FEDERAL COURT OF AUSTRALIA

Applicant S422 of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 89

MIGRATION – protection visa – no reviewable error

MIGRATION – failure to attend Migration Review Tribunal hearing – letters sent to applicant in accordance with the requirements of the *Migration Act 1958* - whether sufficient notice given

PRACTICE AND PROCEDURE – remitter – application for review made to the High Court - out of time under High Court Rules - remitted to Federal Court – what constitutes the subject matter of a remitted application - remitted application for review treated as application for extension of time – whether High Court Rules or Federal Court Rules apply to remitted application – whether time limits in court rules are substantive or procedural – Federal Court's power to extend time limitations in High Court Rules – whether order nisi interlocutory or final

Migration Act 1958 (Cth) ss 441A(4), 441C(4)
Judiciary Act 1903 (Cth) ss 44, 86
Federal Court of Australia Act 1976 (Cth) ss 23, 38

High Court Rules 1952 O 55 rr 1, 2, 17, 30, O 60 r 6, O 64
Federal Court Rules O 51A rr 1, 2, 2A, 4, 5

Applicant M216 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 931 considered
John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503 considered
Re Ross; Ex parte The Australian Liquor, Hospitality and Miscellaneous Workers' Union (2001) 108 FCR 399 considered
Applicants A64 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1142 considered
Applicant S70 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 204 ALR 115 considered
State Bank of New South Wales v The Commonwealth Savings Bank of Australia (1984) 154 CLR 579 cited
Bowtell v Commonwealth of Australia (1989) 86 ALR 31 cited
Pozniak v Smith (1982) 151 CLR 38 cited
Applicant A26 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) [2003] FCA 1431 referred to
S267 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1442 referred to
M206 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 24 referred to
Daniel v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 21

referred to
Applicant A2 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 576 referred to
Applicant M29 of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1266 referred to
In re Pritchard (decd); Pritchard v Deacon [1963] Ch 502 discussed
Perez v Transfield (Qld) Pty Ltd [1979] QdR 444 referred to
McKain v R W Miller & Co (SA) Pty Ltd (1991) 174 CLR 1 cited
Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Co rporation Pty Ltd (1993) 67 ALJR 389 referred to
NAHQ v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 297 considered
Paramasivam v Flynn (1998) 90 FCR 489 at 493 considered

APPLICANT S422 OF 2002 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

N 14 OF 2004

NORTH, DOWSETT and LANDER JJ
21 APRIL 2004
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 14 OF 2004**

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

BETWEEN:	**APPLICANT S422 OF 2002** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**NORTH, DOWSETT AND LANDER JJ**
DATE OF ORDER:	**21 APRIL 2004**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. Leave to appeal be granted.

2. The appeal be dismissed.

3. The appellant pay the respondent's costs of the application for leave to appeal, the notice of appeal and of the appeal.

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

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AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**
JUDGES:	**NORTH, DOWSETT AND LANDER JJ**
DATE:	**21 APRIL 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

NORTH J:

1 I agree that the appeal should be dismissed because the appellant did not demonstrate that the Tribunal erred in any way which would attract relief. I agree with the analysis of the merits of the appeal contained in the judgment of Dowsett and Lander JJ.

2 As this is sufficient to resolve the appeal, I prefer not to venture into the question of the application of O 55 of the High Court Rules to matters remitted to the Federal Court.

I certify that the preceding two (2) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North .

Associate:

Dated: 20 April 2004

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 14 OF 2004**

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

BETWEEN:	**APPLICANT S422 OF 2002** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGES:	**NORTH, DOWSETT AND LANDER JJ**
DATE:	**21 APRIL 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

DOWSETT & LANDER JJ:

THE DECISION AT FIRST INSTANCE

3 The facts of this case appear adequately from [1] - [21] of the reasons for judgment given by LindgrenJ as follows:

> *[1] On 20 November 2002, the applicant commenced a proceeding in the High Court of Australia in respect of a decision of the Refugee Review Tribunal ('the Tribunal') made on 21 March 2002 and handed down on 17 April 2002.*
>
> *[2] The Tribunal affirmed a decision of a delegate of the first respondent ('the Delegate' and 'the Minister', respectively) not to grant a protection visa to the applicant. The applicant sought in the High Court proceeding in the first instance the issue of an order nisi for writs of certiorari and mandamus, as well as injunctive relief.*
>
> *[3] On 6 February 2003 Gaudron J ordered that further proceedings in the action be remitted to this Court, and that the application proceed in this Court as if the steps already taken in the High Court had been taken in this Court.*
>
> *[4] The applicant has not been legally represented in this*

proceeding but is assisted by a Bengali interpreter today.

[5] *The applicant is a citizen of Bangladesh who arrived in Australia on 2 July 1999. He arrived on a Singaporean passport which identified him as a citizen of Singapore. On 6 August 1999 he lodged an application for a protection visa with the then Department of Immigration and Multicultural Affairs under the* Migration Act 1958 *(Cth) ('the Act'). On 20 September 1999 the Delegate refused to grant a protection visa. On 14 October 1999 the applicant applied to the Tribunal for a review of that decision.*

[6] *I need not say much of the reasons for decision of the Tribunal. The Tribunal conducted a hearing on 21 March 2002 which the applicant, despite being invited to attend, and indicating that he would attend, did not in fact attend. The Tribunal decided the application for review on the material before it and without the benefit of any questioning of the applicant or oral evidence from him.*

[7] *The application for the protection visa was submitted through Mr Boni Amin of Little n' Bons' Associates, Migration and Language Services. The application for the protection visa was accompanied by a letter dated 5 August 1999 from Mr Boni Amin which outlined the nature of the claims made by the applicant. The form of application itself was brief and contained no work or education history of the applicant. It stated that the applicant would submit a more detailed statement later.*

[8] *The applicant claimed to have been born in Bangladesh in 1972, never to have married, to be a business man, and to have departed Bangladesh from Zia International Airport in Dhaka on 22 May 1999. The ground of his application is a claim of persecution based on his homosexuality. I treat this as a claim that he has a well-founded fear of persecution on account of belonging to a particular social group.*

[9] *The applicant claimed that a month before he left Bangladesh he was dragged from his rickshaw by 'miscreants' who beat him. He said the market committee told him and his boyfriend, who was his business partner as well as his sexual partner, that they could no longer operate their business from the market. He said they departed Bangladesh and went to Singapore, and that an agent in Singapore (of Pakistani background) advised them that he could get them into Australia. The agent arranged Singaporean passports for them, but told them not to travel directly to Australia and to go first to Sri Lanka.*

[10] *They did not travel together to Sri Lanka. The applicant went first and waited for his boyfriend, who, however, did not arrive. The applicant said he found out later that his boyfriend was arrested in Singapore and was in gaol there for 'cheating' (the Tribunal understood this to be a reference to the obtaining of the false*

Singaporean passport).

[11] *The applicant travelled to Australia from Sri Lanka. He presented only four photocopy pages of his Singaporean passport in his application. One of those pages indicated that he arrived in Sri Lanka on 27 June 1999 and departed on 1 July 1999. The passport was issued on 22 December 1998 in the applicant's own name and stated that he was born in Singapore. The passport also contained a copy of the applicant's visa for entry to Australia issued on 22 May 1999.*

[12] *The Tribunal observed that the application for the protection visa was vague and lacked detail. The Member said that if the applicant had attended a hearing he would have been asked to provide more detail, including more information in relation to his claim of being in a homosexual relationship, and his claim that he had suffered persecution on account of his homosexuality.*

[13] *The Member said that he would have questioned the applicant about the date of his departure from Bangladesh, as the Member thought it dubious that he left that country, arrived in Singapore, then met a person in Singapore who arranged a passport for him, and obtained the Australian visa, all on 22 May 1999. The Member said he would have asked the applicant to produce his Bangladesh passport, and any other documents to establish that he in fact came from Bangladesh.*

[14] *I mention these matters, as no doubt the Member did, to show that the Member had a number of areas of concern in connection with the applicant's claims. The result was that he was not satisfied on the evidence that the applicant had a well-founded fear of persecution on a Convention ground.*

[15] *On the hearing today the applicant handed up a 10-page submission which I have read. Most of the submission was directed to showing that the applicant was indeed a refugee as defined by the Convention. In so far as the submission attacked the reasons for decision of the Tribunal, it did so only in very general terms. I would not have been satisfied that any error, let alone jurisdictional error, on the part of the Tribunal was demonstrated.*

[16] *The applicant told me from the Bar table that he did not attend the hearing before the Tribunal because he was in hospital when the letter of invitation arrived at his address, and that he became aware of the letter only after the hearing had taken place on 21 March 2002. There is evidence before me in the form of an affidavit annexing registered post records of the Tribunal which satisfies me that a letter dated 7 February 2002 was posted to the applicant on 8 February 2002 inviting him to attend the hearing on 21 March 2002.*

> *[17] In fact an earlier letter dated 6 February 2002 had been posted to the applicant on that date advising that the hearing would be held on Thursday 14 March 2002, but the later letter dated 7 February advised of a change in the hearing date to Thursday 21 March 2002.*
>
> *[18] Each letter was sent, one copy to the applicant in person at his residential address and another copy to his migration agent, Mr Boni Amin.*
>
> *[19] On or about 11 February 2002, the Tribunal received by facsimile the applicant's affirmative response to the hearing invitation. It is not clear, however, to which of the two letters referred to in [17] the applicant was responding.*
>
> *[20] Subsection 441A(4) of the Act allows for the invitation to attend a hearing to be sent by prepaid post within three working days of the date of the document to a person at the last address for service provided to the Tribunal by the recipient in connection with the review in question, or the last residential or business address provided to the Tribunal by the recipient in connection with that review. There is no dispute that the letters in this case were sent to the applicant at an address which was both the last address for service provided to the Tribunal by him and the last residential address provided to the Tribunal by him.*
>
> *[21] Importantly, subs 441C(4) of the Act provides that, if the Tribunal gives a document to a person by the method referred to in subs 441A(4), the person is taken to have received the document, if the document was despatched from a place in Australia to an address in Australia – seven working days after the date of the document. Accordingly, the relevant document here, being the letter dated 7 February 2002, is deemed to have been received by the applicant on 18 February 2002, and questions of the applicant's hospitalisation and late receipt of the letter of invitation are beside the point.*

4 His Honour then observed that pursuant to O 55 rr 17 and 30 of the High Court Rules, the applications for certiorari and mandamus were out of time. The latter rule itself permits extension of time, while O 60 r 6 provides for enlargement or abridgement of *'… the time appointed by these Rules or fixed by an order of the Court or a Justice for doing an act …'*. The appellant, at no stage, sought any extension. Nonetheless Lindgren J treated the proceedings before him as being such an application and, in effect, dismissed it upon the ground that the appellant had not demonstrated any arguable error in the Tribunal's decision sufficient to justify an extension.

THE APPEAL/APPLICATION FOR LEAVE TO APPEAL

5 The appellant filed a notice of appeal from that decision, which notice was dated 5 January 2004. The respondent, on 23 January 2004, filed a notice of objection to competency, asserting that the judgment of Lindgren J was an interlocutory judgment, that leave to appeal was therefore necessary and that leave had not been granted. On 20 February 2004 the appellant filed an application for leave to appeal. Both parties submitted quite extensive written submissions. At the hearing the appellant appeared for himself and was assisted by an interpreter. He initially sought the appointment of *pro bono* counsel, or alternatively an adjournment to enable him to arrange finance in order to secure his own legal representation. These applications were declined. The appellant added virtually nothing to his written submissions concerning the merits of his appeal or application for leave.

THE MERITS

6 Clearly, Lindgren J was correct in concluding that the appellant had not demonstrated any arguable error in the Tribunal's process or in its decision. In explaining this conclusion, we need only add a few comments to those made by Lindgren J.

7 His Honour effectively dealt with two issues raised by the appellant, namely:

- his failure to attend the Tribunal hearing; and
- his claims concerning persecution of homosexuals in Bangladesh, including his own experience.

8 As to the first matter, two notices of hearing were sent to the appellant. The first was dated 6 February 2002, was posted on that date and invited him to a hearing on 14 March 2002. The second was dated 7 February 2002, was posted on 8 February 2002 and advised that the date of hearing had been changed to 21 March 2002. The appellant told Lindgren J that he was in hospital when notification of the date of hearing arrived at his address. However there was no sworn evidence to that effect. Further, he had acknowledged in writing the receipt of one such notification. That acknowledgement was received by the Tribunal on or about 11 February 2000. Had it related to the first notification, then the appellant should have attended on 14 March 2002. There is no suggestion that he did so. Had he attended, we expect that he would have been told of the amended hearing date. If the

acknowledgement related to the second notification, he should have appeared on 21 March. He did not do so. In any event, as Lindgren J observed, the Tribunal followed the procedure for notification prescribed by the *Migration Act 1958* (Cth) (the "*Migration Act*"). There has been no suggestion that it was obliged to do more.

9 As to the second matter, the appellant's outline of argument on appeal addressed the conditions to which homosexuals are allegedly subject in Bangladesh. We infer that he sought to put similar information before Lindgren J. However, as his Honour observed, the Tribunal was not prepared to act upon his claims concerning his homosexual relationship, prior persecution on account of homosexuality or his departure from Bangladesh. It even doubted whether he was from Bangladesh. Given the various conflicting dates referred to in [8] and [11] of his Honour's reasons, it is easy to understand why the Tribunal declined to act on his claims. The Tribunal said that had the appellant appeared at the hearing it would have explored these matters with him. There was no obligation upon the Tribunal to accept at face value the assertions made by the appellant in his application. There were good reasons for not doing so.

10 It follows that any application to Lindgren J for an extension of time should have failed because the appellant demonstrated no basis for criticism of either the process adopted by the Tribunal or its decision. If no such extension was necessary then the application for constitutional writs should have failed for the same reason. It follows that both the appeal and the application for leave to appeal should fail. However, before disposing of these proceedings, we wish to identify, without resolving, certain apparent anomalies which appear to have arisen in the way in which this Court deals with applications for constitutional writs remitted from the High Court. We suspect that certain assumptions underlying current practices may need reconsideration. Unfortunately, because of the particular circumstances of this case, we have not had the benefit of submissions concerning them. For this reason, we are reluctant to offer any concluded views. Further, some of our concerns may involve the construction of the High Court Rules, a matter which ultimately is better left to the members of that Court.

O 55 OF THE HIGH COURT RULES

11 In treating the remitted application as being subject to the time limitations prescribed in O 55 of the High Court Rules, Lindgren J acted in accordance with a number of earlier

decisions. In *ApplicantM216 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 931 Heerey J considered a remitted application which included a prayer for an extension of time. His Honour considered, at [22], that the matter which had been remitted *'… included an application for enlargement of the time fixed by the* High Court Rules. *The relief sought can be characterized as not just certiorari, but certiorari on an application filed more than six months after the impugned decision. The same analysis applies,* mutatis mutandis*, in the case of mandamus.'* His Honour cited the decision of the High Court in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 where Gleeson CJ and Gaudron, McHugh, Gummow and Hayne JJ observed at [99] that:

> *'... matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure.'*

12 Their Honours also observed at [100] that:

> *'... the application of any limitation period, whether barring the remedy or extinguishing the right, would be taken to be a question of substance, not procedure...'.*

13 Heerey J also referred to a decision of a Full Court of this Court in *Re Ross; Ex parte The Australian Liquor, Hospitality and Miscellaneous Workers' Union* (2001) 108 FCR 399 which, in his Honour's view, demonstrated that a matter of this kind, remitted from the High Court, remained subject to the time limitations prescribed by O 55 rr 17 and 30. A similar approach was taken by Mansfield J in *Applicants A64 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1142, which decision was followed by Hely J in *Applicant S70 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 204 ALR 115 at [5]. In *Applicants A64 of 2002* the order of Hayne J was, at [16]:

> *'1. The further proceedings in this application be remitted to the Federal Court of Australia.*
> *2. The application proceed in that Court as if the steps already taken in the application in this Court had been taken in that Court.'*

14 Mansfield J observed at [17] - [18]:

> *'[17] It was argued that the effect of the second order is that the principal application proceed in this Court as if it had been commenced in this Court. The proposition includes the premise that*

the "steps already taken" include the steps of instituting the application itself. It is pointed out that, apart from the directions given on 7 February 2003, no other steps appear to have been taken in the High Court. Under the Federal Court Rules, no time limits apply in respect of applications for orders in the nature of certiorari, mandamus or prohibition.

[18] In my view, the order of remittal of 7 February 2003 does not have that intent. Order 1 refers to the "further proceedings in this application" being remitted to this Court. Order 2 then relates to how the application should further take place in this Court. The reference to the steps already taken in to ensure that whatever procedural steps had been taken in the High Court to the time of remittal did not require to be repeated, so that the conduct of the proceedings in this Court should progress efficiently. Section 44(1) of the Judiciary Act 1903 *(Cth) empowers the High Court to remit "further proceedings" in a matter to other Courts. The terms of Order 1 of the remittal orders made on 7 February 2003 reflect that expression. By way of contrast, s44(2A) of the* Judiciary Act 1903 *empowers the High Court to "remit the matter or any part of the matter" to this Court. In any event, the High Court would not by a remittal order alter the rights of the parties unless it explicitly intended to do so:* State Bank of New South Wales v The Commonwealth Savings Bank of Australia *(1984) 154 CLR 579 per Gibbs CJ at 586. And, as Toohey J pointed out in* Bowtell v Commonwealth of Australia *(1989) 86 ALR 31 at 32, the remittal power does not extend to directing the Court to which the matter has been remitted whether to apply a particular view of the law.* Pozniak v Smith *(1982) 151 CLR 38 recognised that the power of the High Court to give directions at the time of remittal is confined to matters of procedure: per Gibbs CJ, Wilson and Brennan JJ at 44. Whilst there is scope for debate about whether the effect or operation of O 55 rr 17 and 30 of the High Court Rules do prescribe matters of procedural law or of substantive law, I do not consider that Hayne J intended by the remittal order made on 7 February 2003 that, to the extent to which the application had been instituted out of time by reason of O 55 rr 17 and 30 of the High Court Rules, it should no longer be regarded as having been instituted out of time. Order 51A rr 2A and 4 of the Federal Court Rules provide that, subject to any direction of the High Court, the Federal Court Rules apply as relevant to a remitted matter. What was remitted was the "further proceedings" in the matter. Those rules do not, in my view, address the issue as to whether the substantive application was out of time except to the extent (as occurred) of having the Federal Court Rules prescribe how any application for an extension of time should be pursued.'*

We will return to these decisions at a later stage.

15 Other remitted cases in which this question arose include *Applicant A26 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2003] FCA 1431; *S267 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1442; *M206 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 24; *Daniel v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 21; *Applicant A2 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 576; and *Applicant M29 of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1266.

THE POWER OF REMITTER

16 The High Court's relevant power of remitter is to be found in s 44 of the *Judiciary Act 1903* (Cth) (the "*Judiciary Act*") which provides:

> *'(1) Any matter other than a matter to which subsection (2) applies that is at any time pending in the High Court, whether originally commenced in the High Court or not, or any part of such a matter, may, upon the application of a party or of the High Court's own motion, be remitted by the High Court to any federal court, court of a State or court of a Territory that has jurisdiction with respect to the subject-matter and the parties, and, subject to any directions of the High Court, further proceedings in the matter or in that part of the matter, as the case may be, shall be as directed by the court to which it is remitted.*
>
> *(2) Where a matter referred to in paragraph 38(a), (b), (c) or (d) is at any time pending in the High Court, the High Court may, upon the application of a party or of the High Court's own motion, remit the matter, or any part of the matter, to the Federal Court of Australia or any court of a State or Territory.*
>
> *(2A) Where a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party is at any time pending in the High Court, the High Court may, upon the application of a party or of the High Court's own motion, remit the matter, or any part of the matter, to the Federal Court of Australia.*
>
> *(3) Where the High Court remits a matter, or any part of a matter, under subsection (2) or (2A) to a Court:*
> *(a) that Court has jurisdiction in the matter, or in that part of the matter, as the case may be; and*
> *(b) subject to any directions of the High Court, further proceedings in the matter, or in that part of the matter, as the case may be, shall be as directed by that court.'*

17 As Mansfield J observed in *Applicants A64 of 2002*, the power of the High Court to give directions is limited to matters of procedure. Subject to such directions, a remitted matter is to proceed in accordance with directions given by the court to which it has been remitted. Order 51A rr 1 and 2 of the Federal Court Rules concern mechanisms associated with such a remitter. Rule 2A provides:

> *'The other Orders of these Rules apply, so far as they are relevant and not inconsistent with this Order, to a proceeding that involves a matter, or part of a matter, remitted by the High Court to the Court.'*

18 Rule 4 provides:

> *'Rules 1 to 3 of this Order apply subject to any direction of the High Court in the matter.'*

19 Clearly, in the absence of a direction to the contrary, the Federal Court Rules will apply to any matter remitted to this Court pursuant to s 44 of the *Judiciary Act*.

THE REMITTED MATTER

20 When a matter is remitted from the High Court, it may be necessary to identify the subject matter of the remitter. This may involve an examination of the order of remitter and of the prior proceedings in the High Court. The subject matter of the remitter in this case was, on its face, an application for orders nisi for certiorari and mandamus and supporting injunctions. Pursuant to O 55 r 1 of the High Court Rules, an application for a writ of certiorari or mandamus may be made ex parte to the Court or to a Justice. The application is to be supported by an affidavit. In the first instance the application is to be for an order calling on the proposed respondent to show cause why the writ should not be issued (an "order nisi"). A Justice may direct the applicant to serve a notice of motion (O 55 r 2).

21 Order 55 subr 17(1) of the High Court Rules provides:

> *'An order nisi for a writ of certiorari to remove a judgment, order, conviction or other proceeding, for the purpose of its being quashed, of an inferior court or tribunal, or of a magistrate or justices, shall not be granted unless the application for the order is made not later than six months after the date of the judgment, order, conviction or other proceeding, or within such shorter period as may be prescribed by any law.'*

22 Order 55 r 30 provides:

> *'An application for a writ of mandamus, or an order in the nature of mandamus, to a judicial tribunal to hear and determine a matter shall be made within two months of the date of the refusal to hear or within such further time as is, under special circumstances, allowed by the Court or a Justice.'*

23 As the High Court Rules do not seem to contemplate the filing of any initiating document, we assume for present purposes that the "application" contemplated in rr 17 and 30 will usually be an oral application. Apart from the express power to extend time under special circumstances, conferred by O55 r 30 in the case of mandamus, O60 subr 6(1) provides:

> *'A Court or Justice may enlarge or abridge the time appointed by these Rules or fixed by an order of the Court or a Justice for doing an act upon such terms, if any, as the justice of the case requires.'*

24 Presumably, in the case of mandamus, the express power conferred by O55 r30 should be invoked rather than the more general terms of O 60 subr 6(1).

25 It may be significant that O 64 provides relevantly as follows:

> *'1. (1) Subject to the next succeeding sub-rule, non-compliance with these Rules or with a rule of practice for the time being in force, does not render any proceedings void unless the Court or a Justice so directs.*
>
> *(2) The proceedings may be set aside, either wholly or in part, as irregular, or may be amended or otherwise dealt with in such manner and upon such terms as the Court or Justice thinks fit.*
>
> *2. The Court or a Justice may at any time, upon such terms as are just, relieve a party from the consequences of non-compliance with these Rules or with a rule of practice for the time being in force.*
>
> *3. An application to set aside proceedings for irregularity shall not be allowed -*
>
> *(a) unless the application is made within reasonable time; or*
>
> *(b) if the party applying has taken a fresh step after knowledge of the irregularity.*
>
> *4. Where an application is made to set aside proceedings for irregularity, the several objections intended to be relied upon shall be stated in the summons or notice of motion.*

(5) … '.

26 The application of O 64 may not be as wide as it seems. A similar rule existed in England prior to 1964. In *In re Pritchard (decd); Pritchard v Deacon* [1963] Ch 502, the majority of the Court of Appeal, following a line of earlier authority, concluded that the rule did not validate proceedings which were otherwise void (rather than irregular). In that case proceedings which were required by the rules to be commenced in the Central Registry of the High Court were commenced in a District Registry. It was held that the proceedings were void, and incurably so. See the decision of the Full Court of Queensland in *Perez v Transfield (Qld) Pty Ltd* [1979] QdR 444 for a discussion of that decision and the subsequent amendments to the English and equivalent Queensland rules.

27 It is unlikely that Gaudron J intended to remit a matter which was in fact a nullity. Nothing in the order suggests that her Honour intended to remit an application to extend time pursuant to O 55 r 30 or O 60 r 6. In *Applicant M216 of 2002*, the draft order expressly sought such an extension. Heerey J was no doubt correct in concluding that Hayne J had intended to remit that application to this Court. In *Applicants A64 of 2002*, there was no suggestion that any such application was included in the order nisi or referred to in the order of remitter. Nonetheless Mansfield J inferred that Hayne J had intended to remit the proceedings subject to, or perhaps including such an application. That can only have been because Mansfield J considered that the O 55 limitations applied notwithstanding the remitter.

O 55 – SUBSTANTIVE OR PROCEDURAL?

28 Both Heerey and Mansfield JJ appear to have considered that the time limitations prescribed by O 55 rr 17 and 30 created and/or terminated "substantive" rights. In this respect, Heerey J relied upon the decision in *Pfeiffer* to which we have previously referred. Whilst conceding the authority and relevance of that decision, we doubt whether the O 55 limitations create or destroy substantive rights. Rules of court are, by definition, procedural. In the case of the High Court Rules, see *Judiciary Act* s 86. The issue of constitutional writs is discretionary. Delay is frequently a relevant factor in exercising that discretion. Order 55 rr 17 and 30 seem to do little more than raise the question of delay for consideration at a preliminary stage. We note that in *Pfeiffer*, the majority observed at [99]:

> *'Two guiding principles should be seen as lying behind the need to distinguish between substantive and procedural issues. First, litigants who resort to a court to obtain relief must take the court as they find it. A plaintiff cannot ask that a tribunal which does not exist in the forum (but does in the place where a wrong was committed) should be established to deal, in the forum, with the claim that the plaintiff makes. Similarly, the plaintiff cannot ask that the courts of the forum adopt procedures or give remedies of a kind which their constituting statutes do not contemplate any more than the plaintiff can ask that the court apply any adjectival law other than the laws of the forum. Secondly, matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in* [McKain v R W Miller & Co (SA) Pty Ltd *(1991) 174 CLR 1 at 26-27*]*, "rules which are directed to governing or regulating the mode or conduct of court proceedings" are procedural and all other provisions or rules are to be classified as substantive.'*

29 It is difficult to avoid the conclusion that O 55 is *'directed to governing or regulating'* the conduct of proceedings in the High Court. If so, the decision in *Pfeiffer* would suggest that the time limits in rr 17 and 30 are procedural rather than substantive. It would then be difficult to see any role for the O 55 limitation periods in proceedings which have been remitted to this Court (where there are no such procedural limitations), save where the High Court remits an application for an extension of time or directs that the High Court Rules or some part thereof should continue to apply to the remitted matter. Delay will still be relevant in exercising the discretion to grant relief.

POWER TO EXTEND TIME - *RE ROSS*

30 In *Re Ross*, the Full Court assumed that a remitted matter was subject to the limitation periods prescribed by O 55, and sought to find power to extend those periods. At [39], it found such power in a *'combination of s 23 of the* Federal Court of Australia Act *and O 60, r 6(1) of the High Court Rules'*. Alternatively, the Court relied upon *'… the effect of s38(2) of the* Federal Court of Australia Act *… to fill any gap in the Federal Court Rules.'*

31 Section 23 provides:

> *'The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate.*

32 We doubt whether s 23, by itself, would operate to permit this Court to extend a limitation period. We also doubt whether O 60 subr 6(1) or O 55 r 30 of the High Court Rules should be construed as addressing the power of any court or judge other than the High Court and the Justices of that Court.

33 Section 38 provides:

> *'(1) Subject to any provision made by or under this or any other Act with respect to practice and procedure, the practice and procedure of the Court shall be in accordance with Rules of Court made under this Act.*
>
> *(2) In so far as the provisions for the time being applicable in accordance with subsection (1) are insufficient, the Rules of the High Court, as in force for the time being, apply,* mutatis mutandis*, so far as they are capable of application and subject to any directions of the Court or a Judge, to the practice and procedure of the Court.*
>
> *(3) In this section,* ***practice and procedure*** *includes all matters in relation to which Rules of Court may be made under this Act.'*

34 The decision in *Re Ross* seems to suggest that this provision transports Orders 55 and 60 of the High Court Rules into Federal Court practice. We cannot see why that should be so. The notion of "insufficiency" implies some inadequacy in the Federal Court Rules as they apply to a particular case. We do not see any such insufficiency inherent in either the absence from those rules of limitation periods such as those found in O 55 rr 17 and 30 of the High Court Rules, or in the absence of any power to extend such periods.

THE ORDER NISI – INTERLOCUTORY OR FINAL?

35 One further matter requires comment. Counsel for the Minister submitted that if the appellant did not require an extension of time in which to appeal, the order under appeal should be treated as an order refusing an application for an order nisi. Such orders have traditionally been considered to be interlocutory, therefore necessitating leave to appeal. See *Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corporation Pty Ltd* (1993) 67 ALJR 389 at 390. It occurred to us in the course of argument that the terms of O 51A r 5 of the Federal Court Rules may have changed the nature of an application for an order nisi remitted to this Court by the High Court. That order provides:

> *'(1) Subject to subrule (2) and to any Act to the contrary, when the Court or a Judge hears an application remitted by the High Court for an*

> *order* nisi *for a constitutional writ, the Court or Judge:*
> *(a) will at the same time hear the parties on whether, if the order* nisi *were made, it should be made absolute; and*
> *(b) if satisfied that an order absolute should be made, will not make the order* nisi*, but will proceed directly to make the order absolute.*
>
> *(2) In a particular case, the Court or Judge may order that subrule (1), or any part of it, does not apply.'*

36 We were referred to the Full Court decision in *NAHQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 297. The majority (Whitlam and Kiefel JJ) concluded that notwithstanding the provisions of O 51A r 5, a decision refusing an order nisi in a remitted matter was an interlocutory judgment and therefore not subject to appeal as of right. In the absence of any submissions to the contrary, we should follow that decision. Nonetheless we see some substance in the doubts expressed by Moore J in his reasons for judgment in *NAHQ*.

ORDERS

37 It is now necessary to determine how we should dispose of these proceedings. Whether or not O 55 rr 17 and 30 of the High Court Rules continued to apply to these proceedings after remitter, it is clear that Lindgren J decided only that there should be no extension of the time periods prescribed by those rules. In *Paramasivam v Flynn* (1998) 90 FCR 489 at 493, a Full Court (Miles, Lehane and Weinberg JJ) observed:

> *'An order refusing an application to extend time to sue after the expiry of the limitation period may or may not be regarded as interlocutory since it may or may not finally determine the rights of the parties in respect of the subject matter of the action. It is possible that the state of the pleadings and of the circumstances of a particular case leaves open the question whether the defence of expiry of the limitation period will succeed at the trial.'*

38 We have expressed the tentative view that the bars prescribed by O 55 rr 17 and 30 are procedural rather than substantive. That view may not necessarily lead to the conclusion that the refusal of an extension of any such period is interlocutory rather than final. Nonetheless we are inclined to think that the decision in this case was interlocutory, and that leave to appeal is necessary. Given the concerns which we have expressed, we should grant leave to appeal. We will treat the notice of appeal dated 5 January 2004 as reflecting the grounds which the appellant wishes to prosecute. He did not suggest to the contrary in the

course of argument. For the reasons which we have given the appeal must be dismissed. The appellant should pay the respondent's costs of the application for leave to appeal and of the appeal.

I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Dowsett & Lander.

Associate:

Dated: 20 April 2004

The Appellant appeared In Person.

Counsel for the Respondent:	Mr Reilly
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	26 February 2004
Date of Judgment:	21 April 2004