FEDERAL COURT OF AUSTRALIA

Appellant WABZ v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 30

APPELLANT WABZ v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
W318 OF 2002

FRENCH, LEE and HILL JJ
18 FEBRUARY 2004 (Corrigendum dated 19 February 2004)
PERTH

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY **W318 OF 2002**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**APPELLANT WABZ** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**FRENCH, LEE AND HILL JJ**
DATE:	**19 FEBRUARY 2004**
PLACE:	**PERTH**

CORRIGENDUM

For 'Counsel for the Respondent' delete 'Mr JD Allanson' and insert 'Mr MT Ritter'.

Associate:

Dated: 19 February 2004

FEDERAL COURT OF AUSTRALIA

Appellant WABZ v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 30

MIGRATION – judicial review – protection visa – Refugee Review Tribunal – representation – common law agency principle – statutory restrictions - procedural fairness – legitimate expectation – entitlement to representation – denial of representation – erroneous opinion that Legal Aid solicitor unable to appear in Tribunal – unexpected denial of representation – failure of procedural fairness – other factors – failure to provide female interpreter – refusal to permit appellant to call a witness – errors of interpretation – solicitor employed by Legal Aid Commission – whether 'official' for purpose of exemption from restrictions on immigration assistance – whether 'member of the public service of a State'

WORDS AND PHRASES – 'official', 'member of the public service of a State'

Migration Act 1958 (Cth) s 474, s 425, s 426, s 427, s 280, s 275
The Legal Aid Commission Act 1976 (WA)
Judiciary Act 1903 (Cth) s 39B

NAAV v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 193 ALR 449 cited
Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476 followed
Lobo v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 200 ALR 359 cited
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82 followed
Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 195 ALR 502 cited
R v Board of Appeal; Ex parte Kay (1916) 22 CLR 183 cited
R v Assessment Committee of Saint Mary Abbotts, Kensington [1891] 1 QB 378 cited
Jackson and Co v Napper [1886] 35 Ch D 162 cited
R v Visiting Justice at Pentridge Prison; Ex parte Walker [1975] VR 883 cited
R v Commissioner of Police (NT); Ex parte Edwards (1997) 32 FLR 183 cited
Finch v Goldstein (1981) 55 FLR 257 cited
Pett v Greyhound Racing Association Ltd (No 1) [1969] 1 QB 125 cited
Pett v Greyhound Racing Association Ltd (No 2) [1970] 1 QB 46 cited
Enderby Town Football Club Ltd v Football Association Ltd [1971] Ch 591 cited
Fraser v Mudge [1975] 1 WLR 1132 cited
R v Secretary of State for the Home Department; Ex parte Tarrant [1985] QB 251 cited
Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs (1994) 35 ALD 557 cited
Xiang Sheng Li v Refugee Review Tribunal (1994) 36 ALD 273 cited
Guo Wei Rong v Minister for Immigration and Ethnic Affairs (1995) 38 ALD 38 cited
R v Maze Visitors; Ex parte Hone [1988] 1 AC 379 cited
Bank Voor Handel on Scheepvaart NV v Administrator of Hungarian Property [1954] AC 584 cited
Superannuation Fund Investment Trust v Commissioner of Stamps (SA) (1979) 145 CLR 330 cited

Townsville Hospital Board v Townsville City Council (1982) 149 CLR 282 cited
Nguyen Do Vinh v Minister for Immigration and Ethnic Affairs (1997) 47 ALD 528 cited
Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim (2000) 175 ALR 209 cited
Algama v Minister for Immigration and Multicultural Affairs (2001) 115 FCR 253 cited
Gowfkir v Minister for Immigration and Multicultural Affairs [2001] FCA 988 cited
Gurung v Minister for Immigration, Multicultural and Indigenous Affairs [2002] FCA 772 cited
VFAB v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 872 cited
Zhang de Yong v Minister for Immigration, Local Government and Ethnic Affairs (1993) 45 FCR 384 cited
Krstic v Australian Telecommunications Commission (1988) 20 FCR 486 cited
Re Minister for Immigration & Multicultural & Indigenous Affairs & Anor; Ex parte Applicants S124/2002 (2003) 195 ALR 1 cited
SBBG v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 121 cited
Dietrich v The Queen (1992) 177 CLR 292 referred to
Canellis v Slattery [1994] 33 NSWLR 104 cited
R v Board of Appeal; ex parte Kay (1916) 22 CLR 183 cited
Haritou v Skourdoumbis [2002] FCA 116 cited
Chamber of Commerce & Industry of Western Australia (inc) v Commissioner of Equal Opportunity [2001] WASC 306 cited
Stampalia v Racing Penalties Appeal Tribunal of Western Australia [2000] WASCA 24 cited
Commonwealth v Frost (1982) 41 ALR 626 cited
R v City of Melbourne; Ex parte Whyte (1977) 17 ALR 445 cited
Russell v Duke of Norfolk [1949] 1 All ER 109 (PC) cited
Cains v Jenkins (1970-80) 28 ALR 219 cited

J Alder, *Representation before Tribunals* [1972] Public Law Review 278

APPELLANT WABZ v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
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GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY **W318 OF 2002**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**APPELLANT WABZ** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**FRENCH, LEE AND HILL JJ**
DATE OF ORDER:	**18 FEBRUARY 2004**
WHERE MADE:	**PERTH**

THE COURT ORDERS THAT:

1. The appeal is allowed.
2. The decision of the learned primary judge dismissing the application with costs is set aside.
3. An order in the nature of certiorari is made whereby the decision of the Refugee Review Tribunal is set aside and the matter is remitted to the Refugee Review Tribunal for determination according to law.
4. The respondent is to pay the appellant's costs of the appeal and of the proceedings before the learned primary judge.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY **W318 OF 2002**

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JUDGES:	**FRENCH, LEE AND HILL JJ**
DATE:	**18 FEBRUARY 2004**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

FRENCH AND LEE JJ:

Introduction

1 The appellant is a national of Iran, born in that country on 19 February 1959. She has two daughters who were born in Iran in 1982 and 1986 and a sister born in 1969 who is living in Australia. Her father is deceased but her mother and two other sisters are still living in Iran. She also has a brother who lives in England.

2 The appellant arrived in this country on a visitor's visa on 22 August 1999. She lodged an application for a protection visa with the Department of Immigration and Multicultural Affairs on 20 October 1999. That application was refused by a delegate of the Minister for Immigration and Multicultural Affairs on 16 March 2000. She applied to the Refugee Review Tribunal ('the Tribunal') for review of that decision on 27 March 2000. On 24 September 2001, the Tribunal affirmed the decision not to grant the appellant a protection visa. The appellant then filed an application in this Court on 13 November 2001 seeking judicial review of the decision of the Tribunal. That application was dismissed by Carr J on 30 October 2002. The appellant now appeals against his Honour's decision.

3 In the proceedings before the Tribunal, the presiding member refused to allow a solicitor employed by the Legal Aid Commission of Western Australia to represent the appellant. The member did so in the erroneous belief that the solicitor, not being a migration agent, was not able to provide 'immigration assistance' within the meaning of the *Migration Act 1958* (Cth), by way of representation in the Tribunal. As is now not disputed the statutory restrictions on the provision of 'immigration assistance' did not apply to the solicitor because, as an employee of the Legal Aid Commission, she was a member of the Public Service of the State of Western Australia and hence an 'official' within the meaning of the *Migration Act*. In the circumstances of this case the denial of representation constituted a breach of procedural fairness. This amounted to jurisdictional error on the part of the Tribunal. For the reasons that follow, the decision of the Tribunal must be set aside and the application for review reconsidered by the Tribunal according to law.

The Claims and Evidence Before the Tribunal

4 The appellant's claims before the Tribunal as summarised in the reasons for judgment of the learned primary judge were as follows:

> A. At the start of the Iranian revolution (in 1979), wages due to the appellant's husband were not paid and he wrote a letter of demand. The Iranian Revolutionary Guard labelled him as 'anti-government' and he was thereafter banned from public sector work. However her husband had worked successfully for a private company for the past ten years.
>
> B. In about 1997 the appellant celebrated her daughter's 12th birthday at her home in mixed gender company. Music was played at the party. While the party was underway authorities entered the family home and confiscated equipment including tapes and a keyboard. Guests were detained for a short time and the appellant and her husband were detained for a few hours before being granted bail. Upon their subsequent appearance in court they were fined 200,000 tomans which they subsequently paid.
>
> C. Shortly following the birthday incident the appellant was apprehended and taken to a local prison where she was told that she was being held for a breach of the Islamic dress code. Although the accusation was false she was insulted, detained overnight and taken before a court on the following day. Her husband and a Mullah persuaded her to sign an undertaking, demanded by the investigating authorities, that she would not breach the dress code in the future.
>
> D. When the appellant's husband saw her distress at her treatment in prison he wrote a letter of complaint to local and other clerics about

the lack of observance of her basic human rights. He was subsequently detained by members of the Revolutionary Guard for insulting the clergy and sentenced to seventy-five lashes and six months imprisonment, although a payment was eventually made to avoid those penalties. The appellant's husband remained in prison for eight weeks and both of them were placed on conditions requiring them to report monthly and later quarterly to the Revolutionary Guard. The appellant's husband had a nervous breakdown and was hospitalised for three weeks before being sent home for a few weeks of further rest. During the appellant's reporting sessions she was put under pressure by a person who held a key position in the Revolutionary Guard to have a sexual relationship with him. He threatened to kill her husband if she did not accede to his wishes. This person was the source of the appellant's continuing problems with the authorities.

E. The appellant travelled to England in March 1999 and remained there for about five months in order to support her sister-in-law during the birth of a child. The member of the Revolutionary Guard who had importuned her had told her she would not be given a passport. The only way she was able to obtain a passport and depart from Iran was through the payment of bribes. She did not apply for asylum as a refugee in England as she had no intention of trying to remain there. She returned to Iran because she was still required to report to the authorities every three months. Upon her return from England she was interrogated at the airport in Iran for eighteen hours, probably in an attempt to intimidate her further.

F. Since the appellant's departure for Australia her husband has had a court summons issued against him and three summonses and an arrest warrant have been issued against the appellant.

G. The appellant had been influenced in her thinking by her father who was a religious liberal and a socialist. She felt there was a vacuum in her life and this caused her to explore Christianity, first in England and then more actively since her arrival in Australia. She has attended the Uniting Church each Sunday and meets with a retired minister and his wife every week for a couple of hours during which time they discuss the Bible and cultural and religious traditions. She has been baptised in Western Australia, has embraced Christianity and wants to teach others about it. She had not done so in Australia because her husband and children remain in Iran. Although Christians can freely attend church in Iran, she would face persecution there because of her wish to tell others about the Christian faith and because she is a convert. If she were returned to Iran she would feel bound to declare her faith if asked and the local Mullah would give her trouble as he would know who the Christians in the area are. As a Christian she would not accept the Islamic way of dressing and would therefore be at risk of serious punishment.

5 In a statement in support of her application for a protection visa, the appellant said, inter alia:

> *'After my release my husband ... wrote a very criticising letter to the local Islamic authorities condemning them of total discrimination against women. Of course he was arrested a few days later without us knowing of his where about. I was called up to the Revolutionary Base in Shahin-Shahz and was explained what the situation was. The person in charge told me what the consequences were. I started beging then for his release but the guards were trying to sexually abuse me. Where I totally said no to them. My husband was imprisoned for 8 week. He was mentally tortured during his prison term, so we hospitilized him in a psychiatric ward for a few weeks. In the begining we were denied passports. But likily seeing a few people and bribing them were issued with passports.' (sic)*

6 The appellant also submitted to DIMIA a number of documents translated from Farsi to support her claims in relation to Court processes to which she and her husband had been subjected. These translations were enclosed with a letter dated 27 January 2000 from the Catholic Migrant Centre. One purported to be a translated copy of a court order dated 16 July 1997. It named the appellant and her husband as defendants and then read:

> *'Charge: Having a mixed (male & female) birthday party on July 7, 1997 for the birth of their child ignoring the Islamic rules and using unlawful musical instruments and songs.*
>
> *Court Order: On July 13, 1997 at 10am in a closed cournt (sic) in the presence of the defendants, following the hearing of the charge, the defendants' statements and the presentation of the confiscated musical instruments, this court finds the accused guilty and considers a lower degree of penalty. This court orders the accused to pay 2 million Rials in cash and sign a written statement that they will not run such parties in the future.'*

The order purported to be signed by a judge of District 2 Islamic Revolutionary Court – Isfahan.

7 The next document was a translation of a purported court order dated 6 September 1997 naming the appellant's husband as defendant. The charge and order were as follows:

> *'Charge: Contempt of Spirituality and Holiness.*
>
> *Court Order: At 9am on September 1, 1997 within the closed court, following the hearing of the defendant's statements and reading the file gathered and sent by Shahin Shahr Information Centre, due to defendant's insufficient evidence the accused was charged and found guilty of Contempt of*

> *Spirituality & Holiness. He is ordered to receive 75 whip lashes according to the Islamic Law and be serving a jail sentence of six months. Till further notice he is ordered to report to the Security & Information Department of Shahin Shahr every three months.*
> *This order is final and requires action.'*

Again the order purported to be signed by a judge of the District 2 Islamic Revolutionary Court - Isfahan.

8 Also attached was a translation of a letter dated 11 January 1998. The letter purported to be from a psychiatrist to the Khorshid Medical Centre at the University of Isfahan. The letter said, of the appellant's husband:

> *'This is to certify that Mr [] was hospitalised from November 21, 1998 to December 7, 1998 at the psychiatric ward of Khorshid Hospital for treatment following his admission to Mola -Sadr Accident & Emergency.*
> *He required to be on two weeks sick leave starting December 8, 1998.'*

Proceedings before the Tribunal

9 As the present appeal raises a question about the fairness of proceedings before the Tribunal, it is necessary to refer to the conduct of those proceedings before turning to the Tribunal's reasons for decision.

10 The appellant applied to the Tribunal for review of the delegate's decision on 27 March 2000. On that same day she was sent a standard letter from the Tribunal advising, inter alia:

> *'If the Tribunal cannot make a decision in your favour, you will be asked whether you want to come to a hearing of the Tribunal to give oral evidence and to present arguments. Some hearings are conducted by video or telephone conference.'*

11 The Catholic Migrant Centre sent documentary material to the Tribunal on 16 May 2000, 22 July 2000 and 21 August 2000. This comprised summonses purportedly issued by the Islamic Revolutionary Court of Isfahan and what appeared to amount to a warrant for the arrest of the appellant issued by the same court.

12 On 12 April 2001, Vanessa Moss, an officer of the Legal Aid Commission of Western Australia wrote to the Tribunal in the following terms:

> *'I advise that I am now acting on behalf of [the appellant] in relation to her application to the Tribunal. I note that her application was made on 27 March 2000.*
>
> *I advise that at this stage I have not had an opportunity to meet with [the appellant] to obtain her instructions in relation to her application for review. I would be grateful if you could allow me a short period of time within which to familiarise myself with her application prior to any further steps being taken by you to progress her application.*
>
> *Further, I advise that I work part time and am not available to attend hearings on Wednesdays or Fridays. I would be grateful if you could bear this in mind should you decide to list the matter for hearing.'*

13 A request for the 'prioritisation' of the application was lodged by the Australian Red Cross on 20 April 2001. On 9 May 2001, the Tribunal sent a letter to the appellant and a copy to Ms Moss at the Legal Aid Commission in the following terms:

> *'The Tribunal has looked at all the material relating to your application but it is not prepared to make a favourable decision on this information alone. You are now invited to come to a hearing of the Tribunal to give oral evidence, and present arguments, in support of your claims. You are also entitled to ask the Tribunal to obtain oral evidence from another person or persons.'*

The date specified for the hearing was Tuesday, 10 July 2001 at 9am. The venue was the office of the Administrative Appeals Tribunal in Perth. The hearing was to be conducted by video conference with the Presiding Member and interpreter located in Melbourne. A 'Response to Hearing Invitation' form was attached for completion and return by the appellant.

14 On 21 May 2001, Ms Moss sent a letter to the Tribunal attaching the signed Response to Hearing Invitation. She added that she would be providing statutory declarations or letters from each of the proposed witnesses outlining the evidence they would give, together with a statutory declaration from her client. In the Response to the Hearing Invitation the appellant provided answers to some standard form questions. Asked whether she needed an interpreter she said 'yes', specifying the relevant language as Farsi. Asked whether she wanted the Tribunal to take oral evidence from any witnesses, she answered in the affirmative. She was told she must fill in details on the back of the form and did so, specifying the name of two witnesses. One was Mr Richard Treloar, a Minister of the Uniting Church, who she said would give evidence about her attendance at his church. The other was her sister who she said would give evidence about her own conversion to Christianity and her support for the

appellant's conversion.

15 In response to the question whether she wanted to bring someone with her to the hearing, the appellant said she did and specified 'Vanessa Moss, Legal Aid'. The next question was:

> *'Do you have any special needs for the hearing? (eg wheelchair access, male or female interpreter)'*

Her answer was:

> *'None (apart from requiring female Iranian Farsi interpreter)'*

The Tribunal lodged an Interpreter Booking Request on 7 June 2001 and requested a female. It received a confirmation identifying the interpreter as a person by the name of 'Val Akbar".

16 On 18 June 2001, Ms Moss wrote to the Tribunal Member allocated to the case, Mr Graham Brewer, providing a written submission in support of the application for review. In the first paragraph of her letter she said:

> *'As you are aware, Legal Aid acts for [the appellant] in relation to her application for review. Please note that Ms Janette McCahon from Legal Aid will be attending at the hearing before you on **10 July 2001**.'*

She enclosed further documentation comprising a statutory declaration by the appellant and her sister and two other documents.

17 In her statutory declaration of 12 June 2001, in support of her application for review by the Tribunal, the appellant again referred to her husband's letter of complaint and its consequences:

> *'This incident also affected my husband. He wrote a letter to the Committee of Clergy. That letter changed our life. In his letter he objected to the basic rights of women being denied and to my ill treatment. After Sepah received the letter they came and took my husband away. I was in the shower at the time and so had no idea what had happened. For 3 days I did not know where he had gone. After 3 days Sepah asked me to come to Setadeh Aminiyat (the intelligence and security service of Sepah). They told me that my husband had been charged with insulting the Committee of Clergy. My husband then had to attend a court hearing. He was taken from detention to the court.... The penalty was 75 lashes and six months imprisonment. He had to report to the security office every three months. We paid money in lieu of him receiving the 75 lashes. He served 8 weeks in prison and then he had a nervous breakdown. He was taken from the prison to a mental hospital and was there*

for three weeks. The doctor said he needed to rest for a while. He was then released and spent 4 weeks at home before returning to work.'

18 In her written submission to the Tribunal, Ms Moss referred to the translations of the court documents dated 16 July 1997 and the psychiatrist's report dated January 11, 1998. She pointed out that on the face of those two documents it appeared that the time span between the birthday party and the period of the husband's hospitalisation was approximately sixteen to seventeen months. She then said that she had been informed by an accredited Farsi interpreter, who had interpreted the appellant's statutory declaration, that the English translations of the documents were correct in so far as they referred to the year in which the events had occurred. But when one looked at the Farsi documents corresponding to those translations (copies of which were enclosed with the submission) the dates were all in the Persian year of 1376 so that the time span between the birthday party and the period of hospitalisation was in fact about four to five months. Her client's account in the statutory declaration was consistent with that shorter time span. Ms Moss said she was advised by the interpreter that the discrepancy arose from the way in which dates are translated from the Persian calendar to the Christian calendar. The explanation that followed was not entirely clear. It was said that for the first six months of the Persian calendar year 1376 it is necessary to add 621 years to arrive at the equivalent Christian calendar year of 1997. For the last six months of the Persian calendar year, it was necessary to add 622 years to arrive at the equivalent Christian calendar year of 1998. The Persian year started on 21 March so that July was in fact the fourth month in the Persian calendar. Accordingly, July 1997 was the fourth month of 1376 while November and December 1998 were the eighth and ninth months of 1376. One observation that can be made of that explanation is that it required elaboration.

19 In an affidavit, which was received in evidence before the primary judge and which was not contested, the appellant said that she had been informed by Legal Aid (WA) that she would have a legal representative before the Tribunal 'to assist and present my case and to speak for and on my behalf in making arguments in support of my case'. She was told before the hearing that Ms Moss would be going on maternity leave. She was introduced to Ms McCahon who said she was happy to represent the appellant at the hearing. She told the appellant she would speak on her behalf at the hearing. The appellant was also provided with a Refugee Review Tribunal Handbook dated April 2000. This informed her that her adviser would be asked if he or she wanted to say anything to the Tribunal.

20 At the commencement of the hearing Ms McCahon introduced herself to the Tribunal Member and informed the Tribunal that Ms Moss was on maternity leave and that she was representing the appellant. The Member asked her whether she was a registered migration agent. The following exchange then occurred:

> *'MS McCAHON: Not currently, no. I am in the process of doing so as is required through Legal Aid, I know.*
>
> *MR BREWER: Well you can be here as an observer.*
>
> *MS McCAHON: … I'm an observer. I'm not an official migration agent at this stage, no.*
>
> *MR BREWER: Okay. Well, as long as that's understood. I mean, I have a submission from Ms Moss and you can remain as an observer.*
>
> *MS McCAHON: Thank you, sir.'*

21 According to the appellant's affidavit the interpreter did not properly interpret for her the exchange between the member and Ms McCahon. She was not told why she could not be represented at the hearing. She said she was upset when Ms McCahon did not assist her at the hearing. She felt as though the Tribunal Member was bullying her during the questioning and that he and the interpreter were against her.

22 After the introductory exchange between the Tribunal Member and Ms McCahon, the Tribunal proceeded to take evidence from the appellant. The interpreter was a male. No objection was taken by the appellant or her representative on that issue at the hearing before the Tribunal. The appellant, however, said in her affidavit before the primary judge that she was upset because she had requested a female interpreter for the hearing and was given no explanation of the failure to meet that request.

23 During the hearing the following exchange occurred:

> *'MR BREWER: Well, did you have any other difficulties in Iran that you haven't already told me about that you wanted to outline?*
>
> *THE APPELLANT: Just I wanted to continue by saying that considering the difficulties that I had, if I was to remain in Iran, the difficulty would become greater and heavier and heavier every day, to the extent that I would probably be executed or stoned to death.*
>
> *MS McCAHON: May I just intervene – one matter about the …*

> *MR BREWER: Well you're here as an observer. I'm letting you stay and you can take notes, but you don't have, I'm afraid, status other than that.*
>
> *MS McCAHON: I am [the appellant's] solicitor. I'm not – I recognise that I'm not a migration agent. It was just – I just wanted to make one small point about the dates, given that Ms Moss mentioned in her submissions the difficulty of translating the Farsi dates and how that can end up with a period of more than 1 year between dates when that isn't in fact the case. That was the only point I wished to make.'*

There was no response from the member to that observation. Instead the member moved directly to put a further question on another matter to the appellant.

24 Later on in the hearing the member asked the appellant whether there was anything else she wanted to say in relation to any problems she had in Iran. This question was asked before the Tribunal moved on to the issue of her religious conversion. The appellant replied that the only thing she wanted to say was, that since she came to Australia, her husband had been summoned to court and that he had told the court she had gone to Australia. Since then she had been summoned on three occasions to attend the court. There followed questions and answers about the appellant's religious conversion.

25 Following these questions and answers, the Tribunal member indicated his intention to adjourn for ten minutes, primarily to give the interpreter a break. He then said:

> *'I will accept that you've been baptised and that you attend church each Sunday and that you also attend a Bible study class for 2 hours weekly. On that basis it seems to me that I probably would not be assisted by hearing from any of the people outside but that's a matter you can discuss during the break and let the attendant know. Okay?'*

The appellant said she just wanted the member to talk to the Reverend Treloar. The member then said they would have a break for ten minutes anyway. He asked what advantage she thought there would be in him talking to the Minister. The appellant said:

> *'No, I wanted and I wish the minister who baptised me can introduce me much better to you.'* (As translated by the interpreter according to the transcript)

The member asked rhetorically what the Minister could say about the appellant's religious practice other than what she had already told him. He asked her to consider this over the break. Following a short adjournment the Tribunal hearing resumed and the Reverend Treloar, a retired Minister of the Uniting Church, was sworn in and gave evidence. At one

point the witness said that the appellant understood English better than she spoke it. The member then addressed the appellant saying that if there was anything in evidence given that she didn't understand, she should indicate it and it would be interpreted for her. At this point it appears that the interpreter was not being used. After an exchange of questions and answers between the member and the Minister, the member asked the appellant whether there was anything she wanted to say about the Minister's evidence. Through the interpreter she said that she ddn't have anything to say although she could read out an oath that she had made in English if he thought it necessary. After the Reverend Treloar finished his evidence the member told the appellant that he would consider the material on the files and the evidence given by her and Reverend Treloar and would write a decision and reasons for that decision. She would be notified when the decision was made.

26 The appellant said in her affidavit evidence before the primary judge that she had asked that her sister give evidence on her behalf at the hearing. She had been advised by Legal Aid (WA) that such evidence would assist her case. However the Tribunal had not wanted to hear from her sister.

27 She also said that during the hearing the interpreter was not correctly interpreting what she was saying. She was getting frustrated and she was not entirely clear why the member was getting frustrated with her as she was attempting to answer the questions that he was putting to her.

The Tribunal's Findings

28 Although the Tribunal accepted that the appellant's husband had ceased to receive wages due to him at the beginning of the revolution and was for a time thereafter, prohibited from working in the public sector, he had had steady remunerative and pleasurable employment in the private sector for a decade. The appellant herself also had a lengthy history of remunerative employment. The Tribunal found that she had not encountered persecution in relation to her employment.

29 The Tribunal accepted that the appellant and others had been present at a party about four years earlier from which musical equipment was removed and that the party-goers were detained for questioning in relation to matters such as the playing of music. In the case of the appellant, the Tribunal accepted that she had been detained for a few hours before being released on a friend's undertaking. It did not accept as genuine the court document

purporting to be a summons or court order directed to the appellant. In any event, any charges that had been laid were in accordance with laws of general application. The same was true of the alleged breach of the Islamic dress code. There was no evidence that these laws had been applied in any discriminatory fashion against the appellant. The Tribunal accepted the probability that the appellant would have been insulted if the circumstances described by her had occurred but did not accept that such an outcome was significant enough to constitute persecution.

30 The Tribunal then gave consideration to the appellant's claim about the letter of complaint which her husband had written to the authorities and the consequences of that letter. It observed that the appellant's initial statement of 20 October 1999 in support of her application for a protection visa and her statutory declaration of 12 June 2001, indicated a close temporal connection between her arrest for a breach of the Islamic dress code and the letter of complaint. In the statutory declaration she had claimed that her arrest for breaching the dress code occurred about three weeks after the party held on 7 July 1997. The Tribunal referred to the purported Court Order recording her husband's conviction for the offence described as 'contempt of Spirituality & Holiness'. That order was dated 6 September 1997, six weeks after the appellant's alleged arrest that gave rise to the protest letter. The Tribunal referred to the gaol sentence of six months which, according to the appellant, had been reduced to eight weeks. It also referred to the statement in her statutory declaration that her husband was taken from the prison to a mental hospital and was there for three weeks. It then said:

> *'On that basis the applicant's husband would have entered a mental hospital at the start of November 1997. A letter purportedly from a treating psychiatrist states that the applicant's husband was admitted to the hospital on 21 November 1998 and discharged on 7 December 1998. The purpose of the psychiatrist's letter, dated 11 January 1998, is puzzling.'*

The Tribunal continued:

> *'While accepting that transposing dates from the Persian to the Christian calendar can pose some problems the sequence of events outlined by the applicant is at odds in several key respects with that indicated by the documentation. Additionally, the court report in relation to the applicant's husband's charge is vague and improbable. In weighing all the evidence the Tribunal finds that the applicant has fabricated her claims regarding her husband's problems following her own alleged punishment for a breach of the dress code. Accordingly, it does not accept that either she or her husband*

were placed on reporting conditions. The fact that the applicant was subsequently permitted to depart Iran underscores that findin g.'

31 It followed, so the Tribunal found, that it did not accept that the appellant was prevailed upon during reporting sessions to engage in a sexual relationship with a member of the Revolutionary Guard. Even had she been so prevailed upon it is manifest, so the Tribunal held, that she would have been able to seek the protection of the State. This conclusion followed from her own evidence that religious police and others are ceaseless in their endeavour to stamp out licentious behaviour.

32 The Tribunal also found it implausible that the appellant would have been able to obtain a passport and pass through all airport checks if she was wanted by the authorities especially in relation to any political matter. There was neither a social nor political impediment of any significance at all to the appellant's freedom of movement. Her voluntary return to Iran in 1999 was said to underscore the Tribunal's finding that she had fabricated claims of being on reporting conditions. The three summonses and the arrest warrant said to have been issued after her departure from Iran all contained wording that was vague about why there was allegedly an official interest in her or her husband. The Tribunal found these documents not to be genuine.

33 In relation to the appellant's conversion to Christianity, the Tribunal was not wholly satisfied that she had genuinely embraced that faith rather than engaging in a conversion for convenience. But even accepting that she had done so, the available evidence indicated that if she were to practice as a Christian in Iran she would be able to do so in ways she has practiced her faith in Australia without raising a real chance of persecution. Although she claimed at the hearing that she wanted to tell others in Iran about her faith more than she had sought to do in Australia, the Tribunal found that the evidence was that she was able to do so without facing any serious repercussions provided she does not proselytize. A requirement to proselytize was not a core component of her faith or indeed essential to it.

The Decision of the Learned Primary Judge

34 The grounds of the application for review as it stood before the learned primary judge were seven in number which his Honour summarised as follows:

'1. Error of law constituting jurisdictional error.

> *2. No evidence or other material to justify making the decision.*
> *3. Error of law "being an incorrect interpretation of the law to the facts as found by the Tribunal".*
> *4. Error of law in making erroneous findings.*
> *5. Further error of law as to what amounted to persecution.*
> *6. Failing to have regard to relevant material.*
> *7. Further alleged error in failing to have regard to whether there was a potential risk of persecution if the applicant were returned to Iran.'*

35 His Honour observed however that it soon emerged in argument that the appellant's main contention was that the Tribunal had wrongly prevented her from being represented before it by Ms Janette McCahon who was a solicitor employed by Legal Aid WA. In the event, the respondent conceded that Ms McCahon was entitled to appear before the Tribunal. The respondent also accepted that the Tribunal had barred her from participating in the hearing although she had been allowed to remain as an observer. A further ground was developed on the basis that the Tribunal had relied upon a document in which dates had been incorrectly translated when rejecting the appellant's claims. Counsel for the appellant also submitted that a tape-recording of proceedings before the Tribunal disclosed that the Tribunal had said it believed the appellant's conversion to Christianity was legitimate and corroborated.

36 The appellant was granted an adjournment by his Honour with leave to file and serve an affidavit setting out any part and annexing any parts of the transcripts of the hearing before the Tribunal upon which she sought to rely, together with a supplementary submission. Ultimately, the only affidavit filed was by the respondent annexing the transcripts of the hearing of the application before the Tribunal. The appellant was also granted leave to amend her application at the start of the resumed hearing to add a further ground of review namely:

> *'That the interpreter failed adequately or properly to interpret the proceedings before the Refugee Review Tribunal and her request for a female interpreter was not granted, with the result that the applicant did not receive a fair hearing.'*

37 The primary judge characterised the essence of the appellant's case as being 'such a denial of procedural fairness as to amount to jurisdictional error'. At the time his Honour made his decision the Full Court had delivered its judgment in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 193 ALR 449. He therefore

regarded himself as bound by that judgment, the High Court, at that time, not having given judgment in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.

38 In additional submissions made following the judgment of the Full Court in *NAAV*, the appellant contended that the Tribunal's decision could be reviewed on the basis that:

- the Tribunal did not make a bona fide attempt to exercise its powers;
- the decision was not reasonably capable of reference to the power given to the Tribunal; and
- the Tribunal acted in breach of an inviolable limitation upon the powers given to it.

His Honour rejected an objection by the respondent that the grounds of review did not accommodate these contentions. He identified the issues to be decided in the case as follows:

- That by commencing and persisting with the view that the appellant was not entitled to be represented at the hearing the Tribunal showed want of good faith as its conduct indicated a degree of capriciousness and a failure to endeavour in good faith to review the delegate's decision.
- The question of legal representation before the Tribunal was one of law and the correct answer to that question was in the nature of an inviolable limitation upon the power given to the Tribunal member and as such its determination was reviewable notwithstanding s 474.

39 The primary judge considered whether the Tribunal had made a bona fide attempt to exercise its powers. He accepted that the Tribunal had wrongly excluded Ms McCahon from appearing for the appellant at the hearing before the Tribunal. A key factor in its adverse finding about the appellant's credibility was the date discrepancy reflected in the psychiatrist's letter of 11 January 1998 which purported to state that her husband was admitted to hospital on 21 November 1998 and discharged on 7 December 1998. His Honour referred to Ms McCahon's attempted intervention on this point. He adverted to the Tribunal member's statements about the appellant's religion-based claim and the fact that Reverend Treloar had given evidence following an adjournment of the hearing. He referred to the affidavit sworn by the appellant's sister, which did not seem to him to bear on the question of whether the Tribunal acted in good faith. He also referred to correspondence following the hearing between Ms McCahon and the Tribunal in letters dated 16 July 2001, 26 July 2001

and 2 August 2001.

40 The primary judge considered the supplementary submissions which had been filed in Court on behalf of the appellant referring to the Tribunal's delay in handing down its decision, the effect of which was to ensure that the application for judicial review by this Court would be governed by amendments to the Act which came into force on 2 October 2001. Although no specific complaint was raised in the grounds of appeal in relation to that matter, his Honour approached it on the basis that the appellant relied upon it as evidence of bad faith. He then said:

> *'In my view, the evidence upon which the applicant relies does not demonstrate a lack of good faith on the Tribunal's part. In relation to the matter of legal representation, there was an error of law, in my opinion, a serious error of law. But that on its own does not show bad faith.'*

Indeed, the appellant's counsel had characterised the Tribunal as operating under a continuing misunderstanding about the position of the Legal Aid Commission and its representative in the Tribunal. The failure to call the appellant's sister did not amount to any evidence of bad faith. In so concluding his Honour did not ignore the possibility that the sister might possibly have given evidence that the appellant would, if returned to Iran, have been likely to proselytize, thus putting herself at risk of very serious persecution.

41 The fact that a male interpreter was provided did not indicate bad faith. There was simply no evidence as to how and by whom that choice was made or whether a female interpreter was appointed. His Honour also said:

> *'I must say that in the context of the Tribunal's attitude towards Ms McCahon's attempt to represent her client, the Tribunal's delay in publishing its reasons aroused my suspicions. The Tribunal had a letter from a social worker outlining the stress which the delay was causing to the applicant and requesting an indication of when the Tribunal's decision would be given. The Tribunal had responded with an approximate date (21 September 2001). It was widely known at the time that amendments to the Act were proposed which would severely curtail review of the Tribunal's decision and in that context, having made its decision on 24 September 2001, the decision was not notified to the applicant until 19 October 2001.'*

He accepted however that that evidence was equally consistent with administrative oversight within the bureaucracy of the Tribunal. Taking all of the circumstances together he did not think that the appellant had established that the Tribunal did not make a bona fide attempt to exercise its powers. He also rejected the contention that the decision was not reasonably

capable of reference to a power given by the Tribunal.

42 The primary judge noted that the facts upon which the appellant relied in establishing the ground that the Tribunal had breached an inviolable limitation or restraint upon its authority were the same as those in respect of the bad faith allegation other than the alleged delay in handing down the decision. On the state of the authorities as they then stood, he concluded that those matters did not involve questions of inviolable limitations or restraints upon the Tribunal's authority. He said:

> *'That is the case, whether one adopts the narrower view of von Doussa and Beaumont JJ in* NAAV *or the views of Black CJ, Wilcox and French JJ in the same case – see also Heerey J in* VDAA v Minister for Immigration and Multicultural and Indigenous Affairs *[2002] FCA 1071 at [27].'*

43 His Honour's reasons contain no finding on the question whether there had been procedural unfairness. This was entirely understandable in the light of the majority decision in *NAAV* which took the view that procedural unfairness was not available as a ground of review following the enactment of s 474 of the *Migration Act*.

The Grounds of Appeal

44 The grounds of appeal in the Amended Notice of Appeal, amended by order of the Court at the hearing of the appeal, are in the following terms:

> *'2. The learned primary judge erred in failing to construe s474 of the Migration Act to mean that the Tribunal's decision if made in jurisdictional error, including a denial of procedural fairness, was not a "privative clause decision" and was therefore subject to review by the Court under s39B of the Judiciary Act.*
>
> *3. The learned primary judge erred in law and in fact in failing to determine that the Tribunal failed to accord the Appellant natural justice in making its Decision.*
>
> *PARTICULARS*
>
> *a) The Tribunal denied the Appellant legal representation at the hearing before the Tribunal.*
> *b) The Tribunal refused and/or failed to comply with the Appellant's request for a female interpreter.*
> *c) The Tribunal refused and/or failed to allow the Appellant to put her case to the Tribunal at the hearing by terminating her evidence in order to hear from a witness and then terminating the hearing.*

d) The Tribunal did not call and did not permit the Appellant to call witnesses which the Appellant had requested the Tribunal to call, alternatively the Tribunal misled the Appellant into not requesting the Tribunal to call her sister [M] as a witness.

e) The Tribunal did not permit the Appellant or her adviser to clarify the Translation and/or calendar conversion error in the dates.

f) There were errors of interpretation during the Tribunal hearing which meant that the Tribunal was misled or confused as to the Appellant's evidence to the Tribunal and such errors contributed to the Tribunal forming an adverse view of the Appellant's credibility.'

Statutory Framework

45 The grounds upon which decisions of the Tribunal can be reviewed are affected by the operation of s 474 of the *Migration Act.* Section 474(1) provides:

'474(1) A privative clause decision:

(a) is final and conclusive; and
(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.'

Subsection 474(2) defines 'privative clause decision' thus:

*'**privative clause decision** means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).'*

46 Subsection 474(3) sets out a number of matters included in the definition of 'decision'. It is not in dispute that a decision of the Tribunal affirming a decision of a delegate refusing an application for a protection visa is a 'decision' for the purposes of s 474. But, as appears below, if affected by jurisdictional error, it is not a decision made under the Act for the purposes of the definition of privative clause decision in s 474(2).

47 The Tribunal is conditionally obliged to afford an applicant for review the opportunity of a hearing. Section 425 provides:

'425(1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.

(2) Subsection (1) does not apply if:

(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
(c) subsection 424C(1) or (2) applies to the applicant.

(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.'

If the applicant is invited to appear before the Tribunal, the Tribunal must give notice of the date, time and place at which he or she is scheduled to appear (s 425A). It must specify in the notice that the applicant is invited to appear to give evidence and that he or she may give the Tribunal written notice of his or her wish that the Tribunal obtain oral evidence from a person or persons named in the notice (s 426). The applicant may give notice of his or her wish that the Tribunal obtain oral evidence from another person or persons (s 426(2)). However, s 426(3) provides:

'426(3) If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice.'

48 Section 427 of the *Migration Act* which deals with powers of the Tribunal provides, inter alia:

'427(1) For the purpose of the review of a decision, the Tribunal may:

(a) take evidence on oath or affirmation; or
(b) adjourn the review from time to time; or

...

(6) A person appearing before the Tribunal to give evidence is not entitled:

(a) to be represented before the Tribunal by any other person; or
(b) to examine or cross-examine any other person appearing before the Tribunal to give evidence.

(7) If a person appearing before the Tribunal to give evidence is not

proficient in English, the Tribunal may direct that communication with that person during her or her appearance proceed through an interpreter.'

49 The classes of person who may provide representation before the Tribunal are affected by the restrictions on the provision of 'immigration assistance'. 'Immigration assistance' includes the use or purported use of knowledge of, or experience in, migration procedures to assist a visa applicant by representing the visa applicant in proceedings before a court or review authority in relation to the visa application (s 276(1)(d)).

50 'Immigration legal assistance' is defined in s 277. A lawyer gives 'immigration legal assistance' if the lawyer represents the visa applicant in proceedings before a court in relation to the visa application. This does not extend to the provision of advice to a visa applicant for the purpose of proceedings before a review authority in relation to the visa application. The restriction upon providing immigration assistance is imposed by s 280 of the *Migration Act* which provides in the relevant parts:

'280(1) Subject to this section, a person who is not a registered agent must not give immigration assistance.
Penalty: 50 penalty units
…
(3) This section does not prohibit a lawyer from giving immigration legal assistance.
(4) This section does not prohibit an official from giving immigration assistance in the course of his or her duties as an official.
(5) This section does not prohibit an individual from giving immigration assistance if the assistance is:

(a) not given for a fee or other reward; and
(b) not given in his or her capacity as an employee of, or a voluntary worker for, another person or organisation; and
(c) not given in the course of, or in association with, the conduct of a profession or business.'

Subsections (1A), (2), (6) and (7) are not relevant for present purposes. In s 275, which is the interpretation provision for Pt 3 of the *Migration Act* relating to migration agents and immigration assistance, the term 'official' is defined as follows:

*'**official** means:*

(a) a person appointed or engaged under the Public Service Act 1999; or
…
(c) a member of the public service of a State or Territory; or

(d) a member of the staff of a Parliamentarian.'

51 The *Legal Aid Commission Act 1976* (WA) establishes the Legal Aid Commission of Western Australia under s 6. The Commission is established as a body corporate. Amongst its functions are the provision of legal assistance in accordance with the Act (s 12(1)). The office of Director of Legal Aid is a statutory office created by s 18 of the Act. Appointment to the office is by the Governor on the recommendation of the Commission. The Director's conditions of service are such as the Legal Aid Commission determines (s 18(3)(b)). The Commission is empowered, after consultation with the Public Service Board, to classify positions to be held by members of the staff of the Commission and to define the duties to be performed by the holders of those positions (s 20(1)). It is empowered to employ, as members of staff of the Commission, such practitioners and other persons as it considers fit to hold the positions mentioned in subs 20(1) (s 20(2)). The terms and conditions of employment of staff of the Commission are referred to in s 21 of the Act. They are to be such terms and conditions as the Commission, after consultation with the Public Service Board, determines (s 21(1)).

52 As appears from the preceding, the Commission is a statutory authority which employs staff on conditions determined by it but subject to consultation with the Public Service Board. It is to be noted also that for the purposes of the *Superannuation and Family Benefits Act 1938* (WA) and for those purposes only, the Commission is declared to be a 'department' within the meaning of that Act (s 22(1)).

The Issues for Determination

53 Following delivery of his Honour's judgment, the High Court gave judgment in *Plaintiff S157/2002 v Commonwealth*. The effect of that decision was to overrule *NAAV*. The propositions which emerged from the joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ were summarised by the Full Court in *Lobo v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 200 ALR 359 at 371:

> *'1. Parliament cannot give power to any judicial or other body in excess of constitutional power.*
> *2. Parliament cannot impose limits on the authority of a body with the intention that any excess of that authority means invalidity and at the same time deprive the High Court of authority to restrain the invalid action by prohibition.*

3. *If legislation purports to impose limits on authority and contains a privative clause it is a question of interpretation of the whole legislative instrument whether the transgression of the limits (if bona fide and bearing every appearance of an attempt to pursue the power) necessarily spells invalidity.*

4. *The* Hickman *principle is simply a rule of construction allowing for the reconciliation of apparently conflicting statutory provisions.*

5. *The meaning of a privative clause must be ascertained from its terms and if that meaning appears to conflict with the provision pursuant to which some action has been taken or some decision made its effect will depend entirely on the outcome of its reconciliation with that other provision.*

6. *The protection which a privative clause purports to afford will be inapplicable unless the three* Hickman *provisos are satisfied:*

   (i) that there has been a bona fide attempt to exercise the power in question;
   (ii) that the decision relates to the subject matter of the legislation;
   (iii) that the decision is reasonably capable of reference to the power.

7. *Section 474 does not effect an implied repeal of all statutory limitations or restraints upon the exercise of the power or the making of a decision under the Act.*

8. *It may be, by reference to the words of s 474, that some procedural or other requirements laid down by the Act are to be construed as not essential to the validity of the decision. That is a matter which can only be determined by reference to the requirement in issue in a particular case.*

9. *The words "under this Act" in s 474(2) are not apt to refer either to decisions purportedly made under the Act or decisions that might be made under the Act.*

10. *The expression "decision[s] … made under this Act" appearing in s 474 must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act.*

11. *An administrative decision which involves jurisdictional error is "regarded, in law, as no decision at all".*

12. *If there has been jurisdictional error because,* for example, *of a failure to discharge "imperative duties" or to observe "inviolable limitations or restraints", the decision in question cannot properly be described in the terms used in s 474(2) as "a decision … made under this Act" and is, thus not a "privative clause decision" as defined in s 474(2) of the Act.*

13. *Section 474 requires an examination of limitations and restraints found in the Act. There will follow the necessity to determine whether as a result of the reconciliation process the decision of the tribunal does or does not involve jurisdictional error and accordingly whether it is or is not a "privative clause decision" as defined in s 474(2) of the Act.*

14. A decision flawed for reasons of a failure to comply with the principles of natural justice is not a 'privative clause decision" within s 474(2) of the Act.'

54 As appears from these propositions a failure of procedural fairness can constitute jurisdictional error amenable to review under s 75(v) of the Constitution or s 39B of the *Judiciary Act 1903* (Cth). Subject to the provisions of recent amendments to the *Migration Act* want of procedural fairness in the processes of the Tribunal can constitute jurisdictional error – *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82. What constitutes procedural fairness varies according to the relevant statutory framework and, within that framework, according to the circumstances of the particular case – *Aala* at 109. It is necessary, of course, to bear in mind the observation of Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 (at 511):

> *'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.'*

This may be seen as an expression of the way in which the content of procedural fairness varies according to the circumstances of the case. Denial of a remedy in respect of the acts or omissions of a delegate on the basis that there was no practical injustice may amount to little more than a recognition that there was no procedural unfairness in the decision under review. This approach is reflected in the observations of Gaudron and Gummow JJ in *Aala* at 109 where their Honours said:

> *'Cases said to turn upon "trivial" breaches are often better understood on other grounds. In particular, it is trite that, where the obligation to afford procedural fairness exists, its precise or practical content is controlled by any relevant statutory provisions and, within the relevant legislative framework, this will vary according to the circumstances of the particular case.'*

55 The grounds of appeal, in effect, contend that the decision of the Tribunal was vitiated by jurisdictional error arising from a denial of procedural fairness to the appellant. That denial of procedural fairness is said to have arisen from a combination of factors set out in pars (a) to (f) of ground 3 in the Amended Notice of Appeal. It is necessary now to consider these matters to determine whether any one or more of them taken together amounted to a denial of procedural fairness.

Representation before the Tribunal – Appeal Ground 3 Particular (a)

56 At common law a person who has a right to appear before a statutory Tribunal may appear by an agent – *R v Board of Appeal; Ex parte Kay* (1916) 22 CLR 183; *R v Assessment Committee of Saint Mary Abbotts, Kensington* [1891] 1 QB 378; *Jackson and Co v Napper* [1886] 35 Ch D 162; *R v Visiting Justice at Pentridge Prison; Ex parte Walker* [1975] VR 883. The common law right may be removed, qualified or narrowed by statute expressly or by implication – *R v Commissioner of Police (NT); Ex parte Edwards* (1997) 32 FLR 183 at 195 (Muirhead J). It may not apply where there is no formal hearing contemplated or required by the relevant statute – *Finch v Goldstein* (1981) 55 FLR 257 at 273 (Ellicott J).

57 Lord Denning once said, in the context of a case involving a domestic tribunal, that 'once it is seen that a man has the right to appear by an agent, then I see no reason why that agent should not be a lawyer' – *Pett v Greyhound Racing Association Ltd (No 1)* [1969] 1 QB 125 at 132. But that was an interlocutory judgment of the Court of Appeal finding a prima facie case for a right to legal representation. It was not followed in the judgment on final relief given by Lyell J – *Pett v Greyhound Racing Association Ltd (No 2)* [1970] 1 QB 46. Subsequent authority in England accepted that legal representation before tribunals was not always essential – *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591; *Fraser v Mudge* [1975] 1 WLR 1132; *R v Secretary of State for the Home Department; Ex parte Tarrant* [1985] QB 251.

58 The common law agency principle is conceptually distinct from the idea of procedural fairness which, according to the circumstances of the case, may require that a person be afforded an opportunity for representation by a lawyer or some other competent agent. The distinction was helpfully drawn in a frequently cited article in Public Law in 1972:

> *'In the area of tribunals the agency principle means that as long as a party himself has a right to appear, he can always exercise this through a representative even though neither statute nor any other procedural rules confer such a privilege upon him. Thus the agency principle had a wider scope than that of natural justice, which provides no invariable procedural requirements, the contents of a fair hearing depending upon the circumstances of the particular case and providing a minimum standard of fairness rather than "the best possible justice".* [Local Government Board v Arlidge *[1915] AC 120] Even the right to be heard is a presumption.'*
> J Alder, *Representation before Tribunals* [1972] Public Law 278 at 281.

59 The variable content of procedural justice in this context was pointed out by Drummond J in *Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 35 ALD 557 at 570 where his Honour referred to various cases on the circumstances in which a right to legal representation is an element of natural justice and said (at 570):

> *'The effect of the cases is that in the absence of statutory indication to the contrary, administrative bodies and lay tribunals are in general free to exclude lawyers; but the circumstances of the particular case may be such that a refusal to allow legal representation may constitute a denial of natural justice. This is likely to be so where complex issues are involved or where the person affected by the decision is not capable of presenting his or her own case. In this sense, it may be said that in certain circumstances the "right to legal representation" is an element of natural justice.'*

See also *Xiang Sheng Li v Refugee Review Tribunal* (1994) 36 ALD 273 at 283 (Moore J) and *Guo Wei Rong v Minister for Immigration and Ethnic Affairs* (1995) 38 ALD 38 at 61 (Sackville J). In the House of Lords in *R v Maze Visitors; Ex parte Hone* [1988] 1 AC 379, Lord Goff said, in relation to representation before prison visitors (at 392):

> *'Everything must depend on the circumstances of the particular case, as is amply demonstrated by the circumstances so carefully listed by Webster J in* [Reg v Secretary of State of the Home Department; Ex parte Tarrant] *as matters which boards of visitors must take into account.'*

60 The provisions of the *Migration Act* restricting who can give 'immigration assistance' contemplate that an applicant may be represented before review authorities set up under the Act (s 276(1)(b)). There is no provision which generally excludes legal or other representation at hearings conducted by the Tribunal. With some exceptions the persons who may provide such representation are limited by s 280 to 'registered agents'. That limitation does not apply to an 'official' as defined in s 275. Counsel for the Minister in this case did not dispute the proposition that a legal practitioner who is an employee of the Legal Aid Commission of Western Australia is an 'official' for the purposes of s 280. The correctness of that proposition depends upon the width of the term 'member of the public service of a State or Territory' which appears in the definition of 'official'. The words 'public service of a State or Territory' are not themselves defined in the *Migration Act*. They must therefore be construed according to their ordinary meaning having regard to context and the purpose of the provision in which they are found. The section in which those words are found and the use of the term they define is related to the provision of assistance by way of advice, preparation and representation in matters arising under the *Migration Act*. Employees of the

Legal Aid Commission are employees of an authority set up by a statute to carry out public purposes, to discharge a public function relating to the provision of legal assistance to persons in need of it who cannot afford private legal representation.

61 The Commission is not subject to ministerial direction. The *Legal Aid Commission Act 1976* (WA) is silent on the question whether the Commission is an instrumentality of the Crown. In this respect it resembles the equivalent statutes in the Northern Territory, the Australian Capital Territory and Tasmania. It is to be contrasted with the equivalent statutes in New South Wales, Victoria, Queensland and South Australia. The *Legal Aid Commission Act 1979* (NSW) provides that the Commission in that State is 'a statutory body representing the Crown' (s 6(3)). The *Legal Aid Act 1978* (Vic) (s 5), the *Legal Aid Queensland Act 1997* (s 42(2)) and the *Legal Service Commission Act 1997* (SA) (s 6) all provide that the respective legal aid bodies in those States do not represent the Crown. Although publicly funded the Commission is necessarily independent of executive government and indeed its staff may find themselves pitted against the State where they represent accused persons in criminal cases or other litigants in proceedings to which the State is a party. Section 32 of the Act expressly authorises the provision of legal assistance to persons whose interests may be adverse to those of the State or the Commonwealth. It seems unlikely, on established principle, that the Commission is an emanation of the Crown in right of the State of Western Australia. The most important indicator of that characteristic, subjection to control or direction by the Crown, is missing from the *Legal Aid Commission Act – Bank Voor Handel on Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584 at 616 (Lord Reid); *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330 at 347 and 348 (Stephen J); *Townsville Hospital Board v Townsville City Council* (1982) 149 CLR 282 at 288-289 (Gibbs CJ) and see generally Hogg and Monahan, *Liability of the Crown,* 3rd Edition Carswell 2000 at 331-340. Undoubtedly however, the Commission provides a public service. The New Shorter Oxford English Dictionary defines 'service', inter alia, as 'a branch of public employment esp a Crown department or organization employing officials working for the State'. Examples given include 'Civil service'. Under the word 'public' the same dictionary specifies the combination 'public service' as including, especially in Australia and New Zealand *the* 'Civil Service'. The Macquarie Dictionary defines the collocation 'public service' as 'the structure of departments and personnel responsible for the administration of government policy *and* legislation'. (emphasis added). Assuming, as seems likely, that the Commission could not properly be regarded as a Crown

instrumentality, it is nevertheless an element of the 'public service of the State', according to the ordinary meaning of those words as used in Australia. On this basis an employee of the Legal Aid Commission is not to be prevented by s 280 from representing a party in the Tribunal. In particular, Ms McCahon was not prevented by s 280 from representing the appellant in the proceedings which are the subject of this appeal. The Tribunal member erred in ruling that she was. It may be noted however that no argument was offered to the Tribunal at the hearing that the restrictions in the Act did not apply to Ms McCahon.

62 That Ms McCahon was not barred by the Act from appearing in the Tribunal does not resolve the question whether the Tribunal's refusal to hear her trespassed upon any entitlement on the part of the appellant to representation. Where a statute restricts rights of representation by limiting the persons who may appear, it may nevertheless be the case that the common law agency principle referred to earlier operates within those restrictions. This will depend first upon whether there is located within the statutory framework a right on the part of an applicant for review to be heard by the Tribunal orally or otherwise. There is such a right. It is conferred by s 425(1) subject to the exceptions in s 425(2). There being a right to appear, the common law rule would, absent any contrary provision, allow an applicant to be represented by another. The second consideration is whether the rule is negated. It is negated in relation to Tribunal hearings by s 427(6).

63 There has been a number of cases in which s 427(6) has been considered. In *Xiang Sheng Li* at 283, Moore J thought it 'reasonably clear' that the subsection, then s 166DD(6)(a), applied to 'an applicant when appearing to give evidence'. Sackville J in *Guo Wei Rong* (at 64) thought it 'arguable' that it so applied although he was prepared to assume for the purposes of that case that it did not apply to an applicant 'in his or her capacity as such'. In *Nguyen Do Vinh v Minister for Immigration and Ethnic Affairs* (1997) 46 ALD 528 at 535, Goldberg J accepted that the role of a legal representative of an applicant before the Tribunal would be quite limited because of the operation of s 427(6). McHugh J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim* (2000) 175 ALR 209 at 212 rejected a claim by the applicant that he had been denied natural justice because s 427(6) prevented him from being properly and adequately advised and represented before the Tribunal. His Honour said at [11]:

> *'That subsection declares that a person appearing before the tribunal is not entitled to be represented or to examine or cross-examine witnesses. The*

common law rules of natural justice cannot prevail against this legislative declaration.'

64 The Full Court in *Algama v Minister for Immigration and Multicultural Affairs* (2001) 115 FCR 253, rejected the proposition that an applicant's right to appear before the Refugee Review Tribunal pursuant to an invitation given under s 425(1) of the Act carried with it equivalents of the procedural rights which a party acquires as an incident of its right to appear before a court. In their joint judgment, Whitlam and Katz JJ, with whom French J agreed, said (at [64]):

'First, an applicant's right to appear before the RRT expressly does not carry with it the rights: to require the RRT to obtain evidence from other persons (s 426(3) of the Act); to be represented before the RRT by some other person (s 427(6)(a) of the Act); to examine or cross-examine any other person appearing before the RRT to give oral evidence in the applicant's review (s 427(6)(b) of the Act); or even to give one's own oral evidence in the presence of the member constituting the RRT (s 428(5) of the Act). Secondly, s 423(1) of the Act entitles an applicant to put before the RRT both sworn or affirmed written evidentiary material in relation to any matter of fact that the applicant wishes the RRT to consider and written arguments relating to the issues arising in relation to the decision under review.'

65 In *Gowfkir v Minister for Immigration and Multicultural Affairs* [2001] FCA 988 at [19], von Doussa J stated, without elaboration, that the effect of s 427(6) is that, before the Tribunal an applicant for review who is invited to attend to present evidence has no right to be represented. Tamberlin J appears to have adopted the same view in *Gurung v Minister for Immigration, Multicultural and Indigenous Affairs* [2002] FCA 772 at [18].

66 In *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 872, Kenny J referred to s 427(6) in a case in which apparent bias was made out on the basis of the tribunal's conduct at the hearing. Her Honour acknowledged the inquisitorial nature of proceedings before the Tribunal and its control of the fact finding process, the examination of witnesses and the identification of the issues. She said at [78]:

'A person appearing to give evidence is not entitled to be represented or to examine or cross-examine any witness: see s 427(6). The Tribunal may, and commonly does, invite an adviser to make oral submissions towards the end of a hearing, or in writing after the hearing. Whilst an applicant may request the Tribunal to obtain oral evidence from a nominated witness, and the Tribunal must have regard to the request, the Tribunal is not required to comply with it: see s 426(3). The Tribunal has a wide discretion as to how it

conducts a hearing.'

Her Honour went on at [79] to describe the purpose of the hearing before the Tribunal as affording:

1. an opportunity to the applicant to give evidence and to put argument in support of his or her claim;
2. an opportunity to the Tribunal to investigate the claim further.

67 The effect of the cases referred to is that s 427(6)(a) applies to applicants for review who appear before the Tribunal to give evidence. An applicant so appearing is 'not entitled ... to be represented before the Tribunal by any other person'. But that is a statement about entitlements. It does not exclude the rules of procedural fairness insofar as they may require representation in the circumstances of a particular case. By way of analogy it has been held that, at certain decision-making levels in the exercise of power under the *Migration Act*, there is no general requirement for an oral hearing but that the circumstances of a particular case might require such a hearing if procedural fairness is to be observed – *Zhang de Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384; and on appeal (1994) 121 ALR 83. To displace the common law agency rule is not to displace procedural fairness, although it could no doubt place a considerable obstacle in the way of any suggestion that procedural fairness requires in every case that an applicant be represented by a lawyer or other agent. That proposition is not before the Court in this case so it is unnecessary to decide it.

68 The requirements of procedural fairness do not confer entitlements upon those affected by the exercise of statutory power. Rather they operate as necessary conditions upon the validity of its exercise. A person affected by a decision vitiated by procedural unfairness has a right to a remedy by way of prerogative or declaratory relief or, where applicable, other statutory remedies such as those provided under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). To say, as McHugh J said in *Cassim*, that the common law rules of natural justice cannot prevail against the legislative direction in s 427(6), is to say that those rules cannot impose a universal requirement for representation before the Tribunal in oral hearings. Indeed it may be the case that s 427(6) really has nothing to say about procedural fairness.

69 The Tribunal clearly has a discretion to allow a person to be represented before it. The

question that arises is whether there may be circumstances in which a decision to disallow representation of an applicant before the Tribunal amounts to a denial of procedural fairness. Considerations relevant to that question include:

1. The applicant's capacity to understand the nature of the proceedings and the issues for determination.
2. The applicant's ability to understand and communicate effectively in the language used by the Tribunal.
3. The legal and factual complexity of the case.
4. The importance of the decision to the applicant's liberty or welfare.

See eg, *Krstic v Australian Telecommunications Commission* (1988) 20 FCR 486 at 490-491 (Woodward J). In weighing up the preceding factors it is important to bear in mind that the Tribunal hearing is generally the first and last opportunity that an applicant has for merits review of the original decision refusing a protection visa. Although an unrepresented non-English speaking applicant in judicial review proceedings is at a crippling disadvantage, the lack of representation at the earlier stage of merits review is probably of greater significance in terms of its effect upon the eventual outcome.

70 It may be that the practice of the Tribunal, or specific representations made to an applicant, give rise to a legitimate expectation that the applicant will be permitted to have a representative present at the hearing, albeit within the framework of the restrictions relating to 'immigration assistance' under the Act. This does not amount to a substantive right to representation but rather informs the content of procedural fairness if representation is to be denied without notice and an opportunity to be heard on that question.

71 It is necessary to have regard to the four factors listed above in considering whether procedural fairness requires that an applicant for review be permitted to have a representative before the Tribunal. In most cases before the Tribunal, the relevant factors will favour the view that representation should be permitted as an aspect of procedural fairness. Non-English speaking applicants may have some capacity to understand the nature of the proceedings and the issues for determination. But the use of an interpreter, even a very good one, does not completely overcome deficiencies in understanding. This is particularly so in relation to oral submissions to be made across a cultural and linguistic divide. There are some issues or legal concepts to be addressed by the Tribunal which may have no equivalent

in the language or cultural background of an applicant. The legal questions arising under the Refugees Convention and the *Migration Act* have generated much debate internationally and in the courts of this country. The notion of a 'well founded fear of persecution' and the various Convention grounds connected with that fear, raise issues of construction and application to the facts which are not likely adequately to be addressed by an applicant in person. Finally, for most persons applying for a protection visa, the outcome is of importance and may affect life, liberty and future welfare in a variety of ways.

72 The factors referred to in the preceding paragraphs are common to many applicants who appear before the Tribunal. The appellant in this case had some capacity for understanding the English language but not the ability to communicate effectively in it. In her case, however, there was the special feature that, through a combination of Tribunal communications and advice from her solicitor, she expected to be represented and assisted on the day by a qualified legal practitioner. That did not occur because of a mistake by the Tribunal, not corrected by the practitioner. The position adopted by the Tribunal appeared to be that the practitioner was prohibited by the Act from providing 'immigration assistance' to the appellant and that the Tribunal was bound by the Act to restrict Ms McCahon's participation in the Tribunal hearing to that of an observer who could make no comment and provide no advice. That this had a real and practical effect upon the appellant is clear. It is not disputed that when she was told, at the hearing, that the solicitor would not be able to speak on her behalf she became upset, shaken and tearful. No adjournment was offered to enable other arrangements to be made. It may be said that the Tribunal was not directed to a correct view of the law by the practitioner but in fairness it must be said that Ms McCahon had no reason to expect that her entitlement to represent the appellant before the Tribunal would be denied. The result was that the appellant was subjected to a process which took her by surprise with no opportunity to challenge it. The refusal of the Tribunal to hear the appellant's representative imposed a disadvantage upon the appellant and constituted a significant derogation from the degree of procedural fairness required to be accorded to the appellant in the conduct of the review. It is unnecessary to speculate on the possible outcome of the review if the Tribunal had not made such a mistake. The failure of the Tribunal constituted jurisdictional error vitiating the Tribunal's decision. The appeal therefore must be allowed.

73 It should be emphasised that the preceding conclusion involves no reflection upon the

case in which a person is unable to afford or secure legal representation. That raises the difficult question whether, for unrepresented non-English speaking applicants unable to secure representation, the processes of the Tribunal would be inherently unfair. It raises also the related question whether the content of procedural fairness is limited by the statutory context and the functions and powers conferred on the Tribunal so that procedural fairness can never be said to arise by reason of want of representation where representation cannot be obtained. In so saying, it must be observed that representation is generally available to persons appearing before the Tribunal from migration agents provided under contract with the Department of Immigration and Multicultural and Indigenous Affairs.

Failure to Provide a Female Interpreter – Appeal Ground 3 Particular (b)

74 The appellant requested a female interpreter before the Tribunal. The Tribunal lodged an Interpreter Booking Request on 7 June 2001 and asked for a female interpreter accordingly. It received notification that a person named 'Val Akbar' would be provided. The name 'Val' could have referred to a woman. In fact it referred to a man. Counsel for the appellant came close to conceding, at the hearing of the appeal, that the failure to meet her request did not of itself give rise to any ground of review. Rather he suggested it was relevant to whether there had been a failure to accord procedural fairness in all the circumstances. The Tribunal did all it reasonably could to accede to the appellant's request. There is no evidence to support an inference that the use of the male interpreter gave rise to substantive prejudice in this case arising from his gender. There is no element of procedural unfairness arising from the use of the male interpreter.

Failure to allow Appellant to put her Case - Appeal Ground 3 Particular (c)

75 Towards the end of the Tribunal hearing the appellant told the Tribunal of the person associated with the Revolutionary Guard who wanted to have a relationship with her. He told her that if he had the power to execute her husband, he had the power to do whatever he wanted. She was asked by the Tribunal member whether she made any complaint about his behaviour. She said:

> *'No, the way they treat us, they made it that we keep quiet and never complain because only for a simple letter that my husband wrote, he went through very severe treatment. He had to suffer very severe treatment so no, we did not complain, lodge a complaint. Indeed, the letter, the simple letter that my husband wrote in regard to the injustice that I suffered turned my life upside down. And then we learned our lesson that we had to keep quiet, that we had*

to be silent and don't complaint.' (sic)

At this point the Tribunal member proposed to adjourn for ten minutes, principally to give the interpreter a break. It was then that the exchange occurred which has already been referred to in which the Tribunal member questioned the advantage of hearing from the Reverend Treloar.

76 Counsel for the appellant submitted that upon the resumption of the hearing the appellant was given no opportunity to complete her evidence, to make submissions or to call further witnesses. This was in the context of her being denied legal representation, allegedly intimidated by the Tribunal, being confused and not feeling able to seek an adjournment.

77 There is no evidence referred to in the submissions or apparent from the record that in fact the appellant had been prevented, by the adjournment, from giving further evidence to the Tribunal. And while she asserted, in her affidavit, that she felt as though the Tribunal member was bullying her during his questions of her in the hearing and that he and the interpreter were against her, there was no evidence to support that as an objective reality. It may be that the inquisitorial style of the Tribunal proceedings conveyed the impression that the member was challenging the appellant. But within reasonable limits the adoption of an inquisitorial approach does not constitute intimidatory conduct. This particular provides no separate basis for inferring procedural unfairness. But insofar as it exposes the undisputed subjective reactions of the appellant to the process in which she was engaged, it supports the finding that the unexpected denial of legal representation to her had an adverse effect upon her capacity to participate effectively in the Tribunal hearing process.

Refusing to Permit the Appellant to Call Witnesses - Appeal Ground 3 Particular (d)

78 In her Response to the Hearing Invitation the appellant gave notice that she wanted her sister to present evidence on her behalf at the hearing. The Tribunal member said at the hearing that he accepted that she attended Church each Sunday and Bible Study class for two hours weekly. On that basis he considered that he would probably not be assisted by hearing 'from hearing from any of the people outside'. This was a reference to the Reverend Treloar and to the appellant's sister. Nevertheless, he said to the appellant that the issue of their testimony was a matter she could 'discuss during the break and let the attendant know'. The appellant did not request after the adjournment that the sister be called.

79 Counsel for the appellant acknowledged that by operation of s 426(3), the Tribunal is not obliged to call a witness requested by a party. However, it is required to have regard to the applicant's wishes. Counsel observed, correctly, that the Tribunal might have allowed the appellant to call her sister had she insisted. It did allow her to call the Reverend Treloar, despite an earlier indication from the Tribunal that it did not think his evidence would assist.

80 It was submitted that the Tribunal's remarks at the hearing about its acceptance of the appellant's religious practices conveyed the implication that it accepted the genuineness of her conversion. However in its reasons, the Tribunal expressed serious reservations about that conversion and whether it was a ploy to provide a basis for a claim for a protection visa. Counsel submitted that the sister's evidence would have been relevant as to whether the appellant was genuine in her Christian commitment given her knowledge of, and close relationship to the appellant and the fact that they had both converted at the same time. Moreover, the appellant's sister might have given relevant evidence of the appellant's intention to proselytize.

81 The fact is however that the appellant told the Tribunal at the hearing, and before the adjournment, 'I just want you to talk to the Minister'. She was given the opportunity to consider her position during the adjournment. There is nothing to suggest that any request that her sister be called was made in the course of or after the adjournment. The statement by the Tribunal at the hearing that it accepted the external aspects of her Christian practice was repeated as a finding in the Tribunal's reasons and there was no indication of what further evidence the sister could have given at the hearing that could have further advanced the appellant's case in that regard. This particular does not provide any basis for judicial review on the ground of lack of procedural unfairness.

Clarification of Calendar Conversion – Appeal Ground 3 Particular (e)

82 Particular 3(e) is, in truth, an aspect of particular 3(a) discussed above, in that it sets out a consequence of the failure to accord the appellant procedural fairness by denying Ms McCahon the right to address the Tribunal on behalf of the appellant. It was contended on behalf of the appellant that, as translated, the psychiatric report of January 1998, referred to earlier, misstated the dates of the hospitalisation of the appellant's husband as November and December 1998 when in fact it occurred between November and December 1997. This error was said to have been crucial in the Tribunal's rejection of the appellant's evidence about her

husband's imprisonment, which rejection affected her remaining claims of events that had occurred in Iran. Ms McCahon had attempted to raise this issue with the Tribunal, but, it was said, her attempt was ignored. In its reasons the Tribunal had said that the purpose of the report dated 11 January 1998 was 'puzzling' but it did not seek to clarify that doubt or confusion with the appellant in the course of the hearing or otherwise.

83 Counsel for the respondent argued that Ms McCahon had been able to address the issue at the hearing and, therefore, it could not be said that her submission was ignored. The written submission from Legal Aid WA dated 18 June 2001 had addressed the question. There was nothing to prevent Ms McCahon from making additional submissions on the issue after the hearing if it were felt appropriate to do so. The Tribunal had regard to the substance of those submissions in saying, as it did, that it accepted 'that transposing dates from the Persian to the Christian calendar can pose some problems...'.

84 Notwithstanding the respondent's submissions it is plain that in regard to the issue of mistranslated dates potential unfairness flowed from the Tribunal's erroneous refusal to allow Ms McCahon to speak on behalf of the appellant. The original submission from Legal Aid WA was not particularly clear. An elaboration in some form of dialogue with the Tribunal might well have enabled it to be clarified to the Tribunal's satisfaction at the time of the hearing.

Errors of Interpretation – Appeal Ground 3 Particular (f)

85 Relying upon an affidavit sworn by the appellant's sister, counsel for the appellant identified seven errors of interpretation. His Honour made no finding with respect to these matters, no doubt because of the constraints imposed by the majority judgments in *NAAV*. They may be referred to in summary with observations on each.

1. Mistranslation, in one part of the appellant's testimony, of the frequency of the periodic reporting requirement imposed upon her and her husband by the Chief of the Revolutionary Guard. The misstatement suggested it was a three month period instead of the one month period stated by the appellant. This created a false impression of inconsistency with later testimony which was correctly interpreted. However this elicited no comment from the Tribunal during the hearing and was not the subject of comment in its reasons for decision.
2. Omission by the interpreter of a statement by the appellant that she went to England

one and a half years after her husband's imprisonment. The rejection by the Tribunal of the appellant's application for review depended significantly upon conflict between the sequence of events outlined by her and those set out in the documentation. The inclusion of the omitted statement, it was suggested, might have affected the Tribunal's view of the inconsistencies which it found. As the respondent's counsel pointed out however, the date discrepancies referred to by the Tribunal related to other aspects of the appellant's evidence and not that which was the subject of the interpreter's omission.

3. Omission by the interpreter of a statement that the appellant was able to get a passport because her 'problem was mainly social and family'. The omission, it was said, made her evidence seem less intelligible and therefore less credible. However in the very next passage at the relevant part of the transcript, the Tribunal member put to the appellant the effect of her evidence in such a way as to indicate that he understood it correctly.

4. Omission by the interpreter of the words 'by the Revolutionary Guard (the Sepah) in charge who could easily set me up' after the appellant's reference to the penalty of 'stoning to death'. This omission was said again to reduce the intelligibility of the evidence and therefore its credibility. However it did not appear to affect any finding made by the Tribunal.

5. Omission of the words 'every time I made an excuse and get away from him' used by the appellant whenever speaking of the Revolutionary Guard officer who sought to importune her sexually. The inclusion of these words would have indicated that she had no relationship with the man. They would have indicated that she had no relationship with the man. The Tribunal, it was said, seemed to have assumed that she was pressured into giving sexual favours. However a perusal of the Tribunal's reasons make clear, no such assumption is detectable. Rather there is a wholesale rejection of the appellant's claims.

6. Omission of the appellant's assertion that as a Christian she would have to spread all she had learned to others. The Tribunal considered that the appellant would not proselytize if returned to Iran. But as counsel for the respondent pointed out, the same answer, in substance, was given in the evidence as interpreted.

7. Omission of an explanation of the title and claimed status of the Revolutionary Guardsman who sought the appellant's sexual favours. The omission, however, does not appear to have been material. The Tribunal referred to the person who

importuned the appellant as having, on her case, 'a key position in the Revolutionary Guard'.

86 While any non-trivial error in interpretation in proceedings before the Tribunal is a matter of concern it does not necessarily give rise to procedural unfairness. In this case the errors were incidental to the reasons for decision and neither individually nor collectively amounted to procedural unfairness.

Conclusion

87 For the preceding reasons, the following orders should be made:

1. The appeal is allowed.
2. The decision of the learned primary judge dismissing the application with costs is set aside.
3. An order in the nature of certiorari is made whereby the decision of the Refugee Review Tribunal is set aside and the matter is remitted to the Refugee Review Tribunal for determination according to law.
4. The respondent is to pay the appellant's costs of the appeal and of the proceedings before the learned primary judge.

I certify that the preceding eighty-seven (87) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices French and Lee.

Associate:

Dated: 18 February 2004

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **W318 OF 2002**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**WABZ** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**FRENCH, LEE AND HILL JJ**
DATE:	**18 FEBRUARY 2004**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

HILL J:

88 I have had the opportunity to read in draft the judgment of French and Lee JJ. That judgment sets out the relevant facts, summarises what happened in the Refugee Review Tribunal, discusses the reasons for decision of the learned Primary Judge, sets out the grounds of appeal and discusses the conclusions their Honours have reached in respect of all of them. I am grateful to their Honours for so doing and I adopt what their Honours have said on all matters, other than with respect to the conclusions which their Honours have reached with respect to the matter dealt with in Paragraph 3(c) of the appellant's amended Notice of Appeal. Accordingly I shall deal only with that matter in these reasons.

89 The substantial issue in the present appeal is whether the refusal of the Tribunal to permit a legal aid officer to make submissions on behalf of the applicant constituted a denial of procedural fairness. For the reasons given by French and Lee JJ, such an officer is not prohibited from giving "immigration assistance", that expression being defined in the Act to include "representing the visa applicant in proceedings before "a review authority". The Tribunal is such an authority. I did not understand counsel for the Respondent Minister to

submit to the contrary. Indeed, it was common ground that the Tribunal erred in law in holding that there was a distinction between a legal aid officer, not being a migration agent, and a migration agent who was permitted to give "immigration assistance" as that expression is defined in the Act. If the refusal of the Tribunal to permit the officer to make a submission was a denial of procedural fairness, then it is common ground between the parties that the Court, on appeal, could set aside the Tribunal's decision, that decision not being a "privative clause decision" as defined in s 474(2) of the Act: *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476; *Re Minister for Immigration & Multicultural & Indigenous Affairs & Anor; Ex parte Applicants S124/2002* (2003) 195 ALR 1; *SBBG v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 121.

90 It is clear from s 425(1) of the Act, that an applicant who applies to the Tribunal for review of a decision of the Respondent Minister for Immigration & Multicultural & Indigenous Affairs is entitled, subject to s 425(2) of the *Migration Act 1958* (Cth) ("the Act") to appear before the Tribunal for two purposes. The first is for the purposes of giving evidence relating to the issues arising in the review. The second is for the purpose of presenting arguments relating to those issues.

91 Whether natural justice (that expression being, for present purposes, interchangeable with procedural fairness) applies to proceedings before an administrative Tribunal, as well as the content of the rules of natural justice applicable, depends upon the Statute under which the proceedings of the Tribunal are regulated and the circumstances of the particular case: *Kioa v West* (1985) 159 CLR 550. It is beyond doubt that at the time the review in the present case was held there was nothing in the Act which negated natural justice in relation to proceedings before the Tribunal. It would be open to Parliament to legislate to exclude natural justice generally in proceedings before the Tribunal or in respect of certain aspects of such proceedings. Indeed, Parliament has done so, at least in part, in amendments passed in 2003 (see s 422B of the *Migration Act 1958*, inserted by the *Migration Legislation Amendment (Procedural Fairness) Act 2002*, which commenced on 4 July 2002). However, those amendments have no application to the present case.

92 So far as the content of natural justice is concerned, three sections of the Act are relevant. The first is s 420 of the Act concerned with the "Tribunal's way of operating". Implicitly, at least, it can be said that this section obliges the Tribunal to conduct a fair review and act

"according to substantial justice and the merits of the case." The second is s276 which defines "immigration assistance". The inclusion in the definition of the words "representing the visa applicant … in proceedings before a … review authority in relating to the visa application" clearly imply that there will be circumstances where a migration agent, or as here, a legal aid officer may represent an applicant before the Tribunal. The implication is made even clearer by the correlative provisions of ss 280 and 281 which make it clear that a solicitor is not entitled to represent a client before the Tribunal. The third is s 427(6) which makes it clear that a person "appearing before the Tribunal to give evidence is not entitled… to be represented before the Tribunal by any other person."

93 There is a distinction to be drawn between entitlement to legal representation on the one hand and the question whether a Tribunal has denied natural justice by refusing legal representation on the other, although the two are not unrelated. If there is an entitlement at law to legal representation then that entitlement may be enforced and the outcome set aside until it is given. Alternatively denial of that entitlement would be a clear breach of natural justice. However, even if there is no entitlement to legal representation there may still be a denial of natural justice in a particular case if legal representation is denied. On the other hand specific statutory provisions which negate the entitlement to legal representation may inform the content of natural justice and make it unlikely that the denial of natural justice will be made out be denying legal representation. I shall return to that matter later.

94 At common law there was, until 1836, no entitlement even in criminal prosecutions for a felony, that a person be legally represented before a Court, although as the judgment of Mason CJ and McHugh J in *Dietrich v The Queen* (1992) 177 CLR 292 at 301 observes, this rule, which dated back to a time beyond legal memory had been relaxed before being abolished by the passing of *The Trials for Felony Act* 1836 (Imp) 6 & 7 Wm IV c 114. The statutory right, now enshrined in the laws of each of the States that every accused person shall be entitled to make full answer and defence by counsel (see, for example, s 397 of the *Crimes Act* 1958 (Vic), discussed in *Dietrich*) has led to the rule that every accused person has a right to a fair trial and that, depending upon all the circumstances, including factual matters and the background of the accused, lack of representation may mean that the person has not had a fair trial with the consequence that the verdict may be set aside.

95 The later case of *Canellis v Slattery* [1994] 33 NSWLR 104 proceeded on the basis that

there was no legal right either in a person who has been a witness in a criminal trial appearing before an enquiry established under the then s 475 of the NSW *Crimes Act* 1900 to receive funding for legal representation. However, the NSW Court of Appeal held that the person holding the inquiry was obliged to observe common law rules of procedural fairness and that in certain circumstances the inquiry would be stayed if it affected the interests of the witness who, being impecunious, was unable to obtain legal representation. In such an enquiry, as Kirby P said, the entitlement to be present and to examine witnesses must be real not nominal (see at 124).

96 It is implicit from the fact that the common law, before the intervention of statute did not provide for an entitlement in an accused to legal representation even in the case of a charge of felony, that there is no absolute common law entitlement, as such, to legal representation in civil cases.

97 As French and Lee JJ point out there is another rule, distinct from that relating to entitlement to legal representation, that a person is, unless prohibited by statute, entitled to appoint an agent to act on his or her behalf and that appointment includes the right to make submissions to an administrative Tribunal through that agency. *R v Board of Appeal; ex parte Kay* (1916) 22 CLR 183. In that case the applicant was granted an order for mandamus directed at a Board of Appeal constituted under the *Commonwealth Public Service Act 1902-1915* that he be permitted to appear by counsel before it and to make submissions. The Full Court of the High Court expressed considerable doubt as to the existence of an absolute right to be represented by counsel under the section in question. However, the appeal was concluded in favour of the applicant on the basis that at common law a person was entitled to appear in the Tribunal before an agent (who could be a lawyer). Strangely in Australia *Kay* has received little attention. It was followed in *R v Commissioner of Police (NT); ex parte Edwards* (1977) 32 FLR 183 and distinguished in *Krstic v Australian Telecommunications* Commission (1988) 20 FCR 486 discussed below. Although it has been considered in a number of cases, namely *Haritou v Skourdoumbis* [2002] FCA 116; *Chamber of Commerce & Industry of Western Australia (inc) v Commissioner of Equal Opportunity* [2001] WASC 306; *Stampalia v Racing Penalties Appeal Tribunal of Western Australia* [2000] WASCA 24; *Commonwealth v Frost* (1982) 41 ALR 626; and distinguished in *Finch v Goldstein* (1981) 36 ALR 287 and *R v City of Melbourne; Ex parte Whyte* (1977) 17 ALR 445; it has not otherwise been followed. Implicitly the case turned upon the language of the Commonwealth

Public Service Act which differs from the language used in the preset context.

98 Mandamus was also granted compelling a rating assessment committee to hear submissions relating to a rating objection from an agent who was a surveyor in *The Queen v Assessment Committee of Saint Mary Abbotts, Kensington* [1891] 1 QB 378. That case did not involve legal representation although it is difficult to see what difference that would make.

99 However, the interlocutory view of Lord Denning that a person in a domestic Tribunal had a right to be represented by an agent who was a lawyer was not accepted by Lyell J in the final hearing in *Pett v Greyhound Racing Association Ltd* (*no 2*.) [1970] 1 QB 46 in holding that there was no denial of natural justice in the Association refusing to allow the plaintiff to be legally represented. This was, however, on the basis that the affairs of the Association had not reached such a degree of sophistication that legal representation was a feature of the fair dispensation of justice. The Court accepted that there could be circumstances where denial of legal representation could constitute a denial of natural justice.

100 Subsequent authorities have turned rather upon whether there has been a denial of natural justice by refusing to permit legal representation in the particular circumstances of the case. They make clear that the circumstances to be considered include the nature of the enquiry, its subject matter and its consequences, see *Russell v Duke of Norfolk* [1949] 1 All ER 109 (PC).

101 In *Cains v Jenkins* (1970-80) 28 ALR 219 at 229-230 Sweeney & St John JJ in this Court, with whom Keely J in a separate judgment substantially agreed, found there to be no denial of natural justice in a domestic Tribunal rejecting legal representation in the circumstances of that case. Their Honours emphasised there was no absolute entitlement to be represented, even in a case where the applicant's livelihood was at stake. It was relevant, however, their Honours said, to consider the seriousness of the matter, the complexity of the issues, factual or legal, and the ability of the applicant to "look after himself". Their Honours pointed out that the result could be different where an applicant was refused representation, in a case where the applicant spoke no English or was a deaf mute.

102 *Krstic v Australian Telecommunications Commission* (1988) 20 FCR 486 involved an application for judicial review of a decision of a Review Tribunal considering the termination

of the employment of an officer who was on probation. Woodward J held that while in the exercise of its discretion the Tribunal might permit legal representation the applicant had not been denied procedural fairness when the Tribunal ruled that she was not entitled to be represented. This was because the applicant was capable of conducting her case without representation and was allowed to consult a union official during adjournments. His Honour distinguished *Kay* as turning upon the particular language of the *Public Service Act 1902-1915* with its reference to "appeal" and "evidence" and noted also the "doubt" which members of the High Court had expressed and the fact that no contrary view had been placed before the High Court. The statute providing for the Review Tribunal by contrast with the *Public Service Act 1902-1915*, provided that the Tribunal could inform itself as it thought fit, was not bound by the rules of evidence and was to proceed without regard to legal forms or solemnities.

103 The question whether refusal of representation involved a denial of natural justice has arisen in the migration context in a number of cases. In *Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 35 ALD 557 Drummond J held that there had been no denial of natural justice in the circumstances of that case. His Honour referred to a number of cases, including *Pett v Greyhound Racing Association*, *Cains v Jenkins* and *Krstic v Australian Telecommunications Commission* to which reference is made above and then proceeded to summarise the effect of those cases in a summary which, with respect, I agree. His Honour said at 570:

> *"The effect of the cases is that in the absence of statutory indication to the contrary, administrative bodies and lay tribunals are in general free to exclude lawyers; but the circumstances of the particular case may be such that a refusal to allow legal representation may constitute a denial of natural justice. This is likely to be so where complex issues are involved or where the person affected by the decision is not capable of presenting his or her own case. In this sense, it may be said that in certain circumstances the 'right to legal representation' is an element of natural justice. Similarly, in this limited sense, there is also a 'right to legal representation of one's choice', in that a tribunal cannot deprive a party of their chosen counsel for reasons unconnected with the case before the tribunal: see* R v Magistrate Taylor, ex Parte Ruud *(1965) 50 DLR (2d) 444."*

104 An appeal against that decision was partly successful (see (1994) 35 ALD 225). Nevertheless nothing in the appeal casts doubt on what his Honour there said. Indeed, the passage was accepted as correctly stating the law by Moore J in *Xiang Sheng Li v Refugee*

Review Tribunal (1994) 36 ALD 273, a case involving the question whether the Tribunal should have adjourned its proceedings pending the result of an application for legal aid.

105 As I have already noted, the rules of natural justice derive their content both from the circumstances of the case and the statutory background in which they arise. Absent any statutory provision, in determining whether there would be a denial of procedural fairness in the Refugee Review Tribunal denying to an applicant before it legal representation, it could be said that generally natural justice would require legal representation. This would be because of the importance of the subject matter to the applicant and the fact that most applicants would be likely to be neither skilled in matters of refugee law nor have English as a language in which they are fluent. Decisions on whether a person has a well-founded fear of persecution such that he or she is entitled to remain in Australia or otherwise is liable to be returned to his or her country of nationality where persecution may be on-going will generally involving matters of life and death to the applicant who is genuine.

106 The application to the Tribunal will often involve very complicated matters both of fact and of law. Assistance of an interpreter will often not remove the difficulty of presenting quite technical matters to a Tribunal conducted in the English language. Even highly skilled interpreters will often be unskilled in either or both of the factual evidentiary matters involved and/or the technical legal language in which issues of refugee law are couched. It will rarely be the case in my experience that applicants to the Tribunal are highly educated, although some may be and even people highly educated and skilled in the English language might have problems making, without legal assistance, submissions concerning the issues which may arise before the Tribunal.

107 However, it is also necessary to have regard to such provisions of the Act as may be relevant to the issue of legal representation. In particular it is necessary to consider the interaction of the provisions of the Act dealing with migration agents and provisions of s 427(6) in order to determine what, if any, impact they have upon the context of natural justice in the present circumstances.

108 It must follow from the rule that the content of natural justice must be determined, inter alia, from the statutory context in which the question arises as well as from the undoubted proposition that while Parliament may negate a common law right such as natural justice it

must do so in express words or by necessary implication, that provisions such as s 427(6) should be given no wider meaning that is necessary. Section 427(6) is concerned with "entitlement" to representation in a particular person, that being a person appearing before the Tribunal "to give evidence". It does not expressly purport to preclude the Tribunal from permitting such a person to be represented in its discretion. Nor does it purport to preclude the entitlement of a person entitled to give immigration assistance to "present arguments relating to the issues arising in relation to the decision under review" in accordance with the provisions of s 425(1) of the Act. However, to the extent that it specifically excludes to a person appearing before the Tribunal to give evidence an entitlement to representation it bears upon the content of natural justice to that extent and excludes from it representation: cf per McHugh J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim* (2000) 175 ALR 209 at 212.

109 As I have already pointed out, s 425(1) of the Act makes it clear that an applicant to the Tribunal has two rights. One is to appear and give evidence. The other is to present arguments relating to the issues arising in the review. There is nothing in s 427(6) which bears on this second right. It follows, in my view, that an applicant to the Tribunal will be entitled generally to be represented before the Tribunal for the purpose of presenting argument by a person entitled to give immigration assistance and failure on the part of the Tribunal to permit such representation may, therefore, involve a denial of natural justice. It would not evoke a denial of natural justice where the applicant is both well educated and able to present his or her case in English such that the rules of natural justice would not require representation: see *Krstic v Australian Telecommunications Commission.* But it would be otherwise where, as here, the applicant is neither well educated nor fluent in English. This view is reinforced by the scheme of the provisions dealing with migration agents. The Act contemplates that a migration agent, who should be taken to be skilled in migration law and in which field he or she has been examined in the course of the registration process, is entitled to represent applicants to the Tribunal before it. Generally lawyers (although not legal-aid lawyers in Western Australia), by contrast may not represent applicants before the Tribunal although they may do so in a Court. Presumably Parliament took the view that lawyers would not necessarily be skilled in migration law.

110 When these propositions are combined it follows that an applicant before the Tribunal will ordinarily be entitled to be represented by persons who are entitled to give immigration

assistance (migration agents or legal–aid lawyers in a case such as the present) for the purpose of presenting arguments on issues arising in the course of the review. Refusal to permit such representation will be a denial of natural justice at least where, as in the present case, the issues are serious and the applic ant is not highly educated, speaks little English and would have difficulty dealing with the issues in the review. However, the person is not entitled to that representation during that part of the Tribunal's hearing when he or she is before the Tribunal to give evidence.

111 So, for example, if the applicant is questioned by the Tribunal the applicant is not entitled to have a representative, whether a migration agent or otherwise make objections to the question sought to be put: s 427(6). If the applic ant sought to have a migration agent or legal aid officer do so, the Tribunal could refuse to permit this and I doubt that then there would be a denial of natural justice. That is not this case.

112 The view I take accords with what Moore J said in *Xiang Sheng Li* at 283 when his Honour noted that the then s 166DD(g)(a) applied to an applicant "when appearing to give evidence". Likewise Sackville J in *Gui Wei Rong* (1995) 38 ALD 38 at 64 was prepared to assume for the purposes of the case before his Honour that s 427(6) did not apply to an applicant "in his or her capacity as such" thus implying the distinction which I have sought to draw.

113 I do not think the present is a case where it is necessary to rely upon any concept of "legitimate expectation" assuming that such is now relevant to natural justice having regard to the comments made by McHugh and Callinan JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502. Even if the concept of legitimate expectation is rele vant to the content of natural justice there is nothing to suggest any representation made by the Tribunal to the appellant that the appellant would be permitted legal representation and I doubt that the existence of any practice of the Tribunal to permit representation is sufficiently established by the evidence. At best the evidence indicates that the appellant had been advised by Legal Aid (WA) (not the Tribunal) that she would have a legal representative although she was given a copy of the Refugee Review Tribunal Handbook. This publication notes that migration agents and solicitors who give immigration advice need to be registered as migration agents. It says that "you" (ie the applicant) can present arguments to the Tribunal. Under the heading, "Can I bring someone with me to the

hearing" the booklet says: "If you have an adviser assisting you with your application, they can come to the hearing with you and they will usually be given an opportunity to speak on your behalf." At the end of the publication it is said: "If you bring an adviser to help you at the hearing, they will generally be asked if they wish to say anything after you and any witnesses have given evidence." Nowhere does the publication say that an adviser will always be permitted to make submissions and the reference to registration probably makes it clear that the later reference to "adviser" refers to advisers who are registered.

114 Accordingly I agree that the appeal should be allowed and that the decision of the Tribunal should be set aside and with the orders suggested by French and Lee JJ for the disposal of the appeal.

I certify that the preceding twenty seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Hill.

Associate:

Dated: 18 February 2004

Counsel for the Applicant:	Mr HNH Christie
Solicitor for the Applicant:	Christie Strbac
Counsel for the Respondent:	Mr JD Allanson
Solicitor for the Respondent:	Australian Government Solicitor
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