Minister for Immigration and Multicultural and Indigenous Affairs

v.

SGLB

High Court of Australia
[2004] HCA 32; (2004) 207 ALR 12; (2004) 78 ALJR 992
17 June 2004

1 GLEESON CJ. For the reasons given by Gummow and Hayne JJ, I agree that the grounds upon which Selway J, in the Federal Court, decided this case against the appellant cannot be sustained. I also agree with what their Honours have said about the procedural aspects of the matter, and with their rejection of an alternative submission made on behalf of the appellant concerning s 474 of the *Migration Act* 1958 (Cth) in the event that the findings by Selway J of error on the part of the Refugee Review Tribunal were upheld.

2 In this Court, the respondent relied upon a Notice of Contention, submitting that the decision of the Federal Court should be affirmed but on a ground other than those relied on by Selway J. The ground was expressed as follows:

> "The Tribunal denied procedural fairness, amounting to jurisdictional error, in refusing the then applicant's request that a psychiatric report be obtained."

3 I agree with what has been said by Gummow and Hayne JJ, and Callinan J, about the matter of procedural fairness, but I wish to add some comments related to the facts of the case.

4 In considering whether the Tribunal's refusal of the respondent's request that a further report be obtained involved a denial of procedural fairness, it is important to keep in mind the exact nature of the request, and the context in which it was made.

5 The proceedings before the Tribunal were the respondent's proceedings, seeking review of an adverse decision by a delegate of the appellant. In the proceedings before the Tribunal, the respondent was represented by a migration agent, and was also being advised by a barrister. Although, at one stage, a request was made for the hearing before the Tribunal to be postponed, it was subsequently indicated by the respondent's advisers that he was ready to proceed.

6 In her reasons for decision, the Tribunal Member recorded the following:

> "On 20 June 2002 the Tribunal as presently constituted held a 'pre-hearing conference' with [the respondent]. This was necessary because [the respondent] had asked the Tribunal to postpone his hearing indefinitely because of his mental

> state. The Tribunal understood that he had 'self-harmed' on several occasions and wished to discuss with him whether he wanted to give oral evidence and if so, when he might feel able to do so. On the day of the pre-hearing conference [the respondent] expressed a wish to give oral evidence as soon as possible, and it was agreed with him that the hearing would take place on 26 June 2002 ... With the agreement of the Department, the Tribunal also arranged for an assessment of [the respondent's] psychological condition to be undertaken by a psychologist at the detention centre at Woomera. [The respondent] had no objection to doing this. The purpose of the assessment was to enable the Tribunal to take into account any memory or other difficulties which might be experienced by [the respondent] during the forthcoming hearing."

7 Thus, before the hearing of 26 June 2002, the Tribunal had dealt with the matter of a postponement in accordance with the respondent's wishes, and had also, on its own initiative, and with the respondent's agreement, arranged to have him assessed by a psychologist. No complaint is made about any aspect of what the Tribunal did up to, or at, the hearing.

8 The hearing of 26 June 2002 was conducted by videolink. Present, as well as the respondent, were the respondent's migration agent and the barrister. It was not suggested, during the hearing of 26 June 2002, that the matter should not proceed to finality.

9 The correspondence following the hearing of 26 June 2002 is referred to in the reasons of Callinan J. Of particular importance to the Notice of Contention is the migration agent's letter of 30 July 2002, which contained the request referred to in the Notice of Contention.

10 The letter was written as a response to the Tribunal's letter of 27 June 2002, which set out, for comment, certain matters that the Tribunal regarded as potentially adverse to the respondent's case. Once again, to that stage the Tribunal conducted itself with scrupulous fairness. The letter of 30 July 2002 was some 13 pages in length. It was accompanied by an affidavit of the respondent dealing with the substance of his case. In the Tribunal's letter of 27 June, the following had been said:

> "The Tribunal has now received an assessment of [the respondent's] general state of mind ... The Tribunal could infer from it that the inconsistencies in [the respondent's] account do not arise from blurred or confused recall."

It was in response to that observation that the presently relevant parts of the letter of 30 July 2002 were written.

11 The letter of 30 July 2002 said:

> "We are not attempting to impugn the Woomera camp psychologist's ability, but contend that a further, more independent and expert assessment be undertaken to

> determine [the respondent's] state of mind and whether there can be justified links to his past claims of trauma and persecution. In other words, an expert assessment to determine the source of such behaviour and whether it stems from serious Post Traumatic Stress Disorder (PTSD). We consider that the Tribunal has a duty to ask the question about [the respondent's] anger and the source of that anger."

12 That is the request referred to in the Notice of Contention.

13 In elaborating that request, the letter of 30 July 2002 advanced two reasons for seeking an "expert assessment". Those reasons were not clearly separated, but they were both apparent to the Tribunal Member. One reason concerned the problem of inconsistency in information given at various times by the respondent. It arose out of the warning in the letter of 27 June 2002 that the Tribunal could infer that such inconsistencies were not the result of "blurred or confused recall". It was to that warning that the letter of 30 July was responding. Another, and different, reason involved the suggestion that an expert might provide opinion evidence directly relevant to the substance of the respondent's claims that he had suffered persecution. The letter suggested that the expert whom the Tribunal was being invited to consult might express the opinion that the respondent's psychological problems were of a kind that demonstrated that he had suffered harm in the past, and that this could support his claim that he was a victim of persecution. The letter said:

> "We submit that it could be possible that our client's anger is a symptom of deeper trauma, which only an expert opinion could determine."

14 This second aspect of the proposal contained in the letter of 30 July 2002 was, no doubt, what the Tribunal Member had in mind when, in giving her reasons for refusing the request for a further psychological assessment, she said:

> "As to whether [the respondent's] current condition is a consequence of Convention-related events in Iran, (rather than during his period of over two years in detention in Australia, for example), it is for the Tribunal to make findings on the events which [the respondent] claims led to his decision to leave Iran."

She also said, in relation to the evaluation of the respondent's evidence, that she was prepared to accept that he was suffering from PTSD, and in those circumstances would not draw the adverse conclusion foreshadowed in her letter of 27 June. She said that she proposed to accept that the respondent's ability to give evidence clearly was almost certainly influenced by PTSD.

15 Senior counsel for the respondent, in this Court, expressly, and correctly, disclaimed any suggestion that there was a denial of procedural fairness in failing to give the respondent an opportunity to add to the substantive evidence in support of his claim by obtaining an opinion from a psychologist to the effect that he had been a

victim of violence. Quite apart from the dubious reliability and relevance of any such opinion, and the possibility (adverted to by the Tribunal) that the respondent had been traumatised since arrival in Australia, there was no request by the respondent's adviser for the respondent to have an opportunity to present further information to the Tribunal in support of his case. In any event, that is not the way in which the argument in this Court was put. The complaint is about the failure to seek a second opinion on the matters about which the Woomera psychologist had reported.

16 The letter of 30 July 2002 did not contend that the respondent was not competent to give evidence. In so far as it contained a proposal that the Tribunal should obtain a further psychological assessment for the purpose of establishing the truth of the respondent's allegations that he had suffered serious harm in Iran, the Tribunal was entitled to reject any such suggestion, and no such suggestion was relied upon in this Court as a reason why a further assessment should have been obtained. In so far as the suggestion was made in response to the problem raised by the Tribunal Member's letter of 27 June 2002, the Tribunal's response was favourable to the respondent, and involved no unfairness.

17 As the written submissions for the appellant in this Court point out, the Tribunal originally gave the respondent a postponement of the hearing when it was requested to do so. It then held a hearing quickly when it was requested to do so. It gave the respondent's advisers an opportunity to comment on its concerns after the hearing. One of those concerns was raised by the psychologist's report. The Tribunal accepted at face value the response that was given to that concern. It was perfectly justified in not pursuing a suggestion that it should seek a further psychological assessment for the purpose of endeavouring to obtain substantive evidence relating to alleged persecution. The detailed and extensive reasons given by the Tribunal for its decision were not of such a kind that fairness required the Tribunal Member to obtain a further psychological assessment of the respondent.

18 The Tribunal Member, in her reasons, said that, being willing to assume that the inconsistencies referred to in the letter of 27 June 2002 were the result of PTSD, she would proceed on the basis of the oral evidence given by the respondent at the Tribunal hearing, coupled with the written submissions in the letter of 30 July and the accompanying affidavit. She then went on to evaluate the respondent's claims, testing them against the objective facts and her view of the probabilities.

19 Many people who appear before administrative tribunals, and many litigants in courts, including some litigants in this Court, suffer from psychological disorders or psychiatric illness. That may affect their capacity to do justice to their case. Fairness does not ordinarily require the court or tribunal to undertake a psychiatric or psychological assessment to investigate the extent to which the person in question may be at a disadvantage; and ordinarily it would be impossible to tell. In the present case, the Tribunal, apprehending that the respondent might be disadvantaged by "memory or other difficulties", of its own motion, and with the respondent's agreement, obtained a psychological assessment. That assessment was for a limited and reasonably specific

purpose. The Tribunal was not then obliged to embark upon an open-ended investigation of the respondent's psychological condition to see whether, in any way, it might have affected his ability to put his case to best advantage. It was not suggested in the letter of 30 July that anything the respondent said at the hearing of 26 June, or in his later affidavit, was unreliable. Two things were suggested. The first was that, if the respondent was suffering from PTSD, that would explain the inconsistencies in his earlier information. The Tribunal was willing to accept that, and not hold those inconsistencies against him. The second, which was rejected, and is not now pursued, is that a further assessment might have provided evidence that he had in fact been seriously harmed before he came to Australia.

20 The ground in the Notice of Contention has not been made out.

21 I agree with the orders proposed by Gummow and Hayne JJ.

22 GUMMOW AND HAYNE JJ. On condition that the appellant ("the Minister") not seek to disturb any costs orders made in the Federal Court and will pay the respondent's costs in this Court, the Minister was granted special leave to appeal from the orders of that Court made on 11 March 2003. Those orders were made by a single judge (Selway J)[1]. The source of the jurisdiction exercised by the Federal Court is not entirely clear but must be identified to establish the foundation of the jurisdiction of this Court.

The jurisdiction of this Court

23 The Refugee Review Tribunal ("the Tribunal"), exercising authority conferred by the *Migration Act* 1958 (Cth) ("the Act"), affirmed the decision of a delegate of the Minister to refuse the application of the respondent for a protection visa. The Tribunal decision was dated 13 August 2002. The Tribunal was not satisfied that the respondent is a person to whom Australia has protection obligations with the result that he did not satisfy the criterion set out in s 36(2) for a protection visa. On 4 September 2002, the respondent, who was then legally represented, applied to the Federal Court under Pt 8 of the Act for judicial review of the decision of the Tribunal. The application was transferred to the Federal Magistrates Court and on 20 December 2002 that Court (Driver FM) dismissed the application. In the meantime, by application filed on 29 November 2002, the respondent instituted a proceeding in the Federal Court seeking review of the decision of the Tribunal. Selway J regarded the Court as dealing with that application and construed it as an invocation of the jurisdiction with respect to mandamus against officers of the Commonwealth conferred on the Federal Court by s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act").

24 However, after the delivery of the decision by the Federal Magistrates Court, the respondent, by notice of appeal filed on 13 January 2003, sought to appeal the decision of Driver FM to the Federal Court. The Chief Justice of that Court, acting pursuant to s 25(1A) of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"), considered it appropriate that the appellate jurisdiction be exercised by a single judge. Selway J regarded the Court as dealing also with this proceeding. The upshot, which appears from the orders made by Selway J, is that his Honour was dealing with both the application in the original jurisdiction under s 39B of the Judiciary Act and the appeal under the jurisdiction regulated by the Federal Court Act together. The orders entered on 26 March 2003 provided:

---

1 *SGLB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 176.

"(1) The order of the Tribunal dated 13 August 2002 is quashed.

(2) Remit the matter to the [Tribunal] for further consideration.

(3) The [respondent] have his costs of the appeal and his application for judicial review (if any)."

In his reasons, Selway J had said that he ordered mandamus to the Tribunal but this was not reflected in the settled order.

25 In this Court, the Minister submits that the subject-matter is those orders in their application to the decision of the Federal Magistrate, albeit that only par (3) of the order just set out is directed expressly to that appeal.

26 The distinction is important because no appeal would lie to this Court from orders made by a single judge of the Federal Court in exercise of the original jurisdiction conferred by s 39B of the Judiciary Act. However, such an appeal does lie in respect of the disposition of the appeal from the Federal Magistrates Court. The point is made clear by s 33(2) of the Federal Court Act as follows:

> "Except as otherwise provided by another Act, an appeal shall not be brought to the High Court from a judgment of the [Federal] Court constituted by a single Judge.
>
> However, this subsection does not apply to a judgment of the [Federal] Court constituted by a single Judge exercising the appellate jurisdiction of the Court in relation to an appeal from a judgment of the Federal Magistrates Court."

27 The submissions of the Minister as to the foundation for the appeal to this Court should be accepted. However, in the treatment of the orders of Selway J in the disposition of the appeal by this Court, difficulties will arise as to the remaining status of the disposition by his Honour of the s 39B application.

Applicable legislation

28 The privative clause provision contained in s 474 of the Act applies in respect of the judicial review of decisions made on or after 2 October 2001. That was the commencement date of the Schedule to the amending Act[2]. In this case, it was on 13 August 2002 that the Tribunal affirmed the decision to refuse the respondent's visa

---

2 Section 474 was inserted by Item 7 of the Schedule to the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth) and its commencement was controlled by s 2 of that statute read together with Item 8(2)(a) of the Schedule.

application. Therefore, s 474 was relevant to the determination of the review by Driver FM, the appeal and application to the Federal Court and the appeal to this Court. Selway J approached the matter before him on the footing that s 474 applied.

29 It is settled by *Plaintiff S157/2002 v Commonwealth* that[3]:

> "[o]nce it is accepted, as it must be, that s 474 is to be construed conformably with Ch III of the Constitution, specifically, s 75, the expression 'decision[s] ... made under this Act' must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act. Indeed so much is required as a matter of general principle. This Court has clearly held that an administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all'[4]. Thus, if there has been jurisdictional error because, for example, of a failure to discharge 'imperative duties'[5] or to observe 'inviolable limitations or restraints'[6], the decision in question cannot properly be described in the terms used in s 474(2) as 'a decision ... made under [the] Act' and is, thus, not a 'privative clause decision' as defined in s 474(2) and (3) of the Act[7]."

In so concluding, the Court rejected a submission put by the Commonwealth which was identified in the joint judgment as follows[8]:

---

3 (2003) 211 CLR 476 at 506 [76].

4 See *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615 [51] per Gaudron and Gummow JJ, 618 [63] per McHugh J, 646-647 [152] per Hayne J.

5 See *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248 per Dixon J. See also *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 632 per Gaudron and Gummow JJ.

6 *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 419 per Mason ACJ and Brennan J. See also *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248 per Dixon J; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 632 per Gaudron and Gummow JJ.

7 See *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 635 per Gaudron and Gummow JJ.

8 (2003) 211 CLR 476 at 502 [62].

> "On behalf of the Commonwealth, it was contended that s 474 should first be construed as meaning and intended to mean that decisions are protected so long as there has been a bona fide attempt to exercise the power in question, that they relate to the subject matter of the legislation and are reasonably capable of reference to the power."

30 Notwithstanding that outcome in *Plaintiff S157*, on one branch of the Minister's argument in the present case, she appeared to attempt to resuscitate that earlier unsuccessful submission. It will be necessary to return to this point later in these reasons.

Facts

31 The facts are set out in full in the reasons of Callinan J. We will not repeat them, except to note that the respondent had on various occasions provided inconsistent evidence in respect of his life in Iran and his reasons for leaving Iran.

Alleged errors

32 In an unreserved judgment, Selway J held that the Tribunal's decision was flawed by three errors, each said to go to jurisdiction:

(1) That there was no evidence before the Tribunal upon which it could be satisfied that the respondent was suffering from Post Traumatic Stress Disorder ("PTSD") (the "no evidence" ground)[9];

(2) The Tribunal erred in making findings as to the credibility of the respondent where there was no evidence before it which would enable it to assess the effects of PTSD on the credibility of the respondent (the "credibility" ground)[10]; and

(3) Having found that the respondent suffered from PTSD, the Tribunal failed to satisfy itself that he could take part in the proceedings (the "competence" ground)[11].

The Minister submitted that, contrary to the holdings of Selway J, the Tribunal had not erred in any respect and that, in any event, the errors attributed to it would not have been jurisdictional errors. The Minister's submissions should be accepted.

---

9 [2003] FCA 176 at [15].

10 [2003] FCA 176 at [16].

11 [2003] FCA 176 at [17].

33 In this Court, the respondent sought to outflank submissions for the Minister by a contention that the alleged errors found by Selway J also constituted a denial of procedural fairness. This argument is without foundation. The conduct of the proceedings by the Tribunal reveals no failure in its observance of the requirements of procedural fairness. To the contrary, the Tribunal went to great lengths to accommodate the respondent and his concerns. The Tribunal postponed the hearing when requested to do so and promptly undertook the hearing when requested to do so. The Tribunal stopped the hearing when it became apparent that the respondent was agitated. It gave him an opportunity to comment on its concerns after the hearing. In addition, as will later appear from these reasons, there was no obligation on the Tribunal to obtain a psychiatric report. The Act indicated that the Tribunal was not required to accede to any such request by an applicant.

34 It remains then to consider the three errors upon which Selway J based his decision. Each was said to be an error going to jurisdiction. That misconstrued the operation of the Act and the decisions concerning jurisdictional error. It is convenient to postpone the consideration of the detail of his Honour's findings until after a consideration of these fundamental and preliminary concerns.

The jurisdiction of the Tribunal

35 Section 36 of the Act provides for a class of visas to be known as "protection visas" and in sub-s (2) stipulates:

> "A criterion for a protection visa is that the applicant for the visa is:
>
> (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
>
> (b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:
>
> (i) is mentioned in paragraph (a); and
>
> (ii) holds a protection visa."

36 For the purposes of this case, only the criteria set out in s 36(2)(a) are relevant as there was no suggestion that the respondent was eligible for a protection visa on the basis that he came within s 36(2)(b).

37 Further, s 65 of the Act provides that the Minister is to grant a visa sought by valid application "if satisfied" of various matters. These include that any criteria for the visa prescribed by the Act are satisfied (s 65(1)(a)(ii)). Section 65 imposes upon the Minister an obligation to grant or refuse to grant a visa, rather than a power to be exercised as a discretion. The satisfaction of the Minister is a condition precedent to the

discharge of the obligation to grant or refuse to grant the visa, and is a "jurisdictional fact" or criterion upon which the exercise of that authority is conditioned[12]. The delegate was in the same position as would have been the Minister (s 496) and the Tribunal exercised all the powers and discretions conferred on the decision-maker (s 415).

38 The satisfaction of the criterion that the applicant is a non-citizen to whom Australia has the relevant protection obligations may include consideration of factual matters but the critical question is whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds[13]. If the decision did display these defects, it will be no answer that the determination was reached in good faith. To say that a decision-maker must have acted in good faith is to state a necessary but insufficient requirement for the attainment of satisfaction as a criterion of jurisdiction under s 65 of the Act. However, inadequacy of the material before the decision-maker concerning the attainment of that satisfaction is insufficient in itself to establish jurisdictional error.

The "no evidence" ground

39 To return to the first ground identified in the Federal Court, the "no evidence" ground, nothing in the Act made the question of whether or not the respondent suffered from PTSD a precondition to the exercise of jurisdiction. No question of a "no evidence" ground of jurisdictional error arises.

40 Moreover, in the absence of any finding of PTSD, the Tribunal would not have been prevented from following the same course and disregarding the respondent's previous inconsistent accounts for the purposes of assessing credibility. The finding of PTSD was in fact beneficial to the respondent, being offered as the most favourable explanation available for the respondent's conflicting accounts.

41 In any case, there was material before the Tribunal which allowed it reasonably to infer that the respondent was suffering from PTSD. There was a history of self-harm of which the Tribunal was aware. There was the Tribunal's own observations of the respondent at the pre-hearing conference and at the hearing. Further, there were the observations by the respondent's adviser in the letter dated 30 July 2002, and within it extracts from a report by a psychiatrist, Dr Stuart Turner, entitled "Discrepancies and delays in asylum seekers".

---

12 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 609 [183].

13 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1172 [37], 1175 [52], 1194 [173]; cf at 1168 [9]; 198 ALR 59 at 67, 71, 98; cf at 62.

Credibility

42 The second ground of alleged error amounts to a finding by Selway J that the Tribunal was under a duty to inquire as to the effects of PTSD. This is apparent from his Honour's judgment[14]:

> "But, having found that the [respondent] was suffering from PTSD there was no evidence before the Tribunal which would have enabled it to assess whether or not any of the evidence the [respondent] gave was reliable. Having (wrongly) diagnosed that the [respondent] was suffering from PTSD it was an error of law for the Tribunal then to proceed to make credibility findings in relation to the [respondent's] evidence *without evidence as to what effect the PTSD might have on the [respondent's] capacity to give evidence.*" (emphasis added)

43 This ground of error is misconceived for two reasons. First, there was evidence before the Tribunal to assist it in determining how to deal with the question of unreliability. There was the Turner report and the fact that the respondent did not object to providing evidence either at the hearing or by affidavit following the hearing. Secondly, whilst s 427 of the Act confers power on the Tribunal to obtain a medical report[15], the Act does not impose any duty or obligation to do so. Rather, s 426[16]

---

14 [2003] FCA 176 at [16].

15 Section 427 of the Act relevantly provides:

> "(1) For the purpose of the review of a decision, the Tribunal may:
>
> ...
>
> (d) require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination."

16 Section 425A deals with the giving by the Tribunal of notices of invitations to appear before it. Section 426 relevantly provides (emphasis added):

> "(1) In the notice under section 425A, the Tribunal must notify the applicant:
>
> ...
>
> (b) of the effect of subsection (2) of this section.

(Footnote continues on next page)

provides that, even if an applicant requests that the Tribunal take oral or written evidence from a witness (such as a medical practitioner or psychiatrist), the Tribunal is not required to obtain such evidence. Thus, the Tribunal is under no duty to inquire.

44 As was noted in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[17]:

> "The Tribunal was required by s 430 of the Act to prepare a written statement setting out its decision on the review, 'the reasons' for that decision and 'the findings on any material questions of fact', and referring to 'the evidence or any other material' on which those findings were based."

This obligation required that where two conflicting accounts were before it, the Tribunal was to determine which it accepted. Thus, after accepting that the respondent's ability to give evidence may have been impaired, the Tribunal went on:

> "As to whether his current condition is a consequence of Convention-related events in Iran, (rather than during his period of over two years in detention in Australia, for example), it is for the Tribunal to make findings on the events which [the respondent] claims led to his decision to leave Iran."

That is to say, while the Tribunal was prepared to take the respondent's claims at their highest, namely, as last described in the oral evidence (at hearing) and written evidence (by affidavit after the hearing), where there was a conflict the Tribunal was nevertheless bound to decide between those inconsistent accounts. Indeed, this is borne out by the example given by Selway J *in support of* this alleged error[18]:

> "For example, the Tribunal found that [the respondent's] first version of where he was living immediately prior to leaving Iran was true, and the later version untrue. The Tribunal analysed the issue in this way:

> (2) The applicant may, within 7 days after being notified under subsection (1), give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice.
>
> (3) If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the applicant's wishes *but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice.*"

17 (2003) 77 ALJR 1165 at 1172 [38]; 198 ALR 59 at 68.

18 [2003] FCA 176 at [16].

> 'These two assertions as to his whereabouts in the months leading to his departure from Iran are entirely irreconcilable, and he has not provided any explanation as to why they differ. I consider untrue his claim to have been in hiding throughout his last six months in Iran. I am satisfied that he was living at his family home throughout that period. It follows, and I am satisfied, that he was not detained again by the authorities because they did not wish to detain him. It also follows, as he willingly remained at his family home where he could be readily located by the authorities, that he did not fear arrest.'"

At the hearing, the respondent gave evidence that he had spent the last six months before leaving Iran living at his family home. In contrast, when invited to give further evidence in writing after the hearing, he claimed that he had spent that time in hiding. Thus, disregarding all accounts given by the respondent prior to the hearing, the Tribunal was still required to make a factual finding.

Competence

45 The third alleged error presupposes that there is some competency requirement as to the satisfaction of which the Tribunal must be convinced before an applicant can take part or continue to take part in proceedings before the Tribunal. This assumption is without foundation. The Act does not provide for any such competency requirement, analogous, for example, to that of fitness to plead[19]. Section 420(2)(a) of the Act expressly provides that the Tribunal is not bound by the rules of evidence[20]. The phrase "the rules of evidence" is taken to include both the common law rules of evidence and

---

19 See *Eastman v The Queen* (2000) 203 CLR 1.

20 Section 420 of the Act provides:

> "(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
>
> (2) The Tribunal, in reviewing a decision:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and
>
> (b) must act according to substantial justice and the merits of the case."

the *Evidence Act* 1995 (Cth)[21]. The only requirements that could be described as competency requirements are that an application for review by the Tribunal can only be made by a non-citizen who is the subject of the primary decision (by the Minister's delegate)[22] and who is physically present in the migration zone when the application for review is made[23]. The Act permits an application for a protection visa to be made by any person who is in Australia and who is not a citizen of Australia[24]. That is not to deny that the rules of procedural fairness may, in particular circumstances arising in individual cases before the Tribunal, require some special steps or procedure to be followed. But there was no denial of procedural fairness in the present case.

46 Further, the alleged error has an air of unreality about it given that the proceeding before the Tribunal was in fact the respondent's proceeding. It was in the interest of the respondent that the matter proceed so that he might obtain from the Federal Court the relief he sought.

The privative clause

47 In the alternative to the submissions which have been considered above, the Minister contended that, even if the errors found by Selway J were substantiated, they fell within the operation of the privative clause (ie, the decision of the Tribunal was made under the Act)[25]. In order to resolve this appeal it is not necessary to deal with these submissions, but it is desirable to say something on the subject.

48 The critical holding in *Plaintiff S157* has already been set out in these reasons, along with the rejection of a submission by the Commonwealth respecting the adequacy of the criterion of bona fide decision-making.

49 Consistently with the reasoning in *Plaintiff S157*, there may be a question as to whether there has been a jurisdictional error by reason of the failure to discharge what have been called "imperative duties" or to observe "inviolable limitations or restraints"

---

21 By its own provisions the *Evidence Act* 1995 (Cth) only applies to proceedings in a federal court or a court of the Australian Capital Territory: see s 4 and s 3, together with the extended definition of "federal court" in the Dictionary to that Act.

22 See s 412(2) of the Act.

23 See s 412(3) of the Act.

24 See ss 5(1) (definition of "non-citizen"), 45 and 46(1)(b) of the Act, read together with Item 1401 of Sched 1 to the Migration Regulations 1994 (Cth).

25 See s 474 of the Act and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

found in the Act. In *Plaintiff S157*, this question was readily answered, given the nature of the alleged error by the Tribunal. The joint judgment explained the situation as follows[26]:

> "The plaintiff asserts jurisdictional error by reason of a denial to him of procedural fairness and thus s 474, whilst valid, does not upon its true construction protect the decision of which the plaintiff complains. A decision flawed for reasons of a failure to comply with the principles of natural justice is not a 'privative clause decision' within s 474(2) of the Act."

50 In other cases, the nature of the alleged error will turn upon the meaning of the legislative criterion of jurisdiction, making the construction of the legislation the primary and essential task. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*[27] was such a case. The Court divided on the question whether, on the proper construction of the relevant regulations under the Act, as picked up by s 65(1), the Tribunal had been obliged to determine to its satisfaction whether applicants were entitled to protection visas by reason of membership of the family unit of a person who had already been granted a protection visa. The majority answered "no"; Gaudron and Kirby JJ were of the other view[28].

51 However, in the light of the detailed specification of the criteria for the grant of the various classes of visa, including protection visas, it is impossible to treat the consideration by the Minister's delegate (and hence the Tribunal) of what are the relevant criteria (the issue in *Applicants S134*), and the satisfaction thereof, as other than conditions precedent to the making of a valid decision to grant or refuse to grant a visa under s 65. Further, certain observations by Gaudron and Kirby JJ in *Applicants S134* (not on an issue upon which the division in the Court turned) are, with respect, compelling. Their Honours said[29]:

> "The detailed specification of matters bearing upon the grant of a protection visa inserted into the Act at the same time as was s 474 makes it clear that the Parliament was not enacting provisions to the effect that decision-makers could validly grant or refuse to grant protection visas on the basis of a bona fide attempt to determine whether the criteria for the grant of a protection

---

26 (2003) 211 CLR 476 at 508 [83]. As to natural justice and jurisdictional error, see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.

27 (2003) 211 CLR 441.

28 (2003) 211 CLR 441 at 457 [29]-[32], 471 [86]-[88].

29 (2003) 211 CLR 441 at 471 [85].

visa have been satisfied, as distinct from the decision-maker's actual satisfaction or lack of satisfaction as to those criteria. And as already pointed out, a decision-maker cannot be said to be satisfied or not satisfied if effect is not given to those criteria because, for example, they have been misconstrued or overlooked."

52 In support of an attempt to advance a case to the contrary of what was said in the above passage, the Minister relied in particular upon *Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd*[30]. That case concerned an order made by the Court of Arbitration, a body established by a law of Western Australia. The order prohibited the respondent employer from giving a certain notice to any of the members of the appellant union who were employed by the respondent. The notice was one terminating the employment of workers because of a failure or refusal by workers to increase the production of coal. The appeal in this Court turned upon the construction of the provision in s 137(1) of the *Industrial Arbitration Act* 1912 (WA) conferring jurisdiction upon the Court of Arbitration. The sub-section relevantly provided:

"Where it appears *reasonably likely* to the [Court of Arbitration]

that an *act, omission or circumstance will occur*, or *has occurred*, or having occurred, *will be repeated or continued*; and that

the *result*

of the act, omission, circumstance, repetition, or continuance,

is or will be

(a) to cause, contribute to, or hasten the occurrence of a lock-out ...

the [Court of Arbitration] may make such order as it considers necessary to terminate or avoid that result." (emphasis added)

The expression "lock-out" was defined so as to include any closing of a place of employment or suspension of work or refusal by an employer to continue to employ any number of workers *with a view* to enforcing compliance with demands by any employer of any workers (s 6).

53 The Supreme Court of Western Australia made an order absolute for certiorari quashing the order that had been made under s 137(1) but, on appeal to this Court by the employees' union, that decision was set aside. Dixon CJ emphasised the criterion of

---

30 (1960) 104 CLR 437.

jurisdiction appearing from the introductory words of s 137(1), "[w]here it appears reasonably likely to the [Court of Arbitration]", and said that this committed to that body the judgment of the very facts concerning the lock-out which the respondent employer submitted were jurisdictional. His Honour continued[31]:

> "The result is to make it impossible to base prohibition or *certiorari* on any error of the [Court of Arbitration] made in a bona fide attempt to apply these conceptions in the course of exercising the power which that Court possesses, a power to which the order might reasonably be referred. Plainly it is not a misapprehension which would take the order completely outside the scope of the [Court of Arbitration's] authority."

54 The legislation considered in that case thus anticipated what was later said by Gaudron and Kirby JJ in *Applicants S134*[32] with respect to the involvement of significant discretionary elements as to matters to be satisfied before a particular act is done or decision taken. Their Honours added[33]:

> "In such a case it may be possible to construe the provision governing that act or decision as one which does not impose restraints or limitations which must be observed if the act or decision is to be valid."

Gaudron and Kirby JJ went on to construe s 65 of the Act as containing specific requirements or restraints observance of which was essential to the validity of the decisions thereunder.

55 It should be added that the qualification concerning bona fides discerned in s 137 of the Western Australian legislation in issue in *Coal Miners* may have had a pedigree in *The Colonial Bank of Australasia v Willan*[34]. This was an appeal from the Supreme Court of Victoria which, despite the presence in the relevant statute law of a privative clause (in a form which is not accurately reproduced in the report)[35], had

---

31 (1960) 104 CLR 437 at 446.

32 (2003) 211 CLR 441 at 469 [80].

33 (2003) 211 CLR 441 at 469 [80].

34 (1874) LR 5 PC 417. The authorities cited in argument (at 437) had included *R v Bolton* (1841) 1 QB 66 [113 ER 1054]; *Brittain v Kinnaird* (1819) 1 Brod & B 432 [129 ER 789] and *Mould v Williams* (1844) 5 QB 469 [114 ER 1326].

35 Section 244 of the *Mining Statute* 1865 (Vic) read:

> "No proceedings under this Act shall be removed or removable into the Supreme Court save and except as hereinbefore provided."

(Footnote continues on next page)

quashed by way of certiorari an order by a mining court for the winding up of a mining company. The Supreme Court had acted on the ground of fraud in procuring the winding-up order, but the Privy Council allowed the appeal on the ground that the evidence fell short of establishing fraud. The result was that the winding-up order ought not to have been quashed on certiorari. However, their Lordships did speak of the inefficacy of the privative clause to exclude certiorari, observing[36]:

> "It is, however, scarcely necessary to observe that the effect of this is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it."

56 This led Professor de Smith to write[37]:

> "A statute which purports to take away the right to apply for certiorari is wholly ineffective to exclude or attenuate the jurisdiction of the court to issue the order in cases where fraud or collusion is established",

and Professor Sir William Wade to say that what in *Plaintiff S157*[38] were to be identified as the "three *Hickman* provisos" appeared to derive from *Willan*[39].

57 However, as was emphasised in the joint judgment in *Plaintiff S157*, what is involved with those three provisos is a construction rendering a privative clause inapplicable unless they are satisfied. Their Honours rejected the proposition that the provisos always would be sufficient, so that the satisfaction of them necessarily takes

---

cf (1874) LR 5 PC 417 at 422-423, 440.

36 (1874) LR 5 PC 417 at 442.

37 *De Smith's Judicial Review of Administrative Action*, 4th ed (1980) at 409 (footnote omitted).

38 (2003) 211 CLR 476 at 502 [64].

39 *Administrative Law*, 7th ed (1994) at 742.

effect as an "expansion" or "extension" of the power of the decision-makers in question[40].

Orders

58 The appeal should be allowed. However, the Minister is to pay the costs of the respondent of the appeal in accordance with the terms of the grant of special leave. To the extent that the orders of the Federal Court relate to the appeal to that Court from the decision of the Federal Magistrates Court, those orders should be set aside (save that as to costs). In place thereof it should be ordered that the appeal to that Court from the decision of the Federal Magistrates Court delivered on 20 December 2002 should be dismissed.

59 There remains for consideration the treatment by the Federal Court in the one set of undifferentiated orders of the appeal from Driver FM and the application in the original jurisdiction under s 39B. The orders just indicated leave intact the orders made by Selway J to the extent that they relate to the s 39B application. For the reasons indicated earlier, this Court has no jurisdiction to deal with those orders. It therefore remains for the Federal Court to make any further orders for the disposition of the s 39B application. However, consistently with these reasons, the only outcome in the Federal Court upon the s 39B application could be an order dismissing that application. It will be for the Federal Court to make such an order upon application, and to consider any application to displace the present costs order in favour of the applicant in the s 39B application.

---

40 (2003) 211 CLR 476 at 502 [64].

60 KIRBY J. The central issue in this appeal is whether a tribunal denied procedural fairness to an applicant for refugee status. If it did, the denial would amount to jurisdictional error rendering the tribunal's decision invalid and requiring a rehearing of the application by the tribunal, differently constituted.

61 This appeal is not a trial by this Court of the merits of the applicant's claim. It is not, as such, an occasion for us to evaluate the facts or to assess the applicant's credibility. The experience of the law is that adherence to fair procedures is an important safeguard against erroneous conclusions. It also has its own value in helping to secure acceptance of outcomes and thereby to quell controversies. Here, there was unfairness in the procedures followed in the tribunal. This Court's limited role is to confirm the Federal Court which said so; to affirm the order for a rehearing; and to leave the reconsideration of the merits where it belongs – in the tribunal, avoiding the unfairness demonstrated by the hearing under review.

The course of the proceedings

62 The Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister"), by special leave, challenges a decision of the Federal Court of Australia[41]. The Federal Court was constituted by a single judge (Selway J) exercising that Court's appellate jurisdiction[42]. The issue before the Federal Court was whether jurisdictional error had been demonstrated in the review conducted by, and the decision of, the Refugee Review Tribunal ("the Tribunal") in relation to an application by SGLB[43] ("the respondent") for a protection visa[44] on the grounds of refugee status[45].

---

41 *SGLB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 176.

42 Pursuant to the *Federal Court of Australia Act* 1976 (Cth), s 25(1A), which permits the Chief Justice of the Federal Court to allow the appellate jurisdiction of the Federal Court to be exercised by a single judge.

43 The respondent's name has been anonymised pursuant to the *Migration Act* 1958 (Cth), s 91X. See *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 495-496 [44]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at 461-462 [50]; Germov and Motta, *Refugee Law in Australia*, (2003) at 712.

44 *Migration Act* 1958 (Cth), s 36(2)(a).

45 Pursuant to the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, [1954] *Australian Treaty Series* No 5; Protocol relating to the Status of Refugees done at New York on 31 January 1967, [1973] *Australian Treaty Series* No 37. See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 287.

63 The Federal Court found jurisdictional error. It ordered that the decision of the Tribunal under challenge be quashed and that the matter be remitted to the Tribunal for further consideration. The Minister submits that the reasoning of the Federal Court was erroneous and that no jurisdictional error was identified to warrant that Court's orders.

64 In support of the Minister's argument, it was submitted that the decision of the Tribunal was a "privative clause decision" within s 474 of the *Migration Act* 1958 (Cth) ("the Act")[46]. On that footing, it was said that the Federal Court had no jurisdiction in relation to the decision of the Tribunal "which involve[d] neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act"[47].

65 The respondent supported the reasoning of the Federal Court; relied on a notice of contention specifying that the vitiating jurisdictional error included denial of procedural fairness; and contended that such jurisdictional error took the purported decision of the Tribunal outside those declared by the Act to be final.

66 The general background to this case is stated in the reasons of other members of this Court[48]. I will not repeat it. I have come to the conclusion opposite to that reached by the majority. I shall explain why.

Procedural unfairness and jurisdictional error

67 *The no evidence conclusion*: First, it is necessary to clear away a procedural complication. In the Federal Court, Selway J recognised that, for the respondent to succeed, he had to demonstrate jurisdictional error which the Federal Magistrate (Driver FM), who dismissed the primary application for judicial review, had failed to

---

46 Section 474, a "privative clause", was inserted into the Act in 2001: *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth). Section 474 limits, but does not exclude, the jurisdiction of this Court to review decisions of the Tribunal. A decision of the Tribunal will not be protected from review by the privative clause where the decision involves jurisdictional error: *Plaintiff S157/2002* (2003) 211 CLR 476 at 504-507 [71]-[78]; Robertson, "Truth, Justice and the Australian Way – *Plaintiff S157 of 2002 v Commonwealth*", (2003) 31 *Federal Law Review* 373.

47 *SGLB* [2003] FCA 176 at [6], quoting *Plaintiff S157/2002* (2003) 211 CLR 476 at 506 [76].

48 Reasons of Gummow and Hayne JJ at [23]-[34]; reasons of Callinan J at [98]-[115].

correct[49]. The Federal Court's reasons for coming to the conclusion of jurisdictional error were expressed in terms of the language of "no evidence"[50]; a misconceived finding of credibility[51]; and a threshold failure to consider the respondent's competence to give evidence[52]. These explanations of jurisdictional error have been attacked in this Court as factually and legally erroneous and, in any case, as attracting the operation of s 474 of the Act.

68 It is not necessary to resolve the Minister's attack on the reasoning of the Federal Court. This is because the respondent, in his argument, sought to outflank the Minister's criticisms of that reasoning. He did so by relying on a notice of contention that expressly raised the argument that the Tribunal had denied the respondent procedural fairness, amounting to jurisdictional error sustaining the Federal Court's orders on that ground.

69 *The denial of procedural fairness*: The respondent was not legally represented before the Federal Court[53] although he did have the assistance of migration agents in his earlier applications to the delegate of the Minister and to the Tribunal. Before the Federal Magistrate, the respondent was represented by counsel who appeared *pro bono* pursuant to a referral made under the Federal Court Rules[54].

70 It seems likely that it was the want of legal representation in the Federal Court that led to the failure in that Court to express the claim for relief in terms of denial of procedural fairness. The judge exercising the appellate jurisdiction of the Federal Court had to carry the additional burden of identifying precisely the respondent's available arguments; of amending the grounds of appeal to bring them into legal form; and of then conducting the hearing with assistance from counsel for the Minister and as much assistance as he could procure from the respondent appearing in person and a representative of the Refugee Advocacy Service of South Australia present as *amicus curiae*. The respondent's command of English was negligible. By any account the evidence showed that he was a person mentally disturbed by his experiences. This

---

49 *SGLB* [2003] FCA 176 at [18]. The Federal Magistrate's decision is *SGLB v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FMCA 309.

50 *SGLB* [2003] FCA 176 at [15].

51 *SGLB* [2003] FCA 176 at [16].

52 *SGLB* [2003] FCA 176 at [17].

53 *SGLB* [2003] FCA 176 at [8].

54 *SGLB* [2002] FMCA 309 at [3].

Court does well to remember the special difficulties under which the Federal Court, and the Tribunal, must labour in cases of this kind. Generally, we are spared most of them.

71 This much is clear. When the respondent was represented by counsel, as before the Federal Magistrate and in this Court, express reliance was placed on the suggested denial of procedural fairness before the Tribunal. Whereas the Federal Court's reasons make passing mention of defects in procedural fairness as a ground of jurisdictional error[55], that issue was in the forefront of the consideration of the Federal Magistrate[56]. He recorded counsel's then submission "that the [Tribunal] fell into jurisdictional error by failing to accord the applicant procedural fairness in the conduct of proceedings before [it]"[57]. The submission of the Minister, in response to this argument, was also summarised. The conclusion that the proceedings before the Tribunal were "procedurally fair" was then explained[58]:

> "The [Tribunal] went to considerable lengths to establish that it had provided an interpreter suitable to the applicant … The [Tribunal] accepted that the applicant suffers from [post-traumatic stress disorder (PTSD)], on the basis of a psychologist's report obtained by the [Tribunal]. Having accepted the disability suffered by the applicant there was no need for the [Tribunal] to further prolong proceedings to obtain a further medical assessment. His legal advisers were apparently satisfied that they could obtain instructions from him and represent him. Persons suffering from PTSD commonly conduct legal proceedings without particular difficulty. The [Tribunal] took into account that the answers given by the applicant may be confused, consistent with his PTSD and adjourned proceedings early when it became apparent that the proceedings had become unproductive. The [Tribunal] took the precaution of submitting further questions in writing … This was, in my view, a proper approach for the [Tribunal] to take."

72 Against this background, it was unsurprising that this Court granted the respondent, although out of time, leave to file his notice of contention raising the procedural fairness point. It is not unknown for a respondent to an appeal to succeed in this Court on the basis of a contention, even one presented effectively for the first time[59]. Such a result may certainly follow in a case where the contention was argued

---

55 *SGLB* [2003] FCA 176 at [6], with reference to *Plaintiff S157/2002* (2003) 211 CLR 476.

56 *SGLB* [2002] FMCA 309 at [9].

57 *SGLB* [2002] FMCA 309 at [9].

58 *SGLB* [2002] FMCA 309 at [23].

59 *Gattellaro v Westpac Banking Corporation* (2004) 78 ALJR 394 at 405 [74]; 204 ALR 258 at 273.

earlier. Procedural unfairness represents the preferable legal categorisation of the error that led the Federal Court to intervene. I will therefore direct my attention to the issues that the notice of contention presents.

Approach and common ground

73 First, it is appropriate to collect a number of points that, in my view, should be accepted as common ground in the present appeal:

1. *Avoiding merits review*: The appeal is not an opportunity for a merits review, permitting the court performing judicial review simply to substitute a different conclusion because it regards that conclusion as preferable in the facts[60]. The Federal Court acknowledged this limitation[61]. It is reinforced in this field of judicial review by the limitations relevantly confining the review to the demonstration of jurisdictional error[62].

2. *Avoiding over-critical analysis*: A court performing judicial review should not over-zealously scrutinise the reasons of the administrative decision-maker to find error[63]. As it happens, the Tribunal's reasons in the present case comprise 35 closely typed pages. This was the second occasion on which the Tribunal had considered the respondent's claim. The first decision (which also affirmed the decision of the delegate of the Minister not to grant a protection visa) had been set aside by the Federal Court on the basis of a suggested problem with interpretation of the respondent's testimony before the first Tribunal[64]. In such circumstances, there would be a reasonable, and understandable, desire to bring the extended proceedings in the Tribunal to a conclusion without further undue delay. The confinement of the respondent to immigration detention during the proceedings before the Tribunal would add a sense of urgency to this endeavour.

---

60 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, 291; *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222 at 254 [105].

61 *SGLB* [2003] FCA 176 at [20].

62 The Act, s 474; *Plaintiff S157/2002* (2003) 211 CLR 476 at 504-507 [71]-[78].

63 *Wu Shan Liang* (1996) 185 CLR 259 at 271-272, 291-292; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 585-586; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 372 [153]. See also *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 286-287.

64 *SGLB* [2003] FCA 176 at [3].

3. *Recognising the serious stakes*: The decision concerning the respondent's application for a protection visa is serious and important. As was remarked in *Abebe v The Commonwealth*[65]:

> "It is necessary always to bear in mind that an applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself."

The decision has significance for the composition of the Australian population and for the compliance of the nation with its obligations, by international law, under the Refugees Convention[66]. These are reasons why, properly, the Australian legal system treats such applications seriously and insists upon the attainment of high levels of accuracy in compliance with the Act and with the requirements of procedural fairness.

4. *Adopting approach of vigilance*: It was accepted by the Tribunal that the respondent did not wish to return to his country of nationality, Iran, and that he "may have a strong subjective fear in relation to doing so"[67]. Moreover, the Tribunal accepted (and the evidence supported the conclusion) that "arbitrary arrest and detention are common in Iran and that serious ill-treatment occurs in prisons"[68]. The material on the record before the Tribunal included a news report in relation to the return of Iranian men refused refugee status in Australia after spending two years in immigration detention at the Woomera Detention Centre[69]. These materials properly oblige the Tribunal, and other Australian

---

65 (1999) 197 CLR 510 at 577-578 [191] per Gummow and Hayne JJ. See also *Yusuf* (2001) 206 CLR 323 at 369 [143], 373 [156]-[157]; *Rajamanikkam* (2002) 210 CLR 222 at 248-249 [91].

66 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 70-71 [198]; *Yusuf* (2001) 206 CLR 323 at 373 [156]-[157]. See also Schloenhardt, "To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia", (2002) 14 *International Journal of Refugee Law* 302; Edwards, "Tampering with Refugee Protection: The Case of Australia", (2003) 15 *International Journal of Refugee Law* 192.

67 Reasons of the Refugee Review Tribunal, unreported (N02/42401), 13 August 2002 ("Reasons of the Tribunal") at 35.

68 Reasons of the Tribunal at 35, referring to United States Department of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices 2001: Iran*, (March 2002).

69 Skelton, "Returnees arrested in Iran", *The Age*, Melbourne, 29 April 2002 at 5, in evidence before the Tribunal.

decision-makers, to adopt an approach of vigilance to such applications. All Australian decision-makers in this field must test their conclusions against the possibility that the conclusions might be wrong. The benefit of any reasonable doubt should ordinarily be given (at least in a case such as the present) to a person in the position of the respondent[70]. Especially is this so because, under current arrangements, the respondent remains in immigration detention whilst the legal process is being completed. He pays for the further scrutiny of his claim, and for delays caused by any legal errors, in a coinage purchased at the price of his own liberty[71].

5. *Accepting the case of mental disturbance*: By the time of the second hearing before the Tribunal, there appeared to be no doubt that the respondent was suffering from some form of psychiatric or psychological disturbance. The suggestion to this effect occasioned the second Tribunal's own initiative to obtain an opinion from the psychologist employed by the body managing the Woomera Detention Centre. That person's report noted that the respondent was "emotionally and physically volatile" and that he had "self-harmed" (a euphemism for the administration of self-inflicted wounds) rising in the respondent's case to repeated cases of attempted suicide. The Tribunal accepted the "repeated incidents of serious self-harm while in detention"[72]. In the conduct of the second hearing before the Tribunal, the respondent "became highly agitated". The Tribunal found it "apparent that he was not in a condition to answer any further questions"[73]. This led to the abandonment of the hearing and the substitution of a series of written questions for the oral hearing.

6. *Considering the initial application*: On first arrival in Australia, the respondent did not recount the attacks on him in Iran, the murder of members of his family and the serious civil deprivations suffered by members of his community, the Arab ethnic minority in Iran. The migration agent then representing the respondent, in a letter to the Tribunal, suggested that the respondent might not have mentioned these matters because of his mental disorder and past trauma.

---

70 United Nations High Commissioner for Refugees, *Handbook On Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (1979, reedited Geneva, January 1992) ("UNHCR Handbook") at [203]. This paragraph, also appearing in the 1979 version of the UNHCR Handbook, was quoted in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 425.

71 See the Act, ss 209, 210; *Judiciary Act* 1903 (Cth), 26. Also see Germov and Motta, *Refugee Law in Australia*, (2003) at 722.

72 Reasons of the Tribunal at 28.

73 Reasons of the Tribunal at 16.

Although the respondent was unable to speak or write in English, his initial application was written by someone, other than the respondent himself, obviously fluent in that language. Based upon multiple factors, various authorities have noted the risks of errors in initial interviews of refugee applicants, on first arrival in a country of refuge[74].

7. *Remembering the purpose of credibility*: Credibility is often seen as the crucial issue in Tribunal determinations of refugee status. The references in the Refugees Convention to the existence of "fear", and to the grounds of that emotion, necessarily imply that those deciding refugee claims will have to make highly personal evaluations of the subjective feelings and motivations of applicants. As I said in *Minister for Immigration and Multicultural Affairs v Rajamanikkam*[75], "[m]any, perhaps most, claims to refugee status involve examination of the truthfulness of the factual assertions of the applicant. Many turn on the assessment of credibility". There was some suggestion during the hearing of this appeal that inconsistent statements by asylum seekers might suggest fabrication of evidence, and might justifiably lead to negative conclusions as to credibility. While such a conclusion is sometimes justified, refugee cases involve special considerations where credibility is an issue[76]. There is no *necessary* correlation between inconsistency and credibility in such cases. Many factors may explain why applicants present with the appearance of poor credibility. These include: mistrust of authority; defects in perception and memory; cultural differences; the effects of fear; the effects of physical and psychological trauma; communication and translation deficiencies; poor experience elsewhere with governmental officials; and a belief that the interests of the applicants or their children may be advanced by saying what they believe officials want to hear[77]. The Tribunal must be firmly told – if necessary by this Court – that the process is one for arriving at the best possible understanding of the facts in an inherently imperfect environment. It is not to punish or

---

74 *Selliah v Minister for Immigration and Multicultural Affairs* [1999] FCA 615 at [2]-[5]. See also UNHCR Handbook at [198]-[200].

75 (2002) 210 CLR 222 at 248 [91].

76 *Sujeendran Sivalingam v Minister for Immigration and Multicultural Affairs* [1998] 1167 FCA.

77 Hathaway, *The Law of Refugee Status*, (1991) at 84-87; Taylor, "Informational Deficiencies Affecting Refugee Status Determinations: Sources and Solutions", (1994) 13 *University of Tasmania Law Review* 43 at 64-71. See also *Sivalingam* [1998] 1167 FCA; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 577 [190] per Gummow and Hayne JJ; Kneebone, "The Refugee Review Tribunal and the Assessment of Credibility: an Inquisitorial Role?", (1998) 5 *Australian Journal of Administrative Law* 78.

disadvantage vulnerable people because they have made false or inconsistent statements, or are believed to have done so.

8. *The evidence before the Tribunal*: It is for the Tribunal to assess the facts, including questions of credibility and the genuineness of the application made by the respondent. The Tribunal has a duty to reach its own conclusion on the review and to give effect to it in the form of a "decision"[78]. By the Act, it is relieved from the obligation to comply strictly with the rules of evidence[79]. The *Evidence Act* 1995 (Cth) does not, in terms, apply to proceedings before the Tribunal[80].

9. *The inquisitorial obligation*: Nevertheless, the Tribunal is not a body engaged in purely adversarial proceedings. It operates according to inquisitorial procedures[81]. This feature of the Tribunal's operation casts obligations upon it that are different from, and in some respects more onerous than, those applicable to more traditional bodies acting according to the more passive decision-making virtues of adversarial trial.

74 Against the background of these features of review in the Tribunal, the respondent's case and the evidence as to his mental condition, the question in this appeal is ultimately whether the Tribunal's procedures in the second hearing denied a fair hearing to his claim for a protection visa. If so, the Federal Court's orders, although for a different reason, will be sustained. In my opinion the procedures were unfair. This constitutes jurisdictional error[82]. That error cannot be saved by the privative provision in the Act[83]. In the circumstances, it results in dismissal of the appeal.

---

78 The Act, ss 411, 414, 415, 420, 425, 426, 427, 430.

79 The Act, s 420.

80 *Evidence Act* 1995 (Cth), ss 3, 4(1) and Dictionary; the Act, s 420.

81 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 69-70 [31]-[32]; *Re Refugee Review Tribunal; Ex parte H* (2001) 75 ALJR 982 at 990 [29]-[30]; 179 ALR 425 at 435; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 1001 [208]; 190 ALR 601 at 648; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 77 ALJR 1909 at 1918-1919 [57], 1922-1923 [81], 1923 [86], 1924 [88]; 201 ALR 437 at 450, 455-456, 457; *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 78 ALJR 678 at 697 [97]; 205 ALR 487 at 513.

82 *Plaintiff S157/2002* (2003) 211 CLR 476 at 489-490 [25], 494 [38], 508 [83].

83 *Plaintiff S157/2002* (2003) 211 CLR 476 at 508 [83].

The unfairness of the Tribunal's procedures

75 *The Tribunal was on notice*: The majority in this Court, like the Federal Magistrate, have concluded that there was no procedural injustice to the respondent in the way the Tribunal proceeded. In effect, the majority are of the view that it was sufficient for the Tribunal to accept to the full, as it did, that the respondent was suffering from PTSD, that this had "led to [the respondent] not revealing all his claims from the outset, and has also given rise to some confusion in his description of particular events"[84]. It is argued that this course of reasoning is not unusual to a body such as the Tribunal; that effectively, it favoured the respondent, perhaps more than was warranted; and thus that the Tribunal's approach involved no procedural unfairness.

76 Like Selway J in the Federal Court, I regard this reasoning as seriously flawed. The migration agent then acting for the respondent was not qualified with the appropriate expertise to diagnose any mental disorder from which the respondent may have suffered, whether PTSD or otherwise. When the agent's letter to the Tribunal of 30 July 2002 is read carefully, it does not even purport to perform such a diagnosis. Still less does it request the Tribunal to act upon the agent's particular assessment of the respondent's mental condition. All that the agent's letter did, relevantly, was to "address the very worrying and complex issue of our client's psychological and emotional condition" and to bring that condition to the notice of the Tribunal. The agent referred to his "self-harming … happening over an extended period of time". She expressed a belief that this "may indicate considerably deeper trauma than reported by the Woomera camp psychologist". The letter then went on:

> "It is imperative that the source of this anger [in the respondent] is assessed thoroughly by an expert in the field of psychology or psychiatry to enable the Tribunal to know its true source."

77 These observations must be read with an earlier letter of 20 May 2002 sent by the respondent to the Tribunal. By that letter, the respondent had asked for the hearing before the second Tribunal to be adjourned because he was "not psychologically fit to attend the upcoming [Tribunal] hearing". That statement itself was made against the background of the respondent's further attempt at suicide on 17 May 2002. This had been sufficiently serious to result in his being transferred from the Woomera Detention Centre to the Derby Hospital. It was this request by the respondent that led to the Tribunal's initiation of the advice from the psychologist employed by the detention centre.

78 There can therefore be no doubt that the Tribunal was on notice that the respondent was making an application for the adjournment of the second hearing on the

---

84 Reasons of the Tribunal at 28.

basis of his mental condition. And that his agent was suggesting that the Tribunal should not be satisfied with the opinion of the detention centre psychologist alone.

79 *The defects in the report*: The migration agent was careful not to "impugn the Woomera camp psychologist's ability". But she did contend that:

> "[A] further, more independent and expert assessment be undertaken to determine [the respondent's] state of mind and whether there can be justified links to his past claims of trauma and persecution. In other words, an expert assessment to determine the source of such behaviour and whether it stems from serious [PTSD]. We consider that the Tribunal has a duty to ask the question about [the respondent's] anger and the source of that anger … We submit that it could be possible that our client's anger is a symptom of deeper trauma, which only an expert opinion could determine."

80 Objective evidence was before the Tribunal to support this expressed dissatisfaction with the opinion of the employed psychologist. The evidence of "self-harming" was not apparently contested. The further instance of attempted suicide was objectively demonstrated by the admission to hospital. The concerns regarding the employed psychologist's opinion were given support from a report by Dr Stuart Turner[85] and by the UNHCR Handbook, quoted by the respondent's agent[86].

81 The opinion of the employed psychologist was criticised, by reference to Dr Turner's report, on the following grounds[87]:

> "[H]olding a first degree in psychology does not mean that the individual is appropriately clinically qualified or competent to carry [out] detailed psychological assessments … In my view, these are hard to see as expert reports. The danger is that non-expert advice may lead to incorrect decisions in which an asylum-seeker [i]s wrongly refused. The acceptance of non-expert advice may also make those responsible for adjudication more cynical about all reports … [T]he interpretation of such restricted evidence should in matters of uncertainty or doubt always be in favour of the asylum-seeker in order to avoid the inherent risks arising from the use of such material."

The UNHCR Handbook emphasises that[88]:

---

85 "Discrepancies and Delays in Asylum Seekers", cited in the letter from the respondent's agent to the Tribunal.

86 UNHCR Handbook at [207]-[208].

87 Letter from the respondent's agent to the Tribunal, quoting from Dr Turner's report.

88 UNHCR Handbook at [207]-[208] (emphasis added).

> "It frequently happens that an examiner is confronted with an applicant having mental or emotional disturbances that impede a normal examination of his case. A mentally disturbed person may, however, be a refugee, and while his claim cannot therefore be disregarded, it will call for different techniques of examination.
>
> The examiner should, in such cases, whenever possible, obtain expert medical advice. The *medical* report should provide information on the nature and degree of mental illness and should assess the applicant's ability to fulfil the requirements normally expected of an applicant in presenting his case".

82 The apparent mental state of the respondent was sufficient to cause the Tribunal to obtain a report on his condition. However, the report secured was not that of a fully independent expert. Nor was it a "medical report" as recommended in the UNHCR Handbook. Its terms, when known, supported the respondent's application for postponement of the second hearing before the Tribunal. The established history of "self-harm", repeated attempted suicide and the expressed opinion of the respondent's *pro bono* barrister who had personal dealings with him, all suggested that the proper course for the Tribunal to take was to postpone the hearing and to obtain an independent, expert and medical report on his psychiatric condition.

83 *The tribunal's own diagnosis*: In other circumstances the failure of the Tribunal to adopt the preferable procedure might be viewed as an error within its jurisdiction, not as an error of jurisdiction vitiating the ensuing "decision". However, the Tribunal proceeded, in effect, to make its own diagnosis, based on the imperfect materials before it. This was the turn of events that properly concerned Selway J in the Federal Court[89]. The Federal Magistrate felt that it was enough for the Tribunal to accept that the respondent "suffers from PTSD"[90]. However, as Selway J pointed out, the employed "psychologist did not diagnose PTSD"[91]. That condition had been mentioned by the respondent's agent, with reference to the report of Dr Turner. But Dr Turner's report was not *specific* to the respondent's condition. It was one *general* to "asylum seekers" as a class. Whether it was a correct diagnosis in the respondent's *particular* case was entirely a matter of speculation. What the incidence and relevance of PTSD were to the case was a matter for evidence, not assumption. It was wholly unsatisfactory for the Tribunal to make its own medical diagnosis of the respondent's condition and then to proceed, on the basis of that diagnosis, to reach its own, unsupported, conclusions concerning the impact of that condition (assuming it to apply) on the respondent; his competence to give evidence at all at that time; and the effect that any psychiatric

---

89 *SGLB* [2003] FCA 176 at [14]-[20].

90 *SGLB* [2002] FMCA 309 at [23].

91 *SGLB* [2003] FCA 176 at [18].

condition from which he then suffered might have had on his initial ability to recall and express events and traumas to which he had earlier been subjected.

84 *The arguable impact of trauma*: Obviously, courts and tribunals act under practical constraints. The tribunal concerned with the respondent's application was no exception. Giving evidence or appearing before such bodies is often stressful and upsetting. For most applicants, the matters at stake in the hearing, the investment of time and emotion before and the prospects of failure and future events, inevitably make the hearing one of the most traumatic and stressful before any Australian court or tribunal. When to the normal burdens of this kind are added months (or in the respondent's case more than two years) of detention in isolated and unfamiliar circumstances, it may readily be accepted that the Tribunal could be entrusted with making a general allowance for the impact of stress and even for acute feelings of anxiety. If that had been all that the Tribunal did in the present case, there would be no ground for judicial intervention on the basis of procedural unfairness.

85 However, this was not what occurred. This was a case with objectively established circumstances of extreme distress, including uncontested, repeated attempts at suicide. This was therefore not merely an instance where an administrative decision-maker with inquisitorial powers and duties could make assumptions and perform assessments of a degree of stress without proper expert materials. What might have been an assumption concerning the respondent's mental condition, appropriate to a normal case of stress, was not permissible against the background of this particular respondent's history, and his request for postponement of the imminent hearing and for securing the opinion of an independent medical expert concerning the respondent's condition. The Tribunal has a large power to conduct hearings and to reach its conclusions, as the Act provides[92]. However, its powers are not completely at large. The proceeding must remain a "hearing" as the Parliament has provided. It must conform to basic principles of natural justice (procedural fairness). If it does not, there will have been no "hearing" at all. The purported "decision" will not be one such as the Act contemplated.

86 For a very long time, it has been recognised in our legal system that the mere mention, even the proof, of mental disability of some kind does not necessarily render a person incompetent to give instructions to legal or other representatives or to give evidence that will be received and considered in a formal legal proceeding[93]. However, in the present case the objection advanced on the respondent's part was two-fold. First, that he might not be in a position to give evidence before the Tribunal competently in a case of great importance to his future – potentially to his life and safety. This suggestion proved prescient. In a sense, it was demonstrated by the breakdown of the

---

92 The Act, ss 420, 425, 426, 427.

93 eg *R v Samuel Hill* (1851) 2 Den 254 [169 ER 495].

hearing before the second Tribunal. Secondly, that, without expert medical evidence, it would be impossible to reach a conclusion on the suggested explanation of the respondent's inconsistent versions of his treatment in Iran. This included the traumas to which he and his immediate family had been subjected there, and the fears that he allegedly suffered as a consequence. Those fears, it was argued, may have caused the respondent to suppress, or withhold, that information in his initial account upon his arrival in Australia.

87 Lawyers may like, for their purposes, to dissect the impact of trauma upon a person's mental state and upon their capacity and competence to give an account of their claims. In a case such as the present, lawyers may prefer to address the impact of experience whilst in detention and to ignore the vulnerability that may have been caused by events earlier in the person's life. However, an individual's mental state and their capacity and competence to give evidence is an integrated phenomenon. The effect of prolonged detention might be borne stoically by an individual who has led an uneventful life. But, for a vulnerable person, with experiences giving rise to accepted fears and with so much at stake, the impact of events might be more telling. That was how the respondent put his case. His was not the ordinary instance of stress and tension, inherent in most proceedings of this kind. It was a case of serious and repeated "self-harm", attempted suicides and exceptional trauma, "diagnosed" in the end by the Tribunal itself.

88 *The role of procedural fairness*: In the decisions of this Court, a difference emerges concerning the role of the common law principles of natural justice (procedural fairness) as they relate to the conduct of administrators, exercising powers given to them by statute[94]. One view that has been expressed is that the common law principles continue to operate, save insofar as the legislature has explicitly or clearly abolished them[95]. This view is consonant with the rule, followed since the earliest days of this Court[96], that common law principles expressing basic civil rights are not taken to be abolished by statute unless the legislature clearly and validly so provides[97]. The other view is that the rules of procedural fairness, found in the common law, may be implied

---

94 *Miah* (2001) 206 CLR 57 at 83 [89] per Gaudron J.

95 *Kioa v West* (1985) 159 CLR 550 at 575-579, 582-585 per Mason J.

96 *Potter v Minahan* (1908) 7 CLR 277 at 304; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93.

97 *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; *Coco v The Queen* (1994) 179 CLR 427 at 436-438; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 49 [43], 57 [90]; 192 ALR 561 at 573, 584-585; *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 134 [167]-[168]; 202 ALR 233 at 273.

in the statutory grant of power to the administrator[98]. This is explained in terms of an implication that the statutory power is conditioned on observance of the principles of natural justice (procedural fairness). It is presumed that the Parliament, in providing for a "hearing" and in requiring the administrator to reach a "decision", envisages that the "hearing" will be carried out with justice to both sides and will result in a "decision" achieved by due process.

89 This is not the occasion to attempt to resolve that debate. The result of either theory will normally be the same. I do not for a moment consider that the Tribunal acted in relation to the respondent with conscious unfairness. Every indication in the record is to the contrary. Nor do I believe that there was any lack of *bona fides* on the part of the member constituting the Tribunal. She thought that it was fair to proceed upon an assumption that the respondent had a particular psychiatric condition (PTSD) and that she could infer the consequences that this condition would have had both for his competence to participate in the hearing and for the Tribunal's evaluation of his successive conflicting stories concerning his reasons for coming to Australia and his treatment in Iran, before he set out.

90 *Conclusion: objective unfairness*: Unfortunately, the course adopted by the Tribunal was objectively unfair. Independent, expert medical advice was requested, and its need was demonstrated. The particular condition "accepted", and its operation upon the competence and conduct of the respondent, were not within matters of general knowledge or matters of which even an expert and experienced body, such as the Tribunal, could take notice without proof[99]. The result was that, in the procedures adopted by the Tribunal, an injustice was done to the respondent. In the Federal Court, Selway J identified that injustice, even if his reasons did not precisely classify the legal category by which it might best have been described.

The privative clause argument is unavailing

91 As a fallback argument (and somewhat *sotto voce* I thought) the Minister submitted that the Federal Court had erred in failing properly to consider the effect of the privative clause in the Act on whether any error of law relied upon constituted jurisdictional error giving rise to judicial relief. Specifically, the Minister argued that, if (contrary to the primary submission) the Tribunal had infringed an express or implied requirement of the Act in making its decision, it was still necessary for the Federal Court to consider whether a breach of such requirement went to the jurisdiction of the

---

98 *Kioa v West* (1985) 159 CLR 550 at 614-619 per Brennan J.

99 *Gattellaro* (2004) 78 ALJR 394 at 397 [15]-[18], 404-405 [68]-[69]; 204 ALR 258 at 262, 272. See also *Holland v Jones* (1917) 23 CLR 149 at 152-154; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 478-481 [64]-[68].

Tribunal[100]. It was said that if the Tribunal appeared to make a jurisdictional error, it remained for the Federal Court, providing judicial review, to undertake a "reconciliation process" required in the light of s 474 of the Act[101].

92 It is possible that this argument might need to be addressed in a case wholly dependent upon the way in which the reasons of Selway J in the Federal Court were stated. I will not decide that point. However, once the suggested jurisdictional error is revealed as a failure to accord procedural fairness to a party, the result is that the reasoning of this Court in *Plaintiff S157/2002 v The Commonwealth*[102] applies. The purported "decision" was not a "decision" for the purposes of the Act. As Gleeson CJ put it in *Plaintiff S157/2002*[103]:

> "In the case of a purported exercise of decision-making authority, limitation on authority is given effect, notwithstanding the privative provision. That may involve a conclusion that there was not a 'decision' within the meaning of the privative clause. In a case such as the present, it may involve a conclusion that a purported decision is not a 'decision … under this Act' so as to attract the protection given by s 474."

93 In my view, *Plaintiff S157/2002* is indistinguishable from the present case. The result that follows must be the same.

Orders

94 The orders made by the Federal Court were correct. That Court's conclusion can more readily be confirmed in this appeal because of the objective indication of the serious mental disturbance of the respondent, whatever may have been its cause; the Tribunal's finding that he had a genuine subjective fear of being returned to his country of nationality; and the objective proof (seemingly uncontested by the Tribunal) that many arbitrary cruelties and wrongs occur to people in that country that justify genuine fears of persecution, at least in some cases.

95 It would be burdensome indeed to require a third hearing before the Tribunal. However, nothing less is necessary where procedural unfairness, however unintended,

---

100 The Minister relied on *Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437 at 446.

101 *Plaintiff S157/2002* (2003) 211 CLR 476 at 501-504 [61]-[70].

102 (2003) 211 CLR 476.

103 (2003) 211 CLR 476 at 488 [19]. See also the joint reasons in that case at 506-507 [77]-[78].

has been established. Such, in my view, are the high standards required by the Act and specifically in a case of a person such as the respondent, objectively demonstrated to be seriously damaged by his life's experiences.

96 The appeal should be dismissed with costs.

97 CALLINAN J. This appeal is concerned with the conduct of a hearing by the Refugee Review Tribunal and raises questions as to the nature and detail of the evidence upon which it may act and any obligations that it may have to obtain it.

Facts

98 The respondent is an Iranian citizen who travelled to Australia by sea without a visa on or about 8 June 2000. He was immediately detained and interviewed by an officer of the Department of Immigration and Multicultural Affairs on 9 June 2000 at the Port Hedland Immigration Reception and Processing Centre. The officer told the respondent that he should answer the questions put to him carefully and honestly because any subsequent inconsistent claims could raise doubts about his reliability.

99 The respondent said that he had left Iran because his life there was monotonous: that he had been unable to marry as he had to "work hard from morning to evening". He informed the officer that he never had any problems with the "Military/Police/Security" in Iran. I set out two of his responses in more detail.

> "6. WHY DID YOU COME TO AUSTRALIA? It was mainly to secure my future, find a job in my own profession or in any other occupation. I have come to work, to live to get married. After I get married hopefully my children will lead a happy life. …
>
> 7. DO YOU HAVE ANY REASONS FOR NOT WISHING TO RETURN TO YOUR COUNTRY OF NATIONALITY? Why should I return to that addicted community. It is like going back to prison as there is no recreation and you work all the time to earn money for your food. You can't go to a park because they say you are a single man and not allowed. My eldest brother is 40yrs old and is single the same with my other brother. At least I have a little room nothing else."

100 It appeared clearly from those answers therefore that the respondent had come to Australia to find a job and a wife, and to secure his future. There was no suggestion by him that any fear of persecution and possible incarceration by the authorities there motivated his departure from Iran.

101 On 20 October 2000, the respondent applied for a protection visa. The account that he gave was markedly inconsistent with his answers on his arrival in Australia. He asserted that he and his family had suffered discrimination, detention, and torture at the hands of the Iranian authorities since the time of the Iran-Iraq war because they belonged to the Arab minority in Iran. There could be little doubt that if the account which he gave in his application were to be accepted, he had lived in such a state of

well-founded fear of persecution before he came to Australia as would justify the grant to him of the status of refugee[104]. I set out relevant parts of his account.

> "During the interview conducted with me upon my arrival in Australia, I could not reveal all the information simmering in my heart about the tragic circumstances I passed through in Iran. That was due to the fact that I was seized with fear over the information being divulged and taken as evidence to expose my family in Iran to destruction at the hands of the Iranian security organs. I tried during the months of my detention to appoint a personal solicitor to explain to him my problems free of fear.
>
> I lived with my family and the members of my clan a tragic life in Iran. We were treated with disdain and contempt and were subjected to all forms of discrimination. We were denied our rights and barred from work. We were not allowed to compete according to our qualifications with the Iranians of Persian origin. The policy of the Iranian government is almost identical with the policy followed in America to eradicate the Red Indians. The Iranian government dumped our area with drugs to poison the youths of the Arab origin, distance them from national politics and demoralise them. Moreover, that government cast them into prisons where they were subjected to all forms of intolerable terrorism, repression and torture.
>
> My grandfathers had long ago migrated from Iraq and settled in Al Mohammarah on the Iranian-Iraqi borders. They cultivated vast areas of land which were not under Iranian sovereignty. But due to the weakness of Iraq, the Persian Empire imposed its hegemony on our cities and villages. Our people found themselves forced to abandon their Iraqi identity and Arabism and shift towards Persianism.
>
> At the start of the Iranian Iraqi war (1980-1988), my grandfather, his elder son and grandson were arrested and detained. They were accused of dealing with the Republic of Iraq and hiding Iraqi weapons on their land. They were further accused with communicating information to the Iraqi government. In 1983,

---

104 Article 1A(2) of the Convention relating to the Status of Refugees adopted on 28 July 1951, as amended by the Protocol relating to the Status of Refugees adopted on 31 January 1967, 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, is unable or, owing to such fear, is unwilling to return to it."

other members of my family were arrested. After a period, my grandfather and uncle were executed. My cousins remained imprisoned up till now.

Then my father and brother were arrested and cast into prison. They were sentenced to ten months imprisonment on charges of dealing and collaborating with the Iraqi authorities. After spending the period, they were released. During their imprisonment they were subjected to all forms of torture and persecution as they denied any relations whatsoever with Iraq. Their only sin was that they were of the Arab origin and took pride in their Arabic background and strongly denounced forcing our people in Al Ahwaz to deny their Arab nationalism and join the Persian nationalism.

The imprisonment of my father and brother was followed by the confiscation of our lands. The Iranian government also confiscated the truck operated by my father under the pretext of public interest and the seizure of the properties of traitors. They also claimed that the vehicle was used to transport weapons to the mountainous areas to activate the Movement of Arab Nationalism and achieve independence from the Persian hegemony. My father was threatened with being imprisoned again if he refused to accept the confiscation.

We had been cornered in a very dangerous situation as a result of these incessant security harassment, acts of revenge, continuous surveillance, raiding of our homes and places of work in search of arms and secret publications hostile to Iran and the Persian hegemony. In each act of raiding, they would take all of us to the security centres in the night for interrogation where we would be subjected to assaults, insults and threats. They wanted to force us to accept their political-religious system and the conception of the Persian Empire. They wanted to force us to realise that there would be no other solution and that any Arabic orientation would not be condoned. Acts of detention and torture became common practice each time we were led to the security centres. We would remain for a period exceeding one month in the detention. They would not release us unless after inflicting all forms of torture and assaults and after extracting a declaration of good behaviour and conduct.

In July 1999, an anti-government demonstration broke out in our area. I and my family felt we had to participate as an important sign of our people's emancipation and to call for respect of Human Rights and our Arabic heritage. We deliberately did not remain until the end of the demonstration, preferring to return to our home fearing the revenge of the Islamic authorities. We were taking our lunch when strong knocks were heard at the door. My mother went out to open the door fearing the security men to be there. As soon as she opened the door, the security men burst in and my mother fell on her head as they pushed her aside. She started to scream as blood poured out of her head. Faced with this unacceptable situation, we could not control our nerves. We entered into a sort of a battle with the raiders where we exchanged insults and punches. But they were more numerous and well armed. They arrested and controlled us. They did not give me time to aid my mother. We left her at the hands of my

> father who was alone appealing the human conscience to alleviate this heart-rending tragedy.
>
> Thus, we were again cast into the security prison where we remained for a period of five months without any charge being leveled against us save resisting the security men at our house. We faced all forms of torture. We were only released on financial bail and a personal declaration given by my father.
>
> Upon my release, I decided to leave the country seeking safety and freedom. Fearing to be detained again and probably liquidated, I left immediately for an agricultural area cultivated by one of my friends. I remained there away of the eyes of the security and started to look for a way out of Iran."

102 At a subsequent interview by a delegate of the appellant, the respondent again altered his claims. For example, faced with evidence that the Iranian authorities did not discriminate against the Arab minority, the respondent indicated that he faced harm more by reason of his political opinion, than of his Arabian ethnicity as earlier claimed.

> "7. It was put to the applicant that there are several ethnic groups within Iran and that country information indicates that none of them as a rule face serious discrimination on the basis of ethnicity alone. Despite wide documentation of human rights abuses that do take place in Iran, none of them refer to discrimination against those of Arabic ethnicity. The applicant indicated his problems were more on account of his political opinion."

Another change in his account appears from the following.

> "8. The applicant was asked about the demonstration against the government he claimed to have been involved in 1999. The applicant said that he was not involved in any demonstration in 1999. He said he had been involved in one in 1998. The demonstration occurred because the government had been negligent in providing assistance to local residents after the area had been flooded. People had to sleep on the roof of their houses for five days. The residents drove trucks onto the highway and staged a blockade. Plain-clothes agent came and filmed those involved."

103 The application for a protection visa was refused by a delegate of the appellant on 8 December 2000. The delegate in reliance upon the country information was of the view that an Arab person who refused to participate in Iranian nationalistic activities would not face the kind of harm claimed by the respondent. She also rejected the respondent's explanation for the significant changes in his claims over time.

> "I do not accept that the applicant has a well founded fear of persecution in Iran on account of his Arabic ethnicity. A search of available country information does not identify any reports that indicate that Iranians of Arabic ethnicity face any form of harm or discrimination amounting to persecution. Rather the

available reports state that in general the Iranian government does not discriminate on account of race.

I also note that the US State Department Country Report on Human Rights Practices for 1999 makes no mention of Arabic Iranians in its report concerning racial discrimination. Given the extensive coverage of human rights abuses that do occur in Iran, I consider the absence of any such report concerning ethnic Arabs is indicative of an absence of persecution of that particular racial group.

I also do not accept that the applicant has a well founded fear of persecution on account of his political opinion. The political opinion the applicant holds is one of pride in his Arabic heritage and ethnicity and this has been demonstrated by his refusal to adopt an Iranian identity and join in Iranian nationalistic activities.

There is no country information available which supports the applicant's claim that mere refusal to join in nationalistic activities will result in adverse attention such as arrest, detention and torture. The World Directory of Minorities reports the following about the Arab minority in Iran:

> 'There are probably one million Arabs, mainly Shia, living primarily along the Gulf littoral in the province of Khuzestan and more generally in the South. The Arabs of Khuzestan and of Southern Iraq form a cultural unit. Many Arabs on the coastline are Sunni, originally from the Arabian peninsula, and have a history since the sixteenth century of migrating between the east and west sides of the Gulf. They are thus thought of as neither wholly Iranian or wholly Arab. As a group they are known as Hawila. In spite of such factors, Iraqi attempts to foment unrest for the Pahlavis and the Islamic republic have been largely unsuccessful. Arabs of Khuzestan demanded autonomy like the Baluch, Kurds and Turkomans in 1979, but demonstrated their loyalty to the Islamic regime during the Iran-Iraq war 1980-1988.'

I consider that this report indicates that the Arabs in Iran are able to maintain their cultural identity without experiencing persecution from the Iranian government. The report states that the Arabs pushed for autonomy and gives no indication that this push resulted in treatment amounting to persecution. I consider that if the Iranian government tolerated the Arab push for autonomy, then the applicant's claim of arrest, detention and torture for merely not involving himself in Iranian nationalistic activities is inconsistent with country information. As such I am not satisfied that the applicant has a well founded fear of persecution in Iran on account of his political opinion.

In this context I note the inconsistencies between the applicant's claims put forward at his initial entry interview and those provided in his application for a protection visa. I do not accept the applicant's explanation for the inconsistencies in his statements and consider that they confirm my findings

> above that the applicant does not have a well founded fear of persecution for a Convention reason."

104 On 15 December 2000, the respondent applied to the Refugee Review Tribunal ("the Tribunal") to review the delegate's decision. On 20 February 2001, the respondent made a further submission. He claimed, among other things, that he faced harm not because he was an Arab but because he was a member of the Hamid tribe, who had become associated with the Iraqis during the Iran-Iraq war. He was assisted by a Farsi interpreter at the hearing conducted by the Tribunal.

105 On 26 April 2001, the Tribunal affirmed the decision not to grant a protection visa. The respondent applied to the Federal Court for judicial review of that decision and on 2 April 2002 the matter was remitted by consent to be reheard by the Tribunal. It was common ground that the respondent needed, and should have had an Arabic rather than a Farsi interpreter.

106 The respondent was invited to attend a hearing on 30 May 2002 by the Tribunal as reconstituted. On 20 May 2002 however, the respondent requested that the hearing be adjourned because he was "not psychologically fit to attend".

107 On 11 June 2002, the Tribunal wrote to the Health Services Manager at the Woomera Detention Centre (to which the respondent had been transferred) seeking a written assessment from a psychologist of the respondent's "general state of mind". The relevant passage from that letter is set out below.

> "The Member would be grateful if you could provide to her a written assessment of [the respondent's] general state of mind so that she can decide how best to conduct the hearing, and how well he is presently able to express himself and explain his actions. In particular she would like to know what to expect in terms of his ability to accurately recall incidents from his past. She also needs to know whether he is having difficulties in concentrating which might affect how he gives oral evidence at a hearing. She would appreciate any other observations you may wish to make which you think might assist her to take oral evidence from [the respondent]."

On 18 June 2002, the psychologist responded as follows.

> "I am forwarding this information in response to your enquiry regarding the presentation of [the respondent]. I have had two formal interviews with [the respondent] and several informal interactions.
>
> <u>General Presentation and Psychological State</u>:
>
> [The respondent] presents as extremely tense, and shows signs of being both emotionally and physically volatile. In general he presents as a very angry self-focused person. [The respondent] has had a lot of contact with the medical staff due to his self-harming behaviour, and continues to behave in a threatening

> fashion towards staff. After physically violent acts either to himself or property, [the respondent] shows no sign of remorse or reflection on his behaviour. I have discussed with [the respondent] managing his anger through physical activities available at the centre such as use of the gym, etc but [the respondent] is not receptive to these suggestions.
>
> [The respondent's] Powers of Recall:
>
> [The respondent] has not been interested in discussing his past with me however I don't believe that he cannot recall his past. He says it makes him too angry to discuss his past. He holds very strong views on a variety of situations but expresses his views in few words. [The respondent] has sworn on the Koran that if he gets a negative RRT he will kill himself. [The respondent] has referred to conversations we have had previously. He does not seem to have blurred or confused recall. Although [the respondent] is tense and angry I believe he has the ability and the resources to present information if he felt he would benefit from that process. [The respondent] claims to suffer from headaches, poor concentration, and insomnia through anxiety however it seems that many of his actions are still clearly thought through and premeditated so I believe he has the capacity to think through events if required."

108 The Tribunal held a preliminary hearing on 20 June 2002. The hearing was conducted by video. The member constituting the Tribunal asked the respondent whether he wished to give oral evidence, and if he did, whether he thought himself able to do so. He replied that he wished to give evidence as soon as possible.

109 A further hearing by video link was conducted by the Tribunal on 26 June 2002. At the hearing, an incident occurred which the Tribunal subsequently described in this way:

> "I asked [the respondent] what problems he thought he might have if he went back to Iran now, and what might motivate them. He responded that he would take his life rather than return to Iran. At this point in the hearing [the respondent] became highly agitated. As it was apparent that he was not in a condition to answer any further questions, I agreed to send my final questions to his new adviser (who was present via telephone link) in the hope that she could obtain his responses to them."

110 On 27 June 2002, the Tribunal wrote to the respondent's adviser drawing attention to a number of matters of concern. One appears from the following:

> "The Tribunal has now received an assessment of [the respondent's] general state of mind (a copy of the Tribunal's letter requesting this, dated 11 June 2002, and the letter of assessment dated 18 June 2002, are enclosed). The Tribunal could infer from it that the inconsistencies in [the respondent's] account do not arise from blurred or confused recall."

The reference to "the inconsistencies" is to particular inconsistencies outlined earlier in the letter. They related to differences between the respondent's various accounts of his life in Iran earlier referred to in the Tribunal's reasons.

111 On 30 July 2002, the respondent's adviser, who was a migration agent[105], made a detailed response to the matters raised by the Tribunal. The adviser contended that there was evidence "that [the respondent] is suffering from some form of psychological difficulty, which is complicating his giving of evidence with regard to his claims". The adviser also referred to extracts of a report entitled "Discrepancies and Delays in Asylum Seekers" by a psychiatrist, Dr Stuart Turner ("the Turner Report"). That report suggested that persons suffering from Post Traumatic Stress Disorder (PTSD) may have difficulty in immediately providing a coherent narrative of past events. It was suggested by the adviser that the respondent might be suffering from PTSD.

112 At the same time, the respondent provided an affidavit seeking to explain why he gave false evidence in his original interview and why his subsequent claims varied from time to time. He also sought to restate and elaborate upon his claims to some extent. As to the former, he deposed as follows:

> "After I arrived in Australia I was interviewed about why I had left Iran and come to Australia. I gave false or incomplete answers because I feared the consequences for my family if I told the truth about the persecution my family and I had been subjected to. I feared that the information about me and my family, and the fact that I was seeking asylum in Australia, might get back to the Iranian authorities. This fear was in part based on the fact that the interpreter was Iranian. I also feared that the Australian authorities would see me as a troublemaker or terrorist and refuse to allow me to stay in Australia.
>
> …
>
> I did not tell the truth about leaving Iran on a false passport at the first interview because I thought the Australian authorities would make adverse conclusions about me.
>
> …
>
> I told Dr Al Jabiri [the respondent's previous migration agent] of all the times I was arrested. Dr Al Jabiri told me I did not need to mention all the details of my history and arrests. Specifically, Dr Al Jabiri told me I did not need to mention: (1) my arrest during my last year at school for involvement in protest demonstrations and my subsequent expulsion from that school, (2) my involvement with community protests in 1998 against the government after our area had been flooded because

---

105 A barrister participated in the video link hearing on 26 June 2002 by telephone, together with the migration agent.

> people of the neighbouring area (occupied by wealthy oil company employees) had removed a water barrier protecting our suburb. He told me that my case was strong enough based on my last arrest. I relied on his expertise, believing Dr Al Jabiri knew how best to advance my application."

113 The substance of the restatement and elaboration of his claims appears from the decision of the Tribunal on 13 August 2002, affirming the delegate's decision to refuse a protection visa.

114 In its reasons for that decision, the Tribunal dealt with the issue of inconsistency in the respondent's earlier claims in a way that was highly favourable to him by treating him as if he had in fact been suffering from PTSD and that the presence of this condition was the reason for the inconsistencies.

> "[The respondent] was aged seven when the war with Iraq commenced, and was aged sixteen when it ended (in July 1988). I have considered the plausibility of his claims that his family continued to be subjected to harm because of a political opinion imputed to them arising from their membership of the Hamidi tribe and their family links with its late leader. It is the case that [the respondent's] evidence has changed over time as to his family's, and his own, problems in Iran after the end of the war in 1988. The Tribunal is asked to accept, in brief, that he may be suffering from Post Traumatic Stress Disorder, and that this has led to his not revealing all his claims from the outset, and has also given rise to some confusion in his description of particular events. I have not agreed to his adviser's request that he be assessed by a psychologist in order to confirm this. That is because I consider it highly likely that [the respondent] is suffering from PTSD, as indicated by his repeated incidents of serious self-harm while in detention. I therefore propose to accept that his ability to give evidence clearly has almost certainly been influenced by this. As to whether his current condition is a consequence of Convention-related events in Iran, (rather than during his period of over two years in detention in Australia, for example), it is for the Tribunal to make findings on the events which the [respondent] claims led to his decision to leave Iran.
>
> … Thus, rather than rely on the claims made by [the respondent] on various occasions before [the] hearing [on 26 June 2002], I propose to treat the oral evidence given by him at the hearing, coupled with the content of the written submissions from his adviser (30 July 2002) and himself (30 July 2002) after the hearing, as an accurate reflection of the claims he wishes to make."

115 On 4 September 2002, the respondent lodged an application for judicial review in the Federal Court. The application was transferred to the Federal Magistrates Court pursuant to s 32AB of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"). On 20 December 2002, Driver FM dismissed the application.

The Federal Court

116 On 13 January 2003, the respondent, who at that time did not have legal assistance, filed a Notice of Appeal taking as a ground that his case had never been "considered deeply".

117 On 11 March 2003, the appeal was heard by Selway J exercising the appellate jurisdiction of the Federal Court under ss 24(1)(d) and 25(1A) of the Federal Court Act. His Honour gave an *ex tempore* judgment allowing the appeal.

118 After referring to the evidence before the Tribunal and its holdings with respect to the assumed presence of PTSD, and its likely effect upon the respondent, his Honour said this:

> "There are a number of problems with this. First, there is simply no evidence before the Tribunal upon which it could be satisfied that the [respondent] was suffering from PTSD. I do not suggest that the Tribunal is under a duty to inquire whether a person has a mental disability, even where that person's behaviour may seem bizarre[106]. Certainly in this case there may not have been a jurisdictional error if the Tribunal had simply relied upon the psychologist. But the Tribunal did not do so. Nor could the member be criticized for not relying on the psychologist. She was perfectly entitled to reach the view, particularly after observing the [respondent's] behaviour, that she was not prepared to rely upon the psychologist. But the Tribunal was not entitled to diagnose the [respondent] as suffering from PTSD without evidence. To do so was an error as to jurisdiction.
>
> The second problem is that, even if the [respondent] is suffering from PTSD there was no evidence before the Tribunal, other than the quotations from the Turner report referred to above, which would enable the court to assess the effects of PTSD on the creditability of the [respondent]. As the above quotation makes clear, the Tribunal was prepared to rely upon the diagnosis of PTSD in relation to 'his ability to give evidence clearly.' It is not altogether clear what this means. What is clear though is that the Tribunal nevertheless made credit findings based upon inconsistencies in his evidence. For example, the Tribunal found that his first version of where he was living immediately prior to leaving Iran was true, and the later version untrue. The Tribunal analysed the issue in this way:
>
> > 'These two assertions as to his whereabouts in the months leading to his departure from Iran are entirely irreconcilable, and he has not provided any explanation as to why they differ. I consider untrue his claim to

---

106 See *Eastman v The Queen* (2000) 203 CLR 1.

> have been in hiding throughout his last six months in Iran. I am satisfied that he was living at his family home throughout that period. It follows, and I am satisfied, that he was not detained again by the authorities because they did not wish to detain him. It also follows, as he willingly remained at his family home where he could be readily located by the authorities, that he did not fear arrest.'

But, having found that the [respondent] was suffering from PTSD there was no evidence before the Tribunal which would have enabled it to assess whether or not any of the evidence the [respondent] gave was reliable. Having (wrongly) diagnosed that the [respondent] was suffering from PTSD it was an error of law for the Tribunal then to proceed to make credibility findings in relation to the [respondent's] evidence without evidence as to what effect the PTSD might have on the [respondent's] capacity to give evidence.

The third problem is directly related to the second. Having found that the [respondent] was suffering from PTSD there was no evidence before the Tribunal which would enable the Tribunal to determine whether the [respondent] could properly take part in the proceedings. Having found that the [respondent] was suffering from a disease which affected his capacity to give evidence it was then incumbent upon the Tribunal to satisfy itself that the [respondent] could take part in the proceedings. The failure to do so was also an error of law.

In my view these errors were jurisdictional errors. The Federal Magistrate dealt with it in the following way:

> 'The RRT accepted that the applicant suffers from PTSD, on the basis of a psychologist's report obtained by the RRT. Having accepted the disability suffered by the applicant there was no need for the RRT to further prolong proceedings to obtain a further medical assessment. His legal advisers were apparently satisfied that they could obtain instructions from him and represent him. Persons suffering from PTSD commonly conduct legal proceedings without particular difficulty. The RRT took into account that the answers given by the applicant may be confused, consistent with his PTSD and adjourned proceedings early when it became apparent that the proceedings had become unproductive. The RRT took the precaution of submitting further questions in writing and obtain (sic) written answers from the applicant's legal representatives. This was, in my view, a proper approach for the RRT to take.'

However, the psychologist did not diagnose PTSD. As referred to above it seems to have first been mentioned in the submissions of the [respondent's] advisers. Any diagnosis seems to have been made by the Tribunal member. Further, the assumption made by the Federal Magistrate that many people with PTSD commonly conduct legal proceedings, does not deal with the problem of the capacity of this [respondent] to do so. This is particularly so when the

Tribunal has accepted that the PTSD has affected the [respondent's] capacity to give evidence.

In my view the learned Federal Magistrate was in error in concluding that there were no errors of law in the reasoning of the Tribunal. In my view the relevant errors were jurisdictional errors."

The appeal to this Court

119 The appellant appealed to this Court on the following grounds.

(a) The Court erred in holding that it was not open to the Tribunal to accept without evidence that the respondent had PTSD.

(b) The Court erred in holding that, having accepted that the respondent had PTSD, there was no evidence before the Tribunal which would have enabled it to assess whether or not any of the evidence the respondent gave was reliable.

(c) The Court erred in holding that, having found that the respondent had PTSD, it was incumbent on the Tribunal to satisfy itself that the respondent could take part in the review proceedings.

(d) The Court erred in holding that the errors identified were jurisdictional errors.

120 The decision of the Federal Court is flawed in more than one respect both factually and in law. I will proceed for present purposes on the basis that despite s 420(2)(a) of the *Migration Act* 1958 (Cth) ("the Act"), the Tribunal could only act upon an evidentiary foundation of the kind that Selway J held to be absent and necessary, matters as to which there is some doubt. The provision provides as follows:

"(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence".

121 There was, contrary to his Honour's holding, abundant evidence to justify a finding by the Tribunal that the respondent was suffering from PTSD. The nature, symptoms and possible effects of it were the subject of the extract from the Turner Report provided to the Tribunal. The possible or likely effects of the condition were asserted by the respondent's advisers. The psychologist at Woomera made a comprehensive assessment of the respondent's condition. The Tribunal also had the benefit of observing the respondent on the television screen during the video linked hearing. Together, these matters clearly provided an evidentiary basis for the assumption that the Tribunal was prepared to make in the respondent's favour, that he was suffering from PTSD, that this affected his ability to give evidence, and, further, that it provided an explanation for the inconsistencies between his accounts.

122 Even without any evidence of PTSD, the Tribunal would have been entitled to abstain from making an adverse finding in respect of the inconsistencies in the respondent's accounts. He contends that he was denied procedural fairness. The respondent's complaint is a strange one and involves these propositions. The Tribunal should not have proceeded without ascertaining that the respondent was not suffering from PTSD. If it had made further inquiries the presence of PTSD would or might have been established. Its presence provided an explanation for inconsistencies in his evidence. The Tribunal should and would have accepted that explanation and not held against him, in assessing his current claim, that he had been inconsistent. But the last is of course the precise position that the Tribunal reached. In short, had the Tribunal done what the respondent says, and the Federal Court accepted, should have been done, the position would have been no different. Acceptance of all of these propositions by no means demands the conclusion that the respondent's last, or current claim had to be taken to be true.

123 The Federal Court may not have expressly stated that the Tribunal was under a duty to inquire, but there is little doubt that his Honour assumed the existence of such an obligation. In that respect, his Honour said this:

> "Having found that the [respondent] was suffering from a disease which affected his capacity to give evidence it was then incumbent upon the Tribunal to satisfy itself that the [respondent] could take part in the proceedings."

This finding disregarded four matters: that a psychologist had carefully considered and assessed the respondent's capacity to remember and give a reliable account of his past; that the respondent had said that he was not disabled and wished to give evidence; that the Tribunal had the benefit of the Turner Report; and, that the obligation of any court or tribunal does not generally extend beyond an obligation to satisfy itself that a party can understand the nature of the proceedings and can give instructions and evidence as required, matters to which further reference will be made later.

124 Under s 427 of the Act, the Tribunal may require the Secretary to arrange, and report upon, any investigation or medical examination that the Tribunal thinks necessary with respect to a review[107]. That does not mean that the Tribunal is bound to make

---

107 "Powers of the Refugee Review Tribunal etc.

For the purpose of the review of a decision, the Tribunal may:

…

(d) require the Secretary to arrange for the making of any investigation, or any medical examination, that the Tribunal thinks necessary with respect to the review, and to give to the Tribunal a report of that investigation or examination."

particular inquiries or to obtain evidence on medical or other matters[108]. There is nothing to suggest in this case however that the Tribunal failed, whether it was bound to do so or not, to make all appropriate and sufficient inquiries. The Tribunal was faced with a request by the respondent that the hearing proceed, which it did, and it was well aware of the possibility that the respondent was stressed and made due allowance for that. Even if the respondent had made a request that a particular psychologist or psychiatrist give evidence, the Tribunal was not obliged to comply with it[109]. It certainly made no jurisdictional error in not undertaking further inquiries. It had a discretion and not an obligation to pursue such other inquiries, if any, as it saw fit.

125 It is a powerful consideration that in the Tribunal proceeding, neither the respondent nor his advisers contended that he was unable to give evidence or take part in the proceedings. The contrary was the case. He indicated that he wished to do so and he gave sensible evidence for a substantial portion of the hearing and provided an affidavit afterwards. The Tribunal did not err in permitting the respondent to take part in the proceedings in the way that it did. The Federal Court fell into error in reaching a different conclusion.

126 This should also be said about stressed witnesses. They are by no means rarely encountered in courts and tribunals. Legal and inquisitorial proceedings can be very stressful occasions even for people who have no direct interest in their outcome. That a witness or a party may be stressed will rarely of itself constitute sufficient reason to postpone a hearing. Whether a party or a witness is so stressed as to be unable to give a

---

108 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 290.

109 Section 426 of the Act provides:

"**Applicant may request Refugee Review Tribunal to call witnesses**

(1) In the notice under section 425A, the Tribunal must notify the applicant:

(a) that he or she is invited to appear before the Tribunal to give evidence; and

(b) of the effect of subsection (2) of this section.

(2) The applicant may, within 7 days after being notified under subsection (1), give the Tribunal written notice that the applicant wants the Tribunal to obtain oral evidence from a person or persons named in the notice.

(3) If the Tribunal is notified by an applicant under subsection (2), the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice."

reasonable account of himself or herself, or whether further inquiries as to the capacity of a person to do so should be made, is pre-eminently a matter for the court or the tribunal to decide, and courts and tribunals by experience are generally well equipped to do so.

127 The respondent's submissions would, if correct, place him in a more favourable position than a person with mental deficiencies charged with a serious crime, as to which Gleeson CJ in *Eastman v The Queen* said[110]:

> "Unfortunately, it is not unusual for the criminal justice system to have to deal with people with mental disorders; sometimes severe disorders. The existence of the disorder does not, of itself, prevent them from being brought to trial. It certainly does not mean that they must be allowed to be at liberty. It is not to be overlooked, as Deane and Dawson JJ pointed out in *Kesavarajah v The Queen*[111], that the usual consequence of a finding that a person is unfit to plead is indefinite incarceration without trial. It is ordinarily in the interests of an accused person to be brought to trial, rather than to suffer such incarceration.
>
> In the case of *R v Berry*[112] Geoffrey Lane LJ, criticising a direction to a jury empanelled to determine an issue of fitness to plead, said:
>
> > 'It may very well be that the jury may come to the conclusion that a defendant is highly abnormal, but a high degree of abnormality does not mean that the man is incapable of following a trial or giving evidence or instructing counsel and so on.'
>
> The Ontario Court of Appeal, in *R v Taylor*[113], recorded the following propositions, agreed by counsel, as representing the state of authority in that province:
>
> > '(a) The fact that an accused person suffers from a delusion does not, of itself, render him or her unfit to stand trial, even if that delusion relates to the subject matter of the trial.
> >
> > (b) The fact that a person suffers from a mental disorder which may cause him or her to conduct a defence in a manner which the court

---

110 (2000) 203 CLR 1 at 14-15 [24]-[27].

111 (1994) 181 CLR 230 at 249.

112 (1977) 66 Cr App R 156 at 158.

113 (1992) 77 CCC (3d) 551 at 564-565.

considers to be contrary to his or her best interests does not, of itself, lead to the conclusion that the person is unfit to stand trial.

(c) The fact that an accused person's mental disorder may produce behaviour which will disrupt the orderly flow of a trial does not render that person unfit to stand trial.

(d) The fact that a person's mental disorder prevents him or her from having an amicable, trusting relationship with counsel does not mean that the person is unfit to stand trial.'

In the present case, the ultimate test to be applied is the statutory test set out earlier. However, each of the above propositions is sound, and they are consistent with the statutory test."

128 The respondent demonstrated ample capacity to follow and participate in the Tribunal proceedings and to answer questions coherently.

129 The Tribunal evaluated the evidence in an orthodox manner and made findings based on the evidence and its observations of the respondent when answering questions. The Tribunal made no error in doing so, neither factual, jurisdictional nor legal of any kind.

130 What I have said so far is sufficient to dispose of the appeal and obviates the necessity of dealing with any arguments relating to the operation of the privative clause provision in s 474 of the Act[114].

---

114 "Decisions under Act are final

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

(2) In this section:

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).

(Footnote continues on next page)

131 The appeal should be allowed.

---

(3) A reference in this section to a decision includes a reference to the following:

…

(i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act".