that procedural fairness "requires that [assurances of follow-up will] be given an expansive and not a confined construction"[54] is insubstantial. So is the objection to his Honour's statement that undertakings, such as those given by the Tribunal to the appellant, "should always be strictly observed"[55].

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49 (2000) 204 CLR 82.

50 (1986) 161 CLR 141. See also *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 499-500 [57]; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 992 [140]; 190 ALR 601 at 635; *S154* (2003) 77 ALJR 1909 at 1914 [28]; 201 ALR 437 at 444.

51 (1986) 161 CLR 141 at 147; cf *John v Rees* [1970] Ch 345 at 402.

52 (2000) 204 CLR 82 at 89 [5] per Gleeson CJ, 116-117 [80] per Gaudron and Gummow JJ, 122 [104] per McHugh J, 130-132 [131]-[133] of my own reasons, 144 [172] per Hayne J, 153-155 [211] per Callinan J.

53 (2000) 204 CLR 82 at 89 [4].

54 *NAFF* (2003) 127 FCR 259 at 273 [60].

55 *NAFF* (2003) 127 FCR 259 at 273 [60].

89 These were not separate grounds upon which Downes J favoured upholding the appeal. They were explanations of his Honour's reaction to the statements made by the Tribunal member at the close of the hearing and the omission to follow up those statements in this case.

90 I see no reason to delay over this complaint. The substantial conclusion reached by Downes J was well justified[56]. I take his Honour to have said nothing more than that, if Tribunal members indicate an intention to follow up a matter of potential importance for their decision, they should either do so or they should inform the person concerned that they do not intend to take that course. To say nothing and then to proceed directly to an adverse conclusion results, as here, in a vitiating instance of procedural unfairness. The sixth argument also fails.

The discretion favours the grant of relief

91 Some of the considerations that are relevant to the question whether there has been an instance of procedural unfairness may overlap with the factors relevant to providing, or withholding, relief by way of a constitutional writ on discretionary grounds. A residual discretion exists in the provision of such writs and the other relief contemplated by s 39B of the Judiciary Act[57]. It is legitimate in such judicial review proceedings to consider withholding relief if the analysis of all relevant matters indicates that the requirements for relief are not established. The residual discretion permits a court to reconsider the matter globally and to review all of the relevant considerations, taken as a whole[58].

92 When the present case is examined for this purpose no sufficient ground is established to warrant refusal of relief. None of the arguments advanced by the Minister has that effect. No other or different considerations arise personal to the appellant or connected with such questions as delay and the timeliness of his proceedings[59]. On the contrary, the provision of relief upholds the commitment, imputed to the Parliament, in terms of the Act as it then stood, that vulnerable people in the position of the appellant will have their cases determined by the Tribunal fairly and as natural justice requires.

93 Thus, the considerations involved in upholding a law designed to give effect to Australia's international obligations; the protection of the human rights

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56 See joint reasons at [45].

57 *Ex parte "A"* (2001) 185 ALR 489 at 502 [58].

58 *Aala* (2000) 204 CLR 82 at 144 [172].

59 *Aala* (2000) 204 CLR 82 at 117 [82]-[83], 137 [149]-[150].

of the appellant; and the maintenance of the due administration of a law enacted by the Parliament all favour the grant of relief. The seventh and final argument of the Minister also fails.

Orders

94 As I would reject all of the Minister's arguments and otherwise uphold the appellant's complaint of procedural unfairness, I agree in the orders proposed by the joint reasons.