FEDERAL COURT OF AUSTRALIA

Applicant S214 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 66

ADMINISTRATIVE LAW – Procedural fairness – Confidentiality orders made by administrative tribunal – Content of duty of tribunal nonetheless to provide procedural fairness – Whether tribunal provided procedural fairness in this case – Appeal to Administrative Appeals Tribunal against decision of Minister's delegate that *Convention relating to the Status of Refugees* did not apply to him on account of war crimes and crimes against humanity allegedly committed by him – Failure of Tribunal to require particulars of alleged conduct – Exclusion of appellant and his solicitor from discussion concerning particulars between Tribunal member and solicitor for Minister – Failure of Tribunal to notify appellant prior to decision of substance of identification evidence given in absence of appellant and his solicitor.

Migration Act 1958 (Cth) ss 91X, 500
Convention relating to the Status of Refugees (1951) Article 1F
Administrative Appeals Tribunal Act 1975 (Cth) ss 35, 39(1)

APPLICANT S214 of 2002 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS and ADMINISTRATIVE APPEALS TRIBUNAL

N 1555 of 2003

WILCOX, MOORE and MARSHALL JJ
26 MARCH 2004
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N 1555 of 2003**

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**APPLICANT S214 of 2002** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	ADMINISTRATIVE APPEALS TRIBUNAL **SECOND RESPONDENT**
JUDGES:	**WILCOX, MOORE and MARSHALL JJ**
DATE OF ORDER:	**26 MARCH 2004**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by Emmett J on 30 September 2003 be set aside and, in lieu thereof, it be ordered that:
   (a) an order in the nature of certiorari be made to quash the order of the Administrative Appeals Tribunal made on 12 October 2001;
   (b) an order in the nature of mandamus be made requiring the said Tribunal to rehear, and determine according to law, the appellant's application for review of the decision of the delegate of the first respondent, that the appellant is a person to whom applied Article 1F of the *Convention relating to the Status of Refugees* (1951), as amended by the *Protocol relating to the Status of Refugees* (1967); and
   (c) the first respondent pay the costs of the applicant.
3. The said respondent pay the appellant's costs of the appeal to this Full Court.

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 **N 1555 of 2003**

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**APPLICANT S214 of 2002** **APPELLANT**
AND:	**MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS** **FIRST RESPONDENT**
	ADMINISTRATIVE APPEALS TRIBUNAL **SECOND RESPONDENT**
JUDGES:	**WILCOX, MOORE and MARSHALL JJ**
DATE:	**26 MARCH 2004**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal against a decision of a judge of the Court (Emmett J) dismissing with costs an application for an order nisi for prerogative relief (prohibition, certiorari and mandamus) that was made to the High Court of Australia and remitted to this Court for hearing.

2 The application for an order nisi asserted that the Administrative Appeals Tribunal ('the Tribunal') committed jurisdictional error in denying procedural fairness to the applicant ('the appellant') in a proceeding for review being considered by it. The only issue before the Tribunal was whether the appellant was excluded, by Article 1F, from the operation of the *Convention relating to the Status of Refugees* (1951), as amended by the *Protocol relating to the Status of Refugees* (1967) ('the Convention').

3 As we understand the position, it was common ground before the primary judge that a denial of procedural fairness would constitute a jurisdictional error of law, permitting the grant of prerogative relief. However, counsel for the respondent, the Minister for

Immigration and Multicultural and Indigenous Affairs ('the Minister'), persuaded Emmett J that the Tribunal had not denied procedural fairness to the appellant.

The appellant's history

4 The following information about the appellant is taken from the findings of the Tribunal.

5 The appellant is an Afghan national who was born in Kunduz (or Konduz), in northern Afghanistan, in 1958. He is of Tajik ethnicity and a Sunni Muslim.

6 Between 1965 and 1977, the appellant attended high school in Kunduz. Thereafter, he studied philosophy and social science at the University of Kabul, where he was the Secretary of the Philosophy Faculty Branch of the Peoples' Democratic Party of Afghanistan ('the PDPA'). A faction of that party governed Afghanistan, with Soviet Union support, from 1978 to 1992. For a period of about ten years, from 1979 to 1989, the support included a substantial Soviet army presence in Afghanistan.

7 The appellant was nominated by a committee of the PDPA for a scholarship enabling him to study at the Patrice Lamumba University in Moscow. He attended there between 1980 and 1986 before being awarded the degree of Master of Laws. Whilst in Moscow, the appellant continued as an active member of the PDPA. He became Secretary of the Afghan Students' Branch at the University and, subsequently, President of the Federation of Afghan Students in Moscow. The Tribunal found that, in this role, 'his main activity was to monitor all Afghan students and their behaviour whilst in Moscow and to ensure that they kept to the conditions of their scholarships'.

8 In May 1986, about two months before the appellant returned to Afghanistan, Dr Mohamed Najibullah became President of Afghanistan. On the appellant's return, he went to Kabul. He was told by the PDPA that he had to work for it for a time, then do two years conscripted army service; after that he would be considered for a position in the Ministry of Foreign Affairs. The appellant told the Tribunal he had specialised at Patrice Lamumba University in international law.

9 The appellant told the Tribunal that he spent four or five months as an educator in the organisational section of the central committee of the PDPA in Kabul. His job was to advise others in that section how to set up, develop and maintain party groups. He denied this was an important position in the PDPA or one that carried political influence.

10 At the end of this period, the appellant was sent to Kunduz, where he worked with the local provincial party committee. He said his responsibility was to contact government departments and individuals for the purpose of explaining the PDPA platform and policy and any new directions being taken by the party. After a few months in this role, the appellant commenced his military service. This must have been early to mid 1987.

11 The appellant told the Tribunal that he spent the entire period of his military service as an ordinary soldier in a KHAD military unit stationed on the outskirts of Kunduz. He said the function of his unit was to ensure the safety of the city and that people were not harassed or harmed by the Mujahidin, who were opposed to the PDPA government. In reasons given in connection with an application by the Minister for an order under s 35 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('the AAT Act'), the Tribunal member (Deputy President Wright) said material had been provided to the primary decision-maker, the Minister's delegate, that KHAD was 'a powerful secret police and military organisation which operated under the auspices of the puppet Najibullah administration after the Soviet invasion of Afghanistan'. The Deputy President said '[i]nformation from numerous international and Australian sources clearly establishes that KHAD personnel were involved in the wide scale torture, murder, and imprisonment without trial of countless Afghan citizens who were suspected of opposition to the Najibullah regime'.

12 In his final reasons for decision, the Deputy President recorded that the appellant denied any involvement with KHAD. The appellant had said that, during the period of his military service, he had a secondary duty as a PDPA political deputy but was not involved in any fighting or intelligence work for KHAD.

13 After completion of his military service, apparently about early to mid 1989, the appellant returned to Kabul. He was appointed to the Ministry of Foreign Affairs. He was put 'in charge of the political desk of the third political department'. The Deputy President did not explain what this meant, but he did say the 'department', presumably the third

political department, 'was responsible for relations between Afghanistan and all of the former USSR Republics'. Presumably this was a reference to the situation after the break-up of the Soviet Union late in 1991. The Deputy President said the appellant's responsibilities 'included the establishment of Embassies and Consulates, the signing of political agreements, and arranging seminars, conferences and diplomatic visits'.

14 Dr Najibullah was overthrown in 1992. He was succeeded by President Mojaddedi, but the latter was soon replaced by Professor Rabbani who remained in office until the Taliban took over Kabul in 1996. Between 1992 and 1996, the appellant continued in the Ministry of Foreign Affairs.

15 Shortly after the Taliban took over Kabul, the appellant's home was shelled and partially destroyed. The appellant and his family left Kabul the following day. They fled to Pakistan and then Iran. The appellant contacted President Rabbani, who still retained some authority, and was given a position in the Afghanistan Embassy in Iran.

16 In 1997, the Minister for Foreign Affairs in the Rabbani administration visited Iran. As a consequence, the appellant was appointed second secretary at the Afghanistan Embassy in Syria. He arrived in Damascus in August 1997.

17 The Deputy President commented:

> *'At this time the Taliban rebels had not gained complete control over Afghanistan, and the odd situation developed that some of the foreign embassies continued to represent the government of Dr Rabbani, whereas others recognised the Taliban. The applicant claims to have represented the Rabbani administration at all times.'*

18 While working in Damascus, the appellant planned a holiday in Australia. He obtained tourist visas for himself and his family. However, in September 1999, before he could use the visas, his appointment in Syria was terminated. Believing he could not safely return to Afghanistan, the appellant decided to come to Australia and seek asylum. He arrived with his family on 30 September 1999. He and his wife each lodged applications for protection visas. The wife's application was successful. She and the two children were granted protection visas. They have since become Australian citizens.

19 However, the appellant's application was unsuccessful. His application was rejected because of a decision made by a delegate of the Minister, affirmed by the Tribunal, that the appellant is a person who falls within Article 1F of the Convention. Article 1F provides as follows:

> *'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*
> *(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
> *(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*
> *(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.'*

20 The delegate's decision was made on 9 August 2000. The appellant appealed against the decision to the Tribunal. The reason why that was the appropriate course, as distinct from appealing to the Refugee Review Tribunal, is that s 500(1) of the *Migration Act 1958* (Cth) ('the Act') provides for applications for review to be made to the Tribunal where the decision (amongst other decisions) is 'a decision to refuse to grant a protection visa … relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2)'; subject to an exception that is presently immaterial.

The appellant's name

21 Something should be said about the appellant's name. In this Court, both at first instance and on appeal, the appellant has been called 'Applicant S214 of 2002'. This name was taken from the case reference number in the High Court. This course was followed in compliance with s 91X of the Act which forbids publication, in relation to a proceeding in this Court, of the name of a person who has applied for a protection visa.

22 For the purposes of the Tribunal hearing, the appellant was called by his usual name. As is common in Australia, that name consists of two given names and a surname (family name). However, the appellant gave evidence to the Tribunal that he adopted his surname when he was posted to the Afghani embassy in Syria. He said that previously he did not have a surname. He asserted the absence of a surname is not uncommon in Afghanistan; however, it was necessary for him to have a surname for the posting to Syria. The date when the appellant first used his current surname was a matter of some importance at the Tribunal

hearing.

23 Because of s 91X of the Act, we will not state any of the appellant's names. It will be sufficient for us to refer to the 'given names' and the 'surname'.

The confidentiality orders

24 On 27 February 2001, the Deputy President conducted a preliminary hearing at which he considered an application by the solicitor for the Minister, Mr L Leerdam, for orders under s 35(2)(c) of the AAT Act. Section 35 of that Act relevantly provides:

> *(1) Subject to this section, the hearing of a proceeding before the Tribunal shall be in public.*
>
> …
>
> *(2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may, by order:*
>
> *(a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; and*
>
> *(aa) give directions prohibiting or restricting the publication of the names and addresses of witnesses appearing before the Tribunal; and*
>
> *(b) give directions prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal; and*
>
> *(c) give directions prohibiting or restricting the disclosure to some or all of the parties to a proceeding of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceeding.*
>
> *(3) In considering:*
>
> *(a) whether the hearing of a proceeding should be held in private; or*
>
> *(b) whether publication, or disclosure to some or all of the parties, of evidence given before the Tribunal, or of a matter contained in a document lodged with the Tribunal or received in evidence by the Tribunal, should be prohibited or restricted;*
>
> *the Tribunal shall take as the basis of its consideration the principle that it is desirable that hearings of proceedings before the Tribunal should be held in public and that evidence given before the Tribunal and the contents of documents lodged with the Tribunal or received in evidence by the Tribunal should be made available to the public and to all the parties, but shall pay due regard to any reasons given to the Tribunal why the hearing should be held in private or why publication or*

> *disclosure of the evidence or the matter contained in the document should be prohibited or restricted.'*

25 Mr Leerdam argued, on the basis of evidence he called that day, that it was necessary to make orders under s 35(2) in order to prevent disclosure to the appellant of the identity of some of the witnesses. The application was opposed by counsel for the appellant, Mr D Jordan. However, in a reserved judgment delivered on 11 April 2001, the Deputy President made some s 35(2) orders. Those orders were in the following form:

> *'The order of the Tribunal is that, being satisfied that it is desirable to do so by reason of the confidential nature of the evidence and the potential and apprehended risk to the safety of (a) the deponents of the affidavits contained in Annexures CD1 and CD2 and their relatives, and (b) the two persons named as "Member of the Afghan Community" and their relatives in Annexures CD3.*
>
> *It is ordered:-*
>
> *(1) That Annexures CD1, CD2 and CD3 annexed to the affidavit of Nasiba Akram sworn on 21 December 2000 and Exhibit CD4 if annexed to an affidavit of Nasiba Akram sworn hereafter in this proceeding be placed and kept in sealed envelopes in the Sydney Registry of the Tribunal.*
>
> *(2) That the contents of such envelopes be made available for the use of a member of the Tribunal hearing the applicant's application and, subject to his or her order, such material be received in evidence by the Tribunal.*
>
> *(3) That publication or disclosure of the evidence or material contained in CD1, CD2, CD3 and CD4, except to the respondent, his legal representatives and the member of the Tribunal conducting the hearing be prohibited.'*

26 Annexure CD1 was a draft affidavit. Exhibit CD4 was a sworn affidavit of the same witness. Annexure CD2 was a sworn affidavit made by a different deponent. Annexure CD3 was a document called 'Summary of Meeting' which related to a meeting of people, apparently mostly of Afghani origin, with officers of the Department of Immigration and Multicultural and Indigenous Affairs. The appellant had been given a redacted version of this document with much blacked out material.

27 The present appeal does not involve a challenge to the making of the s 35(2) orders. The essence of the case put by counsel for the appellant is that, accepting the existence of the

orders, the Deputy President was nonetheless under a continuing duty to provide procedural fairness, to the fullest extent possible, having regard to the orders. We will return to the detail of that argument.

28 As the orders made on 11 April 2001 are not challenged before us, we need not discuss the Deputy President's reasons for making them. However, having regard to the issues which are raised before us, it is relevant to note that, in reasons for judgment published on 11 April 2001, the Deputy President referred to the decision of Brennan J, sitting as President of the Tribunal, in *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247. The Deputy President quoted a long passage from Brennan J's judgment at 270-273. It includes the following:

> *'To exclude the public from a hearing is a serious step, for the Tribunal is required by statute (s 35(3)) to "take as a basis of its consideration the principle that it is desirable that hearings of proceedings before the Tribunal should be in public". This is a principle which is binding upon courts of justice … and which is calculated to ensure that public confidence in proceedings to administer justice is both warranted and maintained. It is a principle of particular importance to a Tribunal which is engaged in reviewing the exercise of administrative power, for administration has hitherto been a cloistered process … and its exposure to public scrutiny is calculated to enhance greater public confidence in it.*
>
> *Serious though the exclusion of the public is, the exclusion of a party from a hearing which affects his interests is a much graver step. To exclude a party from such a hearing, even if his legal advisers are permitted to remain, is to deny him a full opportunity to cross-examine upon, to comment on or to controvert the case against him – a denial which, in the absence of statutory authority, would constitute an indefensible denial of fair treatment by the Tribunal.*
>
> …
>
> *In the ordinary exercise of this Tribunal's jurisdiction, the Tribunal is required by its statute (s 36(4)) to apply the principle that the parties "should be made aware of all relevant matters", and that is a principle from which the Tribunal departs with reluctance when it is considering the deportation of an alien resident, whose right to remain in Australia is revoked by a deportation order. Such a person is prima facie entitled to a full hearing of his case, and to the protection which such a hearing is designed to give … An alien resident is not accorded the protection to which he is prima facie entitled when he is denied access to the case made against him.*
>
> *Yet the powers conferred upon this Tribunal by s 35(2) are not intended to lie dormant – they are there to be exercised, albeit sparingly. The purpose of*

their exercise is to secure to the Tribunal the availability of as much relevant information as possible, without violating the confidentiality which a party, a witness or the public is properly entitled to preserve (though a proper entitlement to confidentiality is not lightly established). A court may be constrained to violate that confidentiality in order to conduct its proceedings in public; but the Tribunal's powers are intended to facilitate the flow of relevant information to it, and if the exclusion of the public or even of a party is essential to preserve the proper confidentiality of the information needed to determine the application, that is a price which has to be paid, however reluctantly.

An order excluding the public may be justified more readily than an order excluding a party, but strict criteria govern the making of such an order. There must appear a real possibility of doing injustice to, or inflicting a serious disadvantage upon, a party, a witness or a person giving information if the proceedings were in public; or it must clearly appear that publication of the proceedings would be contrary to the public interest; or it must appear that the information to be given in the proceedings is of a kind described by s 36 (though in the last case, it is relevant that the Attorney-General has not given a certificate under that section)…

To exclude a party, a further criterion must be satisfied. As it must appear that the exclusion of the party is essential to preserve the proper confidentiality of the information needed to determine the application, it is necessary to show that the information is of such importance and cogency that justice is more likely to be done by receiving the information in confidence, and denying the party access to it, than by refusing an order to exclude the party. This criterion is not easy to satisfy because an applicant's interest in a hearing fair to him can be over-ridden only by another and superior interest, and then only when reconciliation of the two interests is impossible. But the criterion may be satisfied when a public interest in confidentiality clearly appears.'

29 We have omitted Brennan J's references to authority.

The requests for particulars

30 Two weeks after the making of the orders under s 35(2) of the AAT Act, on 26 April 2001, Mr R Kessels, solicitor for the appellant, wrote to Mr Leerdam seeking further and better particulars of the matters upon which the Minister intended to rely. Mr Leerdam apparently provided no substantive response, with the result that Mr Kessels brought up the matter of particulars at a directions hearing conducted by the Deputy President on 17 May 2001. On that day, the Deputy President made the following direction:

'Having heard the parties at a directions hearing, pursuant to section 33 of the Administrative Appeals Tribunal Act *1975, the Tribunal directs the*

Respondent to provide the following particulars by close of business on 25 May 2001:

1. *The provisions of Article 1F of the Refugee Convention, which are relied upon by the Respondent.*

2. *In relation to Article 1F(a), the precise crimes that it is alleged that the Applicant has committed, with references to provisions of relevant international instruments, as required under that provision.*

3. *In respect of each of the crimes alleged, subject to the confidentiality order made on 11 April, the precise details as to the following:*

   (a) when it is alleged that the crime was committed;

   (b) where it is alleged that the crime was committed, providing the name of the town as well as the precise location; and

   (c) how it is alleged that the crime was committed, such as the precise actions of the Applicant alleged to constitute the crime.

4. *If Articles 1F(b) and/or 1F(c) are relied upon, full particulars of the alleged conduct of the Applicant which allegedly falls with* [sic] *those provisions.'*

31 Mr Leerdam filed a document in purported response to this direction. The document is undated but was apparently filed on 25 May 2001. The document is framed in very general terms. It is not in dispute before us that it fails to provide the information directed by the Deputy President on 17 May 2001.

32 Paragraph (a) of the document alleges the appellant 'has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes'. The document purports to provide particulars of these allegations. We need not quote the particulars of crimes against peace, since the Minister effectively abandoned this allegation at the hearing. The 'particulars' regarding war crimes and crimes against humanity are stated as follows:

> *'(ii)* War crimes: *namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;*

Subject to the confidentiality orders made by the Tribunal on 11 April 2001, it is alleged that the Applicant, after his return from Moscow in 1986, committed acts of torture, inhuman e and ill-treatment, including against the civilian population of Afghanistan. These acts included detention without trial and extra-judicial punishment.

(iii) Crimes against humanity: *namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.*

Subject to the confidentiality orders made by the Tribunal on 11 April 2001, it is alleged that the Applicant engaged in acts and atrocities amounting to the systematic persecution of the people of Afghanistan for political, racial and religious reasons.'

33 Although it is apparent from these words that the Minister was relying on para (a) of Article 1F of the Convention, the 'particulars' fail to reveal 'the precise crimes' that the appellant was alle ged to have committed, with reference to the relevant international instruments: see para 2 of the direction of 17 May 2001. Moreover, the author of the 'particulars' made no attempt to comply with para 3 of the direction of 17 May. The 'particulars' contain no information as to the place or places where the acts were alleged to have occurred. Sub-paragraph (ii), concerning war crimes, specifies the period of the actions only as 'after his return from Moscow in 1986'; sub-para (iii) gives no dates at all.

34 The filed document indicates that paras (b) and (c) of Article 1F were also relied upon; but the 'particulars' of these grounds were devoid of information about the nature of the case that would be put by the Minister under these paragraphs.

The Trib unal hearing

35 The substantive hearing by the Tribunal took place over six days, 23 to 26 July and 16 to 17 August 2001. Mr Kessels appeared for the appellant. Mr Leerdam again appeared for the Minister. We do not have the full transcript of this hearing. However, we have part of the transcript of the first day's hearing, from which it appears that Mr Kessels complained to the Tribunal of the inadequacy of the particulars with which he had been supplied. Mr Kessels pointed out that, until he had a better idea of the nature of the acts alleged to have been committed by his client, it was not possible for him to concede that, if proved, the acts

would constitute conduct falling within Article 1F of the Convention. Mr Kessels said the supplied particulars 'don't really make out very plainly what level of association it is claimed that the applicant actually has which would bring him within Article 1F'. He assumed this would 'come out in cross-examination'; so he foreshadowed he might 'have to deal with it at the end rather than now'.

36 Mr Kessels also made clear that the case involved an identification issue and he did not know 'what the identification evidence will be'. He said he assumed 'that it may be name based and we will be leading most of our evidence, the substantial part of our evidence goes to that'.

37 Mr Leerdam responded to this complaint by saying he was happy 'to further particularise over the course of the next day the issues which [Mr Kessels] alludes to so far as the relevant instruments are concerned and it is something that we will be able to work out by the time submissions are required'.

38 Notwithstanding the unsatisfactory nature of that solution, the Deputy President let the matter rest. He made no further direction about particulars. He took no action to require the Minister to comply with the direction of 17 May 2001 or even to explain why he had not already complied with it.

39 The appellant was the first witness. The only matter about which Mr Kessels questioned him in chief was the date he adopted the surname. As indicated, the appellant said he did this when he was posted to Syria. Mr Leerdam cross-examined at some length. We do not have all the cross-examination transcript but we gather the majority of the questions related to the appellant's career history and his period of military service at Kunduz. However, right at the end of the cross-examination, this exchange occurred:

> '[T]*here are also allegations that when you returned to Kabul in July 1989, that you were involved in the torture and interrogation of people at Sederat* [a government building in Kabul]. *What do you say to that?*
>
> *THE APPELLANT: It is strange and is it logical to think I was discharged from military service and a month later I'll go to Kabul and I'll get involved in torturing and hurting. Is there any logic in it? I was discharged in July and there are documents in that regard. I was still in Kunduz at the time.*

MR LEERDAM: I am referring to after July 1989 when you returned to Kabul.

THE APPELLANT: After July I became an employee of the Ministry of Foreign Affairs and I have documents in that regard showing that I was employed by the Ministry. And I have a witness.

MR LEERDAM: Thank you Deputy President I have no further questions.'

40 Mr Kessels called three witnesses who gave evidence relevant to the issue of identification. On the afternoon of the second day, 24 July 2001, Mr Kessels indicated he had no further evidence to call, but he did not wish formally to close his case 'because I am still not quite certain what might be coming'.

41 Mr Leerdam indicated he proposed to call the two persons whose affidavits and draft affidavits (annexures CD1 and CD2 and exhibit CD4) were subjected to s 35(2) orders on 11 April 2001. He submitted both the appellant and Mr Kessels should be excluded from the hearing room whilst that evidence was taken. In response to the Deputy President's invitation to comment on that submission, Mr Kessels said: 'we maintain that we should be allowed to stay, but … you have made your ruling on that, so we abide by it'. The Deputy President accepted this to be the position. Strictly it was not. The orders of 11 April 2001 were made under s 35(2)(c) of the AAT Act. They dealt only with the confidentiality of the four documents specified in those orders; they said nothing about oral evidence. If it had been the Deputy President's judgment that both the appellant and his solicitor should be excluded from the hearing room while the oral evidence was given, based on the circumstances that existed at 24 July 2001 and having regard to the matters stated in s 35(3) of the AAT Act, he ought to have made an order to that effect under s 35(2)(a). However, the appellant's grounds of appeal do not include any complaint about the fact that the appellant and Mr Kessels were excluded from the hearing while the two witnesses gave their evidence.

42 Before he left the hearing room, Mr Kessels expressed the hope 'that the Tribunal might ask the witnesses some questions on behalf of the applicant, given that we are not able to cross-examine or be present'. Mr Kessels asked the Deputy President whether he intended to ask questions. The Deputy President said he would ask some questions and invited Mr Kessels to indicate the nature of any questions he desired to be asked. Mr Kessels mentioned the issue of identity.

43 On the third day of the hearing, 25 July 2001, Mr Leerdam indicated he proposed to call two academic witnesses, Dr William Maley and Mr Anthony Arnold. Apparently, Mr Kessels had not received signed proofs of their evidence. He complained about the position in which he had been placed. He said:

> *'Well, it is not really fair. At the heart of my objection is the submission that it is not fair and that this Tribunal is still ultimately about providing – although it has to come to the correct decision obviously it has to do so in a way that's fair to the parties.*
>
> *Now, what has happened in effect is, you made orders for directions in relation to particulars. I had to stand up on the first day and say in my view I don't have sufficient particulars, we still haven't been given them. Some of the witnesses have been heard in camera as a result of directions, which I understand, these have all gone by. Now what we have got is, again, two new substantive witnesses for which we don't even have signed proofs of evidence.'*

44 It seems Mr Leerdam accommodated Mr Kessels to the extent of providing him with signed proofs of evidence, but he did not supply any further particulars.

45 Before any other witness was called, the Deputy President raised another matter. He said:

> *'There is just one thing before we adjourn. No-one at this stage has given evidence of the colour of the applicant's eyes. Now that might seem like an odd sort of a comment to make at this stage of the proceedings but it could be relevant. I am not in a position from here to note them for myself. Could there be some agreement on this.'*

46 Counsel preferred the Deputy President himself to gauge the colour of the appellant's eyes, so the Deputy President asked the appellant to approach the bench. After looking at his eyes, he pronounced them to be blue/green. Nobody disputed this finding. The Deputy President did not explain why he thought the appellant's eye colour might be relevant.

47 On the fourth day, 26 July 2001, the matter of particulars again arose, but in a different context. The Deputy President said:

> *'It occurred to me just while you were speaking, Mr Leerdam, that although particulars are usually simply factual particulars in a pleading situation, here, if you are going to contend that the factual references can't be understood except by further reference to decided cases, it would be more*

useful to me and I am sure to Mr Kessels if your particulars were re-cast in the form that they refer to the conduct complained of and what part of the convention it offends and, insofar as it is necessary to do so, provide footnotes or elaboration of the meaning of those terms in the Convention in the way that you are doing orally now.

That is, by referring to cases, providing quotations from the cases and so on so that the particulars themselves will probably shorten what you will have to put in your final written submissions in any event if you are going to reduce your submissions to writing.'

48 Mr Leerdam agreed to provide such a document. Before the resumption of the hearing on 16 August 2001, he filed a document entitled 'Respondent's Expanded Statement of Particulars'. This document gave references to published material and decided cases in relation to the various categories of conduct mentioned in Article 1F of the Convention. However, it gave no additional information as to the conduct alleged to have been committed by the appellant.

49 Mr Kessels filed a response to Mr Leerdam's document. It is only necessary to note what he said about war crimes and crimes against humanity:

*'**War Crimes***

The Applicant concedes that, if the Tribunal finds that there are serious reasons for considering that, as a soldier (or officer – if that is proven), he committed acts of torture against either prisoners of war or civilians during the conflict by the Afghan government against the Mujahadin forces, this would constitute a war crime within the relevant international instruments identified by the Respondent or, alternatively, as a [sic] *Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.*

The Applicant is not able to concede that the acts alleged by the Respondent were in fact war crimes because the Applicant is unaware of the circumstances in which the allegations of torture are said to have taken place.

Crimes Against Humanity

*It is submitted that, to make good the allegation that the Applicant has committed Crimes Against Humanity, the Respondent must demonstrate a systematic pattern of persecution aimed at members of an identifiable group within the civilian population (*Polyukhovich v The Commonwealth *(1991) 172 CLR 501…)*

The Applicant does not know the details of the allegations against him. As

such he cannot admit this matter, but, if the Tribunal finds that there are reasonable grounds for believing that the Applicant tortured civilians on the basis that they were believed to be associated to the Mojahadin, then such actions would constitute a crime against humanity.'

50 When the hearing resumed on 16 August 2001, the appellant was recalled and questioned by the Deputy President about his physical appearance during the period of his military service. The Deputy President did not explain the purpose of the questions.

The closed hearing on particulars

51 Later on 16 August 2001, the matter of particulars came up yet again. Mr Kessels referred to the existence of the confidential material and said he understood he and his client would not get to know any of it. The Deputy President responded:

'Yes, well it's something that has troubled me throughout these proceedings, I must say. To be perfectly frank, I thought that when these particulars were supplied, some more factual material would have been stated by Mr Leerdam in his particulars, based upon that evidence in a way which would not of course have breached the confidentiality aspect of it, which has only been adopted for safeguarding the witnesses' identity essentially.

But it seemed to me that some of the factual component of the evidence could and should have been made known at some appropriate stage. Mr Leerdam, have you been giving any thought to this aspect of the matter?'

52 During subsequent discussion, Mr Leerdam confirmed the Deputy President's understanding that he was putting 'that the applicant's status within the organisation [presumably KHAD] is a sufficient basis for drawing conclusions'. However, Mr Leerdam restricted that claim to his case under para (c) of Article 1F ('acts contrary to the purposes and principles of the United Nations'). Mr Leerdam accepted that the allegations about war crimes, crimes against humanity and serious non-political crimes 'turn on the actions in relation to the applicant individually, that is, the evidence of his direct actions'.

53 Mr Leerdam expressed concern 'as to how I can make submissions on that in open Tribunal'. Mr Leerdam said it might be sufficient for the Tribunal to make findings in general terms. The transcript then reads:

'THE DEPUTY PRESIDENT: I don't think that would be particularly appropriate. If I am to make use of that evidence, I've got to be able to use it as a basis for making findings of fact. Now, the findings of fact, I don't see as

of themselves necessarily identifying the witnesses. To tell of those facts, of course, the witnesses would have had to identify themselves by reason of certain aspects of their evidence and that is self evident, I suppose.

I'm surprised that at some stage there hasn't been a particularisation of the factual allegations made against [the appellant] *as to the criminal activities that would be supported by that particular evidence. Just let me give you a simple illustration of that. I don't see how you are precluded from saying for example and the allegation is that on 25 May, 2001, Joe Bloggs murdered Sam Smith. Now, that is a bald statement of fact but it particularises the alleged crime for your opponent so he knows what he has to direct his attention to in terms of providing an alibi or what other evidence he might be able to adduce to meet it.*

That particularisation doesn't disclose that your only witness of that alleged criminal enterprise was Bill Sykes who happened to be looking out of his window and saw it at the particular time. Now, for Bill Sykes to talk about the event of course, he has to identify himself and his vantage point and so on and then you run into this question of whether his evidence should be kept secret from the other side in circumstances such as this. I don't see that the mere confidential nature of the evidence to support the allegation precludes you or indeed excuses you from not particularising the matter of complaint that you are really intending to rely on. Am I making myself clear as to that?

MR LEERDAM: Yes, Deputy President.

THE DEPUTY PRESIDENT: That is why I anticipated when I got your additional particulars, that you would be specifying factual allegations which may be supported by this confidential evidence but it doesn't appear to do so. Now, that troubles me a little.

MR LEERDAM: It is hard for me to make detailed submissions on this point.

THE DEPUTY PRESIDENT: It might be but as to this point you could make submissions to me if you think that you'll be unduly restricted in making some point to me in Mr Kessels absence.

MR LEERDAM: Yes.

THE DEPUTY PRESIDENT: If he could just be asked to wait outside for a few minutes just while we try and clarify where we are going with this, Mr Kessels. I think it would be appropriate that you and your client remain outside and that this part of the proceedings proceed in camera. We will require you again in a few minutes.'

54 At that stage, the Deputy President did not make any order under s 35(2) of the AAT Act. Nonetheless, Mr Kessels left the room. He remained outside for 25 minutes. When he was recalled, Mr Kessels was given no information as to what had transpired in his absence.

The only exchange was this:

> *'THE DEPUTY PRESIDENT: Mr Kessels that discussion I have had in your absence with Mr Leerdam has clarified my mind to some extent. I don't see any need to pursue the question I raised with him any further at this point. Was there anything more you wanted to raise at this stage?*
>
> *MR KESSELS: No, there's not. It was a matter that I was going to raise with you tomorrow anyway.*
>
> *THE DEPUTY PRESIDENT: What was - the question we've just been debating?*
>
> *MR KESSELS: Yes, the fact that it's obviously going to be a question of the weight that can be attached to the evidence.'*

55 The Deputy President subsequently directed that the transcript of the conversation between himself and Mr Leerdam in Mr Kessel's absence be marked confidential and restricted to himself and Mr Leerdam. The appellant's legal advisers have never had access to this transcript.

56 Consistently with his comment on 16 August 2001, in his final address on the following day, Mr Kessels submitted no weight should be accorded to the Minister's evidence. He said:

> *'Whilst my friend says that he gave us particulars in effect because we knew that the allegation was broadly that there was torture in Sederat and torture in Kunduz in the prison and we denied it completely. That can't cure it because it is possible that the applicant could have provided alibi evidence, I don't know, for the period that it was alleged to have occurred. We don't know. It is possible that he could have been able to say, well, there's a reason why you believe it was me because now that I'm reminded of exactly when it occurred there was this possibility. I don't know what could have arisen.*
>
> *In any event, the upshot of our submission is that as a result of the tactical decision by the respondent to run its case in that way and as a result of the order that your Honour made, the practical consequence and the problems that I've identified already about the inherent nature of problems with ID evidence is that there should be little, if no weight, attached to that material.'*

57 In reply, Mr Leerdam referred to the suggestion of a possible alibi. He said:

> *'The second limb of my friend's submission in relation to the confidential witnesses relates to what practical evidence relating to alibis or other that can be given by the applicant, we say that in the light of his evidence that*

there is none because his evidence was to the effect that he had never been to Sederat nor to the prison in the Kunduz area.'

58 The Deputy President questioned that submission. He said:

'It's one thing to say that you've never been to a place. It's another to confront someone who says that you were at a particular place with an alibi saying that you were somewhere else. They are two different methods of defence. One is a straight out denial and the other one is the provision of an alibi. A good alibi is usually much more compelling evidence if it is given.'

59 Mr Leerdam responded that he understood that; however, he claimed the 'proposition is covered by the confidentiality orders. Obviously the identity of those people would have to be known and known well in order to be able to put that aspect of the evidence up'. Mr Leerdam did not deal with Mr Kessels' point that an alibi might have been directed to a particular time, or period of time, if such details had been revealed to his client.

The Tribunal's decision

(i) Background

60 On 12 October 2001, the Deputy President ordered that the decision under review be affirmed. He published reasons.

61 In a section of his reasons headed 'Issues', the Deputy President noted that the allegation of 'crimes against peace' was 'all but abandoned during the course of the proceedings' and, in any event, 'cannot be sustained'. He then set out the other allegations against the appellant, paraphrasing the 'particulars' supplied before commencement of the hearing. The Deputy President went on:

'The particular acts or activities of the applicant which were alleged to constitute the disentitling conduct described above, were not further particularised because it was contended to do so would be to act in breach of the confidentiality order which I made on 11 April 2001.'

62 Presumably, the contention referred to in this paragraph was made during the closed session on 16 August 2001. So far as we can see, it was not made at any other time. It seems the Minister never openly argued the undesirability of providing particulars.

63 At para 40 of his reasons for decision, the Deputy President described the oral sworn evidence as being 'broadly similar to that recounted in the "Summary of Meeting" document, but from witnesses other than those whose recollections were reported in that document'. He went on:

> *'That evidence was taken in-camera in the absence of both the applicant and his legal advisers. Because of the importance of identification in this case special attention was given to that issue whilst those witnesses were giving their evidence. A copy of the "Summary of Meeting" document with the applicant's name suitably altered (see the final paragraph os* [sic] *these reasons) is appended to the reasons as annexure "A".'*

64 The 'Summary of Meeting' document was one of the four documents (annexure CD3) affected by the s 35(2) orders. The Deputy President did not explain why it was safe to publish the document in his reasons, with the appellant's name altered, but it was not safe to have done this at an earlier stage.

65 A significant point about the 'Summary of Meeting' document is that it identifies the person under discussion, both in relation to events at Kunduz in about 1986 and events after that in Kabul, by reference to the surname now used by the appellant.

(ii) The appellant's case

66 The Deputy President shortly summarised the appellant's evidence, noting that he found it 'difficult to accept his claim that he served simply as a lowly soldier guarding the southern part of Kunduz for a period of nearly two years'. He said he did not believe the appellant's claim that he was 'unaware that there was a prison or detention centre operated by KHAD in Kunduz, and … that human rights abuses were taking place under the auspices of KHAD'.

67 The Deputy President noted that three witnesses gave evidence in support of the appellant. The first witness, Roknodin Nikmal, said he first met the appellant in late 1986 or early 1987 in Kabul. At that time, the appellant was known to him only by his given names; the first time Mr Nikmal heard the appellant called by the surname was when he saw him in Australia at Villawood Detention Centre. Mr Nikmal also gave evidence that he saw the appellant in military uniform while he himself was serving in the army. He said that he could tell from his uniform that the appellant was not an officer.

68 The second witness, Ghulam Ghashe Sadiqi, was a lawyer and diplomat who told the Tribunal he first met the appellant in 1989 'when the applicant was introduced as a new recruit by the Foreign Minister, Mr Wakil'. At para 45 of his reasons, the Deputy President referred, without comment, to some evidence given to him by Mr Sadiqi:

> *'Mr Sadiqi said that Wakil became Foreign Minister in 1985, and he transferred any people who had worked in the KHAD organisation out of the Foreign Ministry and back into KHAD. He also implemented a strict policy of not employing any people who had worked with the KHAD. This was done to ensure that Afghanistan would be seen as taking international relations seriously. Afghanistan had apparently developed a bad reputation as the foreign affairs department was full of KHAD officers. Mr Wakil stated that he wanted to change this perception.'*

69 The primary judge was subsequently to describe this as 'character evidence'. However, if Mr Sadiqi's statement is accepted, and it is assumed Mr Wakil would have known whether or not a particular person had worked with KHAD, it provides some support for the appellant's claim that he had not worked for the organisation.

70 Mr Sadiqi also gave evidence that, when in Afghanistan, the appellant was not known to him by the surname. Mr Sadiqi said 'many people in Afghanistan did not have a surname'. Mr Sadiqi estimated 'only about ten percent of people did so'. They were mostly 'people who lived in Kabul and who were better off'. Mr Sadiqi also identified a document as a diplomatic passport issued by the Ministry of Foreign Affairs. It was issued, on 5 August 1992, in the name of a person who was identified only by the appellant's two given names. It identified the holder as a 'member of the third political division of the Ministry for Foreign Affairs of the I.S. of Afghanistan' and gave particulars that corresponded with the appellant's date and place of birth. It bore a photograph that, we gather, was accepted as being that of the appellant. The Deputy President did not comment on the passport.

71 The Deputy President expressed 'considerable doubt as to the reliability' of Mr Nikmal and Mr Sadiqi. However, the Deputy President thought the third witness, Mohammed Ali Dardmal, '[s]omewhat more impressive'.

72 The Tribunal found that Dr Dardmal was 'a well-qualified and experienced doctor who worked in Afghanistan from 1970 until leaving the country to come to Australia in 1992'. Dr Dardmal told the Tribunal that, as a result of his medical activities, 'he came to

know several senior officials, some of whom had been working in KHAD'. He worked closely with KHAD officers in Kunduz in 1988. He said he knew the head of KHAD in Kunduz at that time, General Taj Mohammad. As a result, he knew many of the officers from the KHAD office. He knew only one person in KHAD by the name of the appellant's current surname. He said in his affidavit:

> *'I met this man. He was a teacher before he joined KHAD, he was a dangerous person. I was told he was a violent person. He was not the same person as the applicant.'*

73 Dr Dardmal said he has known the appellant since 1978, when the appellant had just completed high school. Dr Dardmal was his family physician. Dr Dardmal said he had contact with the appellant in Moscow in September 1984 at the Patrice Lamumba University, and then in Kabul in about 1986 or 1987. He also had contact with the appellant in 1988, when the appellant was stationed at Kunduz. However, Dr Dardmal said, the first time he heard the appellant referred to by the surname was at the Villawood Detention Centre. Dr Dardmal asserted that at no time were the appellant's given names 'connected with KHAD operations. If he had been involved in KHAD with the interrogation or torture of prisoners or others, I believe I would have known about it'.

74 Dr Dardmal said the appellant was never known to him, in Afghanistan, by the surname; he was only ever known to him by his two given names.

75 The Deputy President noted Dr Dardmal's explanation for leaving Afghanistan in 1992, namely that '[t]he Mujahidin kept assassinating each other and I immigrated to Australia to save my life'. At paras 54 and 55 of his reasons, the Deputy President went on:

> *'Dr Dardmal was asked to give some detail as to the person having an identical surname to that of the applicant whom he referred to in paragraph 10 of his statutory declaration. He described him as a tall man with dark skin, who rode a red motorbike. He had dark eyes, was clean shaven and had a mass of black bushy hair. Most of the time he wore military clothing bearing a camouflage pattern like commandos and wore military boots. Dr Dardmal said that he was told that this person worked for KHAD and was "*a very bad man".
>
> *It is plain from the description given that* [this] *man … could not have been confused with the applicant. Whether or not that* [surname] *was a figment of Dr Dardmal's imagination, is something I have difficulty in resolving. Looking at the whole of his testimony it may be said that his evidence does not*

> *exculpate the applicant from the allegations made against him. On the other hand, if his evidence is accepted, it provides circumstantial support for the applicant's case that he was not the feared KHAD operative portrayed by the respondent.'*

76 Nowhere in his reasons did the Deputy President resolve this issue. Apparently, the Deputy President accepted Dr Dardmal as a credible witness ('somewhat more impressive'); but he failed to explain why, if that was the case, Dr Dardmal's evidence failed to support the appellant's case on identification.

77 The Deputy President recorded that, in support of the appellant's evidence that prior to his appointment to the embassy in Syria he was known only by his two given names, the appellant had produced four documents. All referred to a person with the appellant's two given names, being the son of a person who was also identified only by two given names. The documents consisted of a Diploma dated 4 January 1992, a Traffic Certificate dated 12 December 1994, an Identification Card of the Ministry of Foreign Affairs, Republic of Afghanistan, undated, and a Republic of Afghanistan Medal of Self Sacrifice dated 26 October 1990. The Deputy President said all these documents were translated by an accredited translator and the accuracy of the translations was not challenged. He seems to have accepted that all four documents related to the appellant. The Deputy President said '[w]hether the description of the [appellant] in each document as the "son of [two given names]" would invite or require him to be addressed as [surname] was not explored'. The Deputy President did not explain why he thought that might be the case or, if so, why he thought the surname might have been omitted from the documents. However, that question was not the Deputy President's reason for dismissing these documents from further consideration. He said at para 56:

> *'If, however, it was the practice of the better educated members of the Afghan population to adopt a surname, it would be surprising if the highly qualified applicant did not do so soon after his return from his university studies in Moscow rather than leaving that process until he secured a diplomatic posting as he claimed.'*

78 It seems this conjecture was never put to the appellant or disclosed to his solicitor. The appellant was given no opportunity to deal with it.

(iii) The Minister's case

79 The Deputy President then turned to the Minister's case. He noted that oral evidence was adduced in-camera from two witnesses, being the persons in respect of whose affidavits and draft affidavits confidentiality orders had previously been made.

80 One of those witnesses ('Witness B') attended the hearing in person and gave sworn evidence. He said he met a person who was subsequently identified to him by name as [two given names and the surname] in Kabul in 1989. The witness said the person was introduced as a member of KHAD. He was told by a soldier that the person was 'a very educated man and has got a professor's degree in Marxism/Leninism'. The witness saw the person on only one occasion. He was in his presence 'for about 4 minutes'. However, the witness claimed to have a particular reason to remember the person's name 'because of its similarity to the name of another person known to him'. He agreed that both the appellant's given names were not uncommon in Afghanistan. He described the person as clean-shaven, without spectacles or any observable scar or birthmark; his hair was of average length and light brown. The witness was never asked to attend an identification parade. Shown a photograph of the appellant, the witness said: 'I can't be sure a hundred per cent if he is in the photo'.

81 To assist him in evaluating this witness' evidence, the Deputy President took evidence from Nasiba Akram, an Afghani woman resident in Australia since 1979 who had taken a major role in activating official concern about the appellant. Ms Akram told the Deputy President she had asked Witness B whether he knew that 'another member of KHAD is in Sydney'. She mentioned the appellant's name. Witness B then told her he had met someone of that name in Kabul, in the circumstances he described in evidence. Ms Akram told the Deputy President she had no personal knowledge of the appellant.

82 The other confidential witness ('Witness A') claimed to have had a long association with the appellant and to have observed many acts of torture and violence perpetrated by him. However, Witness A had never attended an identification parade. He did not even attend the hearing; his evidence was taken by telephone. The Deputy President had arranged for the witness to be provided with a photocopy of a photograph (A5) of the appellant that was contained in his army discharge certificate. The witness said he was '80 per cent sure' it was [surname]. He gave the subject's name as including both given names and the surname. He said the man he had known had light, yellowish hair and green eyes and was clean shaven

and of medium height. The witness said the military uniform worn by the man in the photograph was that of a Toran, but the Deputy President did not explain what this meant. The witness said he knew of no other person named [surname] at the relevant time; he knew no one of that name who rode a red motorbike. The witness pointed out the circumstances occurred 'a long time ago'.

83 The Deputy President commented at para 65:

> *'During the course of the hearing, I looked closely at the applicant's eyes. They were blue/green in colour. Apparently eyes of this colour are very rate* [sic] *in Afghanistan. The applicant now has wavy hair, much longer than the hair shown in photograph A5. He is also some 12 or 13 years older than at the time that document was issued. Whilst we were not told when the photograph itself was taken, the applicant is in military uniform of some kind, and I would infer that it was taken between 1987 and 1989.'*

84 The Deputy President did not explain the source of his belief about blue/green eyes being 'very rare in Afghanistan'. Counsel for the Minister were not able to identify any source to us.

(iv) The Tribunal's reasoning

85 After noting he had recalled the appellant to ask him about his hair, and been told the appellant's hair was lighter when short, the Deputy President said at para 68:

> *'The interrogator at the Kunduz detention centre run by Khad was described in the "Summary of Meeting" document as "looking like a Russian". Whilst I have no specific knowledge of the facial characteristics which this description is meant to convey, it would be difficult to conclude that it is consistent with the photographs of the applicant which appear in Exhibits A1, A2 or A3 (the only one of which closely resembling his present appearance seems to be A2, although even in that he has a heavy beard as well as a moustache). However the photograph in A5 is a different matter altogether. Anyone would be very hard pressed to recognise the applicant today from that photo. As already mentioned he is shown with short hair, clean shaven and a somewhat fatter face than he has at present. I personally would have no difficulty with his description as "Russian looking" in that photo. These considerations whilst of themselves of no great weight tend to support the conclusion that the applicant was the torturer known to witness "A".'*

86 The Deputy President did not explain what characteristics he assumed to be 'Russian looking' in using that description 'to support the conclusion that [the appellant] was the torturer known to witness "A"'.

87 The Deputy President noted the limitations inherent in the identification evidence. He said at para 70:

> *'Without a formal identification procedure and/or a cross-examination of each witness by opposing counsel, I could not say that I am satisfied beyond reasonable doubt, that the applicant has bæn conclusively identified as the perpetrator of the criminal offences described by witness "A" and to be inferred from the evidence of witness "B". On the other hand, I am persuaded, indeed strongly persuaded, on the balance of probability and am satisfied, bearing in mind the gravity of the allegations made, that the applicant is indeed the person whose violent offences were described by these two witnesses. I have no reason to doubt the credibility of either witness based upon the content of what they told me, or the manner in which they gave evidence.'*

88 In paras 71 and 72 of his reasons, the Deputy President then set out some factual findings:

> *'On the whole of the evidence, including the documentary evidence, I find that the applicant was an influen tial member of KHAD and was directly involved in the interrogation, ill-treatment and torture of political opponents and suspected political opponents whilst serving in a KHAD unit in the Afghanistan army at Kunduz. These activities were carried out on a more or less regular basis over a period of several months in 1986. As the account given suggests that these activities were mainly carried out at night, whilst the applicant was wearing an officer's uniform* [sic]. *The witnesses called by the applicant claimed to have seen him wearing only the uniform of a private soldier. It is entirely feasible in my opinion that his role as an interrogator was assumed in the evening after masquerading as a private soldier during the day. I imagine KHAD operatives would be no more anxious to expose their clandestine activities to the outside world, than members of other secret police and intelligence gathering organisations involved in similar work.*
>
> *I also find that subsequent to his work in Kunduz, the applicant carried out similar interrogation procedures at the Sederat in Kabul involving ill-treatment and torture of suspects. These acts were carried out in 1989 and probably also in 1990.'*

89 The Deputy President noted that, to find that the Convention does not apply to an applicant for refugee status, there must be 'serious reasons for considering' that the person committed various crimes or reprehensible acts. He rejected a contention by Mr Leerdam that it would be enough to find the appellant had been a member of KHAD. He said he had 'no reliable evidence which would enable me to find that [the appellant] was so highly placed in the KHAD organisation that he should be saddled with general responsibility for its known

criminal activities and excesses'.

90 However, the Deputy President said, 'there was strong evidence in the present matter to support the conclusions, which I have expressed'. He must have been referring to the evidence of Witness A; Witness B said nothing about the appellant's personal activities, even by hearsay. Further, Witness A was only '80 per cent sure' that he had the right man. The Deputy President concluded at para 78:

> *'The findings which I have made are such that each of the concessions made by the applicant in paragraphs 5 and 8 of his Response take effect, and it follows from this that my ultimate conclusion should be that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention, and consequently he does not meet the criteria under the Migration Regulations for the grant of a protection visa. His application should therefore be refused and the decision under review should be affirmed. I so order.'*

91 There is obviously room for concern about the Deputy President's conclusion, particularly having regard to the documentary evidence and the evidence of Dr Dardmal. However, it was for the Tribunal to determine the facts of the case. The Tribunal's decision may be challenged only on legal grounds.

The application for prerogative relief

(i) Evidence of the effect of the alleged denial of procedural fairness

92 At a directions hearing on 19 June 2003, prior to the hearing of the application for prerogative relief, Emmett J indicated he would permit the appellant 'to give evidence, if he wishes to do so, to the effect that, had he been given certain particulars of the matters alleged against him that were found by the AAT, he would have adduced evidence to that effect before the Tribunal'.

93 The appellant took advantage of that leave. He filed an affidavit, dated 17 June 2003, in which he dealt particularly with the Tribunal's finding that he committed acts of ill-treatment and torture of suspects at the Sederat in Kabul in 1989 and probably 1990: see para 88 above. The primary judge summarised the contents of this affidavit in the following way:

> '[T]*he applicant said that, from the beginning of 1990, he started taking lunch in the Ministry of Foreign Affairs building and was introduced to Mr Khalil Cargar and Mr Ghulam Shah Nasrat. He said that from March or April 1990, he worked closely on a daily basis with Messrs Cargar and Nasrat. He*

> *said that, from time to time during 1990, and in subsequent years, he invited Messrs Cargar and Nasrat over to the house of his father-in-law and he also attended their homes. During those visits they would discuss work, relax and play cards.*
>
> *The applicant said that he would call Messrs Cargar and Nasrat as witnesses to say that they had known him since the beginning of 1990, that he is a family man of good character, that he was not to their knowledge a member of the KHAD, that he had dark brown hair, that he was not known by the surname now used by him and that they do not believe that he could be the same man that is responsible for the actions alleged to have occurred in 1989 and 1990 referred to in par 72 of the reasons of the AAT.*
>
> *The applicant also said in his affidavit that Mr Kabir Fahrahi, the head of all the Afghan consulates, who had a senior role with the Ministry Foreign* [sic] *Affairs from before his time there, would also be able to give evidence of the eye colouration of Afghan citizens with whom he has had contact, evidence of the name by which the applicant was known, the applicant's character, reputation, employment and evidence that the applicant was not the man referred to in the allegations of conduct in 1989 and 1990.*
>
> *The applicant also asserted in his affidavit that his personnel file would be held by the Ministry of Foreign Affairs in Kabul and that that file would have his name, date of birth, his father's name and the dates of his employment. He said that the file may also have photographs and documents indicating his hair colour as dark brown. He also said that specific alibi evidence, for example, showing that he was not in Afghanistan at a relevant time, may be available from his personnel file.'*

94 This summary was not inaccurate. However, it was incomplete. The affidavit went further than this. It contained a statement by the appellant that, from August 1989 until February 1990, when he married, he lived with his sister and her husband in their apartment in a suburb of Kabul. He said his sister and her family now live in the United States; his sister would have been able to give evidence about his home life, appearance and name during the period he lived with her.

95 In his affidavit, the appellant described his early married life. He claimed that his wife, and some identified members of her family who now live outside Afghanistan, would have been able to give evidence relating to his name, appearance and home life in 1990.

96 Another matter discussed in the appellant's affidavit concerned eye-colour. The appellant disputed the Deputy President's finding that blue/green eyes are very rare in Afghanistan. He said:

'In my experience eyes of blue or green (or both) colour are not rare in Afghanistan but, rather, are quite common. Particularly in some of the northern areas such as Panshir Valley, Fakhar District, and Badakhshan Province, eyes which are blue or green in colour can be very common eye colours.'

97 Finally, the appellant dealt with the identification evidence of Witness A. He said:

'I note that in paragraph 64 of the Decision Witness A is said to have stated that the person known to him had green eyes and "yellowish" hair. I cannot understand how this could relate to me at all. I also note that Witness A felt that the person known to him was slimmer than was set out in a single photograph of my face. I have seen the photograph of my face marked A5 which was a photograph from my conscription discharge documents. This photograph is a photograph of me taken at the time of creation of the photograph and the dimensions of my face were accurately depicted at that time.'

(ii) Issues at the primary hearing

98 At the hearing before the primary judge, counsel for the appellant (Dr C Birch SC and Mr J Hyde) argued four grounds of denial of procedural fairness by the Deputy President:

(i) failing to require the Minister to provide proper particulars of the allegations made against the appellant;

(ii) excluding the appellant and Mr Kessels from the 25 minute discussion on 16 August 2001;

(iii) failing to give the appellant notice of the identification evidence upon which the Deputy President relied; and

(iv) failing to inform the appellant that allegations had been made about his conduct at Sederat in Kabul in 1989. The affidavit evidence regarding the availability of evidence from the appellant's sister, wife and members of her family was relevant to this ground.

99 Counsel for the Minister, Mr R J Bromwich, contended that none of these grounds could be made out. The primary judge accepted that contention and dismissed the proceeding.

100 We will deal with his Honour's reasoning in discussing the four grounds, which were repeated to us. The first and fourth grounds overlap and will be discussed together.

Principles

101 Before turning to the four grounds debated before us, it is convenient to state some matters of principle.

102 At para 24 above, we set out the relevant parts of s 35 of the AAT Act. Reference should also be made to s 39(1) of that Act. That subsection provides:

> *'Subject to sections 35, 36 and 36B, the Tribunal shall ensure that every party to a proceeding before the Tribunal is given a reasonable opportunity to present his or her case and, in particular, to inspect any documents to which the Tribunal proposes to have regard in reaching a decision in the proceeding and to make submissions in relation to those documents.'*

103 As previously indicated, the appellant does not challenge the orders made by the Deputy President under s 35 of the AAT Act. Consequently, the appellant must (and does) accept that his entitlement to procedural fairness, and the Tribunal's obligation to him under s 39(1) of the AAT Act, are in this case significantly qualified. Nonetheless, as is common ground between the parties, the entitlement and obligation continue to exist, subject to that qualification. The problem in the case is to determine, in practical terms, the extent to which the underlying entitlement and obligation are overridden by the s 35 orders. The basic question is whether the Tribunal has been as fair as possible given the existence and content of the s 35 orders.

104 A denial of procedural fairness, having regard to the circumstances of the particular case, constitutes jurisdictional error for the purposes of s 75(v) of the Constitution, entitling the aggrieved party, subject to the discretion of the Court, to appropriate prerogative relief: see *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; 204 CLR 82 *('Aala')* at [5] (Gleeson CJ), [59] (Gaudron and Gummow JJ), [131] (Kirby J), [170] (Hayne J) and [216] (Callinan J)'.

Failure to provide particulars and notice of Sederat allegations

(i) The appellant's submissions

105 In their Outline of Submissions to us, Dr Birch and Mr Hyde expressed these two grounds in the following way:

> *'(a) The failure to provide particulars of the facts was a denial of procedural fairness;*

…

(d) The Tribunal failed to give particulars to the appellant and his lawyers prior to the conclusion of the hearing indicating that there was evidence relating to the conduct at the Sederat at Kabul in 1989 that would be relied upon.'

106 Counsel said that '[t]hroughout the course of the proceedings the appellant has struggled to understand with sufficient particularity the nature of the case that has been brought against him'. They summarised the history of applications for particulars that we have set out above. They pointed out that the Deputy President never ruled that the provision of particulars would breach his s 35 orders; indeed, the Deputy President himself gave some particulars of the allegations in paras 71 and 72 of his reasons. By that stage, of course, it was too late for the appellant to deal with the allegations.

107 Counsel for the appellant accepted that their client guessed that the case against him included allegations about his conduct at Kunduz in about 1986; consequently, Mr Kessels led some evidence about that matter. However, they said, there was nothing to alert the appellant or his solicitor to the fact that the case also included an allegation about the appellant's conduct at Sederat in Kabul in about 1989.

108 Counsel pointed out that the only reference to Sederat at the hearing, at least in the presence of the appellant, was in the four questions asked at the end of Mr Leerdam's cross-examination of the appellant: see para 39 above. In those questions, the Sederat allegation was put to the appellant in general terms ('when you returned to Kabul in July 1989 … you were involved in the torture and interrogation of people at Sederat'). The allegation was denied by the appellant, who pointed out he had documentary evidence that, after July 1989, he was an employee of the Ministry of Foreign Affairs. Mr Leerdam did not press the matter any further.

109 Counsel submitted that it is clear from the subsequent conduct of the appellant's case, including the evidence led from Mr Sadiqi, that it was not apparent to the appellant and Mr Kessels that the case against the appellant extended to events in Kabul in the second half of 1989. In any event, they said, there appears to be no good reason why particulars of those events could not have been given.

(ii) The primary judge's reasoning

110 In addressing the first ground of complaint, Emmett J noted the distinction between particulars of allegations, on the one hand, and the evidence intended to be relied upon to establish those allegations, or both. He went on at paras 81 and 82:

> *'Nevertheless, if furnishing particulars of allegations would disclose part of the contents of a document in respect of which an order had been made under s 35(2), that would be prohibited by the order. The Minister contends that the s 35 Order, and the subsequent order relating to the oral evidence given by Witness 'A' and Witness 'B', operated to preclude not only the disclosure to the applicant of the evidence taken into account by the Deputy President but also the furnishing of particulars of the allegations made against the applicant, in so far as such particulars would disclose material contained in the Confidential Documents.*
>
> *It is possible to contemplate circumstances whereby the giving of particulars of an allegation would involve a disclosure of the evidence by which the facts alleged in the particulars are to be established. For example, if there were an allegation that acts of torture were committed against an individual in private, the only way in which those allegations could be proved might be from the evidence of the individual. Thus, by furnishing particulars of the allegation, even without naming the individual, a witness might be identified. Alternatively, a particular incident might be such that if particulars of the incident were furnished, those particulars might either identify a witness or lead to a chain of enquiry that might identify the witness.'*

111 The primary judge did not consider whether the circumstances contemplated by him applied in this case. Rather, he went on to note the generality of the findings in paras 71 and 72 of the Deputy President's reasons for decision and the fact that the appellant had some notice, through having been provided with a redacted copy of the Meeting Summary, of the Kunduz allegations. His Honour accepted this would have given the appellant notice only in broad terms; but, he said, the appellant 'was at least alerted to the need to deny allegations in those general terms. It was open to him to call evidence of those times and places if such evidence were available to him'.

112 Emmett J accepted that the appellant had no advance notice about the Kabul allegations. He said these allegations were not recounted in the Meeting Summary; they 'must be assumed to be based upon the evidence of Witness A and Witness B' (actually only Witness A). However, his Honour said at para 88:

> *'Given that the applicant denied ever having been to Sederat or to a prison at Kunduz, there was no real scope for further evidence as to an alibi on specific dates. The evidence suggested by the applicant in his subsequent affidavit would not have advanced his position in that regard.'*

113 The primary judge dealt with a submission made on behalf of the Minister that, before the end of the hearing, the appellant was adequately put on notice that his 1989 conduct was in issue. In putting that submission, counsel for the Minister had referred to questions put to the appellant by the Minister's delegate on 25 February 2000. However, the primary judge noted these questions were directed to 1986 and answered on that basis. His Honour said there was no basis for concluding that Mr Sadiqi's evidence (which did not mention Sederat) was a response to specific allegations of conduct at Sederat.

114 Although he rejected counsel's submission arising out of the delegate's questions, the primary judge upheld counsel's broader argument. His Honour thought the final four questions in the appellant's cross-examination on 23 July 2001 ought to have made apparent to the appellant, and to his lawyer, that someone had made allegations that the appellant was involved in torture and interrogation at Sederat in July 1989. Emmett J said that, as there were four subsequent hearing days, the appellant 'had a reasonable opportunity to adduce evidence after 23 July 2001 of the nature described' in his affidavit of 17 June 2003.

115 The primary judge noted that the s 35 orders of 11 August 2001 prohibited 'publication or disclosure of the evidence or material contained' in the identified documents and that the direction for the Minister to furnish particulars was expressed to be subject to the s 35 orders. He said at para 108:

> *'It is apparent from the Deputy President's reasons that he understood that the Minister was contending that the particularisation of the acts or activities of the applicant that were alleged to constitute disentitling conduct would involve the disclosure of material contained in the Confidential Documents.'*

116 Emmett J's conclusion in relation to the appellant's first point was expressed at paras 110 to 112 as follows:

> *'The only way to determine whether the s 35 Order would have been contravened by giving further particulars is to examine the Confidential Documents and the evidence given orally by Witness 'A' and Witness 'B' before the AAT ('the Confidential Material'). The Minister's counsel invited me to examine the Confidential Material for that purpose, notwithstanding*

that the Confidential Material was not made available to the applicant or his counsel. Counsel for the applicant did not wish to be put in the position of having access to the material upon which instructions could not be obtained from the applicant and was therefore unwilling to examine the material.

Having regard to my concern about the absence of particulars, I briefly examined the Confidential Material and invited further submissions from the parties, which I heard on 10 September 2003. However, I have now concluded that it is possible to resolve this question without reference to the Confidential Material and I have not taken it into account in reaching the conclusions that I reach below.

It may well be that there has been a denial of procedural fairness so far as the applicant is concerned. However, that is the effect of s 35 of the AAT Act, which expressly authorises such a course where an order has been made under that provision. There was no challenge to the s35 Order. Particulars were to be furnished, subject to the s35 Order. It was for the AAT to determine whether the giving of further particulars would have contravened the s35 Order. The question of whether the furnishing of particulars might involve contravention of the s35 Order, by disclosing material contained in the Confidential Documents, and the question of whether further particulars should be given in the light of the s 35 Order were matters within the jurisdiction of the AAT. Even if the Deputy President reached an erroneous conclusion as to whether the giving of particulars would have contravened the s 35 Order, that was within the jurisdiction of the AAT. The course adopted by the Deputy President on the questions was not outside the AAT's jurisdiction and was not a failure to exercise jurisdiction.'

117 Emmett J dealt briefly with the fourth ground. He said at para 126:

'In dealing with Ground 1, I concluded that the applicant has not established that, by the end of the hearing of the AAT, he was not adequately informed that there was evidence that related to his conduct at Sederat in Kabul in 1989. While the circumstances in which he was informed were not ideal, consisting of questions coming at the very end of a fairly lengthy cross-examination, I do not consider that there was a failure to inform the applicant that there were allegations as to his conduct in 1989. I do not consider that Ground 4 is made out.'

(iii) The Full Court submissions

118 Counsel for the appellant submitted to us that Emmett J erred in concluding it was 'for the AAT to determine whether the giving of further particulars would have contravened the s 35 Order'. They said the application for further and better particulars was not an application for the exercise of a discretion under s 35(2) of the AAT Act, but an application to accord procedural justice to their client. Alternatively, even if the application involved an exercise of the Tribunal's discretion, the discretion miscarried. In their Outline, counsel said:

> *'The exercise of power under s.35(2) to make a confidentiality order does not exhaust or exclude the application of the principles of procedural fairness to the rest of the hearing to the extent that they are otherwise applicable … Section 39 upholds the appellant's entitlement to procedural fairness and is merely expressed to be subject to s.35(2) not that the entitlement granted by that section is inapplicable if an order has been made under s.35(2).*
>
> *Many orders made under s.35(2) would not seriously affect or reduce the type of procedural fairness that may be accorded to an appellant (eg, non publication orders, orders excluding the press or third parties from a court). It would not be a proper construction of s.35(2) to find that if an order had been made under the section the entitlement to procedural fairness that otherwise existed was no longer of any application. The proper construction of s.35(2) and the Act as a whole, is that upon the making of an order under s.35(2) the appellant retains his entitlement to be accorded procedural fairness restricted* ***only*** *to the extent of the order.*
>
> *The appellant does not understand the first respondent to contend that the Deputy President breached the s. 35(2) order by including in his judgment certain particulars of the evidence. It should therefore follow that it would not have been a breach of s.35(2) to have provided those particulars to the appellant prior to judgment. The appellant's representatives do not at this stage know what further particulars might have been revealed. However, if there are further particulars that could have been revealed which did not disclose the evidence itself, and would not have risked revealing the identity of the confidential witnesses then the appellant submits that revealing such particulars would be unlikely to breach the s.35(2) order. Failure to disclose such particulars was simply a denial of procedural fairness and the failure simply did not concern the s.35(2) discretion.'*

119 In support of their argument that, if it was exercising a discretion, the Tribunal's discretion miscarried, counsel cited a passage from the judgment of Gaudron and Gummow JJ in *Aala* at [39]-[40], in which their Honours adopted a statement made by Brennan J in *Annetts v McCann* (1990) 170 CLR 596 at 604-605. That passage reads:

> '[T]*he common law will usually imply a condition that a power be exercised with procedural fairness to parties whose interests might be adversely affected by the exercise of power. This is the foundation and scope of the principles of natural justice. The common law confers no jurisdiction to review an exercise of power by a repository when the power has been exercised or is to be exercised in conformity with the statute which creates and confers the power …*
>
> *When a writ of prohibition or an injunction is sought to restrain the exercise of a power, the applicant must show that there is a failure to satisfy some condition governing the proposed exercise of the power; for example, that the repository of the power has failed to accord natural justice to a person whose interests are liable to be affected adversely by the proposed exercise.'*

120 Gaudron and Gummow JJ commented that this reasoning is consistent with the proposition (stated by Brennan J in *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36) that 'when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised'. They said: '[t]his reasoning should be accepted with respect to the remedy of prohibition provided for in s 75(v) of the Constitution'.

121 Counsel said that, in the present case:

> '[T]*he ground of exercise of the s.35(2) discretion was the protection of the identity of witnesses A and B, and that, coupled with the injunction to the Tribunal in s.35(3) to pay due regard to the principle of open hearings, constitutes the touchstone against which one must test the reasonableness and propriety of the exercise of discretion'.*

122 Counsel for the Minister (Mr N J Williams SC and Mr Bromwich) responded to the appellant by saying, in their own Outline of Submissions:

> *'The appellant failed on the first ground because his Honour found that what was disclosed as to conduct in the Tribunal's reasons was disclosed to the appellant, such that he was not, for that reason, denial* [sic] *procedural fairness. Anything beyond that that might otherwise have been a denial of procedural fairness was covered by the unchallenged s 35(2) order. There was no error on the part of his Honour in reaching this conclusion, and this ground of appeal should fail for that reason alone.*
>
> *Alternatively, if his Honour did err in concluding that sufficient notice of the substance of the allegations in AAT [71]-[72] had been given in the non-confidential material, the non-disclosure of the confidential material was authorised by the terms of the s 35(2) order. The Tribunal expressly made the direction to provide particulars subject to the s 35(2) order. The sole outstanding question arising from the direction was whether, and if so, to what extent, particulars could be given without breaching the extant order. That was a judgment initially for the respondent to make, and then ultimately for the Tribunal to make in the event, as transpired, that a question arose as to the adequacy of what had been provided.*
>
> *The appellant appears to accept that any residual right to procedural fairness after the operation of the s 35(2) order is governed by the extent of that order … Implicitly, this entails accepting that the right does not exist to the extent of the operation of such an order, and that in some circumstances there will be no residual right at all. Whether or not any detail contained in the ultimate reasons given by the Tribunal (pursuant to its statutory duty to give reasons, including reference to the evidence) was in breach of, or otherwise contrary*

to, the s 35(2) order, or amounted to an implied relaxation of that order occurring in the period between making a final decision and preparing reasons for it, is not to the point. The question is not whether a different order might have been able to be made, judged in hindsight, but whether there was any error amounting to a jurisdictional error in not providing the extra detail sought at the time.

Viewed in this way, the decision on the question of particulars clearly was discretionary in nature, involving a factual assessment of whether the concerns giving rise to the making of the order could be protected if further particulars were provided. The judgment made by the Tribunal at the time was that the qualification on providing further particulars could not be overcome without breaching the s 35(2) order. That did not entail any error, let along any jurisdictional error.'

(iv) Our view

123 The difficulty we have with the Minister's argument, and the view of Emmett J, is that both assume the Tribunal made a careful and balanced judgment that any informative direction for the supply of particulars would necessarily require the Minister to contravene the s 35 orders made on 11 April 2002. The record does not justify that assumption.

124 As noted at para 30 above, on 17 May 2001 (five weeks after making the s 35 orders of 11 April 2001), the Deputy President made a direction for the supply of 'precise details', as to time, place and manner, in 'respect of each of the crimes alleged'. At that stage, of course, the Deputy President had seen the four documents (annexures CD1 to CD3 and exhibit CD4) that were the subject of the s 35 orders of 11 April. He plainly thought it was possible for the Minister to provide the required particulars without contravening those orders. It is true that he made para 3 of his direction (but not para 2) 'subject to the confidentiality order made on 11 April'. Therefore, it may be inferred that he did not intend disclosure of the detailed evidence contained in the confidential documents. No doubt the Deputy President had in mind the distinction, subsequently noted by Emmett J, between particulars of allegations and the evidence intended to be adduced in order to establish those allegations. He probably realised there may be occasions, such as that postulated by Emmett J at para 82 of his reasons (see para 110 above), where particulars of an action committed in private against a particular individual would indirectly reveal the source of the allegation. From the form of the particulars directed by the Deputy President, it might be inferred the allegations contained in annexures CD1 to CD3 and exhibit CD4 were not of that nature. In any event, para 2, which was not made subject to the confidentiality orders, required

particulars of the 'precise crimes that it is alleged that the Applicant has committed', with reference to relevant international instruments.

125 It is, no doubt, theoretically possible that, in making the direction for particulars, the Deputy President overlooked the possibility that disclosure of precise details of the alleged crimes would unacceptably identify a witness. If Mr Leerdam had concluded this was the situation, the proper course would have been for him to apply to the Deputy President for an order revoking or varying the direction of 17 May 2001. Such an application would have required the Deputy President to balance fairness to the appellant against the risk of exposing the witness' identity. However, Mr Leerdam did not make any such application. He simply ignored the Tribunal's direction for the supply of particulars. And, despite complaints from Mr Kessels as to the position in which that placed his client, the Deputy President allowed Mr Leerdam to conduct himself in that way.

126 We think the position in relation to the appellant's first and fourth points is clear. It may be summarised as follows:

(i) on 17 May 2001, the Deputy President directed his mind to the question whether it was necessary, in the interests of fairness, for the appellant to be precisely appraised of the allegations made against him. Being aware of the contents of annexures CD1 to CD3 and exhibit CD4, he thought it was appropriate to make the direction of that date;

(ii) it was never suggested to the Deputy President (at least in an open hearing) that he ought to reconsider his direction of 17 May 2001. Whatever may have passed in the closed session on 16 August 2001, Mr Leerdam never made a formal application, or any application of which Mr Kessels was aware, for revocation or variation of the 17 May 2001 direction;

(iii) it must be presumed the Deputy President made the direction of 17 May 2001 because he thought procedural fairness so required. It is not difficult to see why he reached that conclusion, especially having regard to the fact that the appellant was not to be made acquainted with the evidence to be adduced against him;

(iv) although the Deputy President was never invited to revisit the direction he made on 17 May 2001, he failed (indeed refused) to enforce the direction; and

(v) in taking that course, and in nonetheless proceeding with the hearing and

determination of the application for review, the Deputy President denied procedural fairness to the appellant.

127 Counsel for the Minister submitted, and Emmett J accepted, that the appellant suffered no prejudice from the non-supply of formal particulars. Two answers are appropriate about this conclusion.

128 First, as the judgments in *Aala* make plain, it will ordinarily be inappropriate for a court to speculate upon the question whether the failure of a decision-maker to accord procedural fairness to an affected person made any difference to the final result: see Gleeson CJ at [4], in relation to the effect on credibility of a person being deprived of a fair opportunity of presenting his or her case. At [59], Gaudron and Gummow JJ said:

> *'The concern is with observance of fair decision-making procedures rather than with the character of the decision which emerges from the observance of those procedures. Unless the limitation ordinarily implied on the statutory power is to be rewritten as denying jurisdictional error for "trivial" breaches of the requirements of procedural fairness, the bearing of the breach upon the ultimate decision should not itself determine whether prohibition under s 75(v) should go. The issue always is whether or not there has been a breach of the obligation to accord procedural fairness and, if so, there will have been jurisdictional error for the purposes of s 75(v).'*

See also McHugh J at [104], Kirby J at [131], Hayne J at [164] and Callinan J at [211].

129 Secondly, in the present case it is impossible to conclude that the Deputy President's failure to insist on the supply of particulars made no difference to the outcome of the review. It is necessary to remember the nature of the issue under consideration. The Tribunal had to determine whether the appellant was a person covered by Article 1F of the Convention. That involved a decision as to whether there were serious reasons for considering he had engaged in the conduct described in one or more of paras (a), (b) or (c) of Article 1F. In relation to their application in a particular case, each of the three paragraphs must be considered in their context, including the context of any relevant international instrument. The Minister's undated statement of particulars (see paras 31 to 34 above) recognised this. For example, in dealing with war crimes, the author of the document referred to 'violations of the laws or customs or war'. Although he mentioned specific acts such as torture and inhuman treatment of civilians, the author recognised that these acts would only be 'war crimes' if committed in the context of a war. Therefore, it was important for the appellant to understand what the Minister was alleging about context. Which war? Who were the combatants? During what

period was the war fought? Why was it said this particular fighting constituted a 'war'?

130 No doubt the Deputy President appreciated the need for this type of information when he made his direction of 17 May 2001. That seems to be why he directed that the Minister specify the precise crimes alleged against the appellant 'with references to provisions of relevant international instruments'.

131 A similar observation may be made about crimes against humanity. The Minister recognised the implications of this description in his statement of particulars. He referred to the appellant's alleged 'systematic persecution of the people of Afghanistan for political, racial and religious reasons'.

132 Consideration of the relationship between particular actions of the appellant and concepts such as those listed in Article 1F necessarily required consideration of the pattern and totality of the appellant's actions. The appellant was entitled to know what was going to be put against him in that regard. Therefore, he needed to know the nature, place and period of the alleged acts. It is worth recalling the well-known statement of Dixon J in *Johnson v Miller* (1937) 59 CLR 467 at 489 that 'a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge'. His Honour was speaking about a criminal prosecution but the principle is equally applicable to a civil claim of serious import.

133 Even leaving aside these considerations, we cannot accept the notion of particularisation by cross-examination. A person under cross-examination is supposed to concentrate on answering the instant question, not to consider its wider context and ramifications for the person's case, the relationship between that question and other questions put to the cross-examinee or other evidence that has been, or will be, adduced in the case.

134 A lawyer representing a cross-examinee may have a better chance of appreciating the case the cross-examiner is endeavouring to make. However, the primary task of a lawyer in this situation is to listen to the instant question and to consider whether it is objectionable or requires clarification in re-examination. The lawyer ought not be expected simultaneously to determine the necessity and nature of any evidence to be adduced in reply.

135 Our other objection to particularisation by cross-examination is the time at which it takes place. Especially in a case concerning events said to have taken place some years earlier in another country, relevant evidence may not readily be available. If a lawyer presenting a case is made aware of the nature of the opposing case only during the hearing of the matter, the consequences are likely to include unnecessary inconvenience and disruption of the hearing. On the other hand, if particulars are given in advance of the hearing, the opposing party may identify and locate witnesses prior to the hearing and, desirably, take proofs of evidence or affidavits from them.

136 Emmett J was no doubt correct in finding that, by reason of the redacted Meeting Summary, the appellant was aware of the broad nature of the Kunduz allegations. However, as his Honour also found, he was not aware of the Sederat allegations until the end of his cross-examination. That was not fair.

137 The first and fourth grounds of complaint are made out.

The closed hearing on 16 August 2001

138 At paras 51 to 55 above, we described the circumstances of the closed hearing. Counsel for the appellant argue that, in excluding Mr Kessels from the hearing on this occasion, the Deputy President denied the appellant procedural fairness.

139 Counsel accept the probability that the discussion during the closed hearing related wholly or mainly to the issue of supply of particulars. However, they point out they are not in a position to concede this to be the case; they have never been allowed access to the transcript of proceedings at the closed hearing.

140 In any event, counsel say, the 'consequences of the secret hearing were significant'. They observe that, immediately before the closed hearing, the Deputy President had expressed concern about the Minister's failure to provide particulars; yet, after the closed hearing, the Deputy President informed Mr Kessels that he saw no need to pursue the matter. Presumably, something said by Mr Leerdam changed the Deputy President's mind. Whatever it was, Mr Kessels was given no opportunity to respond to it.

141 Counsel for the Minister noted that Emmett J found it was 'clear' that the only discussion that took place in the absence of the appellant and Mr Kessels related to whether further particulars should be provided. They say that, in any event:

> '[H]*is Honour noted that whether or not the failure to give particulars was a decision of procedural fairness, the exclusion of the appellant and his advisors from argument as to whether further particulars should be furnished did not alter the position. That was because either adequate particulars had been given in which case there would be no denial of procedural fairness, or further particulars should have been given in which case that failure was a denial of procedural fairness and ground one would have been established. His Honour therefore concluded that the exclusion of the applicant and his legal advisor on 16 August 2001 did not involve any error.'*

142 Counsel for the Minister supported this reasoning. They said the appellant's submissions on this point 'do not rise beyond a repetition of the unsuccessful argument before the primary judge, and do not demonstrate any error on the part of his Honour'.

143 We agree that, if the appellant succeeds on the first and/or fourth ground, it is strictly unnecessary to determine this ground. But this does not mean this ground merely repeats the first ground. Let it be assumed, contrary to our opinion, that, before the hearing began, the Deputy President made a considered and balanced judgment that no more information should be given to the appellant than had already been supplied. That would have been a judgment only about a procedural matter; it would have been open to review at any time. On that assumption, Mr Kessels must be regarded as having sought review of that judgment and the Deputy President must be regarded as having been sympathetic to his request. Yet, because of something said to him in Mr Kessels' absence, the Deputy President lost his sympathy for the request and decided not to review his earlier judgment. What could be more unfair to the appellant than to deny to his advocate the opportunity to know, and respond to, the argument that changed the Deputy President's mind?

144 It is important to note that the appellant and Mr Kessels were not excluded from the hearing pursuant to an order under s 35(2) of the AAT Act; consequently, there was no occasion for the Deputy President to apply his mind to the matters mentioned in s 35(3). This is simply a case in which a decision maker, who was under a duty to conduct a hearing governed by the rules of procedural fairness, excluded one party from participation in a significant part of that hearing. It is a patent case of denial of procedural fairness.

The identification evidence

145 Identification was a key issue at the Tribunal hearing. The appellant denied the alleged conduct, that he was a member of KHAD and that he had ever been in the Sederat in Kabul. Both the Minister's confidential witnesses, Witness B and Witness A, knew the man of whom they spoke (in 1989 and about 1986 respectively) as bearing the appellant's current surname. The appellant gave evidence, and tendered corroborative documentary and oral evidence, that suggested he was not known by that name until several years after 1989. Under these circumstances, it was incumbent upon the Deputy President to determine whether or not he was satisfied that the appellant was the person described by Witness B and Witness A. The witnesses were shown photographs of the appellant, but both witnesses were uncertain whether the person they knew in Afghanistan was the person in the photograph.

146 Appreciating both the importance of the issue and the inconclusiveness of the photographic evidence, the Deputy President looked for other identification evidence. Apparently the man (or men) spoken of by Witness B and Witness A had no unique or remarkable physical characteristics, so the Deputy President considered eye colour and hair colour. He drew conclusions about them which he apparently used to support a conclusion that the appellant was the person spoken of by both Witness B and Witness A.

147 Against this background, counsel for the appellant put the following submission:

> *'The appellant contends that had his legal representatives been informed of the procedure that the Tribunal intended to adopt for the purposes of identifying the appellant it would have been possible for cogent submissions to be made and some additional evidence lead. Specifically, had the appellant been given the opportunity, submissions could have been made to the effect that the procedure adopted both in terms of content of the photographic material and procedure was inherently unreliable.*
>
> *In terms of additional evidence the Deputy President might have been persuaded to use different but nonetheless contemporaneous photographs of the appellant. Further it would have been possible to conduct a line up for at least Witness B or alternatively several photographs might have been presented on a page.'*

148 A similar submission was made to Emmett J. He dealt with it, at para 22 of his reasons, in this way:

'In essence, while, in ordinary circumstances, a person in the position of the applicant should be afforded a reasonable opportunity to make submissions such are as [sic] *outlined above, orders under s35 have a significant effect. There is no reason to doubt that that the Deputy President gave anything other than adequate and appropriate consideration to all of the factors identified. They were all adverted to in the reasons given by him for his conclusions.*

The applicant has not adduced evidence of any cogency as to further evidence that he might have adduced had he been given the information contained in par 60 to par 62 prior to the making of the s500 Decision. I do not consider that the failure to furnish to the applicant, prior to the making of the s 500 Decision, the information contained in par 60 to par 62 amounted to a denial of procedural fairness such as would constitute jurisdictional error.'

149 In their submissions to us, counsel for the appellant criticised this approach. They said:

'There is no warrant for any assumption that merely because a tribunal states that it is aware of weaknesses in the evidence and has taken them into account that it will have fully appreciated the impact of that weakness and that no further benefit could be obtained for a party by having forceful submissions put on that party's behalf. For example, Witness A said that the person he knew had "rather light yellowish hair" and "his eyes were green". The Deputy President recalled the appellant and questioned him about his hair colour. The appellant replied that when cut shorter his hair is a lighter hue. His hair however is presently very dark. The Deputy President does not pursue the issue as to whether his hair could ever have been properly described as "light yellowish hair".

Although the Deputy President gave some weight to eye colour, this is only probative at all if the eye colour of the appellant was in fact very rare in Afghanistan at the time. Its rarity was asserted by the Deputy President, although even then only in qualified terms, he noting "apparently eyes of this colour are very rare in Afghanistan". No evidence regarding the rarity of this eye colour is available to the appellants from the records of the proceedings. The issue could and would have been contested by the appellant had he known the factors that were being taken into account. Submissions on these issues might well have led the Deputy President to conclude that they had less weight then [sic] *he had initially thought.*

Given the centrality of the identification issue to the case and the weakness of that identification evidence, the denial of an opportunity to be able to highlight and forcefully argue that that evidence did not constitute a sufficient identification was a substantial infringement of the appellant's entitlement to procedural fairness. That entitlement was not in this instance cut down or reduced by s.35(2), and in any event Emmett J did not find that it was.

> *Where there has been a denial of procedural fairness, relief will not be refused merely because the appellant cannot demonstrate that had he been accorded the opportunity to make submissions, or lead further evidence, a different result would definitely have been produced.'*

150 In argument before us, counsel for the Minister supported the reasons of Emmett J. They contested their opponents' assertion that Emmett J did not regard the provision of particulars of the identification evidence as being covered by the s 35 orders.

151 It is not clear to us whether the Deputy President regarded particulars of the identification evidence as being covered by the s 35 orders he had made. Possibly he did; the identification features arose out of evidence given by Witness B and Witness A. The Deputy President had made confidentiality orders in relation to both the affidavit and oral evidence of those witnesses.

152 If this is the case, it highlights the need for care, restraint and flexibility in relation to confidentiality orders. We accept there may be circumstances under which disclosure to a person of detailed evidence about his or her actions would, on balance, be undesirable, because of the possibility that the details might reveal the identity of the relevant witness and thereby cause adverse consequences for him or her. However, we cannot accept it would ever be necessary to withhold from a person a summary of the features of the identification evidence that incline the tribunal of fact to think that person is the person under consideration. A summary of evidence regarding physical appearance need not give any clue as to the witness' identity.

153 If the s 35 orders made in this case precluded the Minister, or the Deputy President, from disclosing to the appellant the features of the identification evidence which were thought to be significant, the orders were obviously too broad. They ought to have been modified in order to permit this to be done. The Deputy President could have modified the orders at any time. He ought to have done so, once he reached the conclusion that the claimed physical characteristics were significant. It was not sufficient to leave it to the appellant to divine, if he could, the significance of the Deputy President looking at his eyes. He was given no warning that the Deputy President would act on the belief that blue/green eyes are very rare in Afghanistan.

154 We appreciate that Mr Kessels did not ask the Deputy President to modify his s 35 orders in such a manner so as to permit disclosure to him of the physical features of the appellant that were considered to be significant. This is understandable; Mr Kessels had no reason to anticipate that the Deputy President would put any reliance on such matters. However, at some stage before he delivered his decision, the Deputy President knew that he proposed to place reliance on those matters and that Mr Kessels had been given no opportunity to deal with them. He ought to have notified Mr Kessels of the features of the identification evidence that he thought significant and given him an opportunity to adduce evidence and make submissions regarding those matters. If the notification would have required modification of the s 35 orders, in the Deputy President's view, that is what he ought to have done.

155 The debate about this issue demonstrates the critical importance of a tribunal which has made a confidentiality order that restricts a party's access to relevant information remaining conscious of the ongoing effect of such an order and constantly reassessing how procedural fairness may nonetheless be provided.

156 There must be some doubt about whether the s 35 orders did prevent disclosure of the salient points of the identification evidence. As counsel for the appellant submitted, it must be assumed the Deputy President did not intend to reveal confidential information, yet he felt no difficulty in discussing the identification points in his reasons for decision.

157 If the s 35 orders did not preclude disclosure to the appellant of the salient identification points, it was a breach of the rules of procedural fairness for the Deputy President, knowing the appellant was unaware of them, to take those points into account without first giving the appellant an opportunity to call evidence, and put submissions, concerning their significance. On the other hand, if the s 35 orders did preclude disclosure of the salient identification points, this fact points to the unfairness that was caused to the appellant by the Tribunal's failure to insist on detailed particulars of the Minister's case.

Conclusion

158 As we have noted earlier, the s 35 orders are not under challenge in this appeal. Those orders substantially and inevitably affected the conduct of the Tribunal proceeding. No complaint can be made about that. However, it remained incumbent on the Tribunal to

give the appellant a fair hearing, subject only to the inroad on fairness that the s 35 orders unavoidably made. The Tribunal did not do this. Its failure constituted jurisdictional error. There is no basis for refusing relief on discretionary grounds.

159 We propose to allow the appeal and set aside the orders made by Emmett J. In lieu of those orders, we will make an order in the nature of certiorari to quash the Tribunal's decision and an order in the nature of mandamus requiring the Tribunal to rehear the application and determine it according to law. It will be for the President of the Tribunal to determine whether the Tribunal should be differently constituted for that purpose. It will be for the appointed member or members to determine whether any s 35 orders should be made in relation to the new hearing and, if so, their form and content.

160 The Minister must pay the costs incurred by the appellant, both before Emmett J and on the appeal.

I certify that the preceding one hundred and sixty (160) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 26 March 2004

Counsel for the Appellant:	Dr C Birch SC, Mr J Hyde
Solicitor for the Appellant:	Griffin Vincent IT & IP Lawyers
Counsel for the Respondents:	Mr N J Williams SC, Mr R Bromwich
Solicitor for the Respondents:	Australian Government Solicitor
Date of Hearing:	10 February 2004
Date of Judgment:	26 March 2004