HIGH COURT OF AUSTRALIA

GLEESON CJ
KIRBY, HAYNE, CALLINAN AND HEYDON JJ

SZBEL APPELLANT

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS & ANOR RESPONDENTS

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs
[2006] HCA 63
15 December 2006
S274/2006

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Federal Court of Australia made on 9 February 2006 and, in their place, order:*

   (a) appeal allowed with costs; and

   (b) set aside the orders of the Federal Magistrates Court of Australia made on 23 February 2005 and, in their place, order:

      (i) a writ of certiorari issue, directed to the second respondent, to quash the decision of the second respondent made on 27 June 2003; and

(ii) *a writ of mandamus issue, directed to the second respondent, requiring the second respondent to determine according to law the application made on 5 June 2001 by the appellant for review of the decision of the delegate of the first respondent to refuse to grant the appellant a protection visa.*

On appeal from the Federal Court of Australia

Representation

N J Williams SC with R S Francois for the appellant (instructed by Legal Aid Commission of New South Wales)

S J Gageler SC with S B Lloyd for the first respondent (instructed by Clayton Utz)

Submitting appearance for the second respondent

CATCHWORDS

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs

Immigration – Refugees – Protection visa decision – Procedural fairness – Appellant claimed he feared persecution on basis of his conversion to Christianity if returned to Iran – Delegate of the first respondent refused to grant appellant protection visa because not satisfied of the genuineness of appellant's conversion to Christianity – Review by Refugee Review Tribunal – Appellant invited by Tribunal to give evidence relating to the issues arising in relation to the decision under review – Appellant gave evidence addressed to the delegate's concern regarding the genuineness of his conversion to Christianity – Tribunal affirmed the delegate's decision not to grant a protection visa on the basis that appellant's claims were not credible – Whether Tribunal failed to notify the appellant adequately of the issues to which its reasoning processes were directed – Whether failure of Tribunal to ask the appellant to address issues that it considered might be important amounted to a denial of procedural fairness.

Words and phrases – "issues arising in relation to the decision under review", "procedural fairness".

Migration Act 1958 (Cth), ss 424, 424A, 425.

1 GLEESON CJ, KIRBY, HAYNE, CALLINAN AND HEYDON JJ. In 2001 the appellant was employed as a seaman on a ship of the Islamic Republic of Iran Shipping Line. On 7 April 2001, he jumped ship in Port Kembla and 10 days later he applied for a protection visa[1]. A delegate of the respondent Minister refused[2] to grant the appellant a protection visa. The appellant sought[3] review of that decision by the Refugee Review Tribunal[4].

2 The appellant had made a statutory declaration setting out the facts upon which he relied in support of his application for a protection visa. In that declaration he described why he had jumped ship. He said he feared for his safety because the captain of his ship knew of his interest in the Christian religion.

3 The Tribunal wrote to the appellant telling him that it was unable to make a decision in his favour on the information he had supplied, and invited him to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review[5]. The appellant took up this invitation and appeared before the Tribunal in February 2003. The Tribunal member began proceedings by telling the appellant that on reading all of the material, she was not able to be satisfied that the appellant qualified for a protection visa. The Tribunal member then asked the appellant questions that elicited from him the same description of events as he had given in his statutory declaration. At no stage did the Tribunal challenge what the appellant said, express any reaction to what he said, or invite him to amplify any of the three particular aspects of the account he had given in his statutory declaration, and repeated in his evidence, which the Tribunal later found to be "implausible". Rather, the first that the appellant knew of the suggestion that his account of events was implausible in these three respects was when the Tribunal published its decision.

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1 *Migration Act* 1958 (Cth), s 36. (References are to the Act in the form it took at the time of the Tribunal's decision.)

2 s 65.

3 s 412.

4 s 414.

5 s 425(1).

4 Did the courts below err in holding that the Tribunal had not denied the appellant procedural fairness?

5 Before considering what are the relevant principles to be applied in deciding that issue, it is necessary to say more about the course of decision-making in this case that lies behind the appeal to this Court.

The appellant's application for a protection visa

6 On 17 April 2001, the appellant's then migration agent sent the appellant's Application for a Protection (Class XA) visa to the Minister's Department. The agent asked the case officer "to withhold from making a decision" on the matter, for three weeks, so that the appellant's "statement of claims" could be translated. The agent said that the appellant believed that "he has been persecuted by the Iranian authorities due to his religious faith and imputed political opinion".

7 The statement of claims to which the agent had referred was submitted, in the form of a statutory declaration by the appellant, on 2 May 2001. In that statutory declaration the appellant spoke of being invited in 1996, by a Filipino seaman serving on the same ship as the appellant, to attend a Christian service while the ship was in port at Dubai. He said that over the next four years the ship would often dock in Dubai and that, when it did, he would return to the church he had first attended in 1996 and that, as well, he "made every effort to attend Christian churches in the [other] countries we stopped at".

8 The appellant described a series of events in December 2000 when he was seen by some members of his ship's crew coming out of a Christian church in an Argentinian port, confronted by them, taken back to his ship, and there berated by the senior Iranian officer. He said he "was allowed to leave with a warning that if [he] displayed any interest in Christianity, it would lead to the termination of [his] employment".

9 In his statutory declaration the appellant described the events preceding his jumping ship in Australia. The events described were said to have occurred between 15 February 2001 (when he left his ship in its home port in Iran to travel home for some weeks) and 7 April 2001 (when he jumped ship in Port Kembla). The description was set out in 10 paragraphs of the statutory declaration occupying about three pages of double spaced typescript.

10 The description contained three elements of present importance. It is these three elements of the appellant's account which the Tribunal was later to find were implausible. First, he described returning to his home for medical

treatment in February 2001, meeting four of his friends (whom he named) and telling them of what he had learned about Christianity:

> "I told them what I had read in the Bible, and that I had spent some time in Argentina with other Christians. I told them about the other churches I had visited in Brazil and South Africa. I wanted to tell them everything I had learned, and how different it all was to Islam."

His friends "indicated that they were disturbed by what [he] was telling them". They urged him "to renounce this heresy, and to embrace Islam". A few days later he began to receive threatening telephone calls at home, accusing him of apostasy.

11 The second element of present importance in the appellant's account was that, after he had returned to his ship on 9 March 2001, but some weeks after it had sailed on 11 March 2001, he was called before the captain. His statutory declaration continued:

> "The captain had heard about the rumours that were circulating in my home town. One of the other crew members had informed him of the ostracism that I had experienced there. Once I heard this, I knew that I was in a lot of trouble. The captain began by demanding to know why I continued to behave like a deviant, and whether the rumours were true. He asked me if I was a Christian. I denied that I was a Christian. But again, the captain did not believe me. He told me that as soon as the ship returned to Iran I would be dealt with accordingly. Until we returned to Iran I would continue with my duties, but I would be supervised at every moment."

The appellant described his increasing fear for his safety, after this interview, as the anger of the Iranian crew grew. "They [the crew] could not understand why the captain did not lock me up on the ship. They considered me a criminal, and a disgrace."

12 The third element of present importance in the appellant's account of events concerned his being allowed off the ship on 6 April 2001 to visit a doctor in Port Kembla. Of this the appellant said:

> "The constant psychological and mental harassment on board the ship had made me very sick. I was in constant pain. I sought permission to get medical attention, and I believe that the Captain only allowed this out of fear that I may die on board of the ship and therefore become his

responsibility. I was granted permission to seek medical attention in Australia. I knew that I had to find a way off the ship: I was petrified that I would be dead by the time the ship returned to Iran. The harassment by the crew was getting worse, and I was completely at the mercy of the other crew members who considered me an apostate."

The delegate's decision

13 The delegate was not satisfied that the appellant was a person to whom Australia had protection obligations under the Refugees Convention[6]. The delegate concluded that he was not satisfied that the appellant "has a genuine commitment to Christianity". In his reasons, the delegate dealt directly with only one of the three elements of present importance in the appellant's account of events preceding his jumping ship. The delegate noted that the appellant had gone ashore in Port Kembla on 6 April 2001. He said that the appellant's "decision to return to the vessel on 6 April 2001 is not consistent with the actions of a person who feared being seriously mistreated or even killed by crew angered by his alleged interest in Christianity". The delegate made no mention, in his reasons, of the appellant's account of telling friends in his home town of his interest in Christianity or of the appellant's account of being called before the captain to explain this interest.

The Tribunal review – a further statutory declaration

14 In support of his application to the Tribunal, for review of the delegate's refusal to grant him a protection visa, the appellant supplied a further statutory declaration. Given the basis on which the delegate had refused the appellant's application, it is unsurprising that this second declaration by the appellant was directed wholly to demonstrating the appellant's commitment to Christianity.

The Tribunal review – the appellant's oral evidence

15 As noted earlier, the Tribunal member began her interview of the appellant by saying that, on the material that had been supplied, she was not able to be satisfied that the appellant qualified for a protection visa. The appellant

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6 Convention relating to the Status of Refugees done at Geneva on 28 July 1951, [1954] ATS 5, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967, [1973] ATS 37.

then gave evidence on affirmation and called some witnesses to give evidence about his commitment to Christianity.

16 The Tribunal asked the appellant questions about various matters including his meeting in his home town with friends, what had happened when he was called before the captain on board ship, and his going ashore for medical treatment in Port Kembla. In substance, his answers repeated what he had said about those matters in his first statutory declaration, but he amplified those statements in two important respects. First, when asked how the captain had any idea of his interest in Christianity, the appellant said, "[o]ne of the guys on the ship was from my own town." Secondly, when asked about leaving the ship for medical treatment, he said, "I was sent to medical with someone accompanying me and then I was returned to the ship."

17 If accepted, the first of these answers explained how it was that what was said in a conversation over coffee with friends, in a home town hundreds of kilometres from where the appellant's ship had berthed in Iran, came to the attention of the ship's captain. If the second of the answers was accepted, it explained why the appellant had returned to his ship when he was allowed ashore at Port Kembla.

The Tribunal's reasons

18 In its reasons, the Tribunal described the appellant's claims as including that he had "jumped ship because the Iranian authorities had come to know of his interest and involvement in the Christian religion and he was in fear of punishment". This claim was not accepted "because the Tribunal considers that this claim is not credible". What were said to be "key aspects" of the appellant's claim lacked credibility. Three separate aspects were identified.

19 First, there was the basis upon which the captain came to believe that the appellant was involved in Christianity. This was said "to be so tenuous as to be implausible". The reasons continued:

> "The Tribunal considers it implausible that a personal conversation while the [appellant] is in port for ten days would attract the attention or interest of the Hezbollah and would become public knowledge such that a crew member from the same town had knowledge of it."

Secondly, the Tribunal dealt with the appellant's description of his confrontation with the captain in the following way:

> "Further the Tribunal considers it implausible that the Captain of the ship would accuse the [appellant] of apostasy or even involvement in Christianity on the strength of comments from a crew member based on the [appellant's] personal conversations when in port, particularly given that the [appellant] on his own evidence had not spoken of or engaged in Christian activities on board the ship."

Thirdly, the Tribunal said that it considered "that the [appellant's] freedom of movement when the ship was in dock belies the [appellant's] claim that the crew 'considered [him] a criminal' ... and the claim as stated in the hearing that the Captain was intending to hand him to the authorities when the ship returned to Iran". The Tribunal expressed the view that "if the Captain was intending to hand the [appellant] over to the authorities in Iran and had informed the [appellant] of his intention then more stringent measures would have been set in place in respect to the [appellant's] movement when the ship was in dock". Presumably, the Tribunal had in mind steps of the kind to which the appellant had referred when he spoke of the crew not understanding "why the captain did not lock me up on the ship".

20 These three points, "[c]onsidered collectively", led the Tribunal "to reject the [appellant's] claim that the Captain of the ship was intending to hand the [appellant] over to the authorities of Iran on the ship's return to Iran because of the [appellant's] religious inclinations". It was on this basis that the Tribunal concluded that it did not accept that the appellant "was considered by the Iranian authorities to be an apostate or actively involved in Christianity prior to his arrival in Australia".

21 The detailed exposure by the Tribunal of its reasoning processes was not criticised and represented in itself a praiseworthy method of fulfilling the duty to give reasons. The question is whether the issues to which those reasoning processes were directed had been adequately notified to the appellant.

Proceedings in the courts below

22 The appellant applied to the Federal Magistrates Court for relief under s 39B of the *Judiciary Act* 1903 (Cth). By his amended application he alleged, among other things, that the Tribunal had denied him procedural fairness by not putting to him "the critical factors upon which its decision was likely to turn". The particulars given of those factors referred to the three matters identified earlier in these reasons. The particulars described those matters in the following terms:

"(a) it [the Tribunal] believed it was not possible for a personal conversation between friends in a small town to become known within 10 days to the Hezbollah or other town members;

(b) it believed an Iranian ship captain would not act on the word of another crew member about that personal conversation and accuse the [appellant] of apostasy; and

(c) it believed an Iranian ship captain would take more stringent measures with respect to the [appellant] if he intended to hand the [appellant] over to the authorities for questioning than those claimed by the [appellant]."

23 The Federal Magistrate (Raphael FM) dismissed the appellant's application. In respect of the ground alleging want of procedural fairness, the Magistrate said that he was satisfied that the three particulars given by the appellant did "no more than articulate the Tribunal's reasoning processes by which it came to the conclusion that it did about the [appellant's] credit" and that, conformably with the decision of the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*[7], the Tribunal's reasoning processes need not be revealed to the appellant. It is not necessary to notice the reasons given for disposing of the other grounds for review that were advanced by the appellant.

24 On appeal to the Federal Court of Australia, a single judge of that Court, Graham J, exercising the appellate jurisdiction of the Court, dismissed the appellant's appeal. Again, several grounds were advanced, but it is necessary to deal only with the ground alleging want of procedural fairness. Of that ground his Honour said[8] that:

"A decision-maker such as the Tribunal was obliged to advise a person such as the Appellant of any adverse conclusion which would not obviously be open on the known material. However, such a decision-maker would not be otherwise obliged to expose his or her mental processes or provisional views to comment before making the decision in question."

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7 (1994) 49 FCR 576.

8 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 59 at [45].

Procedural fairness

25 Counsel for the respondent Minister correctly submitted, at the outset of his argument of the appeal to this Court, that "what is required by procedural fairness is a fair hearing, not a fair outcome". As Brennan J said, 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."

It is, therefore, not to the point to ask whether the Tribunal's factual conclusions were right. The relevant question is about the Tribunal's processes, not its actual decision.

26 It has long been established that the statutory framework within which a decision-maker exercises statutory power is of critical importance when considering what procedural fairness requires. It is also clear that the particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case. As Kitto J said in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation*[10]:

> "[T]he books are full of cases which illustrate both the impossibility of laying down a universally valid test by which to ascertain what may constitute such an opportunity ['to correct or contradict any relevant statement prejudicial to their view'[11]] *in the infinite variety of circumstances that may exist, and the necessity of allowing full effect in every case to the particular statutory framework within which the proceeding takes place*." (emphasis added)

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9 (1990) 170 CLR 1 at 35-36.

10 (1963) 113 CLR 475 at 503-504.

11 *Local Government Board v Arlidge* [1915] AC 120 at 133.

In the present case, attention in argument, both in this Court and in the courts below, was directed more to the particular circumstances of the case than to the relevant statutory framework, but it is necessary to notice some aspects of that framework. Unless that is done, the argument proceeds at too high a level of abstraction and may proceed upon assumptions that are ill founded.

27 First, the *Migration Act* 1958 (Cth) ("the Act") obliged[12] the Tribunal to "invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review". The Tribunal was not bound to extend such an invitation to appear, if it considered that "it should decide the review in the applicant's favour on the basis of the material before it"[13].

28 Secondly, the Act empowered[14] the Tribunal to seek additional information that it considered relevant, and obliged[15] the Tribunal to give to an applicant particulars of certain information that the Tribunal considered would be the reason, or a part of the reason, for affirming the decision under review. That latter obligation did not apply[16] to information "that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member".

29 No submission was made on behalf of either the appellant or the Minister that the existence or content of the obligation to accord procedural fairness was directly affected by any provision of the Act. Rather, the argument proceeded, for the most part, by reference to what had been said by the Full Court of the Federal Court in *Alphaone*[17]. The Full Court (Northrop, Miles and French JJ) said[18]:

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12 s 425(1).

13 s 425(2)(a).

14 s 424(1).

15 s 424A(1).

16 s 424A(3)(a).

17 (1994) 49 FCR 576.

18 (1994) 49 FCR 576 at 591-592.

> "Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. *It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material.* Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question." (emphasis added)

30 Particular attention was directed in argument in this Court, as it had been in the courts below, to the Tribunal's conclusion that the three identified elements of the appellant's story were not "plausible". Was that a conclusion "which would not obviously be open on the known material"? Or was it no more than a part of the "mental processes" by which the Tribunal arrived at its decision?

31 Stated in this way, the argument seeks to elucidate the content of the requirements of procedural fairness by setting up a dichotomy. There are two reasons to exercise considerable care in approaching the problem in that way. First, it is far from clear that the two categories that are identified (conclusions not obviously open on the known material, and mental processes of decision-making) encompass all possible kinds of case that may fall for consideration. Secondly, there is a very real risk that focusing upon these two categories will distract attention from the fundamental principles that are engaged.

32 In *Alphaone* the Full Court rightly said[19]:

> "It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. *That would ordinarily require the party affected to be given the*

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19 (1994) 49 FCR 576 at 590-591.

opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material." (emphasis added)

33 The Act defines the nature of the opportunity to be heard that is to be given to an applicant for review by the Tribunal. The applicant is to be invited "to give evidence and present arguments relating to *the issues arising in relation to the decision under review*"[20]. The reference to "the issues arising in relation to the decision under review" is important.

34 Those issues will not be sufficiently identified in every case by describing them simply as whether the applicant is entitled to a protection visa. The statutory language "arising in relation to the decision under review" is more particular. The issues arising in relation to a decision under review are to be identified having regard not only to the fact that the Tribunal may exercise[21] all the powers and discretions conferred by the Act on the original decision-maker (here, the Minister's delegate), but also to the fact that the Tribunal is to review that *particular* decision, for which the decision-maker will have given reasons.

35 The Tribunal is not confined to whatever may have been the issues that the delegate considered. The issues that arise in relation to the decision are to be identified by the Tribunal. But if the Tribunal takes no step to identify some issue other than those that the delegate considered dispositive, and does not tell the applicant what that other issue is, the applicant is entitled to assume that the issues the delegate considered dispositive are "the issues arising in relation to the decision under review". That is why the point at which to begin the identification of issues arising in relation to the decision under review will usually be the reasons given for that decision. And unless some other additional issues are identified by the Tribunal (as they may be), it would ordinarily follow that, on review by the Tribunal, the issues arising in relation to the decision under review would be those which the original decision-maker identified as determinative against the applicant.

36 It is also important to recognise that the invitation to an applicant to appear before the Tribunal to give evidence and make submissions is an invitation that need not be extended if the Tribunal considers that it should decide the review in the applicant's favour. Ordinarily then, as was the case here, the

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20 s 425(1) (emphasis added).

21 s 415.

Tribunal will begin its interview of an applicant who has accepted the Tribunal's invitation to appear, knowing that it is not persuaded by the material already before it to decide the review in the applicant's favour. That lack of persuasion may be based on particular questions the Tribunal has about specific aspects of the material already before it; it may be based on nothing more particular than a general unease about the veracity of what is revealed in that material. But unless the Tribunal tells the applicant something different, the applicant would be entitled to assume that the reasons given by the delegate for refusing to grant the application will identify the issues that arise in relation to that decision.

37 That this is the consequence of the statutory scheme can be illustrated by taking a simple example. Suppose (as was the case here) the delegate concludes that the applicant for a protection visa is a national of a particular country (here, Iran). Absent any warning to the contrary from the Tribunal, there would be no issue in the Tribunal about nationality that could be described as an issue arising in relation to the decision under review. If the Tribunal invited the applicant to appear, said nothing about any possible doubt about the applicant's nationality, and then decided the review on the basis that the applicant was not a national of the country claimed, there would not have been compliance with s 425(1); the applicant would not have been accorded procedural fairness.

38 When it is said, in the present matter, that the appellant was not put on notice by the Tribunal that his account of certain events would be rejected as "implausible", and that this conclusion was "not obviously ... open on the known material", the focus of the contention must fall upon what was "obviously ... open" in the Tribunal's review. That can be identified only by having regard to "the issues arising in relation to the decision under review". It is those issues which will determine whether rejection of critical aspects of an applicant's account of events was "obviously ... open on the known material".

39 If the issues on the review of the delegate's decision by the Tribunal are identified no more particularly than by the question "is the applicant entitled to a protection visa?", rejection of some, or all, aspects of his account of the past events said to found his fears of persecution would self-evidently be a conclusion open to the Tribunal. The conclusion would be open because *every* aspect of the applicant's claim would be in issue in the Tribunal's review of the delegate's decision. But if the issues are to be identified more particularly, other questions arise.

40 More than once it has been said[22] that the proceedings in the Tribunal are not adversarial but inquisitorial in their general character. There is no joinder of issues between parties, and it is for the applicant for a protection visa to establish the claims that are made. As the Tribunal recorded in its reasons in this matter, however, that does not mean that it is useful to speak in terms of onus of proof[23]. And although there is no *joinder* of issues, the Act assumes that issues can be identified as arising in relation to the decision under review. While those issues may extend to any and every aspect of an applicant's claim to a protection visa, they need not. If it had been intended that the Tribunal should consider afresh, in every case, all possible issues presented by an applicant's claim, it would not be apt for the Act to describe the Tribunal's task as conducting a "review", and it would not be apt to speak, as the Act does, of the issues that arise in relation to the decision under review.

41 The appellant's complaint in the present matter can be expressed in different ways. It could be described as being that the Tribunal acted upon unstated assumptions about the nature of Iranian society, when it decided that three aspects of his account were implausible. So, to take one of the three critical issues, when the Tribunal concluded (as it did) that it was implausible that what was said in a conversation between friends over coffee would come to the attention of a fellow member of the appellant's crew and thus be conveyed to the ship's captain, the Tribunal assumed that matters of religious interest would not ordinarily be the subject of gossip in a town in such a way as to come to the attention of a fellow crew member. The appellant says that he had no notice that the validity or content of the cultural and other assumptions that underpinned his account were in issue.

42 But closer examination reveals that the appellant's complaint is more deep-seated than a complaint about the making of unstated cultural assumptions. It is that he was not on notice that his account of how his ship's captain came to know of his interest in Christianity, and his account of the captain's reaction to that knowledge, were issues arising in relation to the decision under review.

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22 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 576 [187]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 77 ALJR 1909 at 1918 [57]; 201 ALR 437 at 450.

23 cf *McDonald v Director-General of Social Security* (1984) 1 FCR 354.

43 The delegate had not based his decision on either of these aspects of the matter. Nothing in the delegate's reasons for decision indicated that these aspects of his account were in issue. And the Tribunal did not identify these aspects of his account as important issues. The Tribunal did not challenge what the appellant said. It did not say anything to him that would have revealed to him that these were live issues. Based on what the delegate had decided, the appellant would, and should, have understood the central and determinative question on the review to be the nature and extent of his Christian commitment. Nothing the Tribunal said or did added to the issues that arose on the review.

Conclusion: entitlement to relief

44 The Tribunal did not accord the appellant procedural fairness. The Tribunal did not give the appellant a sufficient opportunity to give evidence, or make submissions, about what turned out to be two of the three determinative issues arising in relation to the decision under review.

45 That conclusion is decisive of the present appeal. It is as well, however, to say something more about the third aspect of the appellant's account which the Tribunal considered to be determinative. That was his being allowed ashore to obtain medical treatment before he jumped ship. The delegate had concluded that the appellant's *returning* to his ship was not consistent with the fear which the appellant said he then held for his safety. It followed that what were the circumstances surrounding the appellant's going ashore on this occasion was an issue arising on the review by the Tribunal.

46 Three further general points should be made.

47 First, there may well be cases, perhaps many cases, where either the delegate's decision, or the Tribunal's statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor. But where, as here, there are specific aspects of an applicant's account, that the Tribunal considers *may* be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted.

48 Secondly, as Lord Diplock said in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*[24]:

> "the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished."

Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment.

49 Finally, even if the issues that arise in relation to the decision under review are properly identified to the applicant, there may yet be cases which would yield to analysis in the terms identified by the Full Court of the Federal Court in *Alphaone*. It would neither be necessary nor appropriate to now foreclose that possibility.

50 In the light of the conclusions reached it is not necessary to consider the larger issues debated in oral argument of the appeal about what, if any, guidance may be had from the course of decisions in the Second Circuit Court of Appeals in the United States concerning plausibility findings in refugee proceedings[25]. Determination of those issues would require close examination of the legislative and regulatory premises that underpin that course of decisions. However, nothing in the conclusions just stated would appear to be inconsistent with the general approach taken in those decisions. To the contrary, they would appear to conform to the principles we have expressed in the context of the Australian legislation.

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24 [1975] AC 295 at 369.

25 See, for example, *Ming Shi Xue v Board of Immigration Appeals* 439 F 3d 111 (2006); *Zhi Wei Pang v Bureau of Citizenship and Immigration Services* 448 F 3d 102 (2006).

Orders

51 For these reasons the appeal should be allowed with costs and the orders of Graham J made on 9 February 2006 set aside. In their place there should be orders that (a) the appeal to that Court is allowed with costs; and (b) the orders of the Federal Magistrates Court made on 23 February 2005 are set aside. In place of the orders of the Federal Magistrates Court there should be an order that a writ of certiorari issue to quash the decision of the Refugee Review Tribunal made on 27 June 2003 and an order that a writ of mandamus issue requiring the second respondent to determine according to law the application made on 5 June 2001 by the appellant for review of the decision of a delegate of the first respondent.