FEDERAL COURT OF AUSTRALIA

SBAR v Minister for Immigration & Multicultural & Indigenous Affairs

[2002] FCA 1502

Judiciary Act 1903 (Cth) s 39B
Migration Act 1958 (Cth) ss 474, 500(1)(c), 476
Administrative Appeals Tribunal Act 1975 (Cth) s 44

Refugees Convention, Art 1A(2), Art 1F

Arquita v Minister for Immigration & Multicultural Affairs [2000] FCA 1889 – referred to
N.96/1441 v Minister for Immigration & Multicultural Affairs, (11 June 1998) – referred to
Polyukhovich v The Commonwealth of Australia (1991) 172 CLR 501 – referred to
W.98/45 v Minister for Immigration & Multicultural Affairs (17 August 1998) – referred to
Re Refugee Review Tribunal: Ex parte Aala (2000) 176 ALR 219 – referred to
Muin v Refugee Review Tribunal [2002] HCA 30, (2002) 190 ALR 601 – referred to
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 – cited
Craig v The State of South Australia (1995) 184 CLR 163 – referred to
Minister for Immigration & Multicultural Affairs v Yusuf (2001) 180 ALR 1 – referred to
NAAV v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 228 – applied

SBAR v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

S 238 of 2001

MANSFIELD J
6 DECEMBER 2002
ADELAIDE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY **S 238 OF 2001**

BETWEEN:	**SBAR** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGE:	**MANSFIELD J**
DATE OF ORDER:	**6 DECEMBER 2002**
WHERE MADE:	**ADELAIDE**

THE COURT ORDERS THAT:

1. The application is dismissed.
2. The applicant pay to the respondent costs of the application.

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

SOUTH AUSTRALIA DISTRICT REGISTRY **S 238 OF 2001**

BETWEEN: **SBAR**
APPLICANT

AND: **MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS**
RESPONDENT

JUDGE: **MANSFIELD J**

DATE: **6 DECEMBER 2002**

PLACE: **ADELAIDE**

REASONS FOR JUDGMENT

INTRODUCTION

1 This is expressed to be an application by way of appeal from a decision of the Administrative Appeals Tribunal (the Tribunal) given on 5 December 2001. For reasons which appear at [28] below, I have treated it as an application to have the decision of the Tribunal set aside under s 39B of the *Judiciary Act 1903* (Cth). The Tribunal affirmed the decision of the delegate of the respondent (the delegate) given on 17 May 2001 refusing to grant to the applicant a protection visa for which he had applied under the *Migration Act 1958* (Cth) (the Act) on 25 February 2001, shortly after his arrival in Australia.

2 The issue before the delegate, and on review before the Tribunal, was whether the decision-maker was satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol, using those terms as defined in the Act (the Convention), and whether the applicant therefore satisfied the criterion set out in s 36(2) of the Act for a protection visa. The resolution of that question turned upon whether the applicant was a refugee as defined in the Convention.

3 Article 1A(2) of the Convention defines a refugee as any person who:

> *"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is*

> *outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."*

However, Art 1A(2) of the Convention must be read in conjunction with other Articles of the Convention, in particular Art 1F.

4 The applicant is a thirty-six year old Afghani national who is of Hazara ethnicity and of Shi'a Muslim religion. He claimed to have a well-founded fear of persecution if he were to return to Afghanistan, so as to satisfy Art 1A(2) of the Convention, for two reasons.

5 The first reason was because of his ethnicity and religion, on the basis that the ruling Taliban in Afghanistan, at the time of his departure from Afghanistan, were persecuting persons of Hazara ethnicity and of Shi'a Muslim religion.

6 The second reason was because of the applicant's perceived political opinion. The applicant had worked for the communist regime, the People's Democratic Party of Afghanistan (PDPA) when it controlled Afghanistan until its collapse in 1992. He had initially then been arrested and interrogated following the takeover by the Mujahedeen government in 1992, but was then released. He lived quietly in Afghanistan until shortly before his arrival in Australia. However, he claimed that the Taliban, shortly before he left Afghanistan, came to know of his previous involvement with the PDPA and so started to pursue him for information which it believed he held in his employment with the PDPA with a view to learning the names of people who had supported the Mujahedeen in order to pursue them. He was not prepared to provide that information and so fled from Afghanistan.

7 Neither the delegate nor the Tribunal determined whether the applicant had a well-founded fear of persecution by reason of those claims, nor (if they were accurate) whether they led to the applicant having a well-founded fear of persecution by reason either of his ethnicity or his religion or of his perceived political beliefs. Both the delegate and the Tribunal decided to reject the applicant's claim because of the provisions of Art 1F of the Convention. It provides:

> *"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."*

8 The Tribunal adopted the findings of the delegate that the applicant was excluded from protection under the Convention by the operation of Art 1F of the Convention. The finding was that the provisions of the Convention did not apply to the applicant because there were serious reasons for considering that he had committed crimes against humanity: Art 1F(a).

THE TRIBUNAL'S REASONS

9 The Tribunal's reasons for decision very substantially followed the reasons for decision of the delegate. After identifying the issue as to whether there are serious reasons for considering that the applicant has committed a crime against humanity so as to be excluded from protection under the Convention by virtue of Art 1F, the Tribunal referred to information almost verbatim from that recorded in the delegate's decision concerning the applicant. It is not necessary to set it out in full. Briefly, it noted that in 1980 the applicant joined Afghanistan's secret police known as KHAD (Khedamat-e Etela'are Dawlati), also known as the State Information Service. He worked as a non-military KHAD intelligence officer, including undertaking some training in Uzbekistan by the then Soviet KGB. After a series of promotions, he became the head of the L35 Department until the demise of KHAD following the collapse of the Afghan communist regime in 1992. At that time he had the rank of army major. To be eligible for appointment to KHAD, the applicant had been a full member of the PDPA, sponsored by three permanent members of the PDPA.

10 The real issue was what he had done in his employment as the head of L35 Department of KHAD. The Tribunal also recorded almost verbatim what the delegate had recorded on that topic, apparently on the basis of information directly provided by the applicant. It then referred at some length to information from independent sources about the nature and activities of KHAD. Its reference to that material parallels precisely the reference to such material undertaken by the delegate of the respondent. The information it recorded is

reflected in the conclusion it reached as set out at [12]. It is not necessary for the purpose of these reasons to set out in detail that information.

11 The Tribunal then addressed the meaning of Art 1F of the Convention. It adopted the meaning of the phrase "serious reason for considering" discussed by Weinberg J in *Arquita v Minister for Immigration & Multicultural Affairs* [2000] FCA 1889. It referred to the meaning of the expression "crimes against peace and crimes against humanity", including considering the decision of Matthews J as President of the Tribunal in matter *N.96/1441 v Minister for Immigration & Multicultural Affairs* (11 June 1998), and of the observations of Deane and Toohey JJ in *Polyukhovich v The Commonwealth of Australia* (1991) 172 CLR 501 at 596 and 669 respectively. The Tribunal also referred to what it called "the question of accessorial liability for crimes against peace and humanity", including reference to the decision of Matthews J again as President of the Tribunal in *W.98/45 v Minister for Immigration & Multicultural Affairs* (17 August 1998). It then concluded that the applicant was sufficiently highly placed in KHAD for a sufficiently long period of time to be fairly saddled with responsibility for that organisation's excesses. It therefore concluded that there were serious reasons for considering that he has committed crimes against humanity and is therefore excluded by Art 1F from the protection of the Convention.

12 The Tribunal's findings and conclusions were adopted expressly from the reasons of the delegate and are set out in the following terms:

> *"I have considered the independent evidence and the applicant's claims carefully.*
>
> *Independent country information indicates that the use of torture and ill-treatment by Khad officers to punish or extract information was endemic. Independent evidence indicates that victims of torture included government and police officials, teachers, students, businessmen and shopkeepers. Most were accused of contacts with opposition groups and were tortured to secure "confession". Independent evidence indicates that forms of torture by Khad officers to extract information or confessions included beating, burning with cigarettes, removal of fingernails, insertion of a bottle in the rectum, sleep deprivation, exposure to cold or to sun, standing in water or snow, mock execution, and witnessing of torture of others. Consistent accounts were given of various forms of electric shock torture; the use of electric shock batons, the application of current by a telephone-like device with wires variously attached to the fingers, toes, ears, tongue and penis, and the use of an electric chair. Independent evidence indicates that immersion in water, prolonger sleep deprivation and threats of abuse against family members*

were typical forms of psychological torture committed by Khad. The independent evidence indicates that the forms of torture referred to above were methodical and systematic practices and a deliberate course of Khad conducted throughout the eighties. The independent evidence indicates that torture and inhuman treatment of prisoners causing great suffering were sufficiently widespread and systematic against the civilian population and against persons taking no active part in the hostilities, including intellectuals, merchants and workers. Independent evidence indicates that under Najibullah's directions, Khad arrested, imprisoned, tortured and executed thousands of Afghans throughout the eighties.

I find that the above practices by Khad come within the meaning of "crime against humanity" as defined by the International instruments referred to above.

The applicant was a KGB vetted and trained Khad officer. He was employed as a Director of Afghanistan's Ministry of National Security (Khad) in the rank of Army Major continuously for more than 10 years at the time when arrests, detention and interrogation of people suspected of political opposition was routine and when torture and ill-treatment of people taken in Khad custody was a widespread, regular and methodical behaviour contrary to internationally accepted norms.

The applicant joined Khad in 1980 and served as a security officer continuously until its demise in April 1992.

Although the applicant did not admit to having committed personally, any acts of torture or murder, the applicant was employed at level of authority, namely, Director of Department in the rank of an army major, where he would necessarily have attained a knowledge of the likely consequences of the activities of the Department which he headed in gathering details and information about particular individuals and groups and passing that information on to relevant Khad Departments.

The activities of the applicant's Department have resulted in imprisonment and deprivation of liberty, torture and persecution causing suffering as part of a widespread attack directed against anti-Government activists and non-violent political opponents. In the applicant's own words, L35 Department was 'the heart of heart' of the Khad operations. It was a vital link in the purpose chain of Khad activities.

Although the applicant claimed to have never interrogated or tortured anyone he admitted he was aware that people died in Khad custody as a result of torture or ill-treatment through such methods as electric shock torture.

The fact that the applicant had not admitted to any involvement in human rights abuses is not in itself a bar to finding that he is excluded.

The applicant was aware of the purpose and consequences of his Department's activities of collecting and passing on the information – namely

> *imprisonment, deprivation of liberty, torture and ill-treatment.*
>
> *The evidence demonstrates that the applicant did nothing to halt these acts of ill-treatment or distance himself from these acts. The applicant has not claimed to have resisted the KHAD operations, and there is no other evidence to suggest that he did so. The applicant understood the purpose and the intended consequences of his Department's activities and did nothing to seek the opportunity to leave the organisation. The applicant actively sought promotion during his employment to the position of a Department Director and he served within the organisation continuously for 12 years until its demise in April 1992 following the collapse of the Soviet-led regime.*
>
> *The applicant was involved in the process that he knew could end in human rights abuses. The applicant shared the purpose and knowingly and voluntarily participated in the chain of these activities.*
>
> *His knowing participation in the ultimate harm suffered by the victims of Khad conduct – imprisonment, torture, persecution makes him complicit in the crimes against humanity.*
>
> *I find the circumstances of this case therefore constitute serious reasons for considering that the applicant has committed crimes against humanity outside the country of refuge prior to his admission to that country as a refugee.*
>
> *Given my finding that there are serious reasons for considering that the applicant has committed a crime against humanity and falls within the operation of exclusion clause 1F, there is no obligation to go on and consider whether the further claims of the applicant entitle him to the protection of the Refugees Convention."*

13 The Tribunal's concluding remarks were that it found it inconceivable, given the applicant's rank and standing within KHAD over a very substantial period of years, that he was not personally well aware of the purpose for which his department existed or that he did not knowingly participate in the inhumane treatment of KHAD's victims. It considered the fact that the applicant's duties were clerical did not render him less complicit. His duties and his functions were obviously central to KHAD's various activities. Consequently, it found strong evidence that he personally and knowingly participated in its commissions of crimes against humanity.

ISSUES ON THE REVIEW

14 The application for review complained that the applicant had no hearing before the Tribunal in that he had been given three different hearing dates but no actual opportunity to say anything to the Tribunal. In his supporting affidavit he disputed that he was a high ranking

officer of KHAD, or that he had any responsibility for KHAD's actions. He claimed that the area of Afghanistan where he lived and worked at material times, in Bamyan Province, was a calm area with little security issues and that there were no injustices or excesses committed towards Afghanis by KHAD in his province. He complained that the Tribunal (and the delegate) based the decision on independent country information and not the reality relating to his particular circumstances. He cited the fact that, following the collapse of the communist regime, the new regime had arrested him and detained him only briefly, and had then permitted him to continue living amongst his people precisely because he had been but a low ranking public servant. He denied having ever committed any inhumane or unjust act on anyone.

15 The applicant submitted a further written contention in support of his application. He repeated his claims about his inability to secure a hearing before the Tribunal, although he recognised (as was the case) that he was represented by a lawyer before the Tribunal. He repeated his claims as to having a well-founded fear of persecution because of his Hazara ethnicity and his Shi'a Muslim religion, because of the Taliban attitude towards Hazaras and Shi'a Muslims. He claimed that the change of regime in Afghanistan had not made his situation any safer because the present ruling regime has no Hazara representation, and because there is an ongoing real risk of Hazaras being persecuted in Afghanistan. He further claimed that he did not commit any crime when working for KHAD. He said he was promoted simply for years of service, and that his job was simply a record keeping job, in which he worked virtually alone. He said the records he retained and maintained were not provided for investigative purposes. He said his education in the Soviet Union was for a period of only four and a half months at a time when thousands were sent for higher education to the Soviet Union. He repeated that in Bamyan Province there was little military operation and it remained a peaceful province.

16 The applicant also appeared in person at the hearing. His oral submissions at the hearing were fluent and well prepared. He complained that, if he had had a chance to speak to the Tribunal about his situation, it would have apprehended more clearly that he was not complicit in any crimes against humanity committed by KHAD. He added that, even if he were aware of what it was doing, there was nothing he could have done about it. He denied having said certain things which were attributed to him. In particular, he denied having given the results of investigations to KHAD active investigators to facilitate any persecutory

conduct on their part. He denied having a high position in KHAD, or having a job in KHAD which carried a lot of responsibility as he was responsible for a very small office only, and he denied during the course of his work witnessing any crimes against humanity because of the relative peacefulness of the Bamyan Province. He denied being an intelligence officer or gathering information about intelligence to facilitate or assist KHAD officers in their misconduct. He denied ever having said that he provided information to other departments of the communist government to be used against other people. He claimed that he had requested to be heard before the Tribunal, and that he expected to be given a right of hearing before the Tribunal, but was then notified of the result without having had any such hearing.

17 The respondent's contentions were twofold. Firstly, the respondent contended that, as the decision of the Tribunal is a privative clause decision by reason of s 474(1) of the Act, the Tribunal did not fall into jurisdictional or reviewable error so as to entitle the Court to make an order under s 39B of the Judiciary Act. Accordingly, it was contended that even if the complaints of the applicant about a lack of procedural fairness before the Tribunal, or about the quality of its fact finding, or about the Tribunal attributing to the applicant things which he did not say, were made out, they could not amount to jurisdictional error on its part. Secondly, it was contended that in any event the applicant's complaints are not well-founded. The respondent pointed out that the applicant was represented by solicitors prior to and during the hearing before the Tribunal. His solicitors made detailed submissions to the Tribunal on his behalf. The Court was invited to infer that, rightly or wrongly, counsel for the applicant made a decision not to present the applicant to give oral evidence before the Tribunal. It also contended that there is nothing to indicate that the Tribunal erred in such a way as to give rise to any appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth), as its findings of fact were not shown to be incorrect, but that the applicant simply disagreed with those findings of fact.

18 No argument was presented that the Tribunal's decision was not made in a good faith attempt to perform its review function.

CONSIDERATION

19 I consider that the Tribunal was obliged to accord the applicant procedural fairness in the course of its hearing: see *Re Refugee Review Tribunal: Ex parte Aala* (2000) 176 ALR 219; *Muin v Refugee Review Tribunal* [2002] HCA 30, (2002) 190 ALR 601. However, despite

his claims to have requested, and to not have been granted, a hearing before the Tribunal, I am not persuaded that the applicant was denied procedural fairness. He was represented at the hearing by solicitors. A hearing was conducted on 25 October 2001. His solicitors made a detailed written submission to the Tribunal on 4 September 2001, as well as attending at the hearing. No doubt those solicitors considered whether, at the hearing, the applicant should give evidence to the Tribunal. The fact that he did not do so, and the fact that he apparently expected to have the opportunity to do so, does not in the circumstances indicate that the Tribunal failed to accord him procedural fairness.

20 I am also not persuaded that the Tribunal erred in law in making the findings of fact which it did. I have carefully considered the transcript of the applicant's examination by the delegate which took place on 3 March 2001. It provided a proper foundation for the specific findings of fact which the delegate made, and which the Tribunal adopted, as to the nature of the applicant's work with KHAD. Contrary to the applicant's specific assertions, it records the applicant as having asserted that his responsibilities with KHAD were important and that his department was like "the heart of the organisation" as it was a "very very important department". He confirmed during that examination that he had joined KHAD in 1980 during his last year of school, and that for two years KHAD had been a civilian state information service, but it converted to a military information service in 1982. He confirmed that he was a member of PDPA and was sponsored by three permanent members of PDPA before he was eligible to be appointed to KHAD. He confirmed that after a short time he had been transferred to the L35 Department of KHAD, and was promoted to supervisor of that department, and that he held that office until 1992. He confirmed that he had been sent to Uzbekistan by the then Soviet KGB for training, and that at that time he attended seminars where he received training in recruitment techniques, photographic and filing training and the use of hand grenades and general military training. He confirmed that ultimately his rank was the highest rank that was achievable in that office, namely the equivalent of an army major.

21 As noted, the applicant further said in that interview that the L35 Department of KHAD was like "the heart" of the organisation, and that he operated three divisions: Statistics Operative, Statistics Agentura, and Archives. He described in detail to the delegate the activities of those divisions. The Statistics Operative division opened and managed files regarding particular active opposition individuals, groups, organisations and political parties involved in

anti-government activities. That included searching and collecting information about those entities, recording that information on files, and providing that information as requested to other officers of KHAD or to other government departments. The Statistics Agentura division dealt with the opening and management of files of KHAD secret agents. He confirmed that, as a result of handling the files of persons arrested by KHAD, he would be aware of the arrest and, in respect of persons under 65 years of age, he would from time to time learn of those who had died in detention as a result of ill-treatment and torture. Both the delegate and the Tribunal acknowledged that the applicant, in his evidence, claimed that he did not see photographs of tortured people, but that he did see files reporting deaths of persons in custody. The findings were made, despite their awareness of his evidence on that topic, on the basis of the other evidence he gave in that interview.

22 There is no dispute that the independent country information confirmed the use of torture and ill-treatment by KHAD officers to punish or to extract information. The Tribunal's description of that information was unchallenged. Nor was there any argument that the practices by KHAD, which the Tribunal accepted on the basis of independent evidence, did constitute a "crime against humanity" within the meaning of Art 1F.

23 Both the delegate, and the Tribunal by adoption, considered whether the applicant was complicit in those crimes. The Tribunal's reasons for concluding that he was complicit in KHAD's crimes against humanity are based upon the role and status he enjoyed in the L35 Department of KHAD in the period of time he was employed there. It concluded, as a matter of inference, that the applicant would necessarily have attained knowledge of the likely consequences of the activities of other officers of KHAD, and he had acknowledged that he was aware that people died in KHAD custody as a result of torture or ill treatment. It concluded that the applicant was aware of the purpose and consequences of the L35 Department collecting and passing on information to other officers of KHAD and other government departments. The applicant acknowledged that he did nothing to distance himself from those acts, although he claimed he had little power to do so. During his period of 12 years or so working for KHAD he sought and was granted promotions routinely. It was therefore open to the Tribunal to conclude, notwithstanding the applicant's assertion to the contrary, that the applicant was involved in the process that he knew could end in human rights abuses, and "shared the purpose and knowingly and voluntarily participated in the chain of these activities".

24 Although there are other matters to which the applicant has pointed which might indicate that the Tribunal might have reached a different conclusion about his status in KHAD, about the nature of his job in KHAD, and about whether he did participate or have knowledge of the consequences and purpose of collecting and passing on information within KHAD, including because of the relatively peaceful situation in Bamyan Province, or because of his level of juniority in KHAD, those are matters of fact upon which the Tribunal made findings by adopting those of the delegate. It is not shown to have erred in any legal way by making those findings of fact.

25 In my view, the applicant's complaints about the Tribunal's findings of fact amount to an attack upon the merits of those findings of fact and an attempt to have the Court substitute for the findings of fact made by the Tribunal other findings which the Court is asked to make on its review of the material before the Tribunal. That is not a course which the Court is permitted to undertake. The appeal from the Tribunal under s 44 of the Administrative Appeals Tribunal Act is confined to errors of law. It is not an error of law to find a fact or facts where there is evidence upon which the fact or facts may have been found, simply because a different mind might not have found the same fact or facts on the same evidence: see generally *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356. That is, however, in essence what the applicant's contentions amount to because I am satisfied that there was material before the Tribunal upon which it could, without legal error, have reached the findings which it expressed for the reasons given.

26 Consequently, in my judgment, the applicant has not established any error of law or any jurisdictional error on the part of the Tribunal either in the way that is explained in *Craig v The State of South Australia* (1995) 184 CLR 163 (*Craig*) or in *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 180 ALR 1 (*Yusuf*).

27 In addition, in my opinion, the effect of s 474(1) of the Act is to extend the jurisdiction of the Tribunal so that the type of jurisdictional error which was discussed in *Craig* and *Yusuf* is no longer jurisdictional error on the part of the Tribunal. The Full Court in *NAAV v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 228 (*NAAV*) (Black CJ, Beaumont and von Doussa JJ, Wilcox and French JJ dissenting) decided that, once the Refugee Review Tribunal's jurisdiction is enlivened by a valid application under s 414 of the Act, the manner of exercise of its authority and powers falls within the expanded area of

authority and powers brought about by s 474(1) of the Act. Its expanded jurisdiction means that failure to comply with the obligation to accord procedural fairness does not amount to jurisdictional error: per Beaumont J at [113]-[114], and per von Doussa J at [636] and [648]-[651]. For the same reasons, even where a Tribunal makes errors of law or wrong findings of fact this does not amount to jurisdictional error.

28 I consider that the decision in *NAAV* applies with equal force to the present application involving a decision of the Tribunal. The Tribunal's review of the decision of the delegate of the respondent was under s 500(1)(c) of the Act. Section 476(1) of the Act states that "despite any other law", the Court does not have any jurisdiction in relation to a "primary decision". The expression "primary decision" is defined in s 476(6) relevantly to mean a "privative clause decision" that has been reviewed under s 500. The term "privative clause decision" is defined in s 474(2) of the Act. Section 474(2) is in the following terms:

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

The Tribunal's decision is a decision of an administrative character made under the Act, and is not a decision referred to in subs (4) or (5) of s 474. Consequently, in my view, the right of appeal on a question of law under s 44 of the Administrative Appeals Tribunal Act, which would otherwise be available to the applicant from the Tribunal's decision, is not available. Section 475A of the Act, however, preserves or recognises the Court's continuing jurisdiction under s 39B of the Judiciary Act, and as that is in a real sense the only available basis upon which the present application could be maintained, I have treated the application as having been made on that basis.

29 The decision of the Tribunal, being a privative clause decision, is however within the extended jurisdictional web created by s 474(1) of the Act, as explained in *NAAV*. The complaints of the applicant, even if made out, would not amount to jurisdictional error so as to enliven the power under s 39B of the Judiciary Act to declare the Tribunal's decision invalid.

30 Accordingly I have reached the view that the application must be dismissed. I so order. In this matter I see no reason why the normal rule as to costs should not apply. I order that the

applicant pay to the respondent costs of the application.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield J.

Associate:

Dated: 28 November 2002

Counsel for the Applicant:	The applicant appeared in person.
Counsel for the Respondent:	Mr M Roder
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	19 June 2002
Date of Judgment:	6 December 2002