HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

NAIS & ORS — APPELLANTS

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS & ANOR — RESPONDENTS

NAIS v Minister for Immigration and Multicultural and Indigenous Affairs
[2005] HCA 77
14 December 2005
S73/2005

ORDER

1. *The Refugee Review Tribunal be added as the second respondent.*

2. *Appeal allowed.*

3. *The Minister pay the appellants' costs.*

4. *Set aside the orders of the Full Court of the Federal Court made on 11 February 2004 and in their place order:*

   (a) the Refugee Review Tribunal be added as the second respondent;

   (b) appeal allowed;

   (c) the Minister pay the appellants' costs;

   (d) set aside the orders of Hely J made in the Federal Court on 15 April 2003 and in their place, order that:

      (i) the Refugee Review Tribunal be added as the second respondent;

(ii) *a writ of certiorari issue directed to the Refugee Review Tribunal, quashing its decision made on 20 December 2002 in matter N97/16702;*

(iii) *a writ of prohibition issue directed to the Minister, prohibiting the Minister from giving effect to the Refugee Review Tribunal's decision made on 20 December 2002 in matter N97/16702;*

(iv) *a writ of mandamus issue directed to the Refugee Review Tribunal, requiring it to determine according to law the application for review of the decision of the delegate of the Minister dated 27 May 1997 in matter N97/002078;*

(v) *the Minister pay the appellants' costs of the application under s 39B of the* Judiciary Act *1903 (Cth).*

On appeal from the Federal Court of Australia

Representation:

C T Barry QC with B M Zipser for the appellants (instructed by Campbelltown City Lawyers)

S J Gageler SC with G R Kennett for the first respondent (instructed by Australian Government Solicitor)

Submitting appearance for the second respondent

CATCHWORDS

NAIS v Minister for Immigration and Multicultural and Indigenous Affairs

Immigration – Refugee Review Tribunal – Substantial delay between first Tribunal hearing and Tribunal decision – Whether delay resulted in real and substantial risk of prejudice to appellants – Whether prejudice to appellants can be inferred – Whether delay by administrative tribunal constitutes denial of procedural fairness or failure to conduct review as required by law – Whether decision of administrative tribunal may be set aside following substantial delay – Effect of delay on question of assessing appellants' demeanour – Calculation of the period of delay.

Immigration – Refugee Review Tribunal – *Migration Act* 1958 (Cth), s 420 provides for an objective of administrative review that is "fair, just, economical, informal and quick" – Relevance of s 420 to complaint of delay – Special considerations relevant to delay in asylum cases.

Administrative law – Jurisdictional error – Whether denial of procedural fairness – Significance of delay – Grounds for judicial review – Whether delay affected the Refugee Review Tribunal's capacity to make a proper assessment of demeanour – Whether there was a real and substantial risk that the Tribunal's capacity to assess the appellants was impaired.

Administrative law – Judicial review – Assessment of fairness of procedures followed by administrative decision-maker – Substantial delay between first Tribunal hearing and Tribunal decision – Limited role of courts performing judicial review – Relevance of general notions of fairness and justice – Relevance of authority on delay in context of appeals against judicial determinations – Importance of contextual factors in assessing complaint of delay.

Administrative law – Jurisdictional error – Substantial delay between first Tribunal hearing and Tribunal decision – Appropriate remedy where denial of procedural fairness due to substantial delay – Failure by appellants to seek mandamus – Whether relief should be refused on discretionary grounds.

Words and phrases – "delay", "jurisdictional error", "procedural fairness".

Migration Act 1958 (Cth), ss 420, 425(1), 430.

1 GLEESON CJ. The issue in this appeal is whether a decision of the Refugee Review Tribunal ("the Tribunal"), which upheld a finding by a delegate of the first respondent that the appellants were not persons to whom Australia has protection obligations, and that they were not entitled to protection visas under the *Migration Act* 1958 (Cth) ("the Act"), involved jurisdictional error in the form of denial of procedural fairness.

2 The unfairness is said to have resulted from what was described by Hely J, in the Federal Court at first instance, as "extraordinary delay". The application to the Tribunal to review the delegate's decision was made on 5 June 1997. The Tribunal held oral hearings on 6 May 1998 and 19 December 2001. The Tribunal's decision was handed down on 14 January 2003. That bare recital of events involves some over-simplification. During some of the above intervals there were communications between the Tribunal and representatives of the appellants, and it appears that the Tribunal took a deal of time to obtain "country information" relevant to the claims made by the appellants. It appears from the Tribunal's reasons that it found difficulty in evaluating the central claim of well-founded fear of persecution arising from the circumstances of the mixed marriage between the first and second appellants. The details of the claims made by the appellants are set out in the reasons of Callinan and Heydon JJ, and it is unnecessary to repeat them.

3 There is no dispute that the delay on the part of the Tribunal was inordinate. There is nothing in the reasons of the Tribunal that seeks to explain or justify the delay. Nor is there anything in those reasons that recognises any possible effect of delay on the decision-making process, or seeks to explain how any possible problem resulting from the delay might have been taken into account or overcome. The reasons are expressed in a form that appears to treat the time involved in the Tribunal process as immaterial to the adjudicative function.

4 The Full Court of the Federal Court divided on the issue with which we are concerned[1]. The majority (Hill J and Marshall J) found no jurisdictional error. Finkelstein J dissented. As will appear, I agree with the reasoning and conclusion of Finkelstein J. It is, however, important to note that there was no disagreement in the Federal Court, and there was no dispute in this Court, on the principles to be applied. The disagreement concerned the application of those principles to the particular, unusual, case.

5 Undue delay in decision-making, whether by courts or administrative bodies, is always to be deplored. However, that comfortable generalisation does

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1 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 85.

little to advance the task of legal analysis when it becomes necessary to examine the consequences of delay. The circumstances in which delay, of itself, will vitiate proceedings, or a decision, are rare. Of course, statutes of limitation impose a legislative direction that certain delays will bar proceedings; and analogous consequences may flow from the application of equitable principles. There is, however, nothing in the Act that prescribes a time limit for decisions of the Tribunal, and this Court has no power to determine some such limit[2]. A court may have power to relieve against oppressive conduct of a complainant, or a prosecutor, and delay may be a factor in the oppression[3]. In such circumstances, the ground for relief is the oppression, not the delay. A court of appeal, reviewing a decision of a primary judge, may conclude that delay in giving judgment has contributed to error, or made a decision unsafe. Again, the ground of appellate intervention is the error, or the infirmity of the decision, not the delay itself[4]. Where delay gives rise to a ground of supervisory or appellate intervention, the remedy must be tailored to the circumstances and justice of the case. In adversarial litigation, for example, neither party may be at fault, and it may be unnecessary and unjust to visit the successful party with all the consequences that flow from having to start again. Remedies available where delay has caused problems may be discretionary. (In the present case, counsel for the first respondent disclaimed any reliance upon a discretionary argument.) In some cases, mandamus may be an available remedy for dilatory behaviour, and failure to seek mandamus could constitute a discretionary reason to deny later relief.

6 The context in which delay occurs will affect any legal consequences that may flow. In this case, the Federal Court was not sitting as a court of appeal, considering whether there were material factual errors in the reasoning of the Tribunal, and deciding whether to uphold or set aside the Tribunal's decision by reference to the principles which guide appellate intervention in the administration of civil or criminal justice. Here the focus was upon alleged jurisdictional error, specifically in the form of denial of procedural fairness, in administrative decision-making.

7 In *Blencoe v British Columbia (Human Rights Commission)*[5], Bastarache J, speaking for the majority, said it was "accepted that the principles

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2 See *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307 at 367 [101].

3 eg *Walton v Gardiner* (1993) 177 CLR 378.

4 See *Monie v Commonwealth of Australia* [2005] NSWCA 25, and the authorities there collected.

5 [2000] 2 SCR 307 at 367 [102].

of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied". There may be some circumstances in which delay has had a direct and demonstrable effect on the outcome of administrative proceedings. Bastarache J gave examples. On the other hand (and this was the point of departure between Hill J and Finkelstein J in the Full Court of the Federal Court), there may be cases where it is difficult, or even impossible, to know the consequences of delay. The problem has been discussed, in a different context, in connection with appellate scrutiny of findings of fact by trial judges where it is argued that delay has resulted either in specific error or in an unsafe outcome[6]. In the present context, which is not one of appellate scrutiny, but of judicial review of an administrative decision for jurisdictional error, the question is one of fairness of procedure. What is said to be unfair is that the Tribunal made demeanour-based findings against the appellants in circumstances where four and a half years elapsed between the observation of the demeanour and the making of the findings. Finkelstein J pointed out that the second hearing, of 19 December 2001, was convened for only a limited purpose, and commented that, had it not been for the second hearing, it was doubtful if the Tribunal member who made the decision would have recognised the appellants if he had seen them again in late 2002 or early 2003.

8 Some of the findings of the Tribunal adverse to the credit of the appellants were based, not on demeanour, but on their own admissions. That people who claim to fear for their lives admit to having told lies in an attempt to advance their claims for protection does not necessarily destroy their credibility. It might simply demonstrate their fear. On the other hand, there were a number of examples of findings by the Tribunal, adverse to the appellants, that turned on an assessment of their credibility in circumstances that must have been influenced by the Tribunal's observation of their demeanour. Evidence that was not inherently improbable, or contradicted by objective facts, was rejected as "implausible". The fact that the third appellant (then aged 12) "displayed no signs of trauma or concern" in her evidence at the second hearing (more than a year before the decision) was treated as indicating that her account of an attack, in which her mother intervened, was fabricated.

9 Because the Tribunal's reasons ignored the question of the time that had elapsed between the taking of evidence and the final assessment of that evidence, it can never be known how that assessment was in fact affected by the delay. What must be kept in mind is that the question concerns the fairness of the procedure that was followed. It was an inquisitorial procedure that, in the circumstances of this case, depended to a significant extent upon the Tribunal's

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6 eg *Hadid v Redpath* (2001) 35 MVR 152; *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17.

assessment of the sincerity and reliability of the appellants. That is one of the reasons why they were entitled to, and were given, a "hearing". An important purpose of the hearing was to enable the Tribunal to do just what it ultimately did, that is, make a judgment about whether the appellants were worthy of belief. Appropriately, effort was directed to a search for independent verification of the claims they were making, and objective justification of the fears they were expressing. Yet ultimately the procedure directed attention to the Tribunal's assessment of them as witnesses in their own cause. A procedure that depends significantly upon the Tribunal's assessment of individuals may become an unfair procedure if, by reason of some default on the part of the Tribunal, there is a real and substantial risk that the Tribunal's capacity to make such an assessment is impaired.

10 In a case of failure to give a hearing when a hearing is required, the person complaining of denial of procedural fairness does not have to demonstrate that, if heard, he or she would have been believed. The loss of an opportunity is what makes the case of unfairness. The appellants in this case do not have to demonstrate that the Tribunal's assessment of them probably would have been more favourable if made reasonably promptly. What they have to demonstrate is that the procedure was flawed; and flawed in a manner that was likely to affect the Tribunal's capacity to make a proper assessment of their sincerity and reliability. The procedures required by the Act were designed to give the appellants a reasonable opportunity to state their claims and to have those claims competently evaluated. If the Tribunal, by its unreasonable delay, created a real and substantial risk that its own capacity for competent evaluation was diminished, it is not fair that the appellants should bear that risk. The delay on the part of the Tribunal in the present case was so extreme that, in the absence of any countervailing considerations advanced in the reasons of the Tribunal, it should be inferred that there was a real and substantial risk that the Tribunal's capacity to assess the appellants was impaired. That being so, the appellants did not have a fair hearing of their claims by the Tribunal.

11 The fact that the impairment resulted from the default of the Tribunal is important. Many events, outside the control and influence of the Tribunal, might occur to make it more difficult to evaluate the claims of an applicant. That does not make the procedure unfair. On the other hand, when the Tribunal, exercising the control over its own procedures given to it by the Act, without explanation or justification, and without any fault of an applicant for review, draws out those procedures to such an extent that its capacity to discharge its statutory obligations is likely to be materially diminished, and there is nothing in the Tribunal's reasons to displace that likelihood, then a case of procedural unfairness arises.

12 I would allow the appeal and set aside the orders of the Full Court of the Federal Court. In place of those orders, it should be ordered that the orders of Hely J be set aside, the decision of the Tribunal be quashed, and the matter remitted to the Tribunal for further consideration. The first respondent should

pay the costs of the appeal to this Court, and of the appeal to the Full Court of the Federal Court, and of the proceedings before Hely J.

13 GUMMOW J. This appeal from the Full Court of the Federal Court (Hill and Marshall JJ; Finkelstein J dissenting)[7] concerns the application of the principles of jurisdictional error in the operation of s 75(v) of the Constitution to set aside administrative decisions made after a period of delay.

The nature of judicial review

14 It is of the first importance for this appeal to recall several well-settled principles in this field. The first is that maladministration is not to be confused with the illegality which founds judicial review[8]. The second is that the adoption of the paradigm of judicial processes of decision-making at trial and on appeal is rarely helpful because it is apt to blur the constitutionally entrenched distinctions between judicial and executive power.

15 These fundamental principles inform the following statement by Brennan J in *Attorney-General (NSW) v Quin*[9]:

> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

16 The course of decision-making which gives rise to this appeal may suggest shortcomings in the administration of the relevant legislation and thereby found an apprehension as to the merits of the outcome which was finally reached and its adverse impact upon the interests of the appellants. However, further remarks of Brennan J in *Quin* are apposite here. His Honour said[10]:

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7 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 85.

8 McMurtrie, "The Waiting Game – the Parliamentary Commissioner's Response to Delay in Administrative Procedures", (1997) *Public Law* 159.

9 (1990) 170 CLR 1 at 35-36. This passage was adopted by Brennan CJ, Toohey, McHugh and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. See also the judgment of Gleeson CJ, Gummow, Kirby and Hayne JJ in *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 152-154 [43]-[44].

10 (1990) 170 CLR 1 at 36.

> "[T]he scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case."

I should add that with respect to the fundamental principles just mentioned, and their application to the present appeal, I agree with what is said by Hayne J, particularly in the last four paragraphs of his Honour's reasons.

Delay in administration

17 The range of powers conferred by various laws of the Commonwealth upon its officers varies greatly. So does the institutional framework for the exercise of those powers. This litigation concerns delay in administrative decision-making at a second level, by way of review by a statutory tribunal of decisions of delegates of a Minister. The procedural arrangements for such a tribunal, including (as in this case) the giving of written reasons, may be far more elaborate than those for decision-making at other levels in public administration.

18 Observations by LeBel J in the Supreme Court of Canada in *Blencoe v British Columbia (Human Rights Commission)*[11] may usefully be repeated here. LeBel J observed that there are different kinds of delay and that not all administrative bodies are the same. Delay in deciding an individual case may relate to the special complexity of the subject-matter as well as to the inattention of the decision-maker. The former may encompass necessary delay. Further, the diversity of the powers, mandates and structures of administrative bodies makes it inappropriate to apply particular standards from one context to the other.

19 Among the sources of delay in administrative decision-making which have been identified in the United States are the presence of a large workload, the complexity of issues entrusted to administrative decision-makers, inadequate funding and staffing and legislatively required time-consuming procedures[12]. It may be said to be a responsibility of the executive and legislative branches of government to the public at large to alleviate such sources of delay. It is another

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11 [2000] 2 SCR 307 at 392-393. The outcome in *Blencoe* was an unsuccessful attempt by Mr Blencoe to stay the hearing by the Commission of complaints made against him more than two years earlier.

12 Pierce, *Administrative Law Treatise*, 4th ed (2002), vol 2, §12.2.

matter to enlist the judicial branch to require an outcome or to set aside a delayed outcome and remand for redetermination. Even in a system where there is constitutionally mandated "due process", such as the United States, the most effective remedies for administrative delay have been said to lie in the political rather than the judicial process[13].

20 Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") entitles "everyone ... to a fair and public hearing within a reasonable time" in the determination of "civil rights and obligations", as well as of any criminal charge. In *Dyer v Watson*[14], Lord Bingham of Cornhill considered the Strasbourg case law[15] applying the ECHR to a range of matters, including delayed determinations of civil rights and obligations by administrative bodies. Lord Bingham concluded[16] that "[t]he threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed"[17].

21 Several points respecting the present appeal should be made immediately. The first is that the complaint made by the appellants is not to compel the making of a delayed decision, but to set aside a decision made adversely to their interests. Secondly, this is not a case turning upon the statutory grounds for "merits" review or for judicial review found respectively in the *Administrative Appeals Tribunal Act* 1975 (Cth) and the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"). The appellants' case turns upon the constitutional conception of jurisdictional error. Thirdly, as is indicated in the analysis by Brennan J in *Walton v Gardiner*[18], in that setting of Ch III of the Constitution, administrative and judicial decision-making, and accompanying review and appellate processes, are distinct, not analogous.

22 Accordingly, no further assistance is to be derived by importing into the body of authority upon s 75(v) of the Constitution notions of judicial review for "abuse of process" indicated by delayed decision-making on the part of officers

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13 Pierce, *Administrative Law Treatise*, 4th ed (2002), vol 2, §12.4.

14 [2004] 1 AC 379 at 394-400.

15 Including *König v Federal Republic of Germany* (1978) 2 EHRR 170.

16 [2004] 1 AC 379 at 402.

17 See, further, Bailey, "Due Process Rights", in Feldman (ed), *English Public Law*, (2004) 669 at 671-675, 680-681.

18 (1993) 177 CLR 378 at 409-411.

of the Commonwealth. In *R v Chief Constable of the Merseyside Police; Ex parte Calveley*, May LJ said[19]:

> "Unnecessary delay in legal and *analogous* proceedings, such as the disciplinary ones in the instant case, is of course to be deplored, but it does occur and, in the absence of mala fides, should not tempt one to resort to judicial review where no real abuse or breach of natural justice can be shown." (emphasis added)

As indicated above, in Australia the analogy is inapt.

23 There is a body of case law dealing with the significance to be attributed to delay in the handling by the courts of their business[20]. However, as Hill J pointed out in the Full Court[21], in these cases appellate courts intervene to order a new trial on the ground that the appellant has not had a fair trial. That ground of appellate intervention is to be distinguished from the ground of jurisdictional error as understood in administrative law. An administrative body has not exercised judicial power. As emphasised earlier in these reasons, on judicial review the court is not concerned with the merits or correctness of the administrative decision. With respect to the English legal structure, the distinction was elaborated by Lord Brightman in *Chief Constable of the North Wales Police v Evans*[22]. The distinction cannot be of less significance in Australia, given our constitutional structure[23].

24 Questions of the consequences in law of delay in public and judicial administration take various forms. The delay here was in the administration by the Refugee Review Tribunal ("the RRT") of its statutory powers, functions and duties. No question arises of remedies which may be available in private law for delay in the exercise of statutory authority.

25 There is thus no occasion here to consider the application in Australia of the reasoning of the House of Lords in *Calveley v Chief Constable of the*

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19 [1986] QB 424 at 439.

20 See, in particular, *Hadid v Redpath* (2001) 35 MVR 152; *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273.

21 (2004) 134 FCR 85 at 87-88.

22 [1982] 1 WLR 1155 at 1174-1175; [1982] 3 All ER 141 at 155.

23 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 23 [72], 24-25 [75]-[77].

Merseyside Police[24]. The appellants were police officers who in June 1981 were concerned in the arrest of persons later acquitted in December 1981. Formal notices of complaints against the appellants required by the governing legislation were not given by the Chief Constable until two years later. The appellants were dismissed from the police force in 1984 but, on judicial review, the English Court of Appeal quashed that dismissal decision for the irremediable delay in giving notice of the complaints against them[25]. The House of Lords affirmed the striking out of later proceedings against the Chief Constable for breach of statutory duty, misfeasance in public office and in negligence. No duty of care had arisen, there was no allegation of malice in the exercise of the powers of the Chief Constable, and no action lay for breach of statutory duty. As to the last matter, Lord Bridge of Harwich remarked[26]:

> "If ... the delay in giving notice under regulation 7 coupled with other factors causes irremediable prejudice to the officer in disciplinary proceedings which result in his conviction of an offence against the discipline code, he has his remedy by way of judicial review to quash that conviction and nullify its consequences. The proposition that the legislature should have intended to give a cause of action in contemplation of the remoter economic consequences of any delay in giving notice under regulation 7 is really too fanciful to call for serious consideration."

The facts

26 The appellants are husband and wife and their daughter. They are citizens of Bangladesh. The husband and wife were born in 1960 and 1959 respectively. They married in 1984 and their daughter was born in 1989.

27 The appellants arrived in Australia on 3 August 1996 on visitor visas issued at Dhaka for a period to expire on 3 February 1997. On 28 January 1997, applications were made for protection visas under the *Migration Act* 1958 (Cth) ("the Act").

28 The husband is a Muslim and the wife is a Roman Catholic. Their daughter has been baptised in the faith of her mother. The parents claimed that on a number of occasions when they were living in Bangladesh they were harassed and attacked because they were parties to a "mixed marriage".

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24 [1989] AC 1228.

25 *R v Chief Constable of the Merseyside Police, Ex parte Calveley* [1986] QB 424.

26 [1989] AC 1228 at 1237.

29 On 27 May 1997, a delegate of the Minister, the first respondent, refused the grant of protection visas and, on 5 June 1997, the appellants applied to the second respondent, the RRT, for review of that decision. The RRT was obliged by s 414 of the Act to exercise its review jurisdiction and by s 430 to prepare a written statement setting out its decision, reasons and findings on material questions of fact and referring to the material on which those findings were based.

30 Years passed and, by decision and reasons for decision handed down on 14 January 2003, the RRT affirmed the decision not to grant protection visas.

31 The litigation that ensued has turned upon the question whether, in the circumstances of the case, involving the delay of more than five years between the application to the RRT and its decision, that decision is tainted by jurisdictional error.

The litigation

32 An application was brought in the Federal Court under s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") which has its source in s 75(v) and s 77(i) of the Constitution[27]. The application claimed among other relief orders in the nature of certiorari, prohibition and mandamus, and was dismissed by Hely J on 15 April 2003[28]. An appeal to the Full Court was dismissed.

33 By their amended notice of appeal in the Full Court, the appellants asserted that the decision of the RRT was beyond power (and thus outside the protection of s 474 of the Act[29]) because the RRT had not bona fide exercised its power, had denied the appellants procedural fairness, and otherwise had not validly exercised its power pursuant to Pt 7 of the Act. Delay itself was not advanced as productive of jurisdictional error; rather, it was treated in the appellants' case as indicative of one or more of the established heads of jurisdictional error.

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27 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 181, 192-193, 212-213, 231.

28 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 333.

29 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 where it is explained that s 474 was inserted with effect from 2 October 2001 (well before the decision of the RRT with which this appeal is concerned) by the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth). This repealed the whole of Pt 8, including the review provision in s 476 which had been considered in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

The statutory framework

34 The appellants stressed the importance of a consideration of the statutory framework for the decision-making by the RRT which is provided by Pt 7 of the Act (ss 410-473). In particular, attention was directed to the objectives stated in s 420. Section 420 states:

> "(1) [The RRT], in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
>
> (2) [The RRT], 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."

35 However, s 420 does not delimit boundaries of jurisdiction. In *Minister for Immigration and Multicultural Affairs v Eshetu*, Gleeson CJ and McHugh J said of s 420 and similar provisions[30]:

> "They are intended to be facultative, not restrictive. Their purpose is to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals."

Other judgments in *Eshetu* construed s 420 in the same way[31].

36 In the face of the decision in *Eshetu*, it would be wrong (and the appellants did not advocate this) to fix upon the word "fair" in s 420(1) as marking a legislatively imposed criterion for the exercise of jurisdiction by the RRT, and then to reason that a decision made after delay is not "fair" and thus is infected with jurisdictional error.

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30 (1999) 197 CLR 611 at 628 [49].

31 (1999) 197 CLR 611 at 642-644 [108]-[109] per Gummow J, 659 [158] per Hayne J, 668 [179] per Callinan J.

37 The appellants also referred to s 425[32]. In certain circumstances, including those of this case, s 425(1) obliged the RRT to "give the applicant an opportunity to appear before it to give evidence". Counsel for the Minister accepted that it is implicit in the reference in s 425 to a hearing where evidence may be given that the challenge to the decision under review by the RRT be given a proper, genuine and realistic consideration in the decision to be subsequently made by the RRT. However, counsel further submitted that the decision and reasons for decision handed down on 14 January 2003 satisfied that criterion. In addition, counsel correctly denied that there was to be drawn from s 425 some additional implication as to timing, a failure of observance of which produced jurisdictional error.

Challenges before delayed decision

38 It is necessary to distinguish between complaints of delay which are made before the decision in question has been reached and those which are made after. It is well settled that in the first category an order in the nature of mandamus may be made to require the exercise of jurisdiction. An example is the issue of mandamus in *R v Secretary of State for the Home Department; Ex parte Phansopkar*[33]. There, the Home Secretary had adopted a rule of practice that applications for certificates of patriality would be considered only in countries of origin (where there were considerable delays in dealing with those applications) rather than in the United Kingdom.

39 With respect to complaint made before a delayed decision is reached, ss 7(1) and 16(3) of the ADJR Act are special provisions respecting unreasonable delays in decision-making. In the United States, §706(1) of the *Administrative Procedure Act*[34] empowers a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed" and the time agencies take to make decisions has been treated as "governed by a 'rule of reason'"[35]. The operation of the ADJR Act is illustrated by *Wei v Minister for Immigration, Local Government and Ethnic Affairs*[36]. In that case, Neaves J ordered that

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32 In what follows in these reasons, reference is made to s 425 in its form before it was repealed and a new s 425 substituted by the *Migration Legislation Amendment Act (No 1)* 1998 (Cth).

33 [1976] QB 606.

34 USC, Title 5.

35 *Telecommunications Research and Action Center v Federal Communications Commission* 750 F 2d 70 at 80 (1984); see also Pierce, *Administrative Law Treatise*, 4th ed (2002), vol 2, §12.3.

36 (1991) 29 FCR 455 at 479.

decisions upon applications for the grant on special humanitarian grounds of permanent residence status to certain citizens of the People's Republic of China be made within eight weeks of the order of the Federal Court. However, it is not contended that the ADJR Act has any application to the regime established by Pt 7 of the Act, even to decisions which are not privative clause decisions protected by s 474[37].

Challenge after decision

40 The appellants complain not of a delay in making a decision not yet reached, but of a delay in making a decision which has been reached. Counsel for the Minister, in oral submissions, described the delay of the RRT in this case as regrettable and inordinate, but as not giving rise to jurisdictional error. Counsel submitted that delay without more does not constitute jurisdictional error, nor does it give rise to a presumption of error. The proper remedy had been mandamus to compel exercise of the jurisdiction of the RRT and the making of the decision, and was not to set aside the decision, once made, for jurisdictional error. These submissions oversimplify the scope of mandamus.

41 With respect to mandamus, there are two species of failure to act or to decide: actual failure and constructive failure. Delay may be such as to show that there has been an abdication or abandonment of the statutory function to proceed in the matter[38]. Further, there will be a constructive failure to exercise jurisdiction where a decision has been given but what purports to be the performance of a duty to decide is vitiated because the decision-maker misconceived its role, misunderstood the nature of its jurisdiction (including the nature of the opinion which it was to form), or failed to apply itself to the questions which the relevant statute prescribed[39].

42 Contrary to what was suggested by the submissions for the Minister, from the delay in the particular circumstances of a given case, there may be inferred one or more of the failures just listed. No general form of words will encapsulate all the circumstances in which delay may operate in this way.

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37 cf *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 511 [97].

38 *Engineers' and Managers' Association v Advisory, Conciliation and Arbitration Service* [1980] 1 WLR 302 at 308, 310, 318 (HL); [1980] 1 All ER 896 at 901, 903-904, 910.

39 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208-209 [31]. See also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 398 [1], 419-420 [82], 420 [87], 453 [189].

43 Something should be said upon the jurisdictional error which follows from a failure to accord procedural fairness. The appellants submitted that it was "manifest" that there had not been a fair hearing by the RRT of their applications where the decision on the issues concerning the subjective element of the Convention definition of "refugee" was made four and a half years after the giving of evidence on those issues.

44 In response, the Minister correctly submitted that the rules of natural justice are not necessarily breached by excessive delay; the question, rather, is whether delay has denied an interested party a proper opportunity to present its case.

45 From the above consideration of the scope of mandamus, and of the requirements of procedural fairness, the ultimate issues on this appeal appear. There are two issues. They are (a) whether the delay of which the appellants complain denied them the proper opportunity to present their case and (b) whether there is to be inferred from the circumstances of their case a constructive failure to exercise jurisdiction. The giving of answers requires further consideration of those circumstances.

Conclusions

46 As already mentioned, the relevant applications for protection visas were lodged on 28 January 1997 and were refused by a delegate of the Minister on 27 May in that year. The application for review of the decision of the delegate was lodged with the RRT on 5 June 1997 and letters in support were sent by the solicitors for the first appellant on 7 October 1997. On 15 April 1998, the RRT wrote to the first appellant providing him with an opportunity to give oral evidence on 6 May 1998. There followed a tribunal hearing on that date where the appellants appeared, together with their representative. A further written submission from the representative of the appellants was received by the RRT on 9 June 1998.

47 The next significant development occurred more than three years later. On 18 December 2001, the solicitors for the first appellant provided to the RRT documents relating to the third appellant and also requested a "reasonable time" to make further written submissions. A further oral hearing was held on 19 December 2001. Evidence was given by the second and third appellants and by a family friend. Written submissions were lodged on 15 March 2002. It was not until more than nine months later, on 14 January 2003, that the RRT handed down its decision and reasons for decision.

48 The RRT noted that it is well established by decisions including those in *Chan v Minister for Immigration and Ethnic Affairs*[40] and *Minister for Immigration and Ethnic Affairs v Guo*[41], that there are two elements involved in the determination of the Convention question as to the existence of a well-founded fear of persecution. One is subjective and the other objective. The subjective element is whether the claimant to refugee status has a fear of persecution; the objective element is whether that fear is well founded.

49 The RRT made a finding, as to the first two appellants, that as husband and wife they did not face a "real chance" of harm amounting to persecution for reasons of their status as a couple in a mixed faith marriage; the result was that any fears they claimed to hold in that regard were not well founded. As to the third appellant, their daughter, the RRT found that she did not face a "real chance" of harm amounting to persecution were she to return to Bangladesh in the reasonably foreseeable future.

50 Given the conclusions reached by the RRT respecting the objective element in the Convention definition, there was no necessity to make any findings as to the "subjective" element. However, the Minister properly concedes that the conclusion of the RRT that the appellants did not face a "real chance" of persecution depended in part on the rejection of some of their claims about harm they had suffered in Bangladesh. These claims had been explored in the evidence of the first and second appellants at the first of the two hearings, namely that conducted on 6 May 1998.

51 Two of these claims were abandoned by the appellants in the circumstances described as follows by the RRT. As to the first, the RRT said:

> "At the Tribunal hearing both Applicants, husband and wife, maintained an account of a village committee undertaking a serious action against the husband by placing a necklace of shoes around his neck and parading him around the village and beating him.
>
> I had interviewed both Applicants separately and they both provided the same account in that regard.
>
> As they had also provided accounts of other situations which were not consistent I queried the credibility of those accounts.

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40 (1989) 169 CLR 379.

41 (1997) 191 CLR 559.

> Following a brief adjournment the Applicants resiled from the claims in regard to the necklace of shoes and the beating and said that instead they had been forced to leave the village.
>
> Accordingly, by their own account the original claim was fabricated and since the accounts were consistent when both Applicants were separated at the hearing it leads me to find that they colluded in this fabrication."

52 The second claim concerned an alleged attempt on the life of the first appellant. As to this the RRT said:

> "This claim was first raised by the husband at the Tribunal hearing, and when the wife gave evidence she made no reference to this claimed incident at all, even when asked specifically in regard to knife attacks in the vicinity of the house.
>
> Following the adjournment at the first hearing the Applicant, the husband, resiled from this claim.
>
> Once again this demonstrates the intention of the Applicant to fabricate to provide an account to support his claim to have been targeted because of his mixed religion marriage. I find that he has done so because he is aware that the facts as they are would not provide a basis for a claim to be in need of and deserving protection."

53 The above emphasises the importance of the point made by Marshall J that the findings by the RRT of collusion and fabrication between and by the husband and wife did not turn upon any question involving their demeanour[42]. With respect to the third appellant, their daughter, the situation differed. The RRT considered a claim that there had been an incident in which she was confronted on the way to church and a knife had been held to her throat. The RRT said:

> "At the Tribunal hearing the Applicant daughter, gave evidence in the presence of the parents and the representative and none made any comment on her statement.
>
> In regard to this claimed attack I checked several times to see if she felt comfortable talking about it and she said she did. *She displayed no signs of trauma or concern.*" (emphasis added)

However, the evidence of the daughter was given at the second hearing which, while about a year before the apparent completion of the RRT's reasons, was more proximate to the outcome than the first hearing in 1998.

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42 (2004) 134 FCR 85 at 94.

54 It is common ground that the proceedings before the RRT were recorded. Hill J rightly emphasised that an interval of 12 months between the hearing of oral evidence and the giving of a decision is a lengthy one. Hill J went on to refer to the dissenting reasons of Finkelstein J, saying[43]:

> "As Finkelstein J has pointed out it may well be that unless the Tribunal member had made notes of his initial views of credibility these initial views may well have been lost in the time which passed from the hearing of evidence to the delivery of reasons. On the other hand it may well be the case, I do not know, that the Tribunal member did keep notes, or was able to recall from a reading of the transcript or from listening to a tape recording of the proceedings the views he held at the time. That does not seem to me to be so improbable as to be able to be rejected. Certainly the Court knows nothing about any notes which the Tribunal member kept at the time nor whether the Tribunal member listened to a recording of the proceedings. The Court is, however, well aware that all proceedings of the Tribunal are taped and reading a transcript of proceedings even up to a year later could easily bring back to mind the reactions which the Tribunal member had when originally hearing the evidence."

55 It may be accepted, as authority in this Court requires[44], that:

> "once *a breach of natural justice is proved*, a court should refuse relief only when it is confident that the breach could not have affected the outcome". (emphasis added)

However, as indicated earlier in these reasons, excessive delay of itself does not prove a breach of the rules of natural justice. The question is whether it is to be inferred that the delay in the particular proceeding has denied to an interested party the opportunity to present its case.

56 The concluding passage in Hill J's reasons should be adopted as indicating the appropriate outcome on the appeal to this Court. His Honour said[45]:

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43 (2004) 134 FCR 85 at 90-91.

44 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 122 [104] per McHugh J. See also at 88-89 [3]-[4] per Gleeson CJ, 116-117 [80]-[81] per Gaudron and Gummow JJ, 130-131 [131] per Kirby J, 144 [172] per Hayne J, 153-155 [210]-[211] per Callinan J.

45 (2004) 134 FCR 85 at 91.

> "The problem I have is that there is nothing which requires me to reach one conclusion in preference to another as to what consequences were likely to have flowed from the delay which occurred. For my part I do not think that it is a necessary inference just from the delay itself that the Tribunal member was unable as a result of that delay to fulfil his function of reviewing the decision of the respondent Minister or to be fair to the appellants."

Orders

57 The appeal should be dismissed with costs.

58 KIRBY J. This appeal comes from a divided decision of the Full Court of the Federal Court of Australia[46]. It concerns the consequences of extended delay for the validity of a decision of the Refugee Review Tribunal ("the Tribunal") established by the *Migration Act* 1958 (Cth) ("the Act")[47]. Like the Full Court, this Court is divided. However, the application of the applicable principles of law to the largely uncontested facts of the case requires that the appeal be allowed.

59 Not every decision-maker, in a court or tribunal, can be as swift as Sir William Page Wood VC or as accurate as Sir George Jessel MR or as scintillating as Hamilton J (later Lord Sumner) in the delivery of *ex tempore* reasons at the conclusion of the hearing. The habits of those judges (to whom I could add some Australian decision-makers of like capacity) are described by Heydon JA in *Hadid v Redpath*[48]. Nor is the immediate delivery of decisions always possible or even desirable[49]. However, where (as here) the delay is extensive, it invites vigilance on the part of a court with responsibilities for an appellate decision or judicial review.

60 Whilst different considerations apply to delay in a court subject to appeal and in a tribunal subject only to judicial review, there are, unsurprisingly, common principles. Ultimately, in either case, if the court, on appeal or review, concludes that the delayed decision is unsafe or involves material unfairness or injustice to the losing party, an affront to the common hypothesis of decision-making is established. That affront cannot be allowed to stand[50]. Appropriate relief will then be granted, as it must be in this case.

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46 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 85 at 90-91 [18]-[19] per Hill J, 94 [39] per Marshall J (Finkelstein J dissenting).

47 The Act, s 457.

48 (2001) 35 MVR 152 at 162 [46]-[48] (NSWCA).

49 As Heydon JA pointed out by reference to Kitto, "Why Write Judgments?", (1992) 66 *Australian Law Journal* 787 at 792: see (2001) 35 MVR 152 at 163-164 [51].

50 *Boodhoo v Attorney General of Trinidad and Tobago* [2004] 1 WLR 1689 at 1694 [11]. Their Lordships, at 1696 [14], approved the remark of Lord Diplock in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 at 399: "The fundamental human right is not to a legal system that is infallible but to one that is fair." In this respect, they upheld the approach of de la Bastide CJ in the Court of Appeal of Trinidad and Tobago.

The facts and the legislation

61 *The facts*: The detailed facts are set out in other reasons[51]. So far as the issue of delay is concerned, the important facts are undisputed.

62 The appellants arrived in Australia in August 1996. In January 1997 the adult appellants applied for protection visas on their own behalf and for their daughter, claiming to be refugees within the Refugees Convention and Protocol, given effect by the Act[52]. In May 1997 their application was refused by a delegate of the Minister. Promptly, they applied to the Tribunal for a review of that decision.

63 In April 1998 the appellants were invited to give evidence in support of their claims at a hearing before the Tribunal. There then followed a first hearing in May 1998 after which a delay of three years and five months ensued without decision or further communication with the appellants. A second hearing was then fixed for 19 December 2001. Unchastened by the previous delays, a still further interval of twelve months followed before, on 20 December 2002, notification was given that the decision of the Tribunal would be handed down on 14 January 2003. So indeed it was, a few months short of the sixth anniversary of the first application by the appellants to the Tribunal. It was adverse to the appellants' claims.

64 As appears from other reasons, the appellants' claims were not particularly complicated, either in law or fact. They concerned a "mixed marriage" between nationals of Bangladesh: the husband being a Muslim and the wife a Christian (Roman Catholic). The difficulty presented by apostasy for persons born and raised as Muslims is quite a common issue in refugee claims. It has arisen in this Court[53].

65 As appears from the reasons of the Tribunal, when it ultimately rejected the appellants' claims, they lost their case (in the words of Finkelstein J, the dissentient in the Full Court) "because their evidence was not believed"[54]. As to some of the unbelieved evidence, the Tribunal had heard of the abandonment of

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51 Reasons of Gleeson CJ at [2]; reasons of Gummow J at [26]-[31]; reasons of Callinan and Heydon JJ at [141]-[151].

52 The Act, s 36.

53 eg *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142; 216 ALR 1. See also Germov and Motta, *Refugee Law in Australia*, (2003) at 270, 277, 280 and the cases there cited.

54 (2004) 134 FCR 85 at 100 [63].

two specific claims which the adult appellants conceded they had invented to bolster their case. However, as Gummow and Hayne JJ pointed out in *Abebe v The Commonwealth*[55], falsehoods and embroidery of such claims do not of themselves justify a conclusion that all aspects of an applicant's case are false. It remains for the Tribunal to consider any evidence that is not discredited or disbelieved.

66 In the appellants' case, that meant considering the other claims concerning their assertion of a fear of persecution by reason of their respective religions and by reason of the fact that, in their daughter's case, she had been baptised into the Christian religion and had not followed the religion of her father and of the majority of the population in Bangladesh, namely Islam.

67 In essence, the appellants' claims on this score were rejected on credibility grounds[56]. Even the young daughter (the third appellant) was disbelieved in respect of an incident which she claimed had occurred on the way to church where she was to be baptised[57]. The assessment of the truthfulness of the appellants as witnesses was not the only foundation for the ultimately adverse decision of the Tribunal. But, clearly, it was a most significant consideration.

68 The general unwillingness of courts, conducting an appeal or judicial review, to go behind findings as to the credibility of parties or witnesses is a well-known feature of all litigation where a determination is challenged after a first instance decision[58]. This fact reposes a great responsibility upon primary decision-makers. Respect for their decisions comes at a price. That price is the reasonably prompt determination of contested questions of credibility whilst memories of impression are fresh and true reasons can be given for preferring some, and rejecting other, evidence.

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55 (1999) 197 CLR 510 at 577-578 [191]; cf *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1619-1620 [119]-[121]; 200 ALR 447 at 477-478. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 139-140 [32]-[34], 159 [94].

56 See extracts from the decision of the Tribunal in the reasons of Callinan and Heydon JJ at [148]-[149].

57 See extracts from the decision of the Tribunal in the reasons of Callinan and Heydon JJ at [149].

58 In appeals, see eg *Fox v Percy* (2003) 214 CLR 118 at 127 [26] and cases there cited. In cases of judicial review, see eg *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 88-89 [4], 124-128 [111]-[121], 130-131 [131].

69 *The legislation*: The Tribunal is not a court of law. It is an administrative body established by the Federal Parliament. It has statutory functions to review, by a generally inquisitorial procedure, contested decisions made by a delegate of the Minister.

70 There is no appeal from the Tribunal to the Federal Court on the factual merits of its decisions. Still less is there such an appeal on the merits to this Court[59]. Instead, the appellants' application to the Federal Court, challenging the unfavourable decision of the Tribunal, was brought pursuant to the *Judiciary Act* 1903 (Cth), s 39B[60]. The application sought the classic relief of judicial review, namely the issue of writs of *certiorari*, prohibition and *mandamus*. The proceedings thus presented issues to the Federal Court concerned with the validity of the decision of the Tribunal and (as it has been put) whether "jurisdictional error" had been shown such as would authorise relief of the kind described[61].

71 By decisions of this Court, jurisdictional error amounts to a failure of the decision-maker to fulfil the essential requirements of the decision-making process established by law. Where a relevant failure to comply with the basic requirements of procedural fairness (natural justice) is shown, jurisdictional error exists. This is either because[62] the common law requirements of procedural fairness are ordinarily to be taken as grafted onto the operations of a statutory decision-maker, such as the Tribunal, or because it is inferred that such requirements are implicit in the conduct of a tribunal established by the Parliament, absent clear provisions to the contrary[63]. Where a decision does not

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59 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 597-598.

60 Which, as Gummow J points out, finds its source in the Constitution, ss 77(i) and 75(v). See reasons of Gummow J at [32].

61 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 419 [82], 453 [189], 505 [339]-[340]; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-617 [51]-[60]; cf at 631-633 [103]-[109].

62 The two explanations are elaborated in *Kioa v West* (1985) 159 CLR 550 at 584, 614-615; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 83 [89] per Gaudron J.

63 See *Quin* (1990) 170 CLR 1 at 35; *Walton v Gardiner* (1993) 177 CLR 378 at 408. But see *Kioa v West* (1985) 159 CLR 550 at 584; *South Australia v O'Shea* (1987) 163 CLR 378 at 386; *Quin* (1990) 170 CLR 1 at 57-58; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652.

conform to the fundamental hypotheses of the legislation, as by a material departure from the requirements of procedural fairness, the law treats the resulting outcome as fatally flawed. In short, it is not a "decision" at all within the statutory grant[64]. It is infected by "jurisdictional error".

72 Differences sometimes exist over the borderline between valid but imperfect decisions made *within* jurisdiction and invalid "decisions" affected by such an error and thus *outside* jurisdiction. However, by the authority of this Court, the distinction exists both for the constitutional writs[65] and for their statutory derivatives and elaborations in the *Judiciary Act*, such as those that the appellants invoked in this case.

73 It follows that the starting point for considering this appeal is the legislative scheme of the Act, which established the Tribunal and made provision for the discharge of its functions. Conforming to the template of a provision common in federal legislation, the Tribunal is obliged, in making a decision on review, to prepare a written statement that[66]:

> "(a) sets out the decision of the Tribunal on the review; and
>
> (b) sets out the reasons for the decision; and
>
> (c) sets out the findings on any material questions of fact; and
>
> (d) refers to the evidence or any other material on which the findings of fact were based."

Self-evidently, these provisions impose on the Tribunal a process of decision-making in which the Parliament envisaged that the Tribunal's disposition will disclose reasons, findings and references to the evidence that are material to the issues for decision and determinative of its outcome.

74 Additionally, the Act, by s 420, provides that the Tribunal must carry out its functions pursuing the objective of providing a mechanism of review "that is fair, just, economical, informal and quick"[67]. This provision is an indication of

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64 *Miah* (2001) 206 CLR 57 at 74-75 [51]-[54], 81-83 [80]-[86], 102-103 [148]; *Bhardwaj* (2002) 209 CLR 597 at 605 [13], 614-615 [51]; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506-507 [76]-[78].

65 Constitution, s 75(v).

66 The Act, s 430.

67 The Act, s 420(1).

the nature of the Tribunal, and its procedures, that the Parliament had in mind in establishing it. To say the least, the carrying out of the functions of the Tribunal in the present case fell far short of fulfilling the legislative objective of a mechanism of review that was quick. Moreover, because the Tribunal's decision ultimately turned on questions involving the assessment of the credibility of the appellants which had to be judged by the Tribunal member months, and even years, after the appellants had appeared to give oral evidence, the carrying out of the Tribunal's functions in this case was neither fair nor just.

75 The legislative aspiration of speed in decision-making expressed in s 420 would not, of itself, give rise to a remedy for jurisdictional error in the case of default. However, the aspiration of fairness and justice in the discharge of the functions of the Tribunal is of a different order. Absent fairness and justice in the performance of its functions and procedures, a question arises as to whether the resulting "decision", "reasons", "findings" and "refer[ence] to the evidence" are such as to comply with the legislation that governed the Tribunal. If not, the conclusion expressed, although apparently a "decision", is flawed. It is invalid as involving jurisdictional error for want of procedural fairness. At the least, because of the applicability to the decisions of the Tribunal of the rules of procedural fairness, a default in compliance with such rules gives rise to a remedy. The "decision" is susceptible to correction by the remedies invoked by the appellants in the Federal Court.

The issues

76 On the basis of the arguments of the parties, the following issues arise for decision by this Court:

(1) *The invalidating delay issue*: Whether the uncontested delays that occurred in the disposition of the appellants' application to the Tribunal were material and, if so, whether such delays constituted jurisdictional error, *prima facie* entitling the appellants to relief and thus requiring correction of the orders of the Federal Court;

(2) *The suggested justification issues*: Whether, if the delays appear to sustain a grant of relief, intervention should be withheld on the basis that (a) the impact of delay in the present case may (for all the Court knows) have been cured by notes made by the Tribunal member or by his listening again to the recording of the hearing[68]; (b) the provision of relief involves an impermissible entry by the Court into the merits of the case, forbidden in proceedings by way of judicial review[69]; or (c) the remedies for

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68 (2004) 134 FCR 85 at 90-91 [18].

69 See reasons of Gummow J at [21]; reasons of Hayne J at [135].

prolonged delay in administrative decision-making of the present kind should be left to the political branches of government having regard to cost and other implications[70]; and

(3) *The discretionary issues*: Whether, if the foregoing issues are resolved against the Minister, relief should nonetheless be refused to the appellants either (a) because their proper remedy for the delay in decision-making was the earlier commencement of proceedings for relief in the nature of *mandamus* which they failed to initiate; or (b) because the ultimate decision arrived at by the Tribunal, despite the delay, was convincing for the reasons which the Tribunal gave, thereby rendering a rehearing of the appellants' claim a futile exercise.

The invalidating effect of delay

77 *Significance of delay*: Two hundred years ago, Lord Eldon explained his delay of twenty years in delivering reasons for a decision by reference to the need he had felt to give the question thorough consideration[71]. Since his Lordship's time, courts throughout the common law world, and beyond, have adopted a more timely standard not only in respect of judicial decisions but (as I shall show) in respect of the decisions of administrative tribunals[72].

78 As numerous authorities attest, the issue presented by the complaint of delay is rarely, if ever, about the delay itself. The issue is ordinarily about the effect of the delay upon the decision that is impugned. As Mummery LJ pointed out in *Bangs v Connex South Eastern Ltd*[73], what is a reasonable time for the provision of a decision:

> "depends on all the circumstances of the particular case: the nature of the tribunal, its jurisdiction, constitution and procedures, the subject matter of the case, its factual and legal complexity and difficulty, the conduct of the tribunal and of the parties and any other special features of the situation in which delay has occurred.

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70 Reasons of Gummow J at [19].

71 *Radnor (Earl of) v Shafto* (1805) 11 Ves Jun 448 at 453 [32 ER 1160 at 1162]: "Having had doubts upon this Will for twenty years, there can be no use in taking more time to consider it."

72 *Goose v Wilson Sandford & Co* [1998] EWCA Civ 245 at [112].

73 [2005] 2 All ER 316 at 318 [2]-[3]. His Lordship was referring to the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 6(1).

> The likely effects of delayed decision-making, which can be serious, are relevant in determining what is a reasonable time."

79 A similar point was made in the Supreme Court of Canada by Bastarache J in a case involving delay on the part of an administrative body that was alleged to have lost its jurisdiction in the matter because of its unreasonable delay in processing complaints[74]. The Supreme Court concluded that delay *per se* did not occasion an abuse of process. However, proof of unacceptable delay that caused relevant prejudice could taint the proceedings[75]:

> "The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. … [It] is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay."

80 A like approach to the significance of delay has been adopted by the European Court of Human Rights in giving meaning to Art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[76]. That provision, which draws no distinction between courts and administrative tribunals, has been interpreted as requiring that all stages of legal proceedings before such bodies must be resolved within a reasonable time[77]. What is reasonable has been held to depend on "the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute"[78].

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74 *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307.

75 [2000] 2 SCR 307 at 376-377 [122].

76 Article 6(1) provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law" (emphasis added); cf International Covenant on Civil and Political Rights, Art 14.1, which provides for equality before courts and tribunals and determination of rights and obligations in a fair and public hearing.

77 *Silva Pontes v Portugal* (1994) 18 EHRR 156 at 162-163 [33]-[36]. See also *Hornsby v Greece* (1997) 24 EHRR 250 at 268 [40].

78 *Frydlender v France* (2001) 31 EHRR 52 at 1165 [43].

81 In *Dyer v Watson*[79], referred to by Gummow J in his reasons[80], Lord Bingham of Cornhill states that "if the period which has elapsed is one which, on its face ... gives ground for real concern"[81] the court, considering the legal consequences of delay, must inquire into the particular facts and circumstances of the case in order to decide whether the "reasonable time" requirement in Art 6(1) of the European Convention has been breached. Applying this rule, their Lordships held that a delay of twenty months between the date perjury charges were laid and the date set down for the trial did not meet the "high" threshold, whereas a case involving charges laid against a minor, where the period of delay was 27 months between charge and trial, did so. The special considerations relevant to a child accused led to this conclusion. Here there are special considerations relevant to refugee applicants.

82 Lord Bingham went on to observe that, once an elapsed period "on its face ... gives ground for real concern ... a marked lack of expedition [on the part of the relevant authorities], if unjustified, will point towards a breach of the reasonable time requirement"[82]. In the present case, the delay of almost five years is clearly one which "on its face ... gives cause for concern". It would therefore meet even the "high threshold" test mentioned in *Dyer v Watson*. As explained in that case, when inordinate delay is established, closer analysis of the circumstances of the case and of the effect of the delay is then required. That is the approach that I favour. When taken in this case, it confirms, and casts no doubt upon, the appellants' claim to relief.

83 Occasionally, distinctions are drawn between delay whilst awaiting a hearing and delay in the delivery of a decision[83]. Pre-hearing delay may amount to abuse of process, by analogy to the law expressed in decisions of this Court[84]. However, there is no authority for the proposition that post-hearing delay by the decision-maker constitutes an abuse of process. For remedies against such defaults, reliance must be had on other legal categories for relief, such as non-compliance with statutory presuppositions or denial of procedural fairness.

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79 [2004] 1 AC 379.

80 Reasons of Gummow J at [20].

81 [2004] 1 AC 379 at 402 [52].

82 [2004] 1 AC 379 at 402-403 [52], [55].

83 See eg *Country Leathers Manufacturing Ltd v Graham* (2003) 239 Sask R 209 at 218 [44].

84 eg *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31, 56; *Walton v Gardiner* (1993) 177 CLR 378 at 392-394. See also *Herron v McGregor* (1986) 6 NSWLR 246 at 250-252, 253-255, 271.

84 One of the reasons why delay in reaching and providing a decision may not, of itself, entitle a party to relief is the recognition of the infinite variety of cases and the differing powers and capacities of those who decide them. In *Krivoshev v Royal Society for the Prevention of Cruelty to Animals Inc*[85], Giles JA pointed out that an assumption that the passage of ten months is destructive of recollection and understanding where a delay of (say) two months is not, "may not be justified". Decision-makers could not be "rated according to retentive capacity and application to the evidence and issues"[86]. Courts hearing appeals or applications for judicial review normally cannot estimate such personal variations. Ordinarily, they are confined to the record and to an assessment of the consequences of delay in the particular case, judged by an objective standard.

85 *Relevance of delay*: The significance of delay, depending as it does on the issues for decision, necessitates examination of the matter actually decided. If this involved no more than the construction of a written document, the interpretation of a statutory provision applied to agreed facts or other like questions, undue delay, whilst regrettable, might not affect the acceptability or validity of what has been done. The court conducting the appeal or judicial review could judge that matter for itself. Where, however, the matter for decision involves an assessment of the truthfulness of a party or important witnesses, the resolution of competing versions of the facts and the differentiation of truth and falsehood, delay, especially protracted delay, in the provision of a reasoned decision may cast doubt on the validity of that decision. Commonly, this is explained by reference to the need to ensure that "the trier of fact can recall the testimony and the demeanor of the witnesses as well as the dynamics of the trial"[87].

86 In a particular case, more may be at stake than distinguishing between the credibility of parties and other witnesses. Thus, in litigation involving detailed and complex evidence, protracted delay in the provision of a reasoned decision

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85 [2005] NSWCA 76.

86 [2005] NSWCA 76 at [124]. See also *Monie v Commonwealth* [2005] NSWCA 25 at [3]. But see the comments of Hunt AJA at [45] with whom Bryson JA agreed at [7].

87 *Tunnage v Bostic* 641 So 2d 499 at 500 (Fla App 4 Dist 1994). See also *In re New York, Susquehanna and Western Railroad Company* 136 A 2d 408 at 413 (SCNJ 1957); *Helfand v Division of Housing and Community Renewal* 696 NYS 2d 630 at 632-633 (Sup 1999); *In re Adoption of Rhona* 784 NE 2d 22 at 29 (Mass App Ct 2003).

may undermine acceptance by the parties and the community that the decision-maker has given careful consideration to all of the evidence, viewed in its context, and remembered its detail when finally putting the decision on paper[88]. Even appellate judges, like myself, who are cautious about the significance of demeanour in the assessment of truth-telling[89], willingly accord to primary decision-makers significant advantages derived from their function in considering all of the evidence, perceiving its parts in relation to the whole and reflecting upon it all, as it is adduced[90]. Such advantages, together with those which demeanour is conventionally held to accord to primary decision-makers, are lost, or significantly reduced, by protracted delay in providing a reasoned decision.

87 In addition to these considerations, there is another factor that is repeatedly mentioned in authority concerned with judicial delay. It is equally applicable to decision-making by members of quasi-judicial tribunals, such as the Tribunal. Extensive delay may sometimes tempt (or appear to tempt) the decision-maker to take the path of easy resolution. In *Expectation Pty Ltd v PRD Realty Pty Ltd*[91], the Full Court of the Federal Court, in an appeal against delayed judicial reasons, explained the problem in terms of the increasing pressure which prolonged delay occasions to publish a decision. That pressure will bear upon the decision-maker as time passes, leading to the possibility that[92]:

> "[t]hat pressure could well unconsciously affect the process of decision-making and the process of giving reasons for decision. The decision that is easiest to make and express will have great psychological attraction."

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88 cf *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 29 WAR 273 at 282-287 [26]-[40]. In a case of serious delay and complex evidence a suspicion may arise that the decision-maker was unable, in the end, to grapple adequately with the issues.

89 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 327-330 [87]-[88]; 160 ALR 588 at 615-618; *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1614-1616 [90]-[100], 1627 [164]; 200 ALR 447 at 470-473, 488; *Galea v Galea* (1990) 19 NSWLR 263 at 265-267.

90 *Jones v The Queen* (1997) 191 CLR 439 at 467; *Lend Lease Development Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 209-210.

91 (2004) 140 FCR 17. See also *Hadid v Redpath* (2001) 35 MVR 152 at 159-160 [34]-[35].

92 (2004) 140 FCR 17 at 33 [74].

These comments are addressed to a human propensity. They are not confined by the legal character of the body in which the propensity may be manifested.

88 Where there is a possibility that the foregoing might have occurred, it is incumbent on a court, reviewing the impugned decision in an appeal or on judicial review, to approach its task with vigilance[93]. Where the decision-maker reaches a decision in reliance upon considerations of the credibility of parties or witnesses, significant delay undermines the acceptability of such assessments. Where there is lengthy delay in the provision of a reasoned decision, whether by a judge or a tribunal, it may not be enough for the decision-maker simply to announce conclusions on credibility. It may then be necessary to say why the evidence of a witness is believed or disbelieved, in effect to demonstrate that any countervailing evidence has not been forgotten or overlooked. That it has not been would, in a timely provision of the decision, more readily be assumed[94].

89 *Administrative delay*: There are important differences between the role of an appellate court disposing of an appeal against a judicial determination, and the reasons that support it, and the function of judicial review of the decision and reasons of an administrative tribunal. Most especially, courts engaged in judicial review are not concerned, as such, with the factual merits of the impugned decision whereas, depending on the contested issues and the enabling legislation, an appeal may involve a reconsideration of the factual as well as the legal merits of the case[95].

90 Nevertheless, there is an obvious intersection between the process of appeal and judicial review, so far as each is concerned with questions of the fairness and justice of the process by which the impugned decision has been reached. In both procedures, the court is obliged to ensure compliance with the fundamental principles of fairness and justice[96]. It must uphold a standard of decision-making that enjoys, and deserves, the confidence of the parties, the community and knowledgeable observers.

91 In one sense, the invalidating effect of delay in the provision of reasoned decisions will be more obvious in the case of administrative decision-makers,

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93 cf *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1617 [105]-[106]; 200 ALR 447 at 474.

94 *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17 at 33 [72].

95 *Fox v Percy* (2003) 214 CLR 118 at 126-127 [24]-[26]; cf at 163 [143].

96 A recent appeal in which a denial of procedural fairness was at the forefront of submissions was *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816 at 1824 [47].

such as the Tribunal, than in the case of judges and courts. Typically, judges are required to decide more complex controversies. These often necessitate more detailed reasoning. They commonly oblige a lengthier time for reflection, analysis and exposition of the reasons. Moreover, judges are members of a trained profession to whom are conventionally ascribed capacities of analysis and discipline in decision-making superior to those possessed by, or expected of, most members constituting statutory tribunals[97].

92 It is the nature of the work of most judges that it usually involves greater variety than is typically the case of administrative bodies, such as the Tribunal. A special danger of delay in the case of a tribunal, such as that in question here, is the risk of confusion between the facts of similar applications and elision between impressions about the reliability and truthfulness of witnesses in one case compared with another having common factual and legal features. It is a commonplace of decision-making that the peculiarities of individual cases may be erased from the memory by later similar cases. In a sense, this is a protective device of the mind. However, it is one destructive of easy recall of an individual case, particularly where it has similarities to many others and was heard much earlier.

93 It is therefore incorrect to suggest that the general principles expressed by appellate courts in relation to the effects of delay upon judicial decision-making have no relevance to the consequences of delay for judicial review of decisions of administrative tribunals[98]. Care must be observed, it is true, in proceedings of the latter kind, so as to avoid review on the factual merits. But, in so far as identical considerations of law are invoked, they invite a like analysis. Thus, judicial review, as much as appellate reconsideration, may address a party's complaint that the outcome of the impugned process is flawed because it has offended the assumptions of the legislation and specifically the requirements of procedural fairness (natural justice) and the obligation belonging to tribunals, as much as courts, to perform their functions in ways that are manifestly fair and just[99].

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97 cf *Krivoshev* [2005] NSWCA 76 at [123]-[124] per Giles JA.

98 See eg *Campbell v Hamlet* [2005] 3 All ER 1116 at 1123-1124 [27]-[31]; *Barker v Home Office* [2002] UKEAT 804_01_0808; *Olwa v North Glasgow University Hospitals NHS Trust* [2004] UKEAT 0067_02_2203; *Uphill v Colas Ltd* [2004] UKEAT 0323_04_0912.

99 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259. See *Johnson v Johnson* (2000) 201 CLR 488 at 502 [42]. "Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice": *Re Minister for*

(Footnote continues on next page)

94 The foregoing, which follows as a matter of legal principle, is confirmed by countless decisions in other jurisdictions of the common law where relief has been provided in proceedings for judicial review directed to tribunals and other administrative decision-makers. In the United Kingdom, the general principles concerning delayed judgments have been applied to tribunals that issue decisions as much as to courts[100]. Specifically, the standard introduced into United Kingdom law by the *Human Rights Act* 1998 (UK) has been applied to administrative tribunals as well as to courts[101].

95 Lest it be said that the pure stream of administrative law in the United Kingdom has lately become contaminated by extraneous notions of European law, a glance at decisions in other common law jurisdictions shows similar developments. I have already mentioned *Blencoe v British Columbia (Human Rights Commission)*[102] and *Country Leathers Manufacturing Ltd v Graham*[103] in Canada, to which might be added *Martineau v Matsqui Institution Disciplinary Board*[104] where Dickson J approached the complaint about delay on the part of a tribunal by asking the question "Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved?". His Lordship suggested that this was the "underlying question" posed for courts dealing with complaints about non-compliance by administrative tribunals with the obligations of natural justice and fair procedures.

96 The decision in *Martineau* was unaffected by the Charter. In the United States of America, significant delay in the provision of decisions with adequate reasons may present constitutional issues of due process[105]. However, when

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Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1 at 14 [37] per Gleeson CJ.

100 eg *University of Southampton's Applications* [2005] RPC 11 at 225-226 [7] per Laddie J.

101 eg *Bangs v Connex South Eastern Ltd* [2005] 2 All ER 316 (a case of delay of more than one year from the hearing of a complaint of race discrimination to the decision of the Employment Appeal Tribunal); cf *Porter v Magill* [2002] 2 AC 357 at 396, 425-426 (CA); 480 [57], 496-498 [108]-[114] (HL).

102 [2000] 2 SCR 307.

103 (2003) 239 Sask R 209.

104 [1980] 1 SCR 602 at 631.

105 *Porter v Estate of Spates* 693 So 2d 88 (Fla App 1 Dist 1997).

examined, the case law refers to considerations similar to those identified above. The separation of each of the three branches of government in the United States has produced a doctrine of deference to administrative decision-making that has never been accepted in Australia or other Commonwealth countries[106]. The authorities on US administrative law, referred to by Gummow J in his reasons[107], have to be read with this caveat in mind.

97 In Australia, at least in respect of officers of the Commonwealth, we embarked in a constitutional direction different from that of deference to administrators[108]. It is one that affords to the courts the jurisdiction and power to ensure compliance with the law by federal office-holders, including, relevantly, members of the Tribunal[109]. This is a distinctive feature of our constitutional arrangements. It is reflected in the provisions of the *Judiciary Act*. This Court should not in any way diminish it.

98 Where significant delay is shown in the determination of proceedings before an administrative tribunal, there is no reason of principle for the adoption of a lesser standard of justice and fairness from that applied to like complaints about judicial decisions. In point of legal principle and policy, there is every reason for applying similar principles, at least where the administrative decision-maker is a quasi-judicial body, like the Tribunal, dealing with issues of great importance to the persons before it and to the community and doing so in accordance with procedures required by statute, as elaborated by the common law, that have to be fair and just. Where there is excessive delay[110], and the demonstration of errors that may "even possibly [be] attributable to the delay", the court considering that complaint will set the decision aside where it concludes that the decision is unsafe and that "to allow it to stand would be unfair to the complainant"[111].

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106 See eg *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 153-155 [44]-[47]; cf Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 214.

107 Reasons of Gummow J at [19].

108 In the Constitution, s 75(v).

109 *Plaintiff S157/2002* (2003) 211 CLR 476 at 506-507 [76]-[78].

110 In *Cobham v Frett* [2001] 1 WLR 1775 at 1783, which was an appeal from the Court of Appeal of the British Virgin Islands, the Privy Council held that a court delay of "12 months would normally justify that description".

111 *Cobham* [2001] 1 WLR 1775 at 1783-1784 per Lord Scott of Foscote. There are resonances in this test of "fairness" in the judicial scrutiny of prosecution conduct in a criminal trial: see *Mallard v The Queen* [2005] HCA 68 at [74], [83].

99 *Delay in asylum cases*: Of special relevance to the present case is the fact that the delay complained of occurred in a tribunal which, quite apart from the statutory injunctions contained in s 420 of the Act, of its very nature needs to decide applications promptly in order to fulfil its statutory purposes. In the past, this Court has referred to the vulnerability of many of the persons who are applicants before the Tribunal[112]. Not infrequently, they are desperate. Sometimes they are subject to prolonged detention with the serious consequences that this involves for themselves and their families, anxiety about the future and concern about life itself if they are returned to the country of their nationality.

100 Such considerations have caused the Immigration Appeal Tribunal in the United Kingdom to draw attention to the particularly serious outcome of delay in cases of contested claims to refugee status. In *SB (Sufficiency of Protection – Mafia) Albania*[113], that tribunal was concerned with a case involving a five month delay from the completion of the hearing to the issue of its determination. In the event, the appeal was dismissed. However, the tribunal identified the standard which, it considered, should apply to such decisions, by virtue of their very character and purpose[114]:

> "[I]n asylum appeals a delay of three months between the hearing and preparation of the determination is unacceptable. The nature of the issues raised particularly in an asylum appeal are such that undue delay causes unnecessary worry and prejudice to a deserving claimant and equally it is not in the public interest where the claimant is undeserving. Asylum, immigration and human rights appeals should be determined with as little delay as possible ideally on the day or at least within days of the hearing. It should only be in exceptional cases that any further delay is justifiable."

101 There is no reason why a different, and lesser, standard should be applied in Australia where there are considerably fewer applications for refugee status than in the United Kingdom and where, unlike that country, mandatory detention is commonly required of applicants who have no bridging or other visa[115]. When the standard of three months, or even five months, or indeed of a year is applied to the present case, the true significance of the serious delay that occurred can be seen in a stark light.

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112 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 577-578 [191].

113 UKIAT [2003] 00028.

114 UKIAT [2003] 00028 at [16].

115 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365; *Al-Kateb v Godwin* (2004) 219 CLR 562.

102 *Conclusion: invalidating delay*: The result of this analysis is that *prima facie* the delay that happened before the Tribunal, in the provision of its reasoned decision in this case, was materially excessive. On the face of things, it deprived the appellants of a "decision" of the type required by the Act[116]. It rendered suspect the reasons, findings and references to the evidence contained in the Tribunal's "decision". The "decision" was not reached by a process that was procedurally fair and just to the appellants. By reason of the delay, the "decision" was presumptively flawed by jurisdictional error.

103 Allowing that the entire delay between the original application to the Tribunal and the ultimate decision must be adjusted by reference to the interval between the relevant hearing and the decision, the delay remained nearly five years. This is because the principal evidence given by the appellants was given at the first hearing in May 1998. The hypothesis of the Minister's case is that the Tribunal could remember, assess and evaluate that evidence, for the credibility findings that it made four years and seven months later. I support the analysis and conclusion on this point of Callinan and Heydon JJ[117].

Administrative injustice and jurisdictional error

104 *The statutory postulate of decision-making*: It is true that this Court, and other courts engaged in judicial review of administrative action, have no general jurisdiction to "cure administrative injustice or error"[118]. However, where complainants bring their claim within the established categories of jurisdictional error, relief will *prima facie* be available. Here, the relevant error complained of is a departure from the postulate of decision-making in the Act and specifically breach of procedural fairness. The requirement that a decision-maker provide affected persons an opportunity to present their case before making a decision carries with it a correlative obligation on the decision-maker's part to adopt

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116 A failure to conform to the basic requirements of procedural fairness (natural justice) deprives the decision of "privative clause" status: *Plaintiff S157/2002* (2003) 211 CLR 476 at 508 [83]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 1001 [49]; 207 ALR 12 at 23-24; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1009 at 1026 [79], 1028 [93]-[94], 1036 [149]; 215 ALR 162 at 183, 186-187, 198.

117 Reasons of Callinan and Heydon JJ at [168]-[170].

118 *Quin* (1990) 170 CLR 1 at 35-36, cited by Gummow J at [15]. See also reasons of Hayne J at [137].

procedures that permit the decision-maker to consider fairly the case so presented. Finkelstein J put it this way[119]:

> "A corollary of the basic right to make representations is that the representations should be taken into account[120]. What is the point of giving someone a right to be heard unless, in arriving at the decision, the decision-maker considers the evidence and has regard to the manner in which it is given."

105 As observed by Callinan and Heydon JJ, one way in which a decision-maker can breach this requirement is if the decision-maker is infected with bias[121]. This is because bias prevents the decision-maker from fairly considering the case before it. By analogy, the delay in this case impaired the Tribunal's capacity to assess the case presented by the appellants, and in particular the Tribunal's capacity to make a proper assessment of the appellants' credibility. As such the requirements of procedural fairness applicable to the Tribunal were not fulfilled[122].

106 *Remedying a substantial risk of unfairness*: I also agree with Gleeson CJ that, in order to make good a claim of unfairness, it is sufficient to establish that there was a substantial risk[123] that the Tribunal's capacity to assess fairly the appellants' evidence, and to carry out its decision-making functions conferred by the Act, was impaired by the procedures adopted by the Tribunal. I do not agree with the opinion of Hayne J that the appellants must demonstrate that the risk that the Tribunal did not fairly assess their evidence actually eventuated[124]. Such an approach falls into the very error that it seeks to avoid because it necessarily involves an impermissible review of the merits of the decision. The concern of a court, in exercising its power of judicial review and evaluating the complaint of unfairness, is with the procedure followed by the Tribunal. The concern is not, as such, with the decision ultimately reached. For this reason, whether or not the Tribunal was *in fact* disabled from assessing the appellants' evidence, or whether

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119 (2004) 134 FCR 85 at 100 [62].

120 *Wiseman v Borneman* [1971] AC 297 at 315.

121 Reasons of Callinan and Heydon JJ at [172].

122 Reasons of Callinan and Heydon JJ at [172].

123 See reasons of Gleeson CJ at [10]; cf Finkelstein J in the Full Court: (2004) 134 FCR 85 at 99 [61].

124 Reasons of Hayne J at [136].

or not the ultimate outcome was *in fact* affected, is not determinative[125]. It can reasonably be inferred from the serious delay in this case that there was a real risk that the Tribunal's capacity to assess the appellants' evidence was impaired. As such, the decision was flawed for want of procedural fairness.

107 Nor do I believe much assistance can be derived from the distinction between a "review of the exercise of executive power" (said to fall within the permissible scope of judicial review) and "a review of the merits of the way in which that power had been exercised" (said to fall outside such a scope)[126]. Where judicial review is sought on the grounds of breach of the requirements of procedural fairness, it is precisely the merit of the way the decision-making power was carried out that is at issue. If that power is exercised in a manner that is unfair, within the authorities on procedural fairness, the decision may be invalidated by jurisdictional error for that reason[127]. The provision of relief is then within the discretion of the court conducting the judicial review.

The suggested justifications fail

108 *Use of notes and recordings*: In the Full Court, Hill J speculated on the possibility that the Tribunal member might have corrected or repaired the problem of delay by reviewing notes that he had taken at the time of the hearing concerning his impression of witnesses or by listening to the recording of the original hearing so as to recapture the impressions of that time[128]. This passage in Hill J's reasons is cited, apparently with approval, by Gummow J[129]. I cannot agree.

109 Re-reading transcript years after oral evidence is given and even listening to sound-recorded evidence (assuming that this occurred) cannot substitute for contemporaneous experience and evaluation. The Tribunal, which well knew of the delay in this case, made no reference to using contemporaneous notes or taking the postulated precautions. Ironically, its only reference to delay was to condemn the appellants, with all the disadvantages which they faced, for

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125 Similarly, where a decision is challenged for want of an opportunity to be heard, the affected person does not need to demonstrate that, if heard, he or she would have been believed: see reasons of Gleeson CJ at [10].

126 Reasons of Hayne J at [135].

127 *Plaintiff S157/2002* (2003) 211 CLR 476 at 494 [37].

128 (2004) 134 FCR 85 at 90-91 [17]-[18]. A passage is cited in the reasons of Callinan and Heydon JJ at [153].

129 Reasons of Gummow J at [54].

delaying a mere five months after their arrival in Australia (and whilst their visitors' visas were still valid) before making their claim for refugee status[130].

110 I would answer the suggested justification, or exculpation, for the Tribunal's delay in the compelling words used by Heydon JA in *Hadid v Redpath*[131]. There, a similar postulate was advanced. If "the Tribunal" is substituted for "the trial judge" and "the appellants" for "the plaintiff", Heydon JA's words apply exactly to the circumstances of this case[132]:

> "[N]o favourable assumptions could be made, and it was up to the trial judge to put beyond question any suggestion that he or she had lost an understanding of the issues. Something should be said about how the possible effects of delay on the judicial process have been overcome. Some explanation should be given as to how the trial judge had recorded or recaptured impressions formed of witnesses at the time they testified. A judge might, for example, say 'I have a perfect recollection of all the characters in the trial' or 'I have contemporaneous notes of my impressions'. … [T]he trial judge made no statements of the kind just indicated, and no assumption in her favour that she had retained any relevant impressions could be made."

111 Of course, if a trial judge or tribunal member made such statements, they would not necessarily be accepted at face value. The delay between the hearing and decision in *Hadid* was twelve months. Here, the operative delay was very much longer.

112 *Entry into the merits*: Nor do I accept that the conclusion that I favour, together with Gleeson CJ, Callinan and Heydon JJ, involves an impermissible shift from the proper province of judicial review to an appeal-like consideration of the issues before the Tribunal on their factual merits[133]. A line of demarcation exists[134]. However, there are necessarily points of intersection between the two procedures. Proof of a "breach of natural justice" is one instance. For such proof, it is not necessary in Australia to establish *mala fides* on the part of the

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130 The passage of the Tribunal's decision appears in the reasons of Callinan and Heydon JJ at [149].

131 (2001) 35 MVR 152.

132 (2001) 35 MVR 152 at 159-160 [34]; cf *Cobham* [2001] 1 WLR 1775 at 1783 (PC).

133 Reasons of Gummow J at [21], [23]; reasons of Hayne J at [135].

134 *Walton v Gardiner* (1993) 177 CLR 378 at 407-409.

administrator. To the extent that the authority cited by Gummow J suggests otherwise[135], it does not represent the law of this country.

113 *Politics and cost*: Nor do I agree with the suggestion that, because a decision in a particular case of gross delay might involve consequences for other cases, and hence demand the expenditure of funds by the Executive Government, such decisions are "political", such that they must be left entirely to the Executive and to Parliament[136].

114 A great many decisions of this Court, declaring the law, have economic consequences, whether for government or for corporations and individuals. Sometimes the consequences are very large and costly. But where the law so requires, this Court has not, in the past, withheld relief for that reason alone. In *Dietrich v The Queen*[137], the dissentients made remarks similar to those contained in the reasons of Gummow J in this case. Although the decision in that appeal[138] had far greater potential economic consequences, this Court concluded that the law required that the rule be stated, as it was.

115 How much less applicable is the notion of withholding relief in the present case? The delay here was extraordinary. The case is exceptional. Provision of relief to the appellants immediately affects only their hearing. And in so far as it may contain suggestions of a wider principle, applicable to other cases of refugee claims, it is material to remember the observations of the Immigration Appeal Tribunal in the United Kingdom about the special need for quick determination of cases of this kind[139], just as the Australian Federal Parliament has itself envisaged[140].

116 None of the foregoing suggested justifications for the decision of the Full Court is persuasive. However, the provision of relief of the kind that the

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135 See May LJ in *R v Chief Constable of the Merseyside Police; Ex parte Calveley* [1986] QB 424 at 439, cited by Gummow J at [22].

136 Reasons of Gummow J at [19].

137 (1992) 177 CLR 292 at 323, 350.

138 Effectively requiring provision of counsel at trial, at public expense, to represent a person not otherwise able to afford legal representation to defend a serious criminal charge.

139 See *SB (Sufficiency of Protection – Mafia) Albania* UKIAT [2003] 00028 at [16]. See also *König v Federal Republic of Germany* (1978) 2 EHRR 170 at 197 [99].

140 The Act, s 420(1).

appellants have sought is discretionary[141]. Given that this Court, unlike the Full Federal Court, must now exercise the discretion, are there reasons for refusing relief to the appellants on that ground?

The discretionary arguments fail

117 *The mandamus argument*: In her written submissions, the Minister submitted that relief should be refused because, in effect, the appellants stood by and took advantage of the Tribunal's delay, or waived any complaint about that delay. Instead, it was suggested, if they had been truly aggrieved by the Tribunal's delay, they ought to have sought relief in the nature of *mandamus* to require the Tribunal to exercise its jurisdiction[142]. This submission was ultimately disclaimed during oral argument[143]. However, it is referred to in some of the other reasons[144]. I will therefore express my views on it.

118 I do not doubt that the relief of a writ of *mandamus* might have been sought. After even part of the delay that existed in this case, such relief would doubtless have been granted[145]. However, if the realities of the appellants' situation are considered (as distinct from theoretical arguments) it appears unrealistic to expect them to initiate such court proceedings. They were not in immigration detention in Australia. They had no real incentive to seek relief. They would have been entitled to draw an inference from the extended delay that their case was not being considered unfavourably. Otherwise, an early adverse decision would have been made. By inference, their access to legal advice would depend upon *pro bono* assistance of lawyers or help from their community, which would be limited and shared with many others.

119 In any case, the issue presented by the appellants' submissions is one that concerns the public law and the standards of administrative justice in this country. It could not seriously be contended that the appellants personally would have been aware of the legal principles governing delay in administrative decision-making and the explanations which courts have given concerning the disadvantages that delay presents to the proper disposition of decisions by administrative tribunals. The *mandamus* argument fails.

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141 *Aala* (2000) 204 CLR 82 at 89 [5], 106 [51]-[52], 136 [145], 144 [172].

142 See eg reasons of Gummow J at [40].

143 [2005] HCATrans 651 at 843-846.

144 See reasons of Gleeson CJ at [5]; reasons of Gummow J at [40]-[42].

145 See *R v Secretary of State for the Home Department; Ex parte Phansopkar* [1976] QB 606, cited by Gummow J at [38].

120 *The futility argument*: The Minister suggested that a further reason for refusing relief was that, when analysed, the reasons of the Tribunal, although greatly delayed, were careful and compelling. For this reason, it was argued, there was no operative jurisdictional error. Implicit in this submission was the suggestion that a rehearing before the Tribunal would be doomed to fail.

121 I accept that some of the country evidence collected by the Tribunal in its reasons for decision is persuasive. If maintained and believed, it might persuade the Tribunal, acting with proper speed, to reject the appellants' claim.

122 However, that claim was not rejected by the Tribunal solely on the basis of such evidence. Substantially, it was rejected because the appellants were not believed. In effect, the Tribunal did not believe that the appellants had a relevant "fear" as required by the Act and the Refugees Convention, still less that the "fear" was "well founded". In so far as these conclusions rested upon assessments of the credibility of the appellants, in the circumstances of such gross delay, they were flawed, for the reasons that I have stated.

123 It is not for this Court to assess the merits and likely outcome of a proper hearing of the appellants' application before the Tribunal. To assume that function is, with respect, to fall into the very error that the differentiation between judicial review and merits review forbids[146]. Where jurisdictional error is shown, this Court does not second-guess the decision of the body authorised by law to make the relevant determination[147]. It performs its function by identifying the relevant error, quashing the decision that is affected by it and requiring that the matter be reheard, freed from the error so identified.

124 In the present case, fairness and justice to the appellants requires the provision of such relief. Such relief will also have the merit of upholding the proper discharge by the Tribunal of its important functions in the manner provided by the Parliament and in accordance with the assumptions inherent in the statutory provisions. It will also state the standards of administrative justice to be observed.

Orders

125 I agree in the orders proposed by Gleeson CJ.

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146 cf reasons of Gummow J at [21].

147 *Roncevich v Repatriation Commission* (2005) 79 ALJR 1366 at 1384-1385 [97]-[104]; 218 ALR 733 at 757-759.

126 HAYNE J. The disposition of this matter must begin from the recognition that it concerns the exercise of statutory powers and obligations by the Executive Government. It therefore invokes principles of judicial review of administrative action, not principles of appellate review of a curial decision. In particular, the matter arises out of a review by the Refugee Review Tribunal ("the Tribunal"). That body was established by the *Migration Act* 1958 (Cth) ("the Act") to review certain decisions made by the Executive, including decisions that a non-citizen is not a refugee[148], and for that purpose to exercise[149] all the powers and discretions conferred by the Act on the respondent Minister to grant or refuse to grant a protection visa[150].

127 The particular complaint made by the appellants, though variously expressed, was that the Tribunal took so long between first receiving oral evidence from the appellants (on 6 May 1998) and deciding the review (on 20 December 2002) that the Tribunal either denied the appellants procedural fairness or otherwise failed to conduct "a real review as required" by the Act.

128 The limits of the role of the courts on judicial review of administrative action are well established. "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power."[151] The merits of administrative action, here the merits of the decision made by the Tribunal, "to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone"[152].

129 Reduced to its essentials the appellants' argument was:

(a) The Tribunal decided not to accept parts of the appellants' evidence about events they said had happened.

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148 *Migration Act* 1958 (Cth), ss 411(1), 414. The Act was amended many times over the period between the appellants first applying to the Tribunal for review and the Tribunal deciding that review. Nothing now turns on any of those amendments. It is convenient to refer to the Act in the form it took at the time the applicants sought review – 5 June 1997 – even though some of the subsequent amendments applied to the uncompleted review.

149 s 415(1).

150 s 65.

151 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J.

152 *Quin* (1990) 170 CLR 1 at 36 per Brennan J.

(b) The decision to accept or reject oral testimony about past events depends, at least in part, upon whether the decision-maker believes the person giving the evidence.

(c) Impressions of the witness and the way in which the witness gave evidence (the witness's "demeanour") can and should be taken into account in deciding whether to accept the evidence, but that must be done at or soon after the time the evidence is given, because impressions fade and assessments of demeanour become increasingly unreliable as time passes.

(d) The appellants "had a right to have their evidence properly evaluated and this included an assessment of the manner in which they gave their evidence" because justice must not only be done, it must be seen to be done[153].

130 The invocation of the well-known aphorism about the appearance of justice reveals that the appellants' argument, at its last step, depended upon equating processes of judicial review of administrative action with appellate review of curial decision-making. The applicable principles are radically distinct and cannot be equated. To point to the fact, as the appellants did, that the Tribunal did not accept evidence that they had given several years before the Tribunal decided the review is relevant and important only to the extent to which it sheds light upon whether the Tribunal failed to exercise its powers and perform its functions according to law.

131 The Act required the Tribunal to invite the applicants for review (the appellants) to appear before the Tribunal to give evidence[154]. This and other aspects of the statutory specification of the Tribunal's duty and power to conduct the review were to be read as conditioned upon the Tribunal's observance of the requirements of procedural fairness[155]. The Act's requirement that the Tribunal

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153 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

154 s 425.

155 *Kioa v West* (1985) 159 CLR 550 at 615 per Brennan J; *Quin* (1990) 170 CLR 1 at 40 per Brennan J; *Annetts v McCann* (1990) 170 CLR 596 at 598-600 per Mason CJ, Deane and McHugh JJ, 604-605 per Brennan J; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 591 per Brennan J; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 99-100 [38]-[39] per Gaudron and Gummow JJ; see also at 89 [5] per Gleeson CJ, 131 [132] per Kirby J, 142-143 [168] per Hayne J; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72 at [10].

invite applicants for review to appear to give evidence, even if considered in isolation from the requirements of procedural fairness, would readily yield the conclusion that any evidence thus given was to be received in a manner that would permit the Tribunal to take that evidence, fairly assessed, into account in deciding the review. And that aspect of the requirements of procedural fairness that obliges a decision-maker, like the Tribunal, to give persons affected by a decision that is to be made an opportunity to be heard would serve only to reinforce that conclusion.

132 The appellants did not complain that there had been no opportunity to be heard in such a way that the evidence they gave *could* be used by the Tribunal in making its decision. Rather, the appellants' complaint was that there had been such delay between the giving of the evidence and the making of the decision that the Tribunal either *did* not properly assess the evidence they had given or *could* not have made a proper assessment of that evidence. The difference between the two propositions is real and radical. The former proposition (that the Tribunal *did* not properly assess the evidence the appellants gave) is a proposition that would be apposite to an appeal. It is not apposite to an application for judicial review.

133 On an appeal from the decision of a court, the trial judge's delay in deciding disputed questions of fact may found a conclusion that the fact-finding process miscarried. Especially is that so if the delay is measured not in weeks, but in months. But the question presented by the appellants' application for relief under s 39B of the *Judiciary Act* 1903 (Cth) was whether jurisdictional error was demonstrated. In particular, was there shown to have been a want of procedural fairness or some other failure to comply with the law limiting and governing the exercise of the Tribunal's power?

134 In that regard, the second proposition advanced by the appellants (that the Tribunal *could* not have made a proper assessment of their evidence) requires further elaboration and examination. In particular, it is a proposition that gives relevant content to the requirements of procedural fairness by requiring that an opportunity be given to the appellants to be heard by receiving their oral evidence in such a way that the evidence could fairly be assessed and then used by the Tribunal in reaching its decision. It is convenient for present purposes to assume that to be so and not to pause to consider how such an articulation of the requirements of procedural fairness would accommodate, or be accommodated to, the provisions of the Act[156] that authorised a Tribunal member to authorise another person to take evidence for the purpose of a review. It is convenient to make that assumption because there was, and could be, no evidence about how the Tribunal made its decision beyond what appeared in the statement of its

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156 s 428.

reasons. That being so, it is not possible to say when or how the Tribunal made the assessment it did of the evidence the appellants had given and it cannot be said that the Tribunal did not receive the evidence they gave in such a way that their evidence could fairly be assessed. It follows that it was not demonstrated that there was a breach of "the law which determines the limits and governs the exercise of the repository's power"[157]. The appeal should be dismissed.

135 A majority of the Court reaches the opposite conclusion. It is said that the circumstances of the matter are unusual and that the Tribunal is an unusual body performing functions in ways that are similar to the way in which courts proceed. That may be so, but the Tribunal is not a court and what the appellant sought was judicial review of the exercise of executive power, not a review of the merits of the way in which that power had been exercised.

136 It is also said that there was a *risk* that the Tribunal's capacity to evaluate the appellants' evidence (or its capacity otherwise to discharge its obligations) was impaired. But the appellants did not demonstrate (and it is not said that they demonstrated) that this risk had come to pass.

137 The principles of judicial review that are to be applied in this matter are, and must be, principles of general application governing the exercise of judicial power under s 75(v) of the Constitution in marking the boundaries to, and enforcing, the application of executive power under statute. No special principles can be devised to apply only to the judicial review of decisions of the Tribunal, or some subset of those decisions identified as exceptional, unusual, or rare. Nor is there any principle of judicial review that operates by allocating the risks of maladministration or fixes the outcome according only to whether terms like "default", or "unreasonable", can be attached to what has occurred. The principles to be applied are more precise. In this case, they required the identification of jurisdictional error and none was demonstrated.

138 The appellants' contention that the Tribunal had failed to conduct "a real review as required" by the Act was no more than an emphatic statement of their proposition about procedural fairness. It was not a proposition seeking to articulate some limit on the Tribunal's exercise of power in addition to the statutory requirement to give the appellants an opportunity to give evidence and the requirements of procedural fairness. It raised no issue different from those considered above.

139 The appeal should be dismissed and the consequential orders proposed by Gummow J should be made.

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157 *Quin* (1990) 170 CLR 1 at 35-36 per Brennan J.

CALLINAN AND HEYDON JJ.

Issue

140 The question in this appeal is whether an extraordinarily prolonged delay by the Refugee Review Tribunal in determining the appellants' applications for protection visas under the *Migration Act* 1958 (Cth) ("the Act") gave rise to an abuse of process such as to render the decision of the Tribunal refusing them invalid.

Facts

141 The appellants, a man, his wife and their daughter, are Bangladeshi citizens. They arrived in Australia on 3 August 1996 and lodged applications for protection visas on 28 January 1997. The adult appellants claimed that they had a well-founded fear of persecution in Bangladesh because their marriage was a mixed one, the husband being a Muslim, and his wife Catholic. The claim on behalf of the third appellant is of fear of persecution as the child of a mixed marriage.

142 By letter dated 27 May 1997, the husband was notified by the delegate of the first respondent that his application, and that of his wife and daughter, had been refused. The appellants applied to the second respondent, the Tribunal, for a review of that refusal on 5 June 1997. They provided letters in support of their application. On 15 April 1998, the Tribunal sent a notice to the appellants inviting them to attend a hearing at the Tribunal to give evidence in support of their application. The hearing was fixed for 6 May 1998.

143 The first appellant sought to have Ms Elizabeth Rozario, author of one of the letters supporting his application, give evidence by telephone from Bangladesh. The application was refused in writing on 1 May 1998, on the basis that the appellants had already had an opportunity to obtain evidence, and that, in any event, the Tribunal would be prepared to receive evidence by facsimile.

144 At the hearing before the Tribunal (Mr Roger Fordham), the adult appellants gave oral evidence in support of their claims.

145 On 9 June 1998, the second appellant sent a written submission to the Tribunal in support of their claims. Apart from the notification by the appellants of a change of address to the Tribunal in November 2000, there was no further communication between them for three years and five months, that is, until 30 November 2001, when the Tribunal invited the appellants to attend a further hearing on 19 December 2001. On 18 December 2001, the appellants' legal adviser, who had only recently come to act for the appellants, provided a deal of written material to the Tribunal and sought leave to make further written

submissions within a reasonable time after 7 January 2002 because he would not be available until that date. The appellants did however attend the further hearing which took place on 19 December 2001 and gave evidence at it.

146 On 5 February 2002, the Tribunal provided the appellants' legal advisers with a transcript of the expert and other country evidence that it had by then taken, some of which, and some of the appellants' responses to it, came to be summarized by the Tribunal in its subsequent reasons for decision delivered nearly a year later.

> "At the continuation of the Tribunal hearing on 19 December 2001 the Applicants appeared with a new representative who had recently taken on the matter.
>
> The Applicants said that the only slight change which had occurred was that the Applicant, husband, had remained a nominal Muslim but socialised with the Catholic community as both wife and daughter are Catholics.
>
> I put to the Applicants that the Tribunal had undertaken investigations after the first date of hearing and had independent material before it concerning mixed marriages in Bangladesh.
>
> Information from the Australian High Commission advised [that as of 27 May 1999]:
>
> > 'A. There are no official statistics available on the incidence of mixed marriages in Bangladesh. Marriages are registered at the district level and not recorded centrally.
> >
> > B. While marriages between people from different religious groups is not an issue we focus on when monitoring the media, in the two years and four months of my posting I do not recall any media reports on this issue. The senior political/economic les officer, who has worked at the mission for five years and before that was a senior newspaper journalist, cannot recall any reports on problems arising from mixed religious marriages in over 10 years. Press reports of problems in marriage usually focus on violence against women from within the family and violence against women (particularly acid throwing) by disgruntled suitors.
> >
> > C. The best known mixed marriage in Bangladesh is between two leading dramatic artists. He is a Hindu and a leading playwright, actor, television newscaster and commentator on cultural affairs. She is from a prominent Muslim family and is a leading actor. They married in the early 1970s and neither has changed religion.

D. We are not aware of public comment on this issue from religious leaders. We contacted the director general of the Islamic foundation, Maulana Abdul Awal, who said that Muslims may marry non-Muslims, but unless the non-Muslim converts to Islam the marriage will not be recognised under Shariah law. He did not indicate there was any antagonism to Muslims marrying non-Muslims. We have been informed by Hindus that modern Hinduism enables non-Hindus to convert. If the Hindu family accepts the non-Hindu party to a marriage as a Hindu, so will the community.

E. Marriages between people from different religions are specifically recognised in Bangladeshi law under the special marriage act no 3 of 1872 and such marriages are readily accepted in Bangladesh. One of the locally engaged staff of this mission is in a mixed marriage (Hindu/Muslim) and we are aware of others. Mixed marriages can present problems, but the mix is not restricted to religion. Sunni/Shia, rich/poor, educated/uneducated marriages can encounter resistance, but this resistance begins in the family. If the family accepts a marriage, so will the community. Such resistance is much more likely to be encountered at the village level than in cities and towns, where mixed marriages are more frequent.

The 10 DFAT locally engaged clerical staff at this mission include a Hindu, a Christian and a Buddhist. The issue of mixed marriages was discussed with them informally. None of them were aware of any problems resulting from mixed religion marriages in Bangladesh.

While Bangladesh has its religious extremists, the majority of Bangladeshi Muslims practice a tolerant form of Islam. At the last general election in June 1996 the leading Islamic party won one per cent of the seats in parliament. There is some resistance to proselytising Christianity that seeks to convert Muslims, but this is unrelated to marriage. We are not aware of anyone suffering discrimination or disadvantage as a result of a mixed religion marriage.

In addition to the sources mentioned above, we spoke with a female barrister who specialises in civil law in one of the country's leading chambers.'

...

Advice from a Muslim sect (Ahmadi) [as] of 18/02/98 was that 'It is highly improbable that a Sunni Muslim would be subjected to discrimination as a result of marriage to an Ahmadi.'

I put to the Applicants that this was relevant as Ahmadis are considered to be people who are not Muslims by mainstream Muslims in Bangladesh.

I further put to the Applicants that the Tribunal had interviewed three people concerning the situation of mixed marriages in Bangladesh. These people were Mr Gamma, a former president of the Bangladeshi community in New South Wales, Dr Mukajee, an expert on Bengal and the issues in that regard and Dr Rosario a sociologist who was herself Bangladeshi.

At those interviews Mr Gamma stated that he, as a Muslim was married to a Christian lady and when they married he was ostracised by the Bangladeshis. However, when asked how he became president of the Bangladeshi community he stated that he was elected to this position in an open election and that they were aware of his marriage to a Christian.

I put to the Applicants that this could lead me to conclude that Bangladeshis were not overly concerned with the concept of mixed marriage or they would not have elected a person in such a marriage to the position of president.

The second person, Dr Mukajee stated that he had never been to Bangladesh and got his information in regard to mixed marriages from the media.

I put to the Applicants that the Tribunal had been unable to find any reference to mixed marriages in the media and the Australian High Commission had not been able to either.

Dr Santi Rozario gave evidence to the effect that people, particularly in rural communities could be ostracised by the community and that in Bangladesh people needed the community to be able to network, find employment and have social support and if this was withdrawn the consequences could be very serious.

I asked the Applicants if they wished to say anything about this material.

The Applicant, the husband, said that he was mentally upset at the time and did not want to comment ...

The Applicant wife said that although mixed marriages may not affect everyone but the family she had married into had caused problems. She

said that when they were living in her husband's village her husband's family had tried to coerce her into converting to Islam and they had later tried to convert her daughter.

She said that since she was in Bangladesh so she was unable to comment on the situation from direct knowledge but she had been told by a friend that a fundamentalist Muslim had been asking about her family and whether or not they were planning to return to Bangladesh.

...

I asked if she [the daughter] was aware of anyone who was not friendly towards her and she said that there was an uncle on her father's side.

I asked what had happened the last time she had met him.

She said she was at school and he had come and said he was taking her to her home but instead he took her to his own home.

I asked if she had visited her uncle with her parents and she said she had and that he had visited their home.

She said she had seen him a couple of times.

I asked what had happened at his home and she said that he had shown her some books and was trying to teach her.

I asked if he was friendly when he was doing this and she said that he was.

I asked if there was anything bad which had happened to her while she was living in Bangladesh and she said that there had been an incident when she was going to church with her mother she said that there were about five men who stopped them and one of them held a knife to her throat.

I asked how she was able to get away from this situation and she said that her mother had said to just continue and go into the church.

I asked this Applicant if she felt comfortable talking about this situation and she said that she did.

I said that from her description it appeared that her mother had been able to control the situation by just telling her to go on with what she was doing, going to church, and the men did not offer any resistance. She said that was the case but said she couldn't recall this clearly.

I turned to the adviser and asked if he had any questions he wished to address to the Applicant.

He pointed out that documents had been provided showing that the child had undergone certain Catholic rites and was a practising Catholic."

147 Ten months later, by letter dated 20 December 2002, the first appellant was notified that the decision would be given on 14 January 2003. By letter dated 14 January 2003, the first appellant was advised that "[t]he Tribunal has decided that you are not entitled to a protection visa."

148 In its reasons for decision, the Tribunal gave an account in detail of what the appellants had said and claimed at the first oral hearing. That first account recorded admissions by the husband that certain claims made by himself and his wife were fabricated. The Tribunal suggested to the wife that this indicated that there had been collusion. She denied this, but did not explain how there had not been collusion. There was accordingly a foundation for some, at least, of the adverse credit and factual findings made by the Tribunal. The Tribunal made these findings of fact:

"1. The Applicants are in a mixed religion marriage, the husband being Muslim and the wife and daughter being Christian.

2. Neither the wife's nor the husband's family accepted the marriage and they began to live apart from their families in 1984.

3. Both husband and wife have shown themselves to be resourceful and to find employment both overseas and in Bangladesh and be independent of family support.

4. They have been married since 1984.

5. Mixed religion marriages are recognised by the state of Bangladesh.

6. The Applicant, wife, was victim of an act of violence and she suffered a miscarriage following that incident.

7. A murder of an unrelated person occurred in the vicinity of the family home in Dhaka.

The Situation Regarding Mixed Religion Marriages in Bangladesh.

...

I find that the state recognises mixed religion marriages and does not condone or sanction discrimination of those marriages.

I accept the information from the Catholic priest advising that the church also recognises those unions after counselling.

I have been unable to find any reference to particular people in Bangladesh suffering adversely as a consequence of being involved in a marriage between people of different faiths.

I accept the advice from the Australian High Commission to the effect that they have never come across any adverse reports in this regard although they monitor the media.

Given the presence of the High Commission, the reporting of groups such as Amnesty International and other human rights groups I am of the view that if there were problems in this regard they would have been reported.

I also accept the advice of Dr Santi Rozario to the effect that such a union could, in certain circumstances result in a couple being ostracised and bereft of communal or familial support, particularly in the case of people from rural areas.

This will depend on the individual circumstances of each case and whether or not there is any significant harm will be a matter of fact and degree.

In summary I find that the state recognises marriages of mixed faiths, it does not sanction persecution of people in such relationships.

Any harm a person may face for reasons of marriage to a person of another faith will depend on the particular circumstances and demands of the family or community and whether or not they are dependent on the support from those people.

Do the Wife and Husband Face a Prospective Real Chance of Harm amounting to Persecution?

...

From the correspondence they have provided I find they have a group of supportive friends in Bangladesh and support through the Catholic church there.

Even if, as is claimed, the husband's brother does not support the union and has tried to convert or instruct his niece to Islam I find that the Applicants' accounts of this show that he has not used any influence to do so and when they have objected or removed their daughter from him he has not taken any action or force to take control.

> I accept that the husband has become alienated from his parents but, this has not affected his right to live separately, to remain married to his wife or to find employment of his choice.
>
> When considered as a whole I find that the Applicants [husband and wife] have not suffered harm amounting to persecution for reasons of their marriage in Bangladesh in the past.
>
> ...
>
> I have considered the situation as it was when they were living in Bangladesh and find they did not suffer harm amounting to persecution in that time and find no reason to consider they would be at greater risk should they return now or in the reasonably foreseeable future.
>
> This being the case, I find the husband and wife do not face a 'real chance' of harm amounting to persecution for reasons of their status as a couple in a mixed faith marriage and that any fears they claim to hold in that regard are not well founded."

149 The adverse view that the Tribunal formed of the husband appears most clearly from these passages in the decision:

> "He has also claimed that he left Bangladesh as a consequence of a fear of harm.
>
> He has worked with foreigners and in foreign cultures for a number of years and had the confidence to inform his former employer that he feared harm to his daughter and that they had faced serious problems in Bangladesh.
>
> If this is accepted then I am of the view that he would have made every effort to apply for refugee status and to find out how to do so as soon as possible after arriving in Australia.
>
> Although the Applicant (husband) claimed his former employer was ill at that time I do not accept that this, alone, would have deterred him from making arrangements to lodge a claim through other means if he genuinely feared for his well being and that of his family.
>
> He did, however, not apply for almost five months after arriving.
>
> I find this is inconsistent with his claims to have held such fear that he could not return to Bangladesh.

As discussed below I find that the core elements of his claim are fabricated and accordingly I find that his reasons for applying for residency in Australia are other than Convention related ones.

...

Following a brief adjournment the Applicants resiled from the claims in regard to the necklace of shoes and the beating and said that instead they had been forced to leave the village.

Accordingly, by their own account the original claim was fabricated and since the accounts were consistent when both Applicants were separated at the hearing it leads me to find that they colluded in this fabrication.

If, however, the rest of the account was credible this would not, of itself, be enough to conclude that the account lacked credibility to the extent that the claim to fear persecution could be discounted.

However, as discussed below I do not accept the other core claims in regard to Convention persecution and thus find that this is one instance of a series of fabrications and concoctions to provide a basis for a refugee claim.

...

Following the adjournment at the first hearing the Applicant, the husband, resiled from this claim [of being the victim of an attempted stabbing, first raised at the first hearing]."

A similarly adverse view was formed of the daughter's evidence:

"e. The Claimed attack on the Daughter

The Applicants [husband and wife and daughter] all claimed that there was an incident in which the daughter was confronted on her way to church and had a knife held to her throat.

At the Tribunal hearing the Applicant daughter, gave evidence in the presence of the parents and the representative and none made any comment on her statement.

In regard to this claimed attack I checked several times to see if she felt comfortable talking about it and she said she did. She displayed no signs of trauma or concern.

> She said that as far as her memory served her she moved away from the claimed attack with no further consequences. She claimed that her mother had said to her just keep walking and that she did so.
>
> I find it implausible that an attacker would take the drastic actions, claimed by the Applicants, to prevent a child from being baptised only to let the child walk away and take no further action.
>
> Since the claim was that she was going to church and, at the hearing that she was going to be baptised, I am of the view that one of the two priests who claim to know the family personally and who wrote in support of the case would have referred to the claimed attack if it had genuinely occurred."

150 As to the daughter, although the Tribunal accepted that she may have been unsettled by the various changes of circumstances and location to which she had been subjected, it could not regard her as having a well-founded fear of persecution for a Convention reason.

151 The appellants applied to the Federal Court for judicial review of the Tribunal's decision. On 15 April 2003, the Court (Hely J) dismissed the application.

The Full Court of the Federal Court

152 The appellants appealed unsuccessfully to the Full Court of the Federal Court (Hill J and Marshall J, Finkelstein J dissenting)[158].

153 Hill J was of the view that the delay was not so inordinate as to lead to the conclusion that the Tribunal member more likely than not could not recall some or all of the evidence or the submissions that had been put to him. His Honour listed the reasons for his conclusion as follows[159]:

> "It seems to me that the relevant time period to consider in determining whether a delay was so excessive as to give rise to either jurisdictional error is not the time from the institution of the application to the Tribunal for review (that occurred on 5 June 1997) but rather the time which elapsed from the conclusion of the proceedings (which may be either the conclusion of the evidence or the conclusion of the hearing) and

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158 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 85.

159 (2004) 134 FCR 85 at 90-91 [17]-[18].

the giving by the Tribunal of its reasons. It will be recalled that evidence was heard in what may be called two tranches. That is to say that after oral evidence was heard initially on 6 May 1998, the Tribunal held a further oral hearing on 19 December 2001. That second oral hearing was followed by written submissions the last of which was lodged with the Tribunal on 15 March 2002. The Tribunal's reasons were prepared on 20 December 2002 – nine months after final submissions and just over 12 months from the last hearing of oral evidence.

Nine months, or for that matter 12 months are very long times indeed. As Finkelstein J has pointed out it may well be that unless the Tribunal member had made notes of his initial views of credibility these initial views may well have been lost in the time which passed from the hearing of evidence to the delivery of reasons. On the other hand it may well be the case, I do not know, that the Tribunal member did keep notes, or was able to recall from a reading of the transcript or from listening to a tape recording of the proceedings the views he held at the time. That does not seem to me to be so improbable as to be able to be rejected. Certainly the Court knows nothing about any notes which the Tribunal member kept at the time nor whether the Tribunal member listened to a recording of the proceedings. The Court is, however, well aware that all proceedings of the Tribunal are taped and reading a transcript of proceedings even up to a year later could easily bring back to mind the reactions which the Tribunal member had when originally hearing the evidence."

154 Marshall J said[160]:

"In my view, whilst it is undesirable that an application before the RRT take such an inordinate time to determine, there is no denial of procedural fairness in the RRT's decision occasioned by the relevant member's delay in coming to the decision. Further, in this matter, it appears that the delay was partly attributable to the RRT making inquiries from independent experts concerning the appellants' claims regarding inter-religious marriage in Bangladesh. Additionally, the reasons for decision were published only nine months after the receipt of the last set of written submissions from the appellants.

The above circumstances do not demonstrate any lack of bona fides in the RRT in the exercise of its power. ... It cannot be said that the RRT did not make an honest or genuine attempt to perform its task."

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160 (2004) 134 FCR 85 at 93-94 [35]-[36].

155 Finkelstein J said[161]:

> "As a matter of principle ... I am of opinion that if it can be shown that there is a real and substantial risk that an administrative decision-maker has either forgotten important evidence or is unable properly to resolve disputed questions of fact because he cannot recall the witnesses' demeanour his decision is flawed in two respects. In the first place it is the duty of the Tribunal to determine the truth of asserted facts, analyse the law applicable to those facts and determine the case in accordance with the law as interpreted and applied to the facts. If the Tribunal purports to undertake this task without regard to important evidence because it has been forgotten or seeks to resolve difficult questions of fact without taking into account the demeanour of witnesses when that demeanour is important then it is not carrying out its proper function. Indeed, for the Tribunal to proceed in these circumstances would be for it to act in abuse of its power.
>
> ...
>
> The appellants lost their case before the Tribunal because their evidence was not believed. The Tribunal was only entitled to reject their evidence after giving full consideration to what was said and the manner in which it was said, if necessary in light of other relevant facts known to the Tribunal. To succeed on the appeal the appellants must show that there is a real and substantial risk that the Tribunal has either forgotten much of the evidence that was led so many years ago or that it can no longer adequately and fairly assess the veracity of the witnesses who gave that evidence. It is impossible for the appellants to make out the first point. The evidence was transcribed. A reading of the Tribunal's reasons, in particular those parts of the reasons which record the appellants' claims, suggests that it took most of its summary of the evidence from the transcript. On one view, it may be said that in its reasons the Tribunal did little more than summarise the transcript.
>
> The appellants' demeanour stands in a different light. The transcript discloses nothing about demeanour. Hence the Tribunal must rely on its memory and any notes that may have been taken. It is common enough for decision-makers to make notes recording their impression of witnesses. That may have happened here. But if notes were taken, their content was not sufficient for the Tribunal, at least before it conducted its inquiry after the first hearing, to find against the appellants on credit. In this connection, it is the first hearing which is the critical hearing because

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161 (2004) 134 FCR 85 at 99-100 [61]-[64].

most of the appellants' evidence was given on that occasion. Moreover, it was this evidence with which the Tribunal was principally concerned in its reasons, basing its findings on the appellants' credibility with particular reference to that evidence."

The appeal to this Court

The appellants' argument

156 The appellants accept that whether delay has vitiated an administrative decision such as this one depends upon the statutory framework under which the decision is to be made; the nature of the issues that the decision-maker is required to determine in discharging the statutory function; and the effect of the delay on the fairness of the process by which those issues are to be determined. Those propositions are correct if it is also understood that regard to the statutory framework under which the decision is to be made includes the scope, objects and purposes of the relevant enactment or enactments.

157 The appellants, adopting in substance what Finkelstein J said in the Full Court of the Federal Court, submit that the effect of the delay was that the Tribunal could not possibly properly assess and comment fairly on the appellants' demeanour by the time that it came to make its decision. They contend that a subjective assessment of "fear" was a critical function that the Tribunal was required to perform in determining whether the appellants had a well-founded fear of persecution for a Convention reason, and that such an inquiry necessarily involved an assessment of the appellants' demeanour.

158 The appellants also submit that the relevant period for determining whether the delay vitiated the decision was not just the period from the date on which the Tribunal ultimately reserved its decision until it delivered the decision. They contend that the delay to be considered was the delay between the time when the appellants gave their evidence about "fear" (6 May 1998) and when the decision was made rejecting their evidence (20 December 2002).

The first respondent's argument

159 The first respondent does not challenge the proposition apparently accepted by the Full Court of the Federal Court, that excessive delay may lead to jurisdictional error if it is "more probable than not that there has been a miscarriage of justice."[162] We interpolate that such a formulation of jurisdictional error may be inapt and too far-reaching for a description of a flawed

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162 (2004) 134 FCR 85 at 90 [15] per Hill J; see also at 94 [37] per Marshall J.

administrative decision. Erroneous findings of fact may produce a grave miscarriage of justice, but still not constitute jurisdictional error.

160 The first respondent submits that the Tribunal's delay in delivering its reasons did not however affect its assessment of the evidence before it. The Tribunal's conclusion that the appellants did not face a real fear of persecution depended in part on the rejection of some of their claims about harm that they had suffered in Bangladesh, claims which were explored in the first hearing. Two of them had been expressly abandoned and conceded to be fabricated. Other claims rejected by the Tribunal included that the appellants had been forced to leave their village; that the husband had been attacked in 1989; and that the daughter had been confronted on the way to church and a knife held to her throat. In rejecting these claims, the Tribunal was required to evaluate the evidence adduced by the appellants. The first respondent contends that the Tribunal's assessment of the evidence, and therefore its decision to reject the appellants' claims, was not compromised by the delay.

Disposition of the appeal

161 Sometimes the pressures of work on administrators and courts can be very great. The sufficiency of the resources and the number of people to do the work depend upon the funds which governments are prepared to expend on them. Not all people have the same capacity for efficient and expeditious work, including decisiveness itself, as others. Care accordingly needs to be taken before condemning what may, in some cases, at first sight appear to be cases of inordinate delay. Nonetheless, nothing, apart from bias or unfairness, is more likely to bring public administration and the law into disrepute than inexplicable prolonged delay in the disposition of matters. Delay of that kind immediately and inevitably raises questions. How earnest was the consideration given to the matter? Did the maker of the decision truly apply his or her mind to it? Did he or she find it too hard? Was the decision-maker distracted? Was the decision in the end made out of desperation, or a realization that it had at last to be given, regardless of its correctness or otherwise? All of these questions can be asked but not satisfactorily answered in this case. That they cannot does not mean that the decision of the Tribunal can on that account alone be set aside. But it does mean that a reviewing court should scrutinize the decision, if not with a disposition against it, at the very least, with scepticism, especially if, as the decision in this case does, it depends in any way at all upon the assessment of competing claims of fact and credit, and impressions based on demeanour.

162 Once the Tribunal received the appellants' application for review of the delegate's decision on 5 June 1997, the Tribunal's duty was to "review the decision": s 414(1) of the Act. The performance of the Tribunal's functions in carrying out that duty is the subject of s 420 of the Act. It provided:

"(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) 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."

163 The only sort of error which the Federal Court and this Court may correct in a matter of this kind is jurisdictional error[163]. A failure to make a quick decision would not, in the context of the Act overall, of itself constitute jurisdictional error[164]. However, the presence of s 420 in the Act provides an indication of the scope and objects of the Act, and it is a section to which some regard may be had in deciding whether an excessively prolonged decision is one that can be said to have been made fairly.

164 Further, the invitation extended on 15 April 1998 by the Tribunal to the appellants to appear before it was an invitation extended pursuant to the duty created by s 425(1) of the Act requiring the Tribunal to "give the applicant an opportunity to appear before it to give evidence".

165 The process in which the Tribunal engages is administrative in the sense that it does not exercise the judicial power of the Commonwealth. The process is inquisitorial, not adversarial: s 424 of the Act. The process in which the Tribunal engages lacks other elements of judicial adjudication, for example the calling of oral evidence is a matter for the Tribunal, not for applicants (s 426) and the hearings are in private (s 429). But the process has nonetheless much in common with the process of fact-finding after hearing evidence called and tested by adversaries characteristic of trials. Like trials conducted before courts, the

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163 The application for judicial review of the Tribunal's decision in this case sought orders of certiorari, prohibition and mandamus pursuant to s 39B of the *Judiciary Act* 1903 (Cth) on grounds of jurisdictional error. Since the challenge was to jurisdiction, s 474 of the Act did not have the effect of rendering the decision immune to challenge: *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

164 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 628 [49] per Gleeson CJ and McHugh J, 635 [77] per Gaudron and Kirby JJ and 667-668 [178]-[179] per Callinan J.

process is dealing with issues which are fundamentally important – here, both for applicants and for the first respondent. Like courts, the Tribunal is dealing with issues which ought to be decided without undue delay. Like trials conducted before courts, the review must conclude with the announcement by the Tribunal of a decision, including the giving of reasons for that decision, the setting out of findings on factual questions, and reference to the evidence or other material on which the findings were based: s 430(1). Like trials, the hearings conducted by the Tribunal are to be "fair" and "just", according to s 420; and while other language in s 420 is intended to free the Tribunal from constraints applicable to courts, the conferment of freedom in those respects is not to undercut fairness or justice. In large measure the achievement of fairness and justice depends on fact-finding which aspires to as much accuracy as is reasonable in the difficult conditions in which the Tribunal must work – difficult because both applicants and Tribunal can be constrained by considerable practical difficulties in discovering material information. It is plain from modern litigious experience that delays before hearings, during hearings or after hearings, are radically inimical to fairness and justice. Some members of this Court, for example, have accepted that in some circumstances, delay in commencing and prosecuting a criminal charge may be so unfairly prolonged as to warrant the granting of a permanent stay on the ground that to proceed would constitute an abuse of process[165].

166 Neither the appellants nor the first respondent cited any cases in which excessive delay has been accepted as a basis for a review of an administrative decision. In oral argument, reference was however made to a case of delay in New South Wales[166] in which error was discernible by the Court of Appeal in the findings of facts made by the primary judge, and the insufficiency of his reasons. It approved[167] a line of cases stemming from *Goose v Wilson Sandford & Co*[168], a decision of the English Court of Appeal. Peter Gibson, Brooke and Mummery LLJ took the view that a decision involving disputed questions of fact reserved for 20 months could not stand. Peter Gibson LJ in delivering the judgment of the Court said:

> "[T]he judge's tardiness in completing his judicial task denied justice to the winning party during the period of delay and also undermined the

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165 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 26-30 per Mason CJ and 58 per Deane J.

166 *Monie v Commonwealth of Australia* [2005] NSWCA 25.

167 [2005] NSWCA 25 at [43] per Hunt AJA, Bryson JA concurring.

168 (1998) 142 SJLB 92.

> loser's confidence in the correctness of the decision. Compelling parties to await judgment for an indefinitely extended period prolonged the stress caused by litigation and weakened public confidence in the whole judicial process. Because of the delay it was incumbent on their Lordships to look with especial care at the findings of fact challenged. In ordinary circumstances where there was a conflict of evidence a judge who had heard and seen the witnesses had an advantage denied to an appellate court, which was likely to prove decisive on appeal unless it could be shown that he failed to use or misused his advantage. The very fact of the delay in itself weakened the judge's advantage and that consideration had to be taken into account when reviewing material which was before the judge. In a complex case it was not uncommon for a judge to form an initial impression of the likely result at the end of the evidence, but when he came to study the evidence and the submissions with greater care, he would then go back to consider the effect witnesses had on him when they gave their evidence about matters which were now troubling him. At a distance of 20 months the judge had denied himself the opportunity of making that further check in any meaningful way. There would be a substantial miscarriage of justice by allowing the judge's decision to stand and it was not possible to rectify that miscarriage without a retrial."

167 We agree that delay of itself may undermine the basis for a judgment that requires the weighing of claims and facts. The first respondent here did not suggest, nor could she convincingly have suggested, that delay of itself may not be a highly relevant consideration in determining whether the process before the Tribunal was fairly conducted, even though the Tribunal was not a court.

168 In our opinion it is not possible to say that the Tribunal's decision, depending so much as it did, on the credibility of the appellants who gave oral evidence, was made fairly. Their application for review was lodged on 5 June 1997. The decision was delivered more than five and a half years later, on 14 January 2003, and after two sessions of intervening oral evidence separated by a period of about three and a half years. This was not a matter in which the Tribunal merely had to weigh up oral evidence against written evidence. It had to weigh up oral evidence given on one occasion with oral evidence given three and a half years later, as well as the further written material that had come to hand. That is not an exercise that can satisfactorily and fairly be carried out over widely separated serial proceedings.

169 The outcome of the appellants' application for review of the decision not to grant them protection visas did depend in part at least on demeanour and credibility. The appellants undertook the task of persuading the Tribunal that they did hold well-founded fears of persecution. That in respect of some of the abuses they claimed to have suffered, they admitted fabrication, or were unable to deny collusion, provides no answer to their entitlement to have their other

claims and their applications assessed in a comprehensive, unattenuated and not excessively delayed process. Unlike the majority in the Full Court of the Federal Court we are unable to regard the possibility, indeed, even the likelihood if that be the case, of the consultation of contemporaneous notes and tape recordings of the proceedings, as a satisfactory substitute for the observation and formation of impressions of persons in the flesh, and the timely personal commitment of these to paper as part of the process of making a decision in the light of the materials supplied to the Tribunal and all the arguments advanced to it.

170 It is right, as Finkelstein J in dissent said in effect, that what appears to be a summary only, without analysis, of the transcript erodes confidence in the findings of fact of the Tribunal. Demeanour was clearly of some relevance here. One example suffices to make the point. The Tribunal purported to be influenced by the daughter's failure to display signs of trauma or concern while recounting the threats she said were made to her on her way to church, and her parents' reaction to her recounting of the incident. This is a matter of some subtlety. To delay committing to paper a recollection of this evidence until a long time afterwards runs a real risk of failing to recapture and give effect to that subtlety.

171 The first respondent accepted that s 414 created, by implication, a duty to conduct the review and arrive at a decision within a reasonable time. The first respondent also accepted that s 425(1), by implication, refers to a hearing where the evidence given is to be given proper, genuine and realistic consideration in the decision subsequently to be made. The first respondent, on the other hand, contended that breach of the duty to decide within a reasonable time attracted only the possibility of correction by mandamus and did not amount to jurisdictional error; that no implication as to timing could be drawn out of s 425, because the topic had been dealt with in s 420; and that since s 420 was facultative, not restrictive, failure to comply with the time stipulation was not jurisdictional error either. The first respondent also submitted that the principles of natural justice – the duty to act fairly – were breached by delay only where "the delay has denied an interested party a proper opportunity to present his or her case."

172 The answer to these arguments is that unfairness can spring not only from a denial of an opportunity to present a case, but from denial of an opportunity to consider it. Failure by the Tribunal to consider a case can arise not only from obstruction by the Tribunal of its presentation but also from self-disablement by the Tribunal from giving consideration to that presentation by permitting bias to affect its mind: either way the case is prevented from having a fair impact on the Tribunal's mind. Another way in which the Tribunal can disable itself from giving consideration to the presentation of a case arises where it permits so much time to pass that it can no longer assess the evidence offered. That is what happened here. The first respondent contended that the appellants could not succeed in the absence of findings that "delay by the Tribunal actually resulted in

a material failure to analyse the oral evidence of the Appellants." That finding ought to be made because it can be inferred from the delay that, in the absence of contrary evidence, the Tribunal had deprived itself of its capacity to do so, and there is no contrary evidence.

173 The circumstances of this case are specific to the Refugee Review Tribunal.

174 This is in our opinion a very exceptional case. The facts, it is to be hoped, are extraordinary. It is one in which the Court is bound to hold that the proceedings have not been fairly conducted, by reason of the delays, both from beginning to end, and between each episode in them. We cannot accept that the only relevant delay is that which occurred between the second oral hearing and the giving of the decision. This is so because the decision was concerned with demeanour on two occasions, long separated in time, and each requiring to be related and compared to the other, and weighed with a considerable volume of written evidence.

175 At one point the first respondent appeared to be advancing as a discretionary ground for the refusal by this Court of relief to the appellants on the ground of the Tribunal's delay, the fact that the appellants delayed in seeking, and in fact never sought, an order of mandamus compelling the Tribunal to do its duty. However, in oral argument it was made plain that the contention was not pressed and hence it need not be considered.

176 The appeal must be allowed. We would make the following orders.

1. The appeal to this Court is allowed.

2. The orders of the Full Court of the Federal Court made on 11 February 2004 and of Hely J made on 15 April 2003 are set aside and in lieu thereof it is ordered that the decision of the Refugee Review Tribunal made on 20 December 2002 and handed down on 14 January 2003 be set aside and the matters be remitted to the Refugee Review Tribunal for determination.

3. The first respondent must pay the appellants' costs of the appeal to this Court and the proceedings at first instance in the Federal Court and on appeal to the Full Court of the Federal Court.