HIGH COURT OF AUSTRALIA

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

SZFDE & ORS APPELLANTS

AND

MINISTER FOR IMMIGRATION
AND CITIZENSHIP & ANOR RESPONDENTS

SZFDE v Minister for Immigration and Citizenship
[2007] HCA 35
2 August 2007
S118/2007

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia entered on 24 October 2006 and, in their place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

G C Lindsay SC with L J Karp for the appellants (instructed by Legal Aid Commission of New South Wales)

R T Beech-Jones SC with G T Johnson for the first respondent (instructed by DLA Phillips Fox)

Submitting appearance for the second respondent

CATCHWORDS

SZFDE v Minister for Immigration and Citizenship

Immigration – Refugees – The Refugee Review Tribunal ("the Tribunal") affirmed a decision refusing the appellants' application for protection visas – The appellants did not attend the Tribunal hearing as a result of fraudulent advice given by a purported registered migration agent – Whether there was fraud "by" or "on" the Tribunal.

Immigration – Refugee Review Tribunal – Inquisitorial process – Distinction between Tribunal process and *inter partes* litigation – Whether fraud practised by an agent upon the applicants for a protection visa subverted the operation of Div 4 of Pt 7 of the *Migration Act* 1958 (Cth) – Whether this fraud led to the jurisdiction of the Tribunal remaining constructively unexercised.

Administrative law – Constitutional writs – Mandamus and certiorari – Availability of constitutional writs in cases of fraud.

Words and Phrases – "bad faith", "does not appear", "fraud", "on the decision maker", "third party fraud".

Migration Act 1958 (Cth), Pt 7 Div 4, ss 281, 422B, 425, 426A.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ. This is an appeal from a decision of the Full Court of the Federal Court of Australia (Allsop and Graham JJ, French J dissenting)[1]. The Full Court on 3 October 2006 allowed an appeal by the Minister (the first respondent in this Court) against the grant by the Federal Magistrates Court (Scarlett FM)[2] on 20 December 2005 of orders in the nature of certiorari and mandamus in respect of a decision of the Refugee Review Tribunal ("the Tribunal") (the second respondent in this Court). The Tribunal had affirmed the decision of a delegate of the Minister not to grant protection visas to the appellants.

The Issues

2 The appellants in order are a wife and husband and their children (born in 1988 and 1989); they are citizens of Lebanon who arrived in Australia on 27 February 2002. The appellant wife claimed a well-founded fear of persecution by reason of her published views questioning the position of women in the Islamic tradition. Her husband and children relied upon their family membership for their protection visa applications. In its reasons the Tribunal noted that the first appellant, although invited to do so, had not appeared before it and that there were relevant matters the Tribunal would have wished to explore with her.

3 The ground upon which the appellants sought relief in the Federal Magistrates Court was that the decision of the Tribunal was affected by the fraud of Mr Fahmi Hussain. He was said to have represented himself to the appellants to be a solicitor and a migration agent licensed in accordance with Pt 3 (ss 275-332H) of the *Migration Act* 1958 (Cth) ("the Act"). The first appellant paid Mr Hussain a total of $8,400 (and lent him $5,000) for him to act for the family with respect to the Tribunal proceeding. She followed his advice, in particular, not to attend the Tribunal hearing for which s 425 of the Act provides.

4 The application to the Tribunal for review of the decision of the delegate of the Minister was made on 29 September 2002. By resolution of the Council of the Law Society of New South Wales on 5 December 2001 Mr Hussain's practising certificate had been cancelled. A letter of notification of the

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1 *Minister for Immigration and Multicultural Affairs v SZFDE* (2006) 154 FCR 365.

2 [2005] FMCA 1979.

cancellation of his registration under Pt 3 of the Act had been given by the Migration Agents Registration Authority on 18 March 2002. This notification had been accompanied by detailed and adverse findings by the Authority on material questions of fact. At the foot of the letter there had appeared:

> "Your attention is directed to Division 2 of Part 3 of the Act which provides for penalties of up to 10 years imprisonment for the giving of immigration assistance or making immigration representations while not a registered agent."

5 The appellants submit that this Court should uphold the reasoning in the dissenting judgment of French J in the Full Court. His Honour was of the view that the Tribunal had fallen into jurisdictional error because, whilst it had made its decision blamelessly, it had acted pursuant to a process compromised by "third party fraud"[3].

6 The position taken by the Minister in submissions to this Court is that the principle articulated by French J is too wide; there must be fraud "by" or "on" the decision-maker and here any fraud was perpetrated on the appellants but neither "by" nor "on" the Tribunal. In resolving this appeal it is sufficient to accept the Minister's proposition without deciding whether it would be sufficient for the appellants to establish, for example, fraud "on" themselves as parties before the Tribunal.

7 For the reasons that follow there was in this case fraud in the necessary sense which was perpetrated "on" the Tribunal, as well as upon the appellants. The result was that, in law, the jurisdiction of the Tribunal remained unexercised and mandamus and certiorari were appropriately ordered by the Federal Magistrates Court.

"Fraud" in the law

8 It is convenient first to consider the place of "fraud" in the framework of general legal principle. In his celebrated speech in *Reddaway v Banham*[4], Lord

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3 (2006) 154 FCR 365 at 400.

4 [1896] AC 199 at 221.

Macnaghten spoke of the various guises in which fraud appears in the conduct of human affairs, saying "fraud is infinite in variety". A corollary, expressed by Kerr in his "Treatise on the Law of Fraud and Mistake"[5], is that:

> "The fertility of man's invention in devising new schemes of fraud is so great, that the courts have always declined to define it ... reserving to themselves the liberty to deal with it under whatever form it may present itself."

9 Nevertheless, much judicial effort has been expended in exploring different shades of meaning, and sometimes deeper distinctions, in the constituents of "fraud" in various areas of the law. Recent decisions in this Court respecting "fraud" concern criminal law[6], the tort of deceit[7], registered designs law[8], the law of agency[9], statutes of limitation[10] and dealings in Torrens title land[11].

10 Professor Hanbury[12] described the common law and equity as having "quarrelled over the possession of the word 'fraud' like two dogs over a bone, off which neither side was sufficiently strong to tear all the meat", and said that the word fraud applied "indifferently to all failures in relations wherein equity set a

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5 6th ed (1929) at 1 (footnote omitted).

6 *Macleod v The Queen* (2003) 214 CLR 230 at 241-242 [32]-[38].

7 *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563 at 579-580.

8 *Polyaire Pty Ltd v K-Aire Pty Ltd* (2005) 221 CLR 287 at 295-296 [17]-[18].

9 *Sons of Gwalia Ltd v Margaretic* (2007) 81 ALJR 525 at 543 [73]-[74]; 232 ALR 232 at 254-255.

10 *Commonwealth v Cornwell* (2007) 81 ALJR 933 at 941-942 [40]-[45], 948-949 [74]-[75]; 234 ALR 148 at 158-159, 167-168.

11 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 81 ALJR 1107 at 1150-1152.

12 *Modern Equity*, 8th ed (1962) at 643-644.

certain standard of conduct". Hence the attachment of the term "fraud" to the exercise of powers of appointment, and of other powers, such as those of company directors, in a fashion of which equity disapproved[13].

"Fraud" and Public Law

11 In the fields of law just discussed, the common law, equity and statute are concerned principally with the creation and protection of personal and proprietary rights in *inter partes* litigation, rather than with what might today be identified as public law. This appeal concerns public law, in particular the due administration of the provisions of the Act respecting protection visas and procedures for review by the Tribunal of decisions on visa applications. That concern with due administration of the laws of the Commonwealth has the important constitutional underpinning described particularly in *Plaintiff S157/2002 v Commonwealth*[14] and *Bodruddaza v Minister for Immigration and Multicultural Affairs*[15] and identified with Ch III of the Constitution.

12 The attachment by courts of equity of the term "fraud", with related notions of "bad faith" and "abuse of power", when stigmatising exercises of powers of appointment and fiduciary powers as falling short of the standards equity required of the repositories of those powers, has proved influential in the development of public law. What came to be known as the principle of "*Wednesbury* unreasonableness" was developed in the case law by analogy to the principles controlling the exercise of powers of discretions vested in trustees and others[16].

13 However, several points should be made here. First, given the equitable nature of their origins described above, principles of public law concerning impropriety in the exercise of statutory powers have not had the focus upon what might be called the "red blooded" species of fraud which engages the common law. Secondly, with respect to references in the public law decisions to good and

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13 See the discussion by Dixon J in *Mills v Mills* (1938) 60 CLR 150 at 185.

14 (2003) 211 CLR 476 at 513-514 [103]-[104].

15 (2007) 81 ALJR 905 at 910 [28], 913-914 [46]; 234 ALR 114 at 119, 123-124.

16 *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 649 [124].

bad faith and the like, the following observation in a leading English text[17] is in point:

> "These add very little to the true sense, and are hardly ever used to mean more than that some action is found to have a lawful or unlawful purpose. It is extremely rare for public authorities to be found guilty of intentional dishonesty: normally they are found to have erred, if at all, by ignorance or misunderstanding. Yet the courts constantly accuse them of bad faith merely because they have acted unreasonably or on improper grounds. Again and again it is laid down that powers must be exercised reasonably and in good faith. But in this context 'in good faith' means merely 'for legitimate reasons'. Contrary to the natural sense of the words, they impute no moral obliquity."

Aickin J made observations to similar effect in *R v Toohey; Ex parte Northern Land Council*[18].

14 Thirdly, in the present case the appellants do not challenge the description by French J of the Tribunal as having acted "blamelessly"[19]. But the appellants do direct attention to the effect upon the processes of the Tribunal of the dishonest acts and omissions of a third party, Mr Hussain. In this regard, the appellants pray in aid another generally expressed precept drawn from private law and from the significance of dishonesty in the litigation of private rights. This is expressed in the oft-repeated proposition that whilst on one hand fraud may be infinite, on the other hand "fraud unravels everything".

How much does "fraud" unravel?

15 In *Lazarus Estates Ltd v Beasley*[20] Denning LJ declared:

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17 Wade and Forsyth, *Administrative Law*, 9th ed (2004) at 416.

18 (1981) 151 CLR 170 at 232-233. See also *Western Australian Planning Commission v Temwood Holdings Pty Limited* (2004) 221 CLR 30 at 67 [93], 95 [181].

19 (2006) 154 FCR 365 at 400.

20 [1956] 1 QB 702 at 712-713.

> "No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever: see as to deeds, *Collins v Blantern*[21]; as to judgments, *Duchess of Kingston's* case[22]; and as to contracts, *Master v Miller*[23]."

Earlier, speaking in this Court of a fraudulently obtained trade mark registration, Williams J said in *Farley (Aust) Pty Ltd v JR Alexander & Sons (Q) Pty Ltd*[24]:

> "Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the Court. It is an insidious disease, and if clearly proved spreads to and infects the whole transaction (*Jonesco v Beard*[25])."

16 The vitiating effect of fraud is not universal throughout the law. The equitable doctrine protecting *bona fide* purchases for value and without notice is an important exception. Further, particular principles, or at least practices, have been developed with respect to collateral attacks in later litigation upon the outcome in earlier litigation where this was alleged to have been vitiated by fraud[26]. It has been said in this Court that, except in very exceptional cases, fraud constituted by perjury by a witness or witnesses acting in concert is not a

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21 (1767) 1 Smith's LC, 13th ed, 406; 2 Wils KB 341 [95 ER 847].

22 (1776) 2 Smith's LC 13th ed 644 at 646, 651; 20 How St Tr 355 at 538-539, 543-544.

23 (1791) 1 Smith's LC 13th ed 780 at 799.

24 (1946) 75 CLR 487 at 493.

25 [1930] AC 298 at 301-302.

26 *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234 at 238-243.

sufficient ground for setting aside a judgment[27]. The precept engaged here has been identified as that favouring the finality of litigation[28].

17 The authorities in this field concern adjudication of civil actions and suits. A rather different trend has appeared in public law, particularly respecting the administration by superior courts of certiorari to supervise the exercise of jurisdiction by inferior courts and tribunals. In *Craig v South Australia*[29], Brennan, Deane, Toohey, Gaudron and McHugh JJ said of the scope of certiorari[30]:

> "Where available, certiorari is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and 'error of law on the face of the record'. Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for certiorari can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it" (footnotes omitted).

Their Honours noted[31] that in this context "fraud" was used in a broad sense which encompasses "bad faith".

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27 See the remarks of Windeyer J in *McDonald v McDonald* (1965) 113 CLR 529 at 544, citing those of Williams J in *Cabassi v Vila* (1940) 64 CLR 130 at 147-148.

28 *Owens Bank Ltd v Bracco* [1992] 2 AC 443 at 483. See also *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 20 [43].

29 (1995) 184 CLR 163.

30 (1995) 184 CLR 163 at 175-176.

31 (1995) 184 CLR 163 at 176, fn 58.

18 So strong was the policy protecting the due administration of justice, that a privative clause by which the legislature sought to exclude or attenuate the jurisdiction of superior courts to issue certiorari was ineffective to exclude the remedy where "manifest fraud" was shown on the part of the party which had obtained the order in the inferior court[32]. Further, it was held in *R v Wolverhampton Crown Court; Ex parte Crofts*[33] that the double jeopardy rule had no application where the Queen's Bench Division granted certiorari to quash an order of acquittal obtained on the perjured evidence of the appellant to Quarter Sessions against his conviction by Justices; the effect of certiorari was to leave standing the regularly obtained conviction. In *Davern v Messel*[34] Mason and Brennan JJ saw *Crofts* as displaying a proper balance between the protection of the defendant as the weaker party in a criminal case and the interests of society in ensuring the due administration of justice.

19 In *Al-Mehdawi v Secretary of State for the Home Department*[35] Lord Bridge of Harwich gave as an example of "the principle that fraud unravels everything" a line of authority which he identified as follows:

> "In *R v Gillyard*[36] the court quashed by certiorari a conviction by justices shown to have been obtained by fraud and collusion. This was followed in *R v Recorder of Leicester*[37] and extended in *R (Burns) v County Court Judge of Tyrone*[38] to allow the quashing of an affiliation order obtained on the strength of perjured evidence of witnesses called to furnish the

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32 *The Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 442; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 1002-1003 [55]-[56]; 207 ALR 12 at 25-26.

33 [1983] 1 WLR 204 at 207.

34 (1984) 155 CLR 21 at 58-59.

35 [1990] 1 AC 876 at 895.

36 (1848) 12 QB 527 [116 ER 965].

37 [1947] KB 726.

38 [1961] NI 167.

required corroboration of the evidence of the complainant, although it was not shown that the complainant herself was party to the perjury."

20 When extending certiorari to cases of "third party fraud" in *R (Burns) v County Court Judge of Tyrone*[39], Lord MacDermott LCJ dealt as follows with the submission that the perjury must be by a party or the party must be privy to it[40]:

> "The supervisory jurisdiction of this court is not at large; but the general aim of that jurisdiction is to promote the due administration of justice, and if a distinction is to be drawn between cases where a decision is procured by perjury and cases where a decision is procured by perjury to which one of the parties is privy, it ought to rest on some basis of principle. I am unable to discern any such basis here. Litigation between parties, whether civil or criminal, does not necessarily mean that there are not others anxious or interested to sway the issue one way or the other, and it would, I think, be a grave defect in the procedure of this court if one of these forms of fraud could be noticed but not the other. I can find no rational ground for the sort of discrimination which must prevail if we are to accede to the submission under discussion. If certiorari does not lie in such circumstances there is no other redress and an order undoubtedly founded on perjury remains effective."

21 The concern with the due administration of justice manifested in these decisions has been adapted in England to the position occupied in the legal system by administrative bodies and tribunals. For example, in *R v Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Gormly*[41] Lord Goddard CJ said:

> "if some collusive proceedings were taken, it would amount to a fraud on the tribunal, and where a fraud was proved I have little doubt that this court could intervene if necessary by an order of certiorari to get rid of a decision which the tribunal had been misled into making."

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39 [1961] NI 167.

40 [1961] NI 167 at 172.

41 [1951] 2 All ER 1030 at 1034.

In Australia, the constitutional considerations referred to earlier in these reasons place due administration of federal law within the field in which the superintendence of Ch III operates.

22 There is another practical aspect of fraud in public law that may tend in a particular case to set it apart from fraud in relation to civil suits in general. It is that often a victim of it will have no useful remedy except to have the fraudulently affected result set aside and a fresh untainted hearing conducted. *Ainsworth v Criminal Justice Commission*[42] is an example of the inadequacy of a conventional remedy such as damages. There they would, even if a cause of action arguably giving rise to them had been available, not only have been probably unquantifiable, but also not a useful remedy. The same may apply to some proceedings before administrative tribunals, for example, an application under the *Freedom of Information Act* 1982 (Cth). In the present case, the only remedy that would be of real utility to the appellants is an order that provides them with the opportunity to press their claims to a protection visa in a fair hearing conducted according to law.

Experience in Australia

23 With respect to certiorari to quash summary convictions by reason, for example, of guilty pleas fraudulently induced by the conduct of police officers, the reasoning in the English authorities has been applied in Australia[43]. The police officers in a sense are "third parties" in this setting, albeit persons in authority or acting under colour of authority.

24 As the Act previously stood, s 476(1)(f) provided as a ground for judicial review by the Federal Court that the decision in question "was induced or affected by fraud". Lindgren J held in *Wati v Minister for Immigration and Ethnic Affairs*[44] that the "fraud" was not limited to that of the decision-maker, a party, or a party's representative, but that the decision in question must be

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42 (1992) 175 CLR 564.

43 *R v The Justices at Biloela, Ex parte Marlow (No 2)* [1983] 1 Qd R 552.

44 *Wati v Minister for Immigration and Ethnic Affairs* (1996) 71 FCR 103 at 112.

actually induced or affected by the fraud. That reasoning was followed and applied by Lehane J in another s 476 (1)(f) case[45].

25 Before its repeal by the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth), along with other provisions of Pt 8 of the Act, s 476 had limited the grounds for judicial review by the Federal Court but had retained the ground (s 476(1)(f)) that the decision was "induced or affected by fraud". The Minister submitted in *Wati*[46] that what was required was *actual* inducement or affectation by fraud, on the balance of probabilities and with due regard to *Briginshaw v Briginshaw*[47]. Lindgren J accepted that submission but rejected the further submission that the "fraud" was limited to that of the decision-maker, a party or a party's representative.

26 Lindgren J reasoned in *Wati* as follows[48]:

> "although the amending Act of 1992 [the source of s 476] limited the grounds of judicial review, I find no reason to think that the fraud referred to in s 476(1)(f) was intended to be limited in the way suggested by the Minister. Indeed, it is easy to accept that the legislature may have wished to ensure that a decision would be able to be reviewed where it was induced or affected by the fraud of some person. Assume, for example, that a decision of [the Immigration Review Tribunal ("the IRT")] adverse to an applicant for a protection visa had been procured by the fraud of the individual's opponents: in such a case, Australia would fail to observe its obligations under the Convention Relating to the Status of Refugees through no fault of the Minister or of the IRT, but as a result of a fraud perpetrated by others. It is not surprising to contemplate that the legislature might have wished, in such a case, that the fraud be able to be exposed and its effects remedied in this Court."

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45 *Jama v Minister for Immigration and Multicultural Affairs* (2000) 61 ALD 387.

46 (1996) 71 FCR 103 at 111.

47 (1938) 60 CLR 336.

48 (1996) 71 FCR 103 at 112.

27 The jurisdiction exercised in this case by the Federal Magistrates Court was not founded in the fully amplified system of statutory judicial review laid out in the repealed Pt 8 of the Act. Rather, it was conferred[49] in terms referable to the conferral on the Court by s 75(v) of the Constitution itself. But that circumstance, given the significance of s 75(v) for due administration of federal law to which reference has been made earlier in these reasons, strengthens the case for its application to the appeal of reasoning akin to that of Lindgren J in *Wati*.

The Present Appeal

28 It is unnecessary for the resolution of the present appeal to determine at large and in generally applicable terms the scope for judicial review for "third party fraud" of an earlier administrative decision (whether a primary decision or, as in the case of the Tribunal, an administrative decision itself made as a system of external administrative review), where the applicant for judicial review did not collude in the fraud practised on the administrative decision-maker or review body and did not then learn of the fraud but complains of it in subsequent proceedings.

29 Rather, the present appeal should be resolved after close attention to the nature, scope and purpose of the particular system of review by the Tribunal which the Act establishes and the place in that system of registered migration agents. Any application of a principle that "fraud unravels everything", requires consideration first of that which is to be "unravelled", and secondly of what amounts to "fraud" in the particular context. It then is necessary to identify the available curial remedy to effect the "unravelling". To these matters we now turn.

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49 See ss 483A, 475A, of the Act and *Judiciary Act* 1903 (Cth), s 39B. With effect 1 December 2005, ss 483A and 475A were repealed by the *Migration Litigation Reform Act* 2005 (Cth) Sched 1, Pt 1, items 28, and 17 respectively. Subject to some qualifications, the Federal Magistrates Court now has, in relation to migration decisions, the same original jurisdiction as does this Court under s 75(v) of the Constitution. Explicit provision to that effect is now made by s 476 of the Act.

Fraud on the Tribunal?

30 Part 7 (ss 410-473) of the Act establishes a detailed regime for the review by the Tribunal of particular visa decisions. (Part 8 (ss 474-486Q) provides for Judicial Review). Division 4 of Pt 7 (ss 422B-429A) lays down the procedure for the conduct of reviews by the Tribunal. This differs significantly from the procedures of *inter partes* civil litigation. Of these differences, in *Minister for Immigration and Multicultural Affairs v Wang*[50] Gummow and Hayne JJ remarked:

> "In adversarial litigation, findings of fact that are made will reflect the joinder of issue between the parties. The issues of fact and law joined between the parties will be defined by interlocutory processes or by the course of the hearing. They are, therefore, issues which the parties have identified. A review by the Tribunal is a very different kind of process[51]. It is not adversarial; there are no opposing parties; there are no issues joined. The person who has sought the review seeks a particular administrative decision – in this case the grant of a protection visa – and puts to the Tribunal whatever material or submission that person considers will assist that claim. The findings of fact that the Tribunal makes are those that it, rather than the claimant, let alone adversarial parties, considers to be necessary for it to make its decision."

31 The importance of the requirement in s 425 that the Tribunal invite the applicant to appear to give evidence and present arguments is emphasised by s 422B[52]. This states that Div 4 "is taken to be an exhaustive statement of the requirement of the natural justice hearing rule in relation to the matters it deals with."

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50 (2003) 215 CLR 518 at 540-541 [71]. See also at 526 [18] per Gleeson CJ, 531 [37] per McHugh J.

51 *Mahon v Air New Zealand Ltd* [1984] AC 808 at 814; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282.

52 Added to Pt 7 Div 4 by the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth).

32 An effective subversion of the operation of s 425 also subverts the observance by the Tribunal of its obligation to accord procedural fairness to applicants for review. Given the significance of procedural fairness for the principles concerned with jurisdictional error, sourced in s 75(v) of the Constitution[53], the subversion of the processes of the Tribunal in the manner alleged by the present appellants is a matter of the first magnitude in the due administration of Pt 7 of the Act.

33 Section 425 of the Act states:

> "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:
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> (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
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> (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."

34 The consequence of failure to appear upon invitation under s 425 is spelled out in s 426A. This provides:

> "426A (1) If the applicant:
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> (a) is invited under section 425 to appear before the Tribunal; and

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

(b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear;

the Tribunal may make a decision on the review without taking any further action to allow or enable the applicant to appear before it.

(2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review in order to enable the applicant's appearance before it as rescheduled."

35 What is the content of the expression "does not appear" in par (b) of s 426A(1)? Certainly it is a jurisdictional fact upon which depends the occasion for the exercise of the decision-making power of the Tribunal given by the balance of the subsection[54]. Further, sub-s 426A(2) enables the Tribunal to respond to cases of *force majeure* and the like which cause the applicant to fail to appear. In *Minister for Immigration and Multicultural Affairs v Bhardwaj*[55] by error of the Tribunal it proceeded to determine a review application adversely to the applicant without having regard to a prior written adjournment application; the Tribunal, later being apprised of its error made a second decision (favourable to the applicant). A challenge by the Minister to the competency of the second decision failed in the Federal Court and in this Court.

36 In argument on the present appeal the Minister accepted that if, before the Tribunal had made its decision, it had appreciated the position of the first appellant and the misconduct of Mr Hussain, but nevertheless had gone ahead, forthwith and without inviting the first appellant to appear before it, this would have "raised a real question" as to the miscarriage of the Tribunal's power under s 426A(1). Upon that view of the due administration of the Act, the legal quality of the Tribunal's decision becomes a question of dates. The principles of finality

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54 See *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at 561; cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 225 [44]-[46], 227-228 [55]-[57].

55 (2002) 209 CLR 597.

in litigation and of the great significance attached to the entry of orders made by superior courts of record are well understood. But the first principle does not apply, and the second cannot apply, in administrative decision-making by the delegate of the Minister, or, as here, by the Tribunal which, by s 415, exercises all the powers and discretions of the delegate.

37 But what of a case such as the present? Here, on the appellants' case, the decision not to appear, whilst consciously made, was the result of the fraudulent conduct of a third party, Mr Hussain, but neither the appellants nor the Tribunal appreciated the situation before the Tribunal made its decision. Before answering the question just posed, some further facts need to be understood.

The Facts

38 As noted in the passage in *Craig*[56] which has been set out earlier in these reasons, in a case of alleged fraud the court exercising judicial review may, subject to any applicable procedural and evidentiary rules, take account of any relevant material placed before it. Further, Mr Hussain is absent from these proceedings, and a finding of fraud is a serious matter. But the identification of the motives of Mr Hussain in acting as he did may be a matter of inference drawn from the available material[57]. In drawing, or failing to draw, such inferences, the Federal Magistrates Court enjoyed no special position precluding a further examination by the Federal Court and, on appeal, this Court.

39 The evidence of the first appellant was that when, with her husband, she met Mr Hussain to discuss the Tribunal's letter of invitation dated 27 June 2003 which invited attendance at a hearing of the Tribunal Mr Hussain used words to the effect:

> "It is best not to go. If you go they will refuse you. They are not accepting any visa applications at all at the moment. I am going to take a different approach. I am going to write a letter to the Minister. I am worried that if you go to the [Tribunal] you will say something in

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56 (1995) 184 CLR 163 at 175-176.

57 See the discussion of principle by Lindgren J in *Wati v Minister for Immigration and Ethnic Affairs* (1996) 71 FCR 103 at 113-4.

contradiction to what I will write. Don't worry. I'm doing what is best for you."

A letter to the then Minister, dated 15 September 2003, was composed by Mr Hussain in the name of the second appellant. It was headed "Application for Consideration [under] Section 417 of the Migration Act". Section 417 conferred a power upon the Minister, if the Minister thought it was in the public interest to do so, to substitute for a decision of the Tribunal a decision more favourable to an applicant. This and further requests of this nature were rejected.

40 The Federal Magistrate held that Mr Hussain had acted fraudulently in his dealings with the appellants for personal gain, that he had extracted money under false pretences and that the appellants had been dissuaded from attending the Tribunal hearing "by the fraudulent behaviour of Mr Hussain". The result was to have "deprived the invitation to the hearing [of] its quality of being a meaningful invitation under s 425".

41 In the Full Court French J properly observed[58]:

"The finding of fraud should have specified, in one place in the reasons, what was said that was fraudulent, how it was fraudulent, and how it was acted upon. The finding of fact that the magistrate made however was not challenged in these proceedings."

42 In his reasons, French J developed the matter as follows[59];

"The agent held himself out to be a practising solicitor and registered migration agent. He was neither. He gave fraudulent advice that the Tribunal was 'not accepting any visa applications at all at the moment'. He expressed a false concern that if [the first appellant] and her family appeared before the Tribunal they would say something inconsistent with his proposed submission to the Minister. The advice amounted to a representation that the Tribunal process was a sham and that participation in it might prejudice [the first appellant's] prospects of a successful outcome on the basis of a submission to the Minister.

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58 (2006) 154 FCR 365 at 383.

59 (2006) 154 FCR 365 at 399-400.

....

> The decision-making process, that is the process of review which incorporates an opportunity for a hearing on the conditions set out in Pt 7, was corrupted. The importance of the appearance before the Tribunal to the outcome of the review was highlighted by the Tribunal's reference, in its reasons, to matters which it did not have an opportunity to explore with [the first appellant] because of her non-appearance. On this basis, in my opinion, the decision of the Tribunal was vitiated. It was not a decision made under the Act and therefore not a privative decision protected by s 474."

43 On the other hand Allsop J, one of the majority, expressed his conclusion for setting aside the relief granted by the Federal Magistrate as follows[60]:

> "A conscious choice was made by the [appellants] not to go to the hearing, which was influenced by the fraud of the agent. The complaints of the [appellants] are not about the process, but about their erstwhile agent who acted as he did. I do not consider that either the decision or the statutory process was corrupted by fraud."

44 Graham J, the other member of the majority, reasoned[61] that the sufficiency of an invitation to attend was to be addressed at the moment when it has been given and that, viewed in that way, any fraudulent advice could not bear upon the question of whether or not an invitation had been duly given. But the relief by way of certiorari and mandamus which had been granted by the Federal Magistrate was directed not to compliance with the letter of s 425 but to the decision made by the Tribunal on its review of the decision of the delegate. Was that decision liable to impeachment by a remedy for fraud practised upon the Tribunal?

45 Neither the reasons of the Federal Magistrate nor the dissenting reasons of French J in the Full Court considered in any detail the question of the motives of Mr Hussain in acting as he did with respect to the rejection of the invitation to attend the Tribunal hearing. The inference is well open upon the evidence that

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60 (2006) 154 FCR 365 at 402.

61 (2006) 154 FCR 365 at 424.

Mr Hussain acted as he did for self-protection, lest in the course of a Tribunal hearing there be revealed his apparently unlawful conduct in contravention of restrictions imposed by Pt 3 Div 2 of the Act, particularly by s 281.

46 Section 281 relevantly provides:

"281 (1) Subject to subsection (3), a person who is not a registered migration agent must not ask for or receive any fee or other reward for giving immigration assistance.

Penalty: Imprisonment for 10 years.

....

(3) This section does not prohibit:

(a) a lawyer from asking for or receiving a fee for giving immigration legal assistance; or

(b) a person from asking for or receiving a fee for the giving of immigration legal assistance by a lawyer.

(4) A person is not entitled to sue for, recover or set off any fee or other reward that the person must not ask for or receive because of subsection (1)."

The term "lawyer" is so defined as to include a solicitor of the Supreme Court of a State. At the relevant time Mr Hussain was no longer a "lawyer" in this defined sense.

Conclusions

47 French J correctly identified the ultimate issue as the effect upon the Tribunal's decision-making process, for which the Parliament provided in Pt 7 of the Act[62], of the fraud of Mr Hussain.

48 As indicated earlier in these reasons, the provisions of Pt 7 obliging the Tribunal to invite the applicant to appear before it to give evidence and present

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62 (2006) 154 FCR 365 at 399.

arguments relating to the issues arising in relation to the decision under review (s 425(1)) and empowering the Tribunal to make a decision on the review in the absence of an appearance (s 426A) are of central importance for the legislative scheme laid out in Div 4 of Pt 7 (ss 422B-429A) for the conduct of reviews. By s 422B that Division provided that it is to be taken as an exhaustive statement of the requirements of the natural justice hearing rule.

49 The fraud of Mr Hussain had the immediate consequence of stultifying the operation of the legislative scheme to afford natural justice to the appellants. That this is so is manifest by the reasons given by the Tribunal, which included the statement:

> "The [first] applicant was put on notice by the Tribunal that it is unable to make a favourable decision on the information before it but the applicant has not provided any further information in support of her claims. Nor has she given the Tribunal an opportunity to explore aspects of her claims with her. A number of relevant questions are therefore left unanswered.
>
> The Tribunal is not satisfied, on the evidence before it, that the applicant has a well-founded fear of persecution within the meaning of the Convention."

50 Reference has been made earlier in these reasons to the submission for the Minister that any fraud perpetrated on the appellants was not a fraud "on" the Tribunal. Further, as noted above, Allsop J characterised the complaints of the appellants as not about the process but about their erstwhile agent and concluded that neither the decision nor the statutory process "was corrupted by fraud"[63]. However, as in other areas of legal debate, including questions of federal legislative power under the Constitution itself[64], to say of a law or state of affairs that it bears one legal character does not necessarily deny it a second legal character which is of decisive significance.

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63 (2006) 154 FCR 365 at 402.

64 *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16].

51 No doubt Mr Hussain was fraudulent in his dealings with the appellants. But the concomitant was the stultification of the operation of the critically important natural justice provisions made by Div 4 of Pt 7 of the Act. In short, while the Tribunal undoubtedly acted on an assumption of regularity, in truth, by reason of the fraud of Mr Hussain, it was disabled from the due discharge of its imperative statutory functions with respect to the conduct of the review. That state of affairs merits the description of the practice of fraud "on" the Tribunal.

52 The consequence is that the decision made by the Tribunal is properly regarded, in law, as no decision at all. This is because, in the sense of the authorities, the jurisdiction remains constructively unexercised. The authorities were collected in *Bhardwaj*[65].

53 The significance of the outcome in this appeal should not be misunderstood. The appeal has turned upon the particular importance of the provisions of Div 4 of Pt 7 of the Act for the conduct by the Tribunal of reviews and the place therein of the ss 425 and 426A. In the Full Court French J correctly emphasised that there are sound reasons of policy why a person whose conduct before an administrative tribunal has been affected, to the detriment of that person, by bad or negligent advice or some other mishap should not be heard to complain that the detriment vitiates the decision made[66]. The outcome in the present appeal stands apart from and above such considerations.

54 Were the matter litigated in the original jurisdiction of this Court, the consequence would be that mandamus would lie under s 75(v) of the Constitution to compel the Tribunal to redetermine the review application according to law. In support of that remedy under s 75(v), certiorari would lie in respect of the purported decision of the Tribunal[67]. By reason of the terms of the conferral of jurisdiction upon the Federal Magistrates Court it was in a corresponding position.

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65 (2002) 209 CLR 597 at 614-615 [51]. See, further, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506 [76].

66 (2006) 154 FCR 365 at 399.

67 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 507 [80].

55 The order of the Federal Magistrates Court granting orders in the nature of certiorari to quash, and mandamus requiring the Tribunal to redetermine according to law, the review of the decision of the delegate were properly made. That redetermination according to law will include the Tribunal giving the appellants, pursuant to s 425, a fresh invitation to appear before the Tribunal.

Orders

56 The appeal to this Court should be allowed with costs. The orders of the Federal Court entered on 24 October 2006 should be set aside and in place thereof the appeal to that Court should be dismissed with costs.