FEDERAL COURT OF AUSTRALIA

SZHWY v Minister for Immigration and Citizenship [2007] FCAFC 64

MIGRATION – procedural fairness – legal professional privilege – hearing before Refugee Review Tribunal – whether a question asking an applicant for review to divulge the content of conversation with his legal representative without informing him of his right to claim legal professional privilege was asked in excess of the tribunal's jurisdiction – whether the natural justice hearing rule in s 422B(1) of the *Migration Act 1958* (Cth) affects legal professional privilege – whether the tribunal was under a duty to warn or inform the applicant of his right to legal professional privilege – whether the applicant had waived privilege by answering questions that revealed the substance of privileged communications – legal professional privilege as a common law immunity – no basis to suggest to tribunal any misuse of communication with legal representative or other abuse of legal professional privilege by applicant – legal professional privilege as an inviolable limitation on the tribunal's inquisitorial powers

HELD – appeal allowed – original decision of tribunal quashed because (per Lander J) tribunal failed to inform applicant of right to claim legal professional privilege and (per Rares J) tribunal asked question beyond power in circumstances – matter remitted to tribunal to be decided in accordance with law

Evidence Act 1995 (Cth) ss 118 and 132
Migration Act 1958 (Cth) ss 422B(1), 433(1) and 433(1A)

Annetts v McCann (1990) 170 CLR 596
Arno v Forsyth (1986) 9 FCR 576
Attorney-General for the Northern Territory v Maurice (1986) 161 CLR 475
Attorney-General v Radloff (1854) 156 ER 366
Baker v Campbell (1983) 153 CLR 52
Benecke v National Australia Bank (1993) 35 NSWLR 110
Boyse v Wiseman (1855) 156 ER 598
Carter v Northmore Hale Davy & Leake (1995) 183 CLR 121
Clough v Leahy (1904) 2 CLR 139
Coco v The Queen (1994) 179 CLR 427
Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501
Commissioner of Taxation v Citibank Limited (1989) 20 FCR 403
Controlled Consultants Proprietary Limited v Commissioner for Corporate Affairs (1985) 156 CLR 385
Corporate Affairs Commission (NSW) v Yuill (1991) 172 CLR 319
Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543
Descôteaux v Mierzwinski [1982] 1 SCR 860
Dunne v J Connolly Ltd (1963) AR(NSW) 873
Edmunds v Greenwood (1868) LR 4 CP 70
Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49

Goldberg v Ng (1995) 185 CLR 83
Grant v Downs (1976) 135 CLR 674
Jacobsen v Rogers (1995) 182 CLR 572
JMA Accounting Pty Ltd v Commissioner of Taxation (2004) 139 FCR 537
Kioa v West (1985) 159 CLR 550
Mann v Carnell (1999) 201 CLR 1
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611
Minister for Immigration and Multicultural and Indigenous Affairs v Lat (2006) 151 FCR 214
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323
Ministry of Correctional Services v Goodis [2006] 2 SCR 32
National Crime Authority v S (1991) 100 ALR 151
O'Reilly v State Bank of Victoria Commissioners (1983) 153 CLR 1
Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476
Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328
R v Bell; ex parte Lees (1980) 146 CLR 141
R v Clyne (1985) 2 NSWLR 740
R v Coote (1873) LR 4 PC 599; 17 ER 587
R v Sloggett (1856) 169 ER 885
Rank Film Distributors Ltd v Video Information Centre [1982] AC 380
Re Minister for Immigration and Multicultural Affairs and Anor; ex parte Miah (2001) 206 CLR 57
Re Minister for Immigration and Mr A and Another; Ex parte Epeabaka (2001) 206 CLR 128
Re Refugee Tribunal; Ex parte Aala (2000) 204 CLR 82
Re Ruddock; Ex parte S154/2002 (2003) 201 ALR 437
SAAP v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 215 ALR 162
Shackell v Macaulay (1825) LJ Ch (OS) 27
Sorby v The Commonwealth (1983) 152 CLR 281
Standard Chartered Bank of Australia Ltd v Antico (1993) 36 NSWLR 87
Stead v State Government Insurance Commission (1986) 161 CLR 141
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63
SZCIJ v Minister for Immigration and Multicultural Affairs [2006] FCAFC 62
Three Rivers District Council and others v Governor and Company of the Bank of England (No 6) [2005] 1 AC 610
Tupling v Ward (1861) 6 H&N 749
Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88

McNichol, SB, *Law of Privilege* (The Law Book Company Ltd, 1992)
The Law Reform Commission, "Research Paper No 16: Privilege"
Desitanik, Dr RJ, *Legal Professional Privilege in Australia* (2nd ed, LexisNexis Butterworths, 2005)
Wigmore JH, *Wigmore on Evidence* (McNaughton revision, Little Brown & Co, 1961)

SZHWY v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND REFUGEE REVIEW TRIBUNAL

NSD 2013 OF 2006

LANDER, GRAHAM AND RARES JJ
9 MAY 2007
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 2013 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZHWY**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **LANDER, GRAHAM AND RARES JJ**
DATE OF ORDER: **9 MAY 2007**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The first respondent's description be changed to 'Minister for Immigration and Citizenship'.

2. The appeal be allowed.

3. The first respondent pay the appellant's costs.

4. Orders 2, 3 and 4 made by the Federal Magistrates Court on 27 September 2006 dismissing the appellant's application be set aside and in lieu thereof there be orders that:

    4.1 The application be allowed.

    4.2 The decision of the Refugee Review Tribunal made on 21 November 2005 be quashed.

    4.3 The application to the Refugee Review Tribunal dated 3 August 2005 be remitted to the Tribunal to decide the matter according to law.

4.4 The first respondent pay the applicant's costs.

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
NEW SOUTH WALES DISTRICT REGISTRY **NSD 2013 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZHWY** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**LANDER, GRAHAM AND RARES JJ**
DATE:	**9 MAY 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

LANDER J:

The Facts

1 This appeal raises only one ground but it is an important one.

2 The appellant is an Egyptian citizen. He arrived in Australia on 9 November 2004 and, on 11 February 2005, applied for a Protection (Class XA) visa. On 23 July 2005 a delegate of the first respondent refused that application. On 3 August 2005 the appellant applied for a review of that decision.

3 On 21 November 2005 the second respondent ('the Tribunal') affirmed the Minister's delegate's decision.

4 On 11 April 2006 the appellant applied to the Federal Magistrates Court for a review of the Tribunal's decision to affirm the first respondent's delegate's decision. A number of grounds were raised but, importantly, for the purpose of this appeal, the appellant claimed

that the Tribunal failed to accord him procedural fairness because it 'breach(ed) the applicant's legal professional privilege'. Although the Federal Magistrate found that the Tribunal had asked questions of the appellant which breached the appellant's legal professional privilege, he found that no jurisdictional error had been demonstrated and dismissed the application.

5 The appellant's case before the Tribunal was that he feared persecution on two grounds. First, on religious grounds because he had converted from the Islamic faith to the Christian faith. Secondly, he feared persecution on the ground of his homosexuality.

6 The Tribunal did not accept that the appellant was truthful in claiming to have converted from Islam to Christianity and, indeed, found that he had invented those claims to advance his application for a protection visa.

7 The Tribunal accepted that homosexuals formed a particular social group in Egypt. It also accepted that:

> *'… there is a real chance that persons taken into custody in Egypt on suspicion of homosexual activity face a real chance of torture, physical mistreatment and other human rights abuses amounting to persecution.'*

However, it did not accept the applicant's claim that he was a homosexual.

8 The appellant claims that the Tribunal failed to accord him procedural fairness in receiving evidence of a privileged communication he had with his solicitor. During the hearing before the Tribunal, the following exchange took place:

'614. Tribunal Member	*Well if you first decided not to return in late December 2004, what did you think was going to happen?*
615. Applicant	*Well I don't know, I told you that I was too confused, you know I had a actually one meeting as well with a solicitor in Lakemba, I believe he call Salah I think so, but he was you know, he was, he was a Muslim in the beginning so I was too afraid to speak in front of him about the Christianity or about the Homosexuality as well*
616. Tribunal Member	*What did you talk to him about*

617. Applicant	*I came to him you know on a crazy idea about that I hate the Mobarak, the President*
618. Tribunal Member	*You came to him what*
619. Applicant	*I came to him in a crazy idea that I hate Mobarak, it just came to me like that (clicks fingers)*
620. Tribunal Member	*That you hated work? I can't*
621. Applicant	*The president of Egypt*
622. Tribunal Member	*oh I see I see, so you told him that you didn't want to go back for political reasons?*
623. Applicant	*Yes*
624. Tribunal Member	*Did you*
625. Applicant	*Because I couldn't tell him about the homosexuality because I was too afraid to tell him about that*
626. Tribunal Member	*And what did he advise you to do?*
627. Applicant	*Ah the, the solicitor?*
628. Tribunal Member	*Hmm*
629. Applicant	*Well he recommended to go for another meeting to discuss all the details*
630. Tribunal Member	*And you didn't go back*
631. Applicant	*Yes for sure not*
632. Tribunal Member	*Ok. Um, so you have had your passport issued for a while.'*

The parties' contentions

9 It is the appellant's case that the communications he had with his solicitor were privileged.

10 He claims that the Tribunal failed to accord him procedural fairness because the

Tribunal failed to advise him that he was entitled to claim legal professional privilege in respect of any confidential communication between him and his solicitor. Further, the Tribunal failed to accord him procedural fairness in that its questions required him to divulge the contents of communications between himself and his solicitor. He contends that in doing so the Tribunal fell into jurisdictional error. In particular, the applicant complains of the questions asked by the Tribunal member, numbered 616, 622 and 626. The appellant contended that the Tribunal was under a duty to accord the appellant procedural fairness and that one of the requirements of procedural fairness obliged the Tribunal 'to observe the appellant's legal professional privilege'.

11 The Minister contended first, that the Tribunal did not rely upon that part of the appellant's evidence for its reasons for decision; secondly, there is no rule of procedural fairness that an applicant in administrative proceedings to which the rules of evidence do not apply may not be asked about his or her conversation with a solicitor; thirdly, if privilege did exist then it was waived by the appellant; and fourthly, even if there was a breach of procedural fairness, relief should be denied because the breach could have made no difference to the outcome.

Legal Professional Privilege

12 Legal professional privilege is a substantive and fundamental common law principle and not merely a rule of evidence: *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 ('*Carter*') per Deane J at 132; McHugh J at 161; *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475 ('*Maurice*') per Deane J at 490; *Goldberg v Ng* (1995) 185 CLR 83 per Deane, Dawson and Gaudron JJ at 93. It is 'a practical guarantee of fundamental, constitutional or human rights': *Carter* per McHugh J at 161. It is a 'bulwark against tyranny and oppression': *Maurice* per Deane J at 490. His Honour said (at 490):

> *'That being so, it is not to be sacrificed even to promote the search for justice or truth in the individual case or matter and extends to protect the citizen from compulsory disclosure of protected communications or materials to any court or to any tribunal or person with authority to require the giving of information or the production of documents or other materials: see* Pearse v. Pearse *(1846) 1 De G. & Sm. 12, at pp. 28-29 [63 E.R. 950, at p. 957];* Baker v. Campbell *(1983) 153 C.L.R., at pp. 115-116.'*

13 It is no less fundamental than the privilege against self-incrimination: *Baker v*

Campbell (1983) 153 CLR 52 (‘*Baker v Campbell*’) per Dawson J at 127, Mason J contrary at 80-81; *Carter v Northmore Hale Davy and Leake* (1995) 183 CLR 121 per Toohey J at 145.

14 Legal professional privilege exists to serve the public by encouraging trust and candour in the relationship between lawyer and client: *Maurice* at 487. It ‘is a precondition of full and unreserved communication with [one’s] lawyer’: *Baker v Campbell* per Deane J at 118.

15 The privilege protects from disclosure ‘communications made confidentially between a client and his legal adviser for the purpose of obtaining or giving legal advice or assistance: *R v Bell; ex parte Lees* (1980) 146 CLR 141 at 144; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 550. When the communication is contained in a document, that document must have been created for the dominant purpose of obtaining legal advice for it to be protected by privilege: *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 65-66. The privilege can arise also where the confidential communication is for the dominant purpose for use in existing or reasonably contemplated judicial or quasi judicial proceedings. A third class of legal professional privilege arises to protect confidential communications between a person or a person’s legal practitioner and a third party if made in existing or reasonably anticipated judicial or quasi judicial proceedings and the dominant purpose of the communication related to those proceedings. On this appeal, the Court is concerned with the first or possibly the second class.

16 Notwithstanding its description, it is the client’s privilege not the privilege of a legal practitioner: *Baker v Campbell* at 85; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* at 54.

The Evidence Act

17 Section 118 of the *Evidence Act 1995* (Cth) (‘Evidence Act’) prohibits the adducing of evidence to which objection is taken and which would disclose a confidential communication between a client and the client’s lawyer or the contents of a confidential document prepared by the client or the lawyer for the dominant purpose of the lawyer

providing the client with legal advice. Where it appears to a Court that a witness or a party may have grounds for objecting to the receipt of evidence of the kind referred to in s 118, s 132 of the Evidence Act obliges the Court to satisfy itself that the witness or party is aware of the effect of the provision. However, because the Tribunal is not bound by the rules of evidence, the Evidence Act does not apply: s 420(2)(a) of the *Migration Act 1958* (Cth) ('the Act').

The Migration Act

18 Part 7 of the Act provides for the review of protection visa decisions and s 411 identifies the decisions which are reviewable under that Part. A decision to refuse to grant a protection visa is an RRT-reviewable decision under s 411(1)(b) of the Act. Section 412 provides a procedure for an application for review of an RRT-reviewable decision. If a valid application is made under s 412, the Tribunal must review the decision: s 414(1) of the Act.

19 The Tribunal may exercise all the powers and discretions that are conferred by the Act on the person who made the decision: s 415(1). The Tribunal may affirm the decision; vary the decision; remit the matter for reconsideration in accordance with directions or recommendations of the Tribunal; or set aside the decision and substitute a new decision: s 415(2). If the Tribunal varies the decision or sets it aside and substitutes a new decision, the decision as varied or substituted is taken to be a decision of the Minister: s 415(3).

20 Part 7 Division 3 provides for the manner in which the Tribunal is to exercise its powers. Section 420 of the Act requires the Tribunal to review a decision fairly, justly, economically, informally and quickly: s 420(1). The Tribunal is not bound by technicalities, legal forms or rules of evidence (s 420(2)(a)) and must act according to substantial justice and the merits of the case: s 420(2)(b). Section 420 is facultative and does not require a particular procedure to be observed: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [46]-[51], [108]-[109], [158] and [179]. In particular, s 420(2) requires the Tribunal 'to operate as an administrative body with flexible procedures and not as a body with technical rules of the kind that have sometimes been adopted by quasi-judicial tribunals': *Eshetu* per Gaudron and Kirby JJ at [75].

21 Part 7 Division 4 provides the legislative framework for the way in which the

Tribunal must conduct its inquiry. Section 422B provides:

> *'(1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.*
>
> *(2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.'*

22 The Tribunal is given power to seek additional information that it considers relevant and must have regard to that information in making the decision on review: s 424(1).

23 Section 424A imposes mandatory obligations on the Tribunal first, to give to the applicant particulars of any information that the Tribunal considers would be the reason or part of the reason for affirming the decision under review; secondly, to ensure, so far as is reasonably practicable, that the applicant understands why that information is relevant to the review; and thirdly, to invite the applicant to comment on that information: s 424A(1). The Act provides procedures where the Tribunal proceeds under s 424 or s 424A.

24 Section 425 imposes a further mandatory obligation on the Tribunal to invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues in relation to the decision under review (s 425(1)), although the Act does excuse the Tribunal from that obligation for any of the reasons in s 425(2).

25 Where the applicant has been invited to appear before the Tribunal, the applicant is permitted to give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice: s 426(2). The Tribunal must have regard to the applicant's wishes but is not required to obtain the evidence orally or otherwise from the person named in the applicant's notice: s 426(3).

26 If the applicant is invited to appear before the Tribunal but does not appear before it, the Tribunal is entitled to proceed to determine the matter without taking any further action enabling the applicant to appear before it: s 426A(1).

27 Section 427 enables the Tribunal to take evidence on oath or affirmation and to

summon a person to appear before the Tribunal to give evidence or produce documents. That section also empowers the Tribunal to require the Secretary of the Department to arrange for the making of any investigation or any medical examination that the Tribunal thinks necessary and to provide a report to the Tribunal.

28 Part 7 Division 5 imposes obligations on the Tribunal to set out in writing its decision, reasons for decision, findings on material questions of fact and recording the evidence on which the findings are made: s 430. The Division also prescribes the way in which the Tribunal gives its decision and the manner in which the parties are notified. There is nothing in Divisions 3, 4 or 5 to suggest that a person appearing or giving evidence before the Tribunal is not entitled to claim the protection of privilege from self-incrimination or legal professional privilege if it be assumed that a person in those circumstances is entitled to claim those privileges in an administrative tribunal.

29 The proceeding in the Tribunal is an administrative review of a decision of the delegate of the Minister not to grant a protection visa. Because the Tribunal may exercise all the power and discretions reposing in the decision maker from whom the review is sought, the review is a full merits review of the delegate's decision. It is not an adversarial proceeding but inquisitorial: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 per Gleeson CJ at 330; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 per Gaudron and Gummow JJ at 115; *Re Ruddock; Ex parte S154/2002* (2003) 201 ALR 437 per Gummow and Heydon JJ at 450.

30 The Tribunal has a similar function to that of a Court. It must decide questions of fact and then determine whether as a matter of fact the applicant is a refugee under s 36 of the Act. In doing so it must, like a Court, proceed impartially and accord the applicant procedural fairness: *Re Minister for Immigration and Mr A and Another; Ex parte Epeabaka* (2001) 206 CLR 128; *Re Refugee Tribunal; Ex parte Aala*. It has, in the discharge ot is functions an obligation to act fairly and impartially. Even though its obligations to accord a party natural justice are governed by Division 4 of the Act, the Tribunal in observing those requirements must still act fairly. However, that does not mean that the Tribunal can be categorised as a quasi judicial body which is concerned with quasi judicial proceedings. It remains what it is, an administrative body with the power to exercise all of the powers of the

decision maker whose decision is under appeal. It cannot therefore be said, because of the nature and character of the Tribunal, a party or witness before the Tribunal necessarily has the privileges against self-incrimination and legal professional privilege.

Offences under the Migration Act

31 Division 6 of Part 7 provides for offences. Relevantly, s 433(1) provides that a person appearing before the Tribunal to give evidence must not refuse or fail to answer a question that the person is required to answer by the Tribunal. The penalty is imprisonment for six months. However, s 433(1A) provides that that subsection 'does not apply if the person has a reasonable excuse'.

32 Section 433(2) provides that a person must not refuse or fail to produce a document that a person is required to produce but, again, that subsection does not apply if the person has a reasonable excuse: s 433(2A).

33 The Act recognises that a person may have a reasonable excuse for refusing or failing to answer a question or not producing a document. The question is what might amount to a reasonable excuse.

34 What may be 'a reasonable excuse' and whether that phrase includes the privileges to which I have referred, must be gleaned from the Act and, in particular, from a consideration of the purpose of the Tribunal in carrying out its review: *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341. Even though the Tribunal is not a quasi judicial body that does not mean that a witness or party appearing before the Tribunal may not be entitled to claim the privileges to which I have referred.

35 Legal professional privilege is not confined to judicial and quasi-judicial proceedings but also applies in respect of documents the subject matter of a warrant: *Baker v Campbell* (overruling its previous decision in *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1) at 97 per Wilson J; at 118 per Deane J; and at 130-131 per Dawson J. Dawson J said at 131:

> *'It is clear to my mind that the power to compel the disclosure in an administrative inquiry of professional confidences is as likely to destroy the*

> *freedom of communication, which the law seeks to protect, between legal adviser and client as effectively as would compulsory disclosure of those confidences in judicial proceedings. It is the possible consequences which are significant and there can be little doubt that nowadays the penalties (and I use the term in a broad sense) which may be imposed administratively are in many instances as disadvantageous as those which may flow from civil or criminal litigation.'*

36 In *Sorby v The Commonwealth* (1983) 152 CLR 281 at 309, Mason, Wilson and Dawson JJ said:

> *'We reject the submission that the privilege is merely a rule of evidence applicable in judicial proceedings and that it cannot be claimed in an executive inquiry. We adhere to the conclusion we expressed in* Pyneboard *that the privilege against self-incrimination is inherently capable of applying in non-judicial proceedings. See* Kempley; Ex parte Grinham; Re Sneddon; Commissioner of Customs and Excise v. Harz.*'*
> (Footnotes omitted.)

37 Brennan J said in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 322 that *Baker v Campbell* should be understood as declaring that legal professional privilege was a common law right which applied 'not only in judicial and quasi judicial proceedings but whenever the exercise of a statutory power would trespass upon the confidentiality of the communications which the privilege protects'.

38 It follows, therefore, unless the Act says otherwise, a party or witness appearing before the Tribunal could claim the benefit of legal professional privilege. The answer to the question must lie in the construction of the Act. That follows because, although legal professional privilege is a common law right and 'an important common law immunity' (*Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553; *Jacobsen v Rogers* (1995) 182 CLR 572 at 589), it may be abolished or narrowed by statute: *Maurice*. But it would require the clearest of provisions in a statute before it were assumed that the right had been so affected: *Goldberg v Ng* at 94; *Baker v Campbell* at 90, 96-97, 104-105, 116 and 123; *Sorby v The Commonwealth* at 289-290, 310-311; *Coco v The Queen* (1994) 179 CLR 427 at 436-437; *Corporate Affairs Commission (NSW) v Yuill*. It should not be 'exorcised by judicial decision': *Grant v Downs* (1976) 135 CLR 674 at 685.

39 It is therefore to the Act that resort must be had to determine whether the legislation has abrogated the privilege. In some Acts the purpose of the power to ask questions or to obtain documents makes it abundantly clear that a reasonable excuse does not include a claim for an answer to a question or the provision of a document may be avoided by reason of a claim of privilege against self-incrimination: *Pyneboard Pty Ltd v Trade Practices Commission; Controlled Consultants Proprietary Limited v Commissioner for Corporate Affairs* (1985) 156 CLR 385. There may be an implied abrogation of the common law privilege: *Corporate Affairs Commission (NSW) v Yuill*. In that case, it was thought that the legislation under consideration would be rendered valueless if the privilege obtained and the legislation was sufficiently clear to show an intention to abrogate the privilege.

40 In *Pyneboard Pty Ltd v Trade Practices Commission* the majority said at 341:

> *'In deciding whether a statute impliedly excludes the privilege much depends on the language and character of the provision and the purpose which it is designed to achieve. The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation. In such cases it will be so, notwithstanding that the answers given may be used in subsequent legal proceedings.'*

41 The Tribunal carries out its inquiry to determine, on the merits, whether the applicant is a refugee under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol relating to the Status of Refugees done at New York on 31 January 1967. In doing so, it must have regard not only to the Convention and Protocol but also to the relevant legislation including s 36 of the Act, the various provisions of the Act relating to protection visas and the Regulations made under the Act.

42 The administrative inquiry is to determine whether Australia owes protection obligations to the applicant. If the inquiry determines that it does, the applicant will be granted a visa to enable Australia to discharge its protection obligations under the Convention and Protocol. If not, the applicant will not be entitled to such a visa and absent any entitlement to any other visa, will be at risk of being removed from the country.

43 But all that is to show that the inquiry is not directed to any criminal behaviour of the applicant. It is an inquiry which is personal to the applicant and, in particular, to determine whether the applicant has a well-founded fear of persecution for a Convention reason and is therefore unable or unwilling to return to his or her country of nationality. True it is that Article 1F raises serious questions which might arise in relation to the applicant's conduct. However if a delegate has refused a protection visa relying on Article 1F, that decision is not reviewable by the Tribunal: s 500(4). In that case, the Administrative Appeals Tribunal is given the power to review that decision: s 500(1)(c).

44 There is nothing in Division 6 which would suggest that a person appearing or giving evidence in the Tribunal is not entitled to claim the benefits of the privileges to which I have referred. There can be no reason why a communication between an applicant for a protection visa and his or her solicitor should not be privileged in any proceedings relating to a claim for protection under the Convention, the Protocol and the Act. The purposes underlying the reason for legal professional privilege would be best served by recognising that such a communication is privileged where an administrative decision maker is conducting an inquiry into a claim for a protection visa. It does not matter that the hearing is inquisitorial rather than adversarial. Nor does it matter that the hearing is being conducted by an administrative decision maker. Communications between an applicant for a protection visa and the applicant's legal advisers for the dominant purpose of obtaining legal advice or for the use in existing or reasonably contemplated proceedings before the Tribunal are privileged.

45 The appellant would have been entitled therefore to refuse to answer the Tribunal's questions. However, he did not so refuse. Indeed, he answered all questions put to him without objection.

The Tribunal's failure to warn the appellant

46 As I have said, the appellant contended that the Tribunal failed to accord him procedural fairness because it did not advise him that he was entitled to claim legal professional privilege and, indeed, asked him questions which caused him to divulge communications with his legal adviser.

47 It was argued by the appellant that the Tribunal acted in excess of its jurisdiction

'both in respect of the appellant's legal professional privilege and the overlapping requirements of procedural fairness'. It was argued that because of the existence of the privilege and procedural fairness, the Tribunal was obliged to implement procedures which would safeguard the appellant's rights to preserve the confidentiality of his communications with his solicitor. It was contended that the Tribunal needed to inform the appellant of his right to claim legal professional privilege and that the Tribunal had no power or right to compel disclosure of any communications with his solicitors.

48 In this case, the decision maker could not have been aware that the first question referred to above which was asked of the appellant would lead to the appellant referring to his meeting with his solicitor and, in those circumstances, the first answer given by the appellant was inadvertently received by the Tribunal. However, the answer given cannot be taken to be any imputed waiver of the appellant's legal professional privilege. In answer 615 he told the Tribunal what he did not speak to his solicitor about. He did not give any evidence of any communication with his solicitor. Sometimes, by advising what was not said, a party might allow another party to infer what was said. However, there was nothing in answer 615 which would have put the Tribunal on notice of the communications passing between the appellant and the appellant's solicitor at that meeting. For those reasons, the answer in 615 cannot be said to be an imputed waiver of the appellant's legal professional privilege.

49 It was contended, after receiving answer 615, the Tribunal should have immediately warned the appellant that the communication between the appellant and his solicitor was subject to legal professional privilege and need not be disclosed by the appellant to the Tribunal. It was put the Tribunal should have advised the appellant that it was not in his best interests to divulge any such communication.

50 It was argued that the next question (616) asked by the Tribunal was impermissible. It directly sought to ascertain the content of a communication between the appellant and his solicitor which was privileged. The further questions (622 and 626) should also not have been asked. Question 622, like question 616, directly seeks to ascertain the content of a communication between the appellant and his solicitor. Question 626 impermissibly seeks to ascertain the advice given by the solicitor to the appellant.

The Natural Justice Hearing Rule

51 The respondent Minister submitted that the natural justice hearing rule is excluded by s 422B of the Act. Therefore, it was submitted the Tribunal was under no obligation to advise the appellant that he was entitled to refuse to answer any question that would disclose the content of a communication between himself and his solicitor. Nor, it was put, was the Tribunal restrained from asking questions of the appellant to ascertain the content of the communications between the appellant and his solicitor and the advice given by that solicitor.

52 Section 422B is set out above: see [21] of these reasons.

53 If the common law right to claim legal professional privilege was part of the natural justice hearing rule, then I think the respondent's contention would have to be accepted. However, for the reasons which follow, I do not accept that premise.

54 The enactment of s 422B followed upon the decision of the High Court in *Re Minister for Immigration and Multicultural Affairs and Anor; ex parte Miah* (2001) 206 CLR 57 which held that the Migration Act did not exclude the application of the common rules of natural justice to the Minister or the Minister's delegate. It held that the Minister and the Minister's delegate were under a duty to accord an applicant for a visa procedural fairness. Section 422B was enacted to make it clear that the obligations in Division 4 of Part 7 of the Migration Act were intended to be an exhaustive statement of the Tribunal's obligations to accord an applicant procedural fairness and that no other common law right attaching to the natural justice hearing rule applied. There is nothing to suggest in the words of s 422B that Parliament intended to deal with the substantive right reposing in a party to claim legal professional privilege.

55 In *Minister for Immigration and Multicultural and Indigenous Affairs v Lat* (2006) 151 FCR 214, the Full Court (Heerey, Conti and Jacobson JJ) said at 225, after referring to the Explanatory Memorandum and the Second Reading Speech relating to the equivalent of s 422B (s 51A):

> '[66] *What was intended was that Subdiv AB provide comprehensive procedural codes which contain detailed provisions for procedural fairness but which exclude the common law natural justice hearing rule.*

[67] *Other aspects of the common law of natural justice, such as the bias rule are not excluded: see* VXDC *at [27].'*

56 On the same day, the same Full Court published their reasons in *SZCIJ v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 62 in which they said that s 51A of the Act, which was the subject matter of *Lat*, is the equivalent of s 422B.

57 I do not understand the Full Court in those decisions to be dealing with other than the natural justice hearing rule and its exclusion by reference to s 51A and s 422B. Indeed, that is all that s 422B addresses. In particular, I do not understand the Full Court in those cases to be saying that those sections have the effect of abrogating the rule allowing a person to claim the protection of legal professional privilege.

58 In my opinion, legal professional privilege is not part of the natural justice hearing rule which is concerned with according parties procedural fairness but a common law right quite separate from the obligation to accord a party natural justice. If the Parliament had intended to abrogate the rule allowing a claim of legal professional privilege it would have said so either expressly or by words which made it clear that was Parliament's intention.

59 In those circumstances, it seems to me legal professional privilege has survived the enactment of s 422B in relation to a review by the Tribunal of a decision of a delegate refusing to grant a protection visa.

60 The benefit of the privilege may be waived: *Mann v Carnell* (1999) 201 CLR 1. A party may expressly waive the privilege attaching to a communication between the party and his or her solicitor. The privilege also may be waived by implication where the party acts inconsistently with a claim for privilege: *Benecke v National Australia Bank* (1993) 35 NSWLR 110. That will occur when it would be unfair to allow a party to maintain the claim for privilege: *Maurice* per Mason and Brennan JJ at 487, Deane J at 492-493 and Dawson J at 497.

61 For the reasons I have already given, I do not think that the first answer was a waiver of the privilege. However, that does not assist the appellant unless some obligation was imposed upon the Tribunal of the kind contended for by the appellant. It was for the

appellant to claim legal professional privilege. In the absence of a claim, the evidence which he gave was admissible and receivable by the Tribunal.

62 Before the enactment of s 118 of the Evidence Act a party or a witness who wished to claim the benefit of legal professional privilege or the privilege against self-incrimination had to make that claim. Section 118 recognises that by requiring the client to make objection. At law it was for the witness or the party to claim privilege against self-incrimination and the onus was upon the party claiming the privilege to establish the claim was a proper one. If the witness failed to make the claim the question had to be answered and would be admissible in the later trial: *Attorney-General v Radloff* (1854) 156 ER 366; *R v Sloggett* (1856) 169 ER 885. It was for the party claiming the privilege to make the claim: *Boyse v Wiseman* (1855) 156 ER 598. Moreover, the claim for privilege needed to be clear and not left vague: *Standard Chartered Bank of Australia Ltd v Antico* (1993) 36 NSWLR 87 at 95. It was for the Court to rule upon the existence or otherwise of the privilege.

63 Suzanne McNicol writes in 'Law of Privilege' (Law Book Company Limited 1992) at p 10:

> *'Generally speaking there must be a specific claim to privilege by the person wishing to take advantage of it in respect of each individual question asked or document sought. A legitimate ground of privilege, therefore, confers an opportunity to withhold particular pieces of "privileged" information from a court or other body. It follows that privilege cannot be claimed on a "blanket objection" before any questions have been asked nor does privilege confer a freedom to choose whether or not to step into the witness box at all.'*
> (Footnotes omitted.)

64 A claim for privilege against self-incrimination might give rise to an inquiry as to whether the claim was validly made. Ordinarily, a claim for legal professional privilege can be determined quite simply by reference to the parties to the communication, the time when it was made and the circumstances in which it was made. But that is not always the case.

65 In *National Crime Authority v S* (1991) 100 ALR 151 at 159, Lockhart J said:

> *'When questions of legal professional privilege arise in proceedings before courts there are well established procedures for dealing with them. The claim is asserted on oath and it is open to the court or the person who seeks access to the document or the answer to the question to cross-examine the person*

who makes the claim. The extent to which the court allows cross-examination or itself asks questions of the deponent is, of course, a matter for the discretion of the judge; but generally it cannot be sufficient for someone merely to assert that the disclosure of the identity of a person or of a document, or of the number of persons who were present at a meeting, or who was present at the meeting, or who on behalf of the client (if the person making the assertion is a solicitor) spoke to him or that he spoke to a particular officer of the client, to enliven a claim of legal professional privilege.'

66 Although a claim of privilege against self-incrimination is a different species of privilege, it is instructive to have regard to the decisions of the Court in relation to the Court's responsibilities in relation to that issue. There was no obligation at law upon a Court to warn or caution a witness that an answer to a question might incriminate that witness: *Dunne v J Connolly* Ltd (1963) AR(NSW) 873; *R v Coote* (1873) 17 ER 587.

67 In *R v Coote* the Privy Council said at 592:

'The Chief Justice indeed suggests, that Coote may have been ignorant of the law enabling him to decline to answer criminating questions, and that if he had been acquainted with it he might have withheld some of the answers which he gave. As a matter of fact it would appear that Coote was acquainted with so much of the law; but be this as it may, it is obvious, that to institute an inquiry in each case as to the extent of the Prisoner's knowledge of law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to the rule, recognised as essential to the administration of the Criminal Law, "Ignorantia juris non excusat". *With respect to the objection, that Coote when a Witness should have been cautioned in the manner in which it is directed by Statute, that persons accused before magistrates are to be cautioned ... it is enough to say, that the caution is by the terms of the Statutes applicable to accused persons and has no application whatever to Witnesses.'*

That case was approved by Street CJ in *R v Clyne* (1985) 2 NSWLR 740 at 746-747.

68 In many jurisdictions there is a practice that a judge will warn a witness that a witness may object to answering a question which might incriminate the witness and bring to the witness' attention that he or she might invoke the privilege against self-incrimination: The Law Reform Commission "Research Paper No. 16: Privilege" at p 87.

69 The common law also provided that where it might be apparent to a Court that a question of legal professional privilege might arise, a Court might elect to warn a party or witness that the question might give rise to the disclosure of confidential communications with the party's or witness' legal adviser but no obligation lay upon the Court to do so.

70 Dr Ronald Desitanik in his book 'Legal Professional Privilege in Australia' (2nd ed, 2005 Lexis Nexis Butterworths) writes at p 74:

> *'Though it may not readily be seen as a qualification to legal professional privilege, one limitation to the doctrine is that it must first be claimed before it can have any effect. Although the privilege is a "fundamental principle of our judicial system" it must be ignored by the courts unless it is claimed. In this respect, though legal professional privilege is "no less fundamental than the right which supports the privilege against self-incrimination," it nevertheless "stands well apart" from that other privilege since, while again there is no obligation at common law for a judge to warn a witness that the privilege against self-incrimination is available to be claimed, judges often do so as a matter of practice.'*
> (Footnotes omitted.)

71 However, the Evidence Act now deals with the Court's obligations. Section 132 of the Evidence Act provides:

> *'If it appears to the court that a witness or a party may have grounds for making an application or objection under a provision of this Part, the court must satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision.'*

72 The Court now has a responsibility (in jurisdictions where the Evidence Act applies) to satisfy itself that the witness or party is aware of the effect of s 118 of the Evidence Act so that the witness or party can take objection to the adducing of evidence which would otherwise disclose the content of a confidential communication which is otherwise the subject of legal professional privilege. As I have already mentioned, the Evidence Act does not apply to a hearing before the Tribunal.

Reviewable Error

73 It is in those circumstances that this Court is called upon to consider whether the Tribunal made a reviewable error in its review of the decision of the delegate of the Minister. The Tribunal's decision will be reviewable, notwithstanding the provisions of s 474, if it

involved jurisdictional error. A decision must not involve a failure to exercise jurisdiction or be made in excess of jurisdiction. In *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, Gaudron, McHugh, Gummow, Kirby and Hayne JJ said at 506:

> *'Thus, 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) and (3) of the Act.'*
> (Footnotes omitted.)

74 A decision maker who exceeds the authority or power given by the Act under which the decision maker is empowered to act commits jurisdictional error.

75 In my opinion, the Tribunal was under an obligation to advise the appellant that he was entitled to refuse the questions which the Tribunal asked of him if they were to disclose the contents of a confidential communication with his lawyer had for the purpose of obtaining or giving legal advice or assistance or for use in the proceedings before the Tribunal.

76 That obligation arises because the Tribunal, like any other administrative decision maker, is not entitled to exercise a power to destroy a freedom of communication which the law seeks to protect: *Baker v Campbell* per Dawson J at 131. The Tribunal was in the same position as an administrative decision maker who has the power to require documents to be produced. The decision maker should not exercise the power to require a party to produce documents which are subject to legal professional privilege: *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 537; *Arno v Forsyth* (1986) 9 FCR 576. A decision maker should not purport to exercise a power to require a person to answer a question which the law would excuse that person from answering.

77 In my opinion, the Tribunal, when conducting its inquiry and in the exercise of its inquisitorial function, should advise a person of their right to claim privilege against self-incrimination or legal professional privilege if it appears that a question asked of the person may give rise to a legitimate claim of that privilege.

The Result

78 However, that does not necessarily mean that the appellant is entitled to the relief

which he seeks. The Minister contended, relying upon *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-146, that a close reading of the Tribunal's decision shows that the evidence was not relied upon by the Tribunal in its reasons for decision and, in those circumstances, the volunteered evidence made no difference to the outcome. That is so. There is no suggestion in the Tribunal's reasons to indicate that the Tribunal had regard to the evidence which was volunteered or later given by the appellant in response to the Tribunal's questions.

79 The question then is raised whether the appeal should be allowed so as to reverse the decision of the Court below to allow for the issue of the discretionary constitutional writs.

80 In *Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 the Tribunal received a letter containing information adverse to the applicant. The Tribunal did not advise the applicant of the existence of the letter but proceeded to conduct its review. The Tribunal said in its reasons for affirming the delegate's decision that it had given the letter no weight because it had been unable to test the claims contained in the letter. The High Court held that procedural fairness required the Tribunal to inform the applicant of the allegations contained in the letter before proceeding to a decision. The Court rejected the suggestion that because the Tribunal said that it had given the allegations no weight that the inquiry was into whether the Tribunal might have been subconsciously influenced by the allegation. Nor said the Court was the inquiry into what reasons were given or what decision should have been made. The relevant inquiry was what procedures should have been followed.

81 In this appeal the Tribunal should not have asked the questions it did or admit the appellant's evidence. The fact that it did not rely upon the appellant's evidence for its decision meant that it failed to follow the appropriate procedures.

82 In considering whether the writs should issue the Court will keep in mind 'the high purpose of vindicating the public law of the Commonwealth of upholding lawful conduct on the part of officers of the Commonwealth (and) of defending the rights of third parties under that law ...': *Re Refugee Tribunal; Ex parte Aala* per Kirby J at 137.

83 There should be an order amending the title of the first respondent to Minister for

Immigration and Citizenship. The appeal should be allowed. The order of the Federal Magistrate dismissing the appellant's application should be set aside. In lieu thereof, there should be an order allowing the application; an order quashing the decision of the Tribunal made on 21 November 2005; and an order remitting the matter to a differently constituted Tribunal to decide the matter according to law. The Minister should pay the appellant's costs in the Federal Magistrates Court and on the appeal.

I certify that the preceding eighty-three (83) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lander.

Associate:

Dated: 9 May 2007

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 2013 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZHWY** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**LANDER, GRAHAM AND RARES JJ**
DATE:	**10 MAY**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

GRAHAM J

84 The primary issue for consideration in the present appeal is the inter-relationship between the rules of procedural fairness and the restrictions imposed on 'the natural justice hearing rule' by s 422B of the *Migration Act 1958* (Cth) ('the Act') in the context of questions asked of an applicant for review by a Member of the Refugee Review Tribunal ('the Tribunal') which sought the disclosure of communications which were the subject of legal professional privilege.

85 The appellant, who has been identified for the purposes of these proceedings as SZHWY, is an Egyptian citizen. He was born in Egypt on 30 September 1976. Travelling on an Egyptian passport issued to him on 29 June 2004 he entered Australia on a Visitor's Visa on 9 November 2004.

86 On 9 February 2005 the appellant applied for a Protection (Class XA) Visa. That Application was refused by a Delegate of the Minister on 23 July 2005. Thereupon the appellant applied to the Tribunal for review of the Minister's Delegate's decision on 3 August

2005. There followed a hearing before the Member constituting the Tribunal at which evidence was given by the appellant and also another male person who attended the Tribunal hearing with the appellant as a 'support person' but who later indicated that he wished to give evidence to the Tribunal.

87 On 21 November 2005 the Tribunal determined that the decision not to grant the appellant a Protection Visa should be affirmed. Notice of that decision was provided by a letter from the Tribunal to the appellant's migration agent dated 22 November 2005. On 20 December 2005 the appellant filed an Application in the Federal Magistrates Court of Australia seeking the issue of constitutional writ relief in respect of the Tribunal's decision. An Amended Application was filed on 11 April 2006 which came before Federal Magistrate Scarlett on 20 April 2006. His Honour reserved his decision on the Application and, thereafter, delivered his reasons for judgment on 27 September 2006. His Honour dismissed the Application. From that decision an appeal has been brought to this Court, the relevant Notice of Appeal being filed on 16 October 2006. The Notice of Appeal contended that the Tribunal's decision was affected by jurisdictional error. Two basic grounds were advanced, the latter of which was abandoned upon the hearing of the appeal. This left for consideration the material appearing in the Notice of Appeal under the heading '<u>Legal Professional Privilege</u>'. It provided as follows:

> *'2. His Honour erred in finding that the requirements of legal professional privilege and/or procedural fairness in relation to confidential communications the subject of professional privilege were limited to an entitlement on the part of the appellant to refuse to disclose the communications to the Tribunal;*
>
> *Particulars*
>
> - *At the Tribunal hearing the Tribunal required the appellant provide details of confidential communications between the appellant and his Lakemba solicitor in relation to his application for a Protection Visa;*
>
> *3. His Honour erred in failing to find that legal professional privilege and or procedural fairness required the Tribunal to inform or warn the appellant of the said entitlement;*
>
> *4. His Honour erred in finding that legal professional privilege and or procedural fairness required that the appellant 's migration agent alone bore the burden of warning the appellant of his entitlement to*

refuse to disclose the privileged communications;

Particulars

- *The appellant was assisted at the Tribunal hearing by a migration agent who had no legal training or right of appearance before the Tribunal.'*

88 The application of s 422B of the Act, which applied as from 4 July 2002, to the facts of the case was not argued in the Federal Magistrates Court.

89 After the Federal Magistrate reserved his decision, a Full Court, comprising Heerey, Conti and Jacobson JJ, handed down their reasons for judgment in *Minister for Immigration and Multicultural and Indigenous Affairs v Lat* (2006) 151 FCR 214 ('*Lat*'). That decision ([2006] FCAFC 61) was not brought to the learned Federal Magistrate's attention. It concerned a sister provision to s 422B, namely s 51A, and, in particular, subsection 1 of that section. It was followed in *SZCIJ v Minister for Immigration & Multicultural Affairs & Anor* ('*SZCIJ*') ([2006] FCAFC 62), another judgment of Heerey, Conti and Jacobson JJ handed down on the same day.

90 At the hearing before the Court as presently constituted an application was made by the first respondent for leave to file in Court and rely upon a Notice of Contention dated 12 February 2007 which raised the application of s 422B of the Act. No relevant prejudice was advanced on behalf of the appellant. In the circumstances, leave was granted. The ground specified in the Notice of Contention was as follows:

> *'1. Any relevant requirement of the natural justice hearing rule to which the Second Respondent would otherwise have been subject was excluded by reason of section 422B of the* Migration Act *1958 (Cth).'*

91 Section 422B of the Act, which fell within Division 4 of Part 7, provided:

> *'422B(1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.*
>
> *(2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.'*

92 Section 51A of the Act, which was under consideration in *Lat* and which fell within Subdivision AB of Division 3 of Part 2 of the Act, provided as follows:

> *'51A(1) This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.*
>
> *(2) Sections 494A to 494D, in so far as they relate to this Subdivision, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.'*

93 In *Lat*, the Court gave consideration to the Explanatory Memorandum and the Second Reading Speech referable to the Bill which became the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) (Act No 60 of 2002). At [64] the Court said:

> *'… reference to the Explanatory Memorandum and the Second Reading Speech makes it plain that s 51A and the related provisions of the Act, were intended to overcome the effect of the High Court's decision in* Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah *(2001) 206 CLR 57.'*

94 At [66]-[67] the Court continued:

> *'66 What was intended was that Subdiv AB* [the subdivision of the Act referred to in s 51A] *provide comprehensive procedural codes which contain detailed provisions for procedural fairness but which exclude the common law natural justice hearing rule.*
>
> *67 Other aspects of the common law of natural justice, such as the bias rule are not excluded: see* VXDC [*VXDC v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 562] *at [27].'*

95 Later at [70] the Court said:

> *'70 … As was said in* VXDC *at [31], the decision-maker is likely to be a person without legal qualifications. Parliament could not have intended that "the uncertainties of the common law rules were in some unspecified way and to some unspecified extent, to survive".'*

96 The observations of the Court in respect of s 51A are equally applicable to s 422B

(see *SZCIJ* at [6] – [8]).

97 In her reasons for decision, the Tribunal Member recorded that the appellant feared returning to Egypt because he would be caught by authorities because of his homosexual activities and because he had abandoned Islam and converted to Christianity and because he feared that his family/community members would persecute or kill him because of his Christianity and/or his homosexuality.

98 The Tribunal Member noted that the appellant's biggest fear about returning to Egypt was being persecuted for his homosexuality.

99 In dealing with the topic '**CLAIMS AND EVIDENCE**' the Tribunal Member noted:

> *'… He had a meeting with a solicitor in Lakemba but as he was a Muslim he was afraid to talk to him about his Christianity and his homosexuality and told him he was afraid to return to Egypt because of his political opinion.'*

100 Under the heading '**FINDINGS AND REASONS**' the Tribunal Member recognised that Country Information demonstrated that persons taken into custody in Egypt on suspicion of homosexual activity faced a real chance of torture, physical mistreatment and other human rights abuses amounting to persecution.

101 The problem for the appellant's case before the Tribunal was that the Tribunal did not accept that the appellant was a witness of truth. The Tribunal Member made findings including the following:

> *'… The Tribunal does not accept that the applicant has converted from Islam or that he has practised Christianity in either Egypt or Australia. It considers and finds that the applicant invented these claims to assist his application for protection visa.*
>
> …
>
> *… the Tribunal does not accept on the evidence before it that the applicant is a homosexual as he claims and that he has engaged in homosexual conduct in either Egypt or Australia.'*

102 Somewhat curiously the Tribunal also included in its findings the following:

'As the Tribunal has found that the applicant has given and submitted untruthful evidence to the Tribunal it gives no weight to the evidence of the male person who attended the Tribunal hearing with the applicant nor to the letters from the applicant's re latives in Australia, the person/s referred to as the applicant's prior partner/s and from the photographers and the TAFE teacher. …'

103 A transcript of the appellant's evidence before the Tribunal included a statement and some questions and answers referable to the meeting with a solicitor in Lakemba to which the Tribunal Member referred in her reasons for decision. Relevantly, the transcript recorded the following in numbered paragraphs 615 – 631:

'615.Applicant	*… I had a actually one meeting as well with a solicitor in Lakemba, I believe he call Salah I think so, but he was you know, he was, he was a Muslim in the beginning so I was too afraid to speak in front of him about the Christianity or about the Homosexuality as well*
616.Tribunal Member	***What did you talk to him about***
617.Applicant	*I came to him you know on a crazy idea about that I hate the Mobarak, the President* [presumably a reference to President Hosny Mubarak of Egypt]
618. Tribunal Member	*You can to him what*
619.Applicant	*I came to him in a crazy idea that I hate Mobarak, it just came to me like that (clicks fingers)*
620.Tribunal Member	*That you hated work? I can't*
621.Applicant	*The president of Egypt*
622.Tribunal Member	*oh I see I see,* ***so you told him that you didn't want to go back for political reasons?***
623.Applicant	*Yes*
624.Tribunal Member	*Did you*
625.Applicant	*Because I couldn't tell him about the homosexuality because I was too afraid to tell him about that*
626.Tribunal Member	***And what did he advise you to do?***
627.Applicant	*Ah the, the solicitor?*

628.Tribunal Member	*Hmm*
629.Applicant	*Well he recommended to go for another meeting to discuss all the details*
630.Tribunal Member	*And you didn't go back*
631.Applicant	*Yes for sure not'*

[emphasis and explanation added]

104 The responses provided by the appellant to the highlighted questions were plainly not without significance given the findings of the Tribunal Member concerning the appellant and his claimed fears which have been referred to above.

105 Legal professional privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers. Where the privilege applies, it inhibits or prevents access to potentially relevant information (per Gleeson CJ, Gaudron and Gummow JJ in *Esso Australia Resources Limited v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 at 64-5 [35]).

106 If a communication qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute, but is otherwise absolute (per Lord Scott of Foscote in *Three Rivers District Council and others v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 at 646 [25]; see also per McHugh J in *Commissioner of Australian Federal Police v Propend Finance Pty Limited* (1997) 188 CLR 501 at 552).

107 At common law, what brings about a waiver of privilege is the inconsistency which the Courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality (per Gleeson CJ, Gaudron, Gummow and Callinan JJ in *Mann v Carnell* (1999) 201 CLR 1 at 13 [28]-[29]).

108 It is not contended by the Minister that the appellant's disclosure of the fact of his meeting with the solicitor in Lakemba or his disclosure of the matters which he did **not**

discuss with that solicitor, constituted conduct on the part of the appellant which was inconsistent with the maintenance of the confidentiality for which the rule in respect of legal professional privilege provides.

109 Counsel for the appellant urged upon the Court that the very asking by the Tribunal Member of the questions referred to in paragraphs 616, 622 and 626 (see [20] above) gave rise to a denial of procedural fairness and accordingly jurisdictional error on the part of the Tribunal as explained in *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 at [5], [41], [59], [142], [170] and [210].

110 It does not seem to me that the asking of the questions was in any way improper. It was always open to a person who was asked a question by a Tribunal Member to decline to answer it on the ground that the answer would require the disclosure of a privileged communication. Section 433(1A) of the Act makes it clear that a privilege such as legal professional privilege would provide a reasonable excuse for a refusal or failure to answer a question that an appellant was required to answer by a Tribunal Member. The more important aspect of the matter is to consider whether procedural fairness required the Tribunal Member to advise the appellant at the time when she asked her questions that it would be open to the appellant to decline to answer the questions on the ground of legal professional privilege (cf s 132 of the *Evidence Act 1995* (Cth)).

111 What is required by the common law rules of procedural fairness is a fair hearing, not a fair outcome. The particular content to be given to the requirement to accord procedural fairness will depend upon the facts and circumstances of the particular case (see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63 at [25]-[26]).

112 Accepting that a Tribunal Member will not necessarily have legal qualifications, nevertheless it seems that a Tribunal Member, who is obliged to provide a fair hearing, should refrain from calling on an applicant for review, who is likely to be unfamiliar with the law in relation to legal professional privilege, to disclose what are ex facie privileged communications, without contemporaneously advising that applicant of his or her right to decline to do so.

113 This then begs the question whether the appellant's right to procedural fairness, extending to the provision of such advice in relation to the disclosure of privileged communications, was abrogated by s 422B of the Act. Whilst the common law of natural justice dealing with disinterest and impartiality (bias) has not been excluded by s 422B of the Act, the right to procedural fairness has been circumscribed by that section in such a way as to deprive the appellant of an entitlement to have advice concerning the availability of legal professional privilege tendered by the Tribunal Member to him before being asked to respond to questions such as those which have been highlighted above: nothing in Divisions 4 or 7A of Part 7 or in ss 416, 437 or 438 preserves that entitlement (see *Lat* and *SZCIJ*).

114 No submissions were put by the appellant to suggest that *Lat* or *SZCIJ* had been decided incorrectly.

115 Without embarking upon a consideration of its correctness it may be observed that, whilst Division 4 of Part 7 is entitled '**Conduct of Review**', it does **not** deal with the **conduct** of a review hearing at which evidence may be given, beyond providing that 'the hearing' must be in private (see s 429) and that it may be conducted by electronic or other means without the appearance in person of the applicant (see s 429A).

116 Sections 425, 425A and 426 deal with the extending of invitations to applicants for review 'to appear' and the content of such invitations. These sections use expressions such as '… 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.', '… must **give the applicant notice** of the day on which, and the time and place at which, the applicant is scheduled to appear.' and '… must **notify** the applicant … that he or she is invited to appear before the Tribunal to give evidence …' (emphasis added).

117 Section 427 empowers the Tribunal to '… take evidence on oath or affirmation …', to '… adjourn the review from time to time …' and to '… summon a person to appear before the Tribunal to give evidence …' amongst other things.

118 None of these matters deal with the **conduct** required of a Tribunal Member at a hearing yet it is implicit from the terms of the sections mentioned that not only must an appropriate invitation be extended but also it should be followed by a corresponding hearing

at which the opportunity to give evidence and present arguments relating to the issues arising in relation to the decision under review will be afforded to the applicant, subject to the limitations contained in provisions such as ss 425(3), 426A and 428.

119 The appeal should be dismissed with costs.

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

Associate:

Dated: 9 May 2007

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **NSD 2013 OF 2006**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZHWY** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**LANDER, GRAHAM AND RARES JJ**
DATE:	**10 MAY 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

RARES J

120 During the course of the hearing before the Refugee Review Tribunal, the tribunal member asked the appellant a question about what he thought was going to happen when he decided not to return to Egypt, his country, in late December 2004. In response the appellant said that he did not know and then volunteered that he had been to see a solicitor in Lakemba and was afraid to speak to the solicitor who was a Muslim, about the grounds on which he claimed refugee status. Those grounds were that he claimed a fear of persecution were he to return to Egypt on the ground that he was a homosexual, and thus a member of a social group in Egypt, and his spiritual orientation had turned towards western Christianity as he perceived it and away from the Muslim faith.

121 The tribunal then proceeded to question the appellant about the discussions he had with the solicitor and elicited the content of those discussions without drawing to the appellant's attention his right not to disclose material that would properly be the subject of a claim for legal professional privilege. In giving its decision the tribunal said that it did not accept that the appellant had been truthful about his claims to be a Christian and did not

accept, on the evidence before it, that he was homosexual as he claimed.

122 This raised the issue as to whether the common law immunity from being required to disclose matters to which legal professional privilege attached, or the common law requirements of procedural fairness, required the tribunal to inform or warn the appellant that he did not have to answer the tribunal's questions which might elicit the content of his confidential communications with his solicitor.

FACTUAL HISTORY

123 The appellant is a citizen of Egypt who arrived in Australia in November 2004. He made two claims. First, he claimed to fear persecution because of his membership of a social group in Egypt, namely that of homosexual men. Secondly, he claimed to fear persecution on the ground of his religion from persons in Egypt who learnt of his spiritual orientation away from Islam and towards western Christianity as he perceived it.

124 In July 2005 a delegate of the minister refused to grant a protection visa to the appellant. He then applied for a review of that decision to the tribunal. The tribunal affirmed the delegate's decision, making the adverse credibility findings referred to above.

125 At the hearing before the tribunal, the appellant gave evidence pursuant to ss 425(1) and 427(1) of the *Migration Act 1958* (Cth). In the course of the hearing an exchange took place between the tribunal member and the appellant which Lander J has set out at [8] above.

126 The minister accepted that before the tribunal asked the question 'What did you talk to him about?' there had been no waiver of legal professional privilege by the appellant. That acceptance was correct. While the appellant had volunteered that he had had a meeting with the solicitor, his account of the conversation was to exclude subject matters as having been discussed, rather than to include what he in fact spoke about with the solicitor. Hence, it may have been natural for the tribunal to pose questions seeking to elicit that very subject matter.

127 The Federal Magistrate found that the conversation with the solicitor was privileged and that the appellant would have been entitled not to answer questions about it. That finding was not the subject of any challenge by the minister.

STATUTORY FRAMEWORK

128 The tribunal was obliged to review the delegate's decision pursuant to its function under s 414(1) of the Act. The tribunal was required, in carrying out its functions, '… to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick' (s 420(1)). In addition, the tribunal in reviewing a decision is not bound by technicalities, legal forms or rules of evidence and 'must act according to substantial justice and the merits of the case' (s 420(2)(a) and (b)). These provisions of s 420 are facultative, not restrictive. They do not amount to a requirement that the tribunal observe a particular procedure in undertaking the review of a decision: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 628-629 [46]-[51] per Gleeson CJ and McHugh J, 642-644 [108]-[109] per Gummow J, 659 [158] per Hayne J and 668 [179] per Callinan J.

129 Next, Div 4 of Pt 7 of the Act commences with s 422B, which relevantly provides:

> *' (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.'*

130 The tribunal had to invite an applicant for review to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review in circumstances, such as the present, where it considered that it could not decide the review in his favour on the basis of the material before it (s 425(1) and (2)). When an applicant accepts an invitation to give evidence pursuant to s 425(1) for the purpose of a review of the decision, the tribunal may take the evidence on oath or affirmation pursuant to s 427(1)(a).

131 By s 433(1) (which is in Div 6 of Pt 7) a person appearing before the tribunal to give evidence must not, when required under s 427 either to take an oath or to make an affirmation, refuse or fail to comply with that requirement or refuse or fail to answer a question the person was required to answer by the tribunal. A failure to comply with the obligation in s 433(1) is a criminal offence of strict liability punishable on conviction by imprisonment for six months. Importantly, the obligation to answer imposed by s 433(1) does not apply '… if the person has a reasonable excuse' (s 433(1A)). Thus, the power of the tribunal to require, and the obligation of, a person to give evidence or to answer questions is

qualified by the right of a person to refuse or fail to do so if he or she has a reasonable excuse.

ARGUMENTS ON APPEAL

132 The appellant argued that the tribunal exceeded its jurisdiction and committed a jurisdictional error by enquiring into the subject matter of the appellant's conversation with the solicitor. He argued that because legal professional privilege was not merely a rule of substantive law but was an important common law right or, perhaps, more accurately, an important common law immunity (*The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ), Div 4 of Pt 7 of the Act should not be construed as abrogating it.

133 The appellant argued that the tribunal should have warned or informed the appellant of his right to legal professional privilege either:

as a matter of substantive law derived from the nature of the privilege; or

as an incident of procedural fairness.

134 The appellant also argued that the tribunal acted in excess of its powers in asking the appellant to divulge communications with his solicitor which were the subject of legal professional privilege.

135 The minister responded that s 422B precluded reliance upon any notion of procedural fairness operating to require the tribunal to exercise its jurisdiction in the way for which the appellant contended. The minister relied upon the decisions of the Full Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Lat* (2006) 151 FCR 214 at 225 [66], [2006] FCAFC 61 and *SZCIJ v Minister for Immigration* [2006] FCAFC 62. They held that the purpose of s 422B and its analogues in the Act was to provide comprehensive procedural codes which contained detailed provisions for procedural fairness but which excluded the common law natural justice hearing rule. No application was made to challenge the correctness of those decisions.

CONSIDERATION

136 A jurisdictional error will occur because there has been a failure to discharge 'imperative duties or to observe inviolable limitations or restraints' (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506 [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

137 Here, s 433(1A) expressly preserves the right of a person to refuse or fail to answer a question which the tribunal requires to be answered if he or she has a reasonable excuse. Such an excuse would exist, inter alia, because the answer might either reveal matter that is the subject of a proper claim for legal professional privilege or a proper claim against self incrimination. It follows that the Act recognises a limitation on the power of the tribunal to require the question to be answered. The first issue is whether the important common law immunity of a person from being compellable, by the exercise of executive or judicial power, to reveal what is protected by legal professional privilege, as recognised in s 433(1A), is an inviolable limitation or restraint or imposes an imperative duty on the exercise of jurisdiction by the tribunal.

138 One of the purposes of legal professional privilege was described by Deane J in *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 133 as playing an essential role in protecting and preserving the rights, dignity and freedom of the ordinary citizen, particularly the weak, the unintelligent and the illinformed, under the law (see too per McHugh J at 161; see also *Baker v Campbell* (1983) 153 CLR 52 at 89 per Murphy J, 94-95 per Wilson J, 116-117 per Deane J and 131 per Dawson J). Dawson J said (*Baker* 153 CLR at 131):

> *'It is clear to my mind that the power to compel the disclosure in an administrative inquiry of professional confidences is as likely to destroy the freedom of communication, which the law seeks to protect, between legal adviser and client as effectively as would compulsory disclosure of those confidences in judicial proceedings.'*

139 The privilege against self-incrimination operates a little differently to legal professional privilege. In *Sorby v The Commonwealth* (1983) 152 CLR 281 at 289 Gibbs CJ said that the mere fact that a witness swore that he believed that the answer would incriminate him was not sufficient to entitle a party called as a witness to the privilege of silence. The

court had to see from the circumstances of the case and the nature of the evidence which the witness was called to give that there was a reasonable ground to apprehend danger to the witness from being compelled to answer (see too per Mason, Wilson and Dawson JJ at 308-309 and Brennan J at 320-321; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 338-341 per Mason ACJ, Wilson and Dawson JJ, 352-353 per Brennan J; *R v Kempley* [1944] ALR 249; (1944) 18 ALJ 118). Mason ACJ, Wilson and Dawson JJ said that it was difficult to suppose the determination as to whether a claim for privilege against self-incrimination was correctly made would be left to an unqualified person (*Pyneboard* 152 CLR at 340).

140 A claim for legal professional privilege is established differently to a claim for privilege against self-incrimination, as Gibbs CJ's explanation shows. In general, a question asking for disclosure of material which is legally professionally privileged is on its face objectionable and does not need the witness to demonstrate or justify that the consequence of an answer may be to reveal the privilege.

141 In *Baker v Campbell* (1983) 153 CLR 52 at 89-90 per Murphy J, 97 per Wilson J, 118 per Deane J and 123, 131-132 per Dawson J, the majority held that the statutory power to issue a search warrant under s 10 of the *Crimes Act 1914* (Cth) should be construed in a way which did not authorise the seizure of documents to which legal professional privilege attached and the claim for privilege was maintained. As Deane J put it (*Baker* 153 CLR at 118), the statute should be construed so that the search warrant it authorised '… be read as not referring to documents to which legal professional privilege attaches'. And Dawson J (with whose reasons Wilson J expressly concurred at 153 CLR at 97) said that:

> *'… the power of search and seizure which the section confers in general terms does not extend to documents to which legal professional privilege attaches.'* (*Baker* 153 CLR at 123)

Murphy J, the other member of the majority, said (153 CLR at 89):

> *'The individual should be able to seek and obtain legal advice and legal assistance for innocent purposes, without the fear that what has been prepared solely for that advice or assistance may be searched or seized under warrant.'*

142 Each justice referred to the then recent decision of the Supreme Court of Canada in

Descôteaux v Mierzwinski [1982] 1 SCR 860. Lamer J delivered the judgment of the Court, saying of a materially similar situation under a Canadian statute ([1982] 1 SCR at 893):

> *'Thus, the justice of the peace has no jurisdiction to order the seizure of documents that would not be admissible in evidence in court on the ground that they are privileged (the rule of evidence). Before authorizing a search of a lawyer's office for evidence of a crime, the justice of the peace should refuse to issue the warrant unless he is satisfied that there is no reasonable alternative to the search, or he will be exceeding his jurisdiction (the substantive rule). When issuing the warrant, to search for evidence or other things, he must in any event attach terms of execution to the warrant designed to protect the right to confidentiality of the lawyer's clients as much as possible.'*

143 The substantive rule laid down in *Descôteaux* [1982] 1 SCR 860 was described in *Ministry of Correctional Services v Goodis* [2006] 2 SCR 32 at [15] by Rothstein J delivering the judgment of the Court as being one in which a judge must not interfere with the confidentiality of communications between solicitor and client except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

144 In *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 537 Gaudron J said that *Baker* 153 CLR 52 held that s 10 of the *Crimes Act 1914* (Cth) did not authorise seizure of documents to which legal professional privilege attached. But Gummow J said that *Baker* 153 CLR 52 did not decide that the warrant was, to any degree, invalid (*Propend* 188 CLR at 567).

145 The appellant argued that the tribunal's power to question applicants for review was constrained by considerations similar to those which the Courts have applied to limit the exercise of statutory powers to issue search warrants in cases where the warrant seeks material for which a valid claim for legal professional privilege could be made.

146 In *Arno v Forsyth* (1986) 9 FCR 576, Fox J said that a justice of the peace asked to issue a search warrant under s 10 of the *Crimes Act 1914* (Cth), in its then form, would not '… knowingly issue a warrant if it were plain on the material submitted [to the justice] that the things sought were the subject of legal professional privilege' (*Arno* 9 FCR at 579). Lockhart J said that it would be contrary to the reasoning of the majority in *Baker* 153 CLR 52 for this Court to hold that it is only at the stage of execution of the search warrant that

questions of legal professional privilege require consideration (*Arno* 9 FCR at 587). He pointed out that the actual question answered by the Court in *Baker* 153 CLR at 133 was:

> *'Question:* *In the event that legal professional privilege attaches to and is maintained in respect of the documents held by the firm can those documents be properly made the subject of a search warrant issued under s 10 of the Crimes Act?*
>
> *Answer:* *No.'*

147 Lockhart J said that s 10 of the *Crimes Act 1914* (Cth) had to be considered as excluding from the 'things' which it authorised to be inspected or seized, documents whose confidentiality would be protected in the courts by the doctrine of legal professional privilege. He said that:

> *'A qualitative bar is attached to documents covered by that privilege falling within the scope of s 10. The protection afforded by the common law rule of immunity recognised in* Baker v Campbell *would be set at nought or at least seriously eroded if justices were able to pay no regard to the question of legal professional privilege and leave it to be determined solely in connection with the later processes of search and seizure. The proposition that the warrant should issue without any consideration being given by the justice of the peace to the question of professional privilege and that the privilege question should only be dealt with later by litigation or otherwise is untenable.'* (*Arno* 9 FCR at 587-588)

148 Jackson J also referred to the form of the question answered by the High Court in *Baker* 153 CLR at 133. He suggested that by using the words 'and is maintained' in relation to the privilege, the Court was dealing only with the position at the time of the attempted seizure and not at the time of the grant of the warrant (*Arno* 9 FCR at 597). He did not think that the lawfulness of the grant of a warrant was to be determined simply by the fact that the description of a document in the warrant would normally indicate that legal professional privilege attached to it. Rather, Jackson J considered that circumstances outside the warrant itself were relevant to this question, including whether there was any suggestion that the document had lost its status of being subject to legal professional privilege. He indicated that if there were no issue that legal professional privilege continued to attach to the document where its grant was sought, the warrant would be bad if issued (*Arno* 9 FCR at 597). Jackson J referred to what Beaumont J had held in *Brewer v Castles (No 3)* (1984) 52 ALR 577 at 583 that a justice had no power to include in a search warrant a class of documents

described as 'opinions of counsel' where there was no suggestion in the material that legal professional privilege in that class had been lost.

149 In Heydon JD, *Cross on Evidence* (7th Aust ed., Butterworths, 2004) at [25250] the learned Australian editor (Heydon J) observed that what Lockhart J had said was doubtless prudent but it was not always clear that questions of privilege would arise because it was possible that the client would waive the privilege. The learned author continued that it would only be an extraordinary case, amounting to an abuse of power, which would justify the treating of a warrant as a nullity for failure of the issuing justice to have regard to the possibility of privilege. But he continued that in any case where no qualification was made, there was an implicit limit on the power of seizure.

150 Here, the tribunal's questions sought the revelation of the subject matter of discussions between the appellant client and his solicitor in relation to legal advice. Of course, it was possible that what was discussed may not have been capable of being the subject of a claim for legal professional privilege. But the only apparent relevance or purpose of the questioning, set out above, was to elicit what had been said between the appellant and the solicitor about the appellant's claim or basis for a claim for a visa. Thus, the tribunal was using its powers to seek from the appellant what was legally professionally privileged.

151 In *Coco v The Queen* (1994) 179 CLR 427 at 437-438 Mason CJ, Brennan, Gaudron and McHugh JJ held that the Courts should not impute to the legislature an intention to interfere with fundamental rights unless the Parliament makes that intention unmistakably clear. They said that such an intention could be revealed by implication. There is a clear and unmistakable intention that a witness before the tribunal, including an applicant for review, may have a reasonable excuse for failing or refusing to answer a question which is afforded protection in s 433(1A). The tribunal's powers under the Act to ask questions and take evidence do not authorise it to override the common law immunity of legal professional privilege or the common law right to refuse to answer questions that might tend to incriminate the person giving the answers.

152 Here, the question for decision is whether the tribunal was authorised by the Act to ask the question 'What did you talk to him about?' and the subsequent questions exploring

the conversation between the appellant and his lawyer. In *Clough v Leahy* (1904) 2 CLR 139 at 156, Griffith CJ (Barton and O'Connor JJ concurring) said:

> *'Nor can the Crown enforce the answering of a question by an individual, unless some law confers the authority to do so.'*

153 Griffith CJ also said that the liberty of another can only be interfered with according to law, but subject to that limitation every person, including the Crown, can make any inquiry he or she chooses (*Clough* 2 CLR at 157). And he continued:

> *'It is not unlawful for me to make the most impertinent inquiry into my neighbour's affairs. It is very undesirable, but it is not unlawful.'*

154 He pointed out that there was a difference between a lawful requirement that a witness give evidence to a Royal Commission where the witness had no reasonable excuse to refuse to be sworn and, if having been sworn, the witness had refused without reasonable excuse to answer questions put to him (*Clough* 2 CLR at 162-163).

155 The search warrant cases show that an unreasonable use of a statutory power to search for and seize material to which legal professional privilege attaches may be outside the statutory authorisation. So, in *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 139 FCR 537 at 544 [27] Spender, Madgwick and Finkelstein JJ said that the exercise of the power of the Commissioner of Taxation to authorise a search and seizure of documents under s 263 of the *Income Tax Assessment Act 1936* (Cth) was impressed with an obligation on the officers conducting the search to do so 'in a reasonable fashion'. They said that whether or not the officers were acting reasonably depended upon the circumstances of the case, and followed a decision of the English Court of Appeal in *Reynolds v Commissioner of Police of the Metropolis* [1985] QB 881 in which their Lordships identified the question of the reasonableness with which the power granted by statute was exercised (see eg per Waller LJ at 889, Slade LJ at 895-896 and Purchase LJ at 902-903).

156 In *JMA Accounting* 139 FCR at 542-543 [16] the Court said that the cases established three board propositions concerning the conduct of a search and seizure under a statutory power. First, the person exercising the power to search and seize is only entitled to seize those documents which he or she is authorised to seize by the relevant power. Secondly, the search and seizure must be reasonably carried out, and thirdly, the repository of the power

must do no more than is reasonably necessary to satisfy himself or herself that he or she has the documents which he or she is entitled to seize. They approved what Doyle CJ had said in *Question of Law Reserved (No 1 of 1998)* (1998) 70 SASR 281, saying (139 FCR at 542 [12]):

> *'[12] Doyle CJ said (at 296) that a statutory power to search and seize which is "expressed in general terms" only authorises a search or seizure that "is reasonable in all of the circumstances". This would require a reasonable opportunity for legal professional privilege to be claimed. He went on to say at 297:*
>
> > *"... there is no principle that powers under a general search warrant are exercised unlawfully and ineffectively merely because they are not exercised reasonably."*
>
> *and:*
>
> > *"... such a principle cannot be used to support a conclusion that failure to allow a reasonable opportunity for legal professional privilege to be claimed means that the power is exercised invalidly."*
>
> *That is, the condition imposed on the person exercising the statutory power to enable legal professional privilege to be claimed is a condition which relates to the manner in which the search and seizure is conducted. This is the only aspect of the search and seizure which is subject to the limitation. We agree with this view.'*

157 The Full Court recognised that the purpose of legal professional privilege was to keep secret communications between a lawyer and his or her client (139 FCR at 542 [13]). The Minister's case founders at the first proposition, namely that the tribunal had no authority, in the circumstances, to probe into the appellant's communications with his solicitor. No occasion to exercise any power to ask such questions had arisen. It is not necessary to go to the second or third propositions as to the exercise of any power to inquire.

158 It is well established that proceedings in the tribunal are inquisitorial in their general nature (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 231 ALR 592 at 601 [40] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ). But its power to inquire is constrained by the purpose of its function of review (s 414) and the principle that it exercise that power in a reasonable way. Legal professional privilege is an important common law right which applies to proceedings in the tribunal, as s 433(1A)

recognises. An impertinent inquiry by the tribunal seeking the disclosure of a communication to which legal professional privilege attaches is not authorised by the Act and is, thus, unlawful. In the context in which the tribunal was questioning the appellant, it is understandable that its curiosity was engaged when he told it about some issues he had not discussed with his solicitor.

159 The existence of s 433(1A) recognises that the tribunal may ask a question which it is not entitled to require be answered. Thus, s 433(1A) itself does not make the asking of the question unlawful, but excepts the witness from the ordinary consequence of a refusal or failure to answer. But, just as a statutory power to issue a search warrant does not permit the warrant to be issued where it seeks what is undoubtedly privileged, so here, the power of the tribunal conferred by the Act did not extend to asking the appellant to disclose what he talked to his solicitor about concerning his application for a visa.

160 If this be wrong, I am of opinion that the tribunal did not proceed in a reasonable fashion in its questioning. This is because it did not take any step to advise the appellant to the effect that s 433(1A) entitled him to refuse to answer or to otherwise maintain his privilege. Curiosity in a tribunal member about the content of communications protected by legal professional privilege does not provide a reasonable basis for asking about that subject matter, anymore than in the analogous position of a justice who is asked to issue a search warrant for counsel's opinions when there is no reason to question that they are privileged (*Brewer* 52 ALR at 583).

161 The Minister did not advance any argument which justified the use of any power of the tribunal in the circumstances to ask the series of questions which sought and obtained revelation of the appellant's legally professionally privileged discussions with his solicitor. This is not a case where there was a suggestion that the privilege would not be capable properly of being claimed. I am of opinion that there was an inviolable limitation or restraint on the tribunal's power to ask questions in its inquisition, so that here, by doing what it did, it committed a jurisdictional error: *Plaintiff S157* 211 CLR at 506 [76].

162 Apart from understandable human curiosity in the tribunal in the present case, there was no basis for asking the questions of the appellant except to discover what was privileged. The statute did not authorise the inquiry in express terms.

163 By exceeding its powers in asking and pursuing questions to elicit the content of the appellant's conversation with his solicitor which was the subject of legal professional privilege, the tribunal committed a jurisdictional error. It failed to give the appellant a hearing according to law (cf: *Coco* (1994) 179 CLR 427; *Ousley v The Queen* (1997) 192 CLR 69 at 101 where McHugh J said that the issue of the warrant in the former case was a jurisdictional error; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 215 ALR 162 at 183-185 [79]-[84] per McHugh J, 203 [174] per Kirby J, 212 [211] per Hayne J; *SZBEL* 231 ALR at 598 [25]).

WAS PRIVILEGE WAIVED?

164 The appellant argued that the secrecy of privileged communications would be lost invalidly or unfairly if the power of the tribunal to inquire into an applicant for review's claims were not limited by a requirement that it inform the applicant for review or witness of the right to claim legal professional privilege and give a reasonable opportunity for such a claim to be made. The Minister retorted that the applicant for review or witness always has an opportunity to claim the privilege following the asking of the question even if he or she is not informed of it.

165 The Minister argued that whether or not the tribunal had power to ask the questions, by answering them, the appellant had waived any legal professional privilege. Ordinarily, where a person is entitled to a privilege, such as legal professional privilege, they must claim it when disclosure is sought from them: see Wigmore JH, *Wigmore on Evidence* (McNaughton revision, Little Brown & Co, 1961), Vol 8 §2321; see also §2196; §2269 (where Wigmore explains the old practice, when an incriminating fact is inquired about, of a judge or other presiding official warning a witness being able to exercise the privilege against self-incrimination), s 132 of the *Evidence Act 1995* (Cth); *Cross on Evidence* [25020], [25250]; see also McNicol SB, *Law of Privilege* (Law Book Co, 1992) at 56-59. And, in *Commissioner of Taxation v Citibank Limited* (1989) 20 FCR 403 at 416 Bowen CJ and Fisher J said that the power of the Commissioner under s 263 of the *Income Tax Assessment Act 1936* (Cth) to search and make copies of documents should be read as not referring to documents to which legal professional privilege attaches, applying what Deane J had said in *Baker* 153 CLR 52; see too *JMA Accounting* 139 FCR at 540 [5].

166 As the Full Court emphasised in its second and third propositions in *JMA Accounting* 139 FCR at 542-543 [16] the exercise of the statutory power (whether or not questions were authorised in the first place) had to be reasonably carried out and the tribunal had to do no more than was necessary to satisfy itself that it was entitled to proceed as it did. The tribunal did not inform the appellant of his right to claim legal professional privilege before he answered the questions. The appellant had the perspective that he was being interrogated by the tribunal in the context (see *SZBEL* 231 ALR at 600-601 [35]-[38], [40]) that:

> he had been informed that this was his opportunity to give evidence and present arguments under s 425, where the tribunal, at that point, had not been able to decide the review on the basis of the material then before it;
>
> the tribunal member was the official under Australian law who had power to decide the review in the appellant's favour;
>
> the tribunal had power and a good basis to ask the questions;
>
> he had no reason not to answer the questions.

167 In cases involving search warrants the courts have placed conditions on the ability of the officials executing a valid warrant to obtain, search for and use documents where no reasonable opportunity to make a claim for legal professional privilege was afforded to the person whose privileged documents were seized. In such cases, the whole procedure usually involves persons who are Australian citizens who could be expected to have some idea of their rights under domestic law. In this context, most Australians whose premises are visited by persons claiming authority to enter and search would think of calling their solicitor to seek advice.

168 An applicant for review of a claim for a protection visa is in a position, in practical terms, where they would have much less idea of what legal rights they may have. Most will not even speak English. And, apart perhaps from a concept that this country is a democracy with independent courts and other state institutions, they will not have any idea or intuition that an official in the position of the tribunal would not be acting within his or her legal powers in asking questions or that they had a legal right to refuse to answer on the ground of legal professional privilege. The tribunal, on the other hand, could be expected to understand

that s 433(1A) of the Act operated to preserve the important common law right of applicants for review and witnesses to legal professional privilege.

169 In that situation, a reasonable exercise of the tribunal's power to question an applicant for review or a witness about communications for which he or she could make a claim for legal professional privilege would require the tribunal to ask whether the applicant for review or witness:

> wanted to obtain legal advice before answering the question; or
>
> was aware of his or her right to claim that the subject was privileged.

170 And, a case like the present is unlike the search warrant cases where the courts can order return of the privileged material or refuse to allow its use in evidence. Here, the tribunal can use the answer(s) revealing privileged communications in arriving at its decision. The tribunal had no procedure for enabling the appellant to claim legal professional privilege. The Minister characterises this absence of procedure itself as a question of procedural fairness to which s 422B applies. But s 433(1A) is not contained in Div 4 of Pt 7, yet I am of opinion that by implication it gives recognition to the substantive, not procedural, common law right of legal professional privilege. The lawful excuse not to answer questions, and, indeed, the obligation under s 433(1) to answer them, are not part of the fair hearing rule. Rather they are incidents of obligations and rights of applicants for review and witnesses imposed by the Act. The partial exclusion of the fair hearing rule by s 422B would not permit the tribunal to use torture to interrogate an applicant for review or a witness giving evidence before it. No doubt torture would be a hallmark of an unfair hearing, but its use would be a substantive, not procedural, excess of the power of the tribunal to review.

171 The Minister pointed out that in *Mann v Carnell* (1999) 201 CLR 1 at 13 [29], Gleeson CJ, Gaudron, Gummow and Callinan JJ said that an implied waiver occurred when particular conduct was inconsistent with the maintenance of a confidentiality which the privilege is intended to protect. If an intentional act of disclosure was inconsistent with the maintenance of the confidentiality of the communication, the Court may, where considerations of fairness suggest this course, hold that a waiver occurred (*Carnell* 201 CLR at 13 [29]).

172 There are no considerations of fairness here which would suggest that the appellant intentionally waived any privilege in his communications with his solicitor. To the contrary, he was the subject of questioning by a government official, the tribunal member, in respect of his claim for refugee status. The questions were designed by the official to elicit what he had told his solicitor. He was not made aware of his rights. This is far from any consideration of fairness dictating a conclusion that the appellant had waived his rights.

173 The tribunal member, the appellant and his migration agent all appear to have been unaware of the entitlement of the appellant to maintain the confidence which is guarded and recognised by the immunity afforded by legal professional privilege. The Federal Magistrate decided that the appellant's migration agent should have warned him that he had the right not to disclose the contents of his conversation with the solicitor ([2006] FMCA 1417 at [35]). The minister conceded that the migration agent was not legally trained. Nor, apparently, was the tribunal member. The minister does not seek to support this reasoning of the Federal Magistrate. It clearly is wrong.

174 I am of opinion that the appellant did not waive his legal professional privilege in what he discussed with his solicitor.

DID S 422B EXCLUDE THE DUTY, IF ANY, TO WARN OF THE PRIVILEGE?

175 If the above view is wrong, the next question is whether the tribunal exceeded its jurisdiction in asking the questions which probed the privilege in circumstances where there was no basis for suggesting that the privilege had either been waived or was colourable (in the sense of being resorted to in order to conceal a fraud, abuse of power or crime).

176 In *Bercove v Hermes (No 3)* (1983) 51 ALR 109 at 117-118 Bowen CJ, Lockhart and Beaumont JJ discussed an argument that it was contrary to the rules of natural justice for an administrative body to admit or rely on evidence given in circumstances when the body lacked the power to compel an answer to questions that might tend to incriminate the person giving the evidence. The person who gave the evidence in that case appeared to have been unaware of his right to claim the privilege against self-incrimination but there was no evidence of his actual position since he did not give evidence. The Full Court approved a statement made by Davies J in *R v McDonald* (1983) 58 ALR 471 at 483, that in such

circumstances in the absence of an objection, the executive body is not bound to disallow the question even if, to its knowledge, the answer may tend to incriminate the witness. Davies J had said that it was for the witness to take the objection in his answer and that by doing so the objection served as an answer to the question (*Bercove* 51 ALR at 117). The Full Court inferred that the person entitled to claim the privilege against self-incrimination, because he always maintained his innocence, may well not have objected to the question had he been aware of his right. They therefore held that the claim had not been established.

177 In *R v Clyne* (1985) 2 NSWLR 740 at 748 Street CJ (with whom Glass and Samuels JJA agreed) said that protection from unlawful or unfair acts can be recognised as extending, in appropriate cases, to protection from abuse of the process of the Court in which incriminating evidence has been obtained. He drew from what had been said in *Bunning v Cross* (1978) 141 CLR 54 at 72 as to the power of a court to reject evidence that had been unlawfully or unfairly obtained. Street CJ applied the decision of the Privy Council in *R v Coote* (1873) LR 4 PC 599 at 607-608 in which their Lordships had held that evidence given by a witness was ordinarily admissible even though it may be incriminating, unless the witness had claimed privilege on the ground of avoiding self-incrimination and had been denied the privilege by the presiding judicial officer. He held that the mere fact that a witness, in the witness box, is ordinarily obliged to answer questions does not, of itself, make those answers involuntary in the sense requisite to make them inadmissible in later criminal proceedings. Importantly, their Lordships had said (*Coote* LR 4 PC at 607):

> *'… it is obvious that to institute an inquiry in each case as to the extent of the Prisoner's knowledge of law, and to speculate whether, if he had known more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to the rule, recognised as essential to the administration of the Criminal Law,* "ignorantia juris non excusat".*'*

178 Such a view of the law in proceedings before the tribunal may be capable of resulting in unfairness to applicants for review. As noted above, almost all persons who appear as applicants for review are unlikely to have any knowledge of the common law system or of this country's laws in relation to legal professional privilege or the privilege against self-incrimination. The tribunal's functions are inquisitorial. It possesses substantial powers with which to pursue its functions.

179 A member of the tribunal needs no legal qualification in order to perform their functions. It would not be unreasonable to expect that members be aware of some limits on their rights to ask or require to be answered questions, because of the existence of s 433(1A) of the Act. Moreover, the search warrant cases show that it may be an unlawful, and thus invalid, use of the power to issue a warrant if its purpose is to ascertain what could only be privileged material. That may be so where there is no issue that privilege had been waived or that an exception existed such as the use of the privilege to further an illegal purpose: *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 515-516 per Gibbs CJ. Compulsory powers of questioning ought not be used as a basis to engage in a mere fishing inquiry upon a hope to build up a case when there is no information to warrant it: *In Re Maundy Gregory; Ex parte Norton* [1935] Ch 66 at 73 per Lord Hanworth MR, with whom Slesser and Romer LJJ agreed; nor should processes of the Court be used for this purpose: *Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1952) 72 WN (NSW) 250 at 254 per Owen J, Street CJ and Herron J agreeing.

180 The appellant gave no evidence before the Federal Magistrates Court as to his understanding or what he would have done if aware of his right, if any, to legal professional privilege. The failure of the appellant to give this evidence suggests that any denial of the right to procedural fairness in this case made no difference to how he would have acted: cf: *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at 12 [34] per McHugh, Gummow, Callinan and Heydon JJ.

181 If the tribunal had power in the circumstances described above to ask the questions, then any denial of procedural fairness that may have occurred because of the abuse of its procedure is not immunised necessarily by s 422B.

182 The appellant argued that procedural fairness required the tribunal to give a warning to him of his right to claim legal privilege and the consequence of it being lost (referring to the dissenting judgment of Hampel J in *Allitt v Sullivan* [1988] VR 621 at 660). In that case the majority of the Full Court of the Supreme Court of Victoria followed the view of Fox J in *Arno* 9 FCR 576 that there was no need to include on the face of a warrant a reference to legal professional privilege (*Allitt* [1988] VR at 630, 642; see also *Saunders v Australian Federal Police Commissioner* (1998) 52 ALD 484 at 493-494 per French J).

183 Under the common law rules of natural justice or procedural fairness the appellant could entertain a legitimate expectation that the tribunal would adopt a fair procedure, including one which respected and ensured the effective exercise of his rights to protect any legitimate claim for legal professional privilege: *Annetts v McCann* (1990) 170 CLR 596 at 599 per Mason CJ, Deane and McHugh JJ. However, s 422B is intended to restrict the operation of this common law expectation. It is clear enough that s 422B(2) contemplates that provisions of the Act outside Div 4 of Pt 7 so far as they apply to hearings, can affect the common law requirements of natural justice in relation to certain topics. So too, s 433(1A) is intended to operate in respect of any hearing conducted in accordance with Div 4 of Pt 7.

184 And, in *Kioa v West* (1985) 159 CLR 550 at 585 Mason J pointed out that the notion of procedural fairness included a requirement that a statutory power be exercised fairly:

> *'i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations: cf.* Salemi *[No 2] (1977) 137 CLR at 451 per Jacobs J.'.*

185 In cases of libel, where the publication of the matter complained of was a criminal offence, courts of common law held that interrogatories would not be allowed on the question of publication because it was clear that the defendant would be able to claim the privilege and that the purpose of asking the interrogatory was to have the claim made in the affidavit verifying the answers.

186 In *Tupling v Ward* (1861) 6 H&N 749 at 753 Martin B (giving the judgment of the Court of Exchequer) said that in cases of that kind:

> *'… it would be unfair to submit questions which a party is clearly not bound to answer; the object being either to compel him to answer when not bound, or to refuse, and so create a prejudice against him. We therefore think that these interrogatories ought not to be allowed.'*

187 This line of authority was followed by the Court of Common Pleas, Bovill CJ, Keating and Byles JJ in *Edmunds v Greenwood* (1868) LR 4 CP 70 at 74-75. And, as Lord Wilberforce recognised in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 443F-H, it was necessary to frame *Anton Piller* orders (now search orders) in a way

which enabled the person to whom the order was directed to avail himself or herself of the privilege against self-incrimination. So, in *Reid v Howard* (1995) 184 CLR 1 at 17 Toohey, Gaudron, McHugh and Gummow JJ held that it was beyond the inherent power of a superior court of record to compel self-incriminatory disclosures while fashioning orders to prevent the use of the information thus obtained in another court, such as a criminal court.

188 There is nothing in the scheme of Div 4, when read with s 433(1A), which requires the tribunal to take any step to draw to the witness's or applicant for review's attention his or her right to claim legal professional privilege in respect of any question or subject matter. The tribunal's obligation to afford procedural fairness to an applicant for review whose case cannot be determined in his or her favour on the papers, to attend a hearing and give evidence, is set out in s 425. And an applicant for review can, but does not have to, reveal matter that is the subject of a valid claim for legal professional privilege.

189 These considerations point to a harsh operation of s 422B, but they cannot deny its efficacy to exclude common law elements of a fair procedure. However, they reinforce that in cases involving a rule of evidence, albeit one of the foundations of liberty under the common law, the Court has been wary of procedures which do not adequately protect a person's right to the benefit of a privilege or which would seek to cause the person embarrassment. After all, as Lord Eldon LC said long ago in *Shackell v Macaulay* (1825) LJ Ch (OS) 27 at 39, a privilege, such as the privilege against self-incrimination, is established for the benefit, not of the witness, but of society, and if a question ought not to have been asked, no inference ought to be drawn from a person declining to answer it. This suggests that fairness is a governing question in procedure. It is fairness of this kind which s 422B would otherwise exclude, unless the tribunal exceeded its power and committed a jurisdictional error in proceeding, as it did here (see also *SZBEL v Minister* 132 ALR 592 at 598 [25]).

190 It follows that by force of s 422B, any common law requirement of the rules of procedural fairness that the tribunal may have had to identify to the appellant, or refrain from asking him questions that might reveal a claim for legal professional privilege, has been abrogated.

DID THE JURISDICTIONAL ERROR MAKE A DIFFERENCE?

191 The minister also argued that, consistent with *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-146 per Mason, Wilson, Brennan, Deane and Dawson JJ, not every departure from the rules of natural justice would entitle the aggrieved party to a new hearing, particularly where conformity with the rules of natural justice would make no difference to the result. He argued that because the tribunal did not refer expressly to the subject matter of the revelation of the appellant's legal advice as a reason for rejecting his claim, that the revelation made no difference to the result. The minister contended that the tribunal was obliged by s 430 of the Act to identify what it considered to be its findings on material questions of fact. He said that because the tribunal did not, in terms, refer to the subject matter of discussion between the appellant and his solicitor, it did not regard that discussion as material: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 345-346 [67]-[69] per McHugh, Gummow and Hayne JJ.

192 However, the tribunal said that it had had regard to the evidence before it in rejecting the appellant's claims as to his homosexuality and Christian inclinations. The evidence included the discussion with the solicitor. It follows that that evidence may have made a difference to the result. It was evidence taken by the tribunal making a jurisdictional error. There is no reason not to set such a decision aside (*SAAP* 215 ALR at 185 [84] per Gummow J, 203 [174] per Kirby J, 212 [211] per Hayne J).

193 For these reasons I would allow the appeal. I agree with the orders proposed by Lander J.

I certify that the preceding seventy-four (74) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 9 May 2007

Counsel for the Appellant:	J F Gormly
Counsel for the Respondent:	T Reilly
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	12 February 2007
Date of Judgment:	9 May 2007