FEDERAL COURT OF AUSTRALIA

Applicants M16 of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs and Another

[2005] FCA 1641

Gray J

10, 11 March, 24 November 2005

Immigration — Refugees — Protection visa — Application for — Procedural fairness — Whether proper opportunity to present claim — Culture and gender issues — Female Tamil applicant not given opportunity to give full account of her experiences in the absence of men — Denial of procedural fairness — Failure to adhere to gender guidelines — Migration Act 1958 (Cth).

Practice and Procedure — Estoppel — Abuse of process — Entitlement to raise procedural fairness issue despite previous court proceedings.

The first applicant, a Tamil woman, claimed that she was not given an opportunity to give a full account of her experiences for the purpose of applying for a protection visa. The applicant contended that she would have been able to overcome cultural barriers preventing the telling of her full story if she had been given an opportunity to speak of her experiences in the absence of men. The applicant was not afforded such an opportunity before her visa application was rejected, despite having stated on two occasions that she had further information to disclose to a female case officer. On application for judicial review, it was said that the Refugee Review Tribunal (the Tribunal) failed to afford the applicant procedural fairness when it affirmed the decision under review without applying the relevant gender guidelines and without giving the applicant a proper opportunity to provide the further information indicated.

According to the respondent Minister, the applicant was estopped from seeking any remedy because she had already been a party to two unsuccessful court challenges to the Tribunal decision. In the alternative, it was submitted that the application for judicial review amounted to an abuse of process.

Held: (1) The Tribunal ignored the real likelihood that the first applicant's evidence had not been exhausted. In doing so, the Tribunal denied her procedural fairness, and thereby failed to provide a hearing that accorded with its statutory obligation. [51]

(2) There has been no judicial determination of the question whether the Tribunal denied the applicants procedural fairness by failing to give the first applicant a proper opportunity to tell her full story. Nor has there been a previous judicial determination of a proceeding in which the issue of denial of procedural fairness could have been raised. Therefore the applicants are not estopped from now seeking remedies. [67], [69]

(3) The present application does not amount to an abuse of the process of the court. [71]

Cases Cited

Applicant S422 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 89; (2004) 138 FCR 151.

Applicant S70 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 182.

Applicants S61 of 2002 v Refugee Review Tribunal [2004] FCAFC 150; (2004) 136 FCR 122.

BC v Minister for Immigration and Multicultural Affairs [2001] FCA 1669; (2001) 67 ALD 60.

BC v Minister for Immigration and Multicultural Affairs [2002] FCAFC 221.

Calvin v Carr [1979] 1 NSWLR 1.

Immigration and Multicultural Affairs, Minister for v Anthonypillai [2001] FCA 274; (2001) 106 FCR 426.

Immigration and Multicultural Affairs, Minister for v Bhardwaj [2002] HCA 11; (2002) 209 CLR 597.

Immigration and Multicultural Affairs, Minister for v Cho [1999] FCA 946; (1999) 92 FCR 315.

Khawar v Minister for Immigration and Multicultural Affairs [1999] FCA 1529; (1999) 168 ALR 190.

M111 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 97.

NAHQ v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 297; (2003) 134 FCR 377.

Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2; (2003) 211 CLR 476.

Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589.

Refugee Review Tribunal, Re; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82.

SAAP v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 24; (2005) 79 ALJR 1009.

Sook Rye Son v Minister for Immigration and Multicultural Affairs [1999] FCA 7; (1999) 86 FCR 584.

SZFOG v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1374; (2005) 88 ALD 138.

Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 172.

Application

D Mortimer SC and *L De Ferrari*, for the applicants.

H Riley, for the respondents.

Cur adv vult

24 November 2005

Gray J.

The nature and history of the proceeding

1 Two principal issues arise in this proceeding. The first applicant, a woman who is a citizen of Sri Lanka and whose ethnic background is Tamil, claims that she was denied a proper opportunity to give a full account of her experiences in Sri Lanka on a particular occasion. She says that, if she had been permitted to overcome cultural barriers against telling her full story, by being allowed to tell it in the absence of men, particularly her husband, she may have been able to make good her claim that she had been persecuted in Sri Lanka. The first issue is whether the first applicant was denied a proper opportunity to put forward her claims, in a way that would ordinarily entitle her to have the decision against her set aside and to be provided with a further opportunity. If the first applicant succeeds on the first issue, the second issue arises. That is whether the first applicant is precluded from seeking a remedy otherwise available to her, because she has already been a party to two unsuccessful court challenges to the decision against her, and because of the time that has elapsed before the applicants began the present proceeding. The first challenge was in a proceeding in this Court, invoking an earlier statutory regime, more limited in some respects than the present one. The second challenge was an application to the High Court of Australia for an order nisi, remitted to this Court and dismissed by consent.

2 The first applicant is the wife of the second applicant. They are the parents of the other four applicants, all of whom were born in Sri Lanka. They arrived in Australia on 14 July 1996 (although the second applicant returned to Sri Lanka on 15 August 1996 and came again to Australia on 16 December 1996). On 22 August 1996, the first applicant and the children were granted a visa available to Sri Lankan people on humanitarian grounds. On 7 March 1997, the first applicant applied to the Department of Immigration and Multicultural Affairs (now the Department of Immigration and Multicultural and Indigenous Affairs) (in each case, the Department) for a protection visa. Her application included the second applicant and the children as applicants. The second applicant made an additional application in his own right for a protection visa, but the details of that application are immaterial to the present case. For present purposes, the success or failure of the second, third, fourth, fifth and sixth applicants in seeking to obtain protection visas depends upon whether the first applicant can qualify for a protection visa.

3 Section 36 of the *Migration Act 1958* (Cth) provides that there is a class of visas known as protection visas. The criterion that the first applicant had to satisfy, in order to obtain a protection visa, was that she be a non-citizen in Australia to whom the Minister for Immigration and Multicultural Affairs (now the Minister for Immigration and Multicultural and Indigenous Affairs) (in both cases the Minister) was satisfied Australia had protection obligations under the Refugees Convention as amended by the Refugees Protocol. The terms "Refugees Convention" and "Refugees Protocol" are defined in s 5(1) of the *Migration Act* as meaning respectively the *Convention relating to the Status of Refugees*, done at Geneva on 28 July 1951, and the *Protocol relating to the Status of Refugees*, done at New York on 31 January 1967. It is convenient to

call these two instruments, taken together, the "Convention". For present purposes, it is sufficient to say that, pursuant to the Convention, Australia has protection obligations to a 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.

4 On 8 December 1997, a delegate of the Minister made a decision refusing to grant protection visas to the applicants. The applicants then sought a review of that decision by the Refugee Review Tribunal (the Tribunal). The Tribunal conducted a hearing on 9 August 2000, at which the first and second applicants gave oral evidence. The Tribunal's written decision and reasons for decision are dated 1 September 2000 and were handed down on 15 September 2000. The Tribunal affirmed the decision not to grant protection visas to the applicants.

5 On 12 October 2000, the applicants filed an application in this Court, in proceeding No V789 of 2000, seeking to review the decision of the Tribunal under the powers then given to the Court by Pt VIII of the *Migration Act*. On 2 May 2001, North J dismissed the application with costs. His Honour's judgment bears a medium neutral citation, but I refrain from citing it here, as to do so would now infringe the prohibition in s 91X(1) of the *Migration Act* on the Court publishing the name of an applicant for a protection visa. By notice of appeal, in proceeding No V667 of 2001, the applicants appealed from the judgment of North J. The appeal was dismissed with costs by consent on 25 October 2001.

6 On 14 November 2001, the applicants applied to the High Court of Australia, in proceeding No M110 of 2001. By order of Hayne J, made on 31 July 2002, that proceeding was remitted to this Court and became proceeding No V821 of 2002. On 3 June 2003, by consent of the parties, Ryan J dismissed the application with costs.

7 On 22 January 2004, the applicants again applied to the High Court for relief in respect of the Tribunal's decision. The proceeding became No M16 of 2004 in the High Court, and the applicants were designated accordingly, in order to ensure compliance with s 91X(1) of the *Migration Act*. In a draft order nisi filed in the High Court, the Minister was named as the first respondent, the Tribunal member who constituted the Tribunal when it made the decision was named as the second respondent, and the Principal Member of the Tribunal was named as the third respondent. By order of Hayne J, made on 26 February 2004, the application was remitted to this Court.

8 On 22 July 2004, pursuant to an order requiring them to file an amended application containing proper particulars of the grounds relied upon, the applicants filed in this Court an application seeking relief pursuant to s 39B of the *Judiciary Act 1903* (Cth), in which the Minister is named as the first respondent and the Tribunal as the second respondent. In a notice of appearance filed in this Court on 13 May 2004, notice was given that "The respondents herein appears [sic]". The title to the proceeding in that notice of appearance listed as respondents the Minister "& Ors". The solicitors were described as "Solicitors for the respondent". The notice provided "The respondent's address for service".

9 It is now clear that, when relief pursuant to s 39B of the *Judiciary Act* is sought in respect of a decision of the Tribunal, the Tribunal must be joined as a

party to the proceeding. See *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; (2005) 79 ALJR 1009 at [43] per McHugh J, [91] per Gummow J, [153] per Kirby J, and [180] per Hayne J. In the light of that authority, by letter dated 9 August 2005, my associate advised the representatives of the parties that the state of the parties was unclear. In response, on 30 August 2005, a notice of appearance was filed, in which the Minister is named as the first respondent and the Tribunal as second respondent. An appearance is entered for each of those respondents. The notice advises that the Tribunal submits to any order the Court may make, save as to costs.

10 In order to ensure that all proper parties are bound by the order of the Court, and to avoid doubt, it seems to me that I should make an order that the Tribunal be joined as a party to the proceeding, in place of the original second and third respondents. Because of the filing of the amended notice of appearance, it is unnecessary to make any order as to service on the Tribunal of the amended application, or any other document.

The first applicant's claims

11 The applicants claimed to have lived in a town called Vavuniya, which was situated on the boundary between the Tamil-dominated north and the Sinhalese-dominated south of Sri Lanka. The town was a focal point in the struggle between the Liberation Tigers of Tamil Eelam (the LTTE), also known as the "Tamil Tigers", an organisation seeking to establish a separate Tamil state in the north of Sri Lanka, and the Sri Lankan Government forces, who were predominantly Sinhalese. To complicate the picture, in Vavuniya there were several pro-government, armed Tamil groups, bearing the acronyms EPRLF, PLOTE and TELO, all of whom oppose the LTTE. The second applicant was a businessman, and was targeted for extortion by the LTTE. The first applicant's brother-in-law was killed by EPRLF in 1989. The first applicant was ordered to sew uniforms for the LTTE and her life was threatened if she refused. There were also demands to prepare and pack food parcels for the LTTE.

12 In 1995, there was an increase in armed hostility between the LTTE and the government and its support groups. A military offensive in the north caused an influx of Tamils into Vavuniya. The first applicant was obliged to take in relatives and friends and to help them obtain security passes from the authorities, so that they could remain in Vavuniya. The second applicant employed two Tamils from Jaffna, who were abducted, and one was never seen again. The applicants were subjected to close scrutiny by PLOTE, members of which were suspicious of LTTE infiltration.

13 Central to the first applicant's claims were two events in July 1995. First, some PLOTE members came to the applicants' house and demanded that they be given a particular motorbike. The second applicant took the view that the person making the demand could not handle a motorbike of that size (200cc) and told the person this. The PLOTE men became angry and left without the motorbike. The second event occurred two days later, when the applicants' house was raided by the PLOTE (the July 1995 incident). Five men forced their way into the house, and more were outside in a vehicle. When the second applicant asked the intruders for a permit or for identification, they reminded him of his brother-in-law's demise at the hands of EPRLF. The first applicant and the second applicant were separated, the first applicant being taken into a bedroom by two men. The two men accused her of being a supporter of the LTTE, told her that she was "carrying a tiger-cub" (because she was four

months pregnant), kicked her in the stomach, and warned her that she would be killed if she were seen outside. In a statement accompanying the original application for a protection visa, the first applicant described the July 1995 incident to this extent, and said:

> I shall confess certain secret matters of sensitive issues, if I am called for an interview. I shall prefer a lady case officer to handle my case.

14 The first applicant claimed that the applicants left Vavuniya and went to Colombo in February 1996, after her child had been born in January 1996. She said that they were forced to pay a substantial sum of money to the PLOTE for a "security clearance". In Colombo, the first applicant was harassed by members of the EPDP, another armed group associated with EPRLF. She was detained and questioned for two weeks in late April 1996 and the EPDP warned her not to harbour LTTE cadres in Colombo. They told her they were aware that she had sewed uniforms for the LTTE, forced her to identify LTTE cadres, and only released her on payment of a bribe. She was then kidnapped twice and released only on payment of a ransom by the second applicant. In Colombo, the first applicant claimed she was also visited by LTTE cadres who insisted her family return to Vavuniya.

15 In a medical report, submitted to the Tribunal, compiled by the Victorian Foundation for Survivors of Torture, there is a brief history of the July 1995 incident. This history contains the statement:

> [The first applicant] HAS OTHER INFORMATION SHE WAS ONLY PREPARED TO REVEAL TO A FEMALE CASE OFFICER.

The processing of the first applicant's claims

16 Despite her clear statement that she had other matters to disclose, particularly to a female case officer, the first applicant was not afforded an interview by the Department. Instead, a delegate of the Minister rejected her claim for a protection visa.

17 The Tribunal member assigned to deal with the review of the delegate's decision was male. He had before him the first applicant's statement, accompanying the original application for a protection visa. Although he referred to that statement in his reasons for decision, and summarised the first applicant's claims, he did not refer to her statement that she would "confess" certain secret matters of sensitive issues if called for an interview and would prefer a lady case officer to handle her case.

18 The Tribunal conducted a hearing on 9 August 2000. The first applicant gave evidence in the absence of her husband, but in the presence of the applicants' migration agent, who was male. She gave her evidence through a female interpreter. Her migration agent had requested that a female interpreter be made available. Apart from this interpreter and the first applicant, every person at the Tribunal hearing appears to have been male.

19 The first applicant gave the Tribunal an account of the first visit of the PLOTE people to her home in July 1995, and of the July 1995 incident. Her description of the latter included the following:

> and then they pushed him into the guest room, they pushed my husband into the ground. I started to cry and wail because they were dragging my husband, so another person came and put his hand around my throat, dragged me by the hair and shoved me into another room. I was four months pregnant then and he said

> oh, you are carrying a little tiger in your belly and he kicked me in my stomach. After that I stopped even screaming once he was hitting me, then I heard my husband crying out in the other room.
>
> And the children were also screaming and crying so they suddenly left, something must have happened among them, they left. They told me if I see you anywhere outside I will kill you. From that time until the child was born, I didn't even go to the hospital for my routine checkup or anything that was asked of me, nothing, didn't shop, nothing.

20 The Tribunal member asked the first applicant no questions about the July 1995 incident. At a later point in her evidence, the Tribunal member asked her whether she had been traumatised by what had happened to her in Sri Lanka. Her response was "yes, I can't tell you how much". The Tribunal member then asked whether she had had treatment or counselling for that reason, and a discussion ensued as to whether she had seen a doctor, and whether the doctor was male. The first applicant said that she had also seen a female doctor. The Tribunal member questioned the first applicant about the medical report to which I have referred at [15], which contained the statement that the first applicant had other information that she was only prepared to reveal to a female case officer. The Tribunal member did not refer to this statement. He did not ask the first applicant if she had any further information, which she had not divulged to the Tribunal, nor did he invite her to reveal such information.

21 Towards the end of the Tribunal hearing, the applicants' migration agent asked for the opportunity to make a post-hearing written submission. The Tribunal member refused to receive such a submission saying, "unless there is something significant or new that's come up at the hearing, I'm not going to give you time". The Tribunal member pointed out that he had received two written submissions and had had three hours of hearing. He said that he could not see anything "significantly new in this hearing". The migration agent persisted with his request, but a discussion then occurred between him and the Tribunal member, about the significance of recent reports from Amnesty International and the United States. The migration agent made a closing oral submission, without mentioning the events of July 1995.

22 In his reasons for decision, the Tribunal member summarised the applicants' claims. His summary of the events of July 1995 was as follows:

> In the first week of July 1995, some PLOTE members came to the Applicants' house and demanded a 200cc motorbike. The Applicant spouse, noting that the person making the demand could not handle the bike, told him that he would not be able to ride such a large bike. The men became angry and left without the bike. Two days later, the house was raided by PLOTE. The Applicant said it was five men, her spouse said there were ten men and more waiting inside the van they used. The men forced their way in and the Applicant spouse asked for permit or identification. In response, he was reminded of his brother-in-law's demise and assaulted, and the Applicant and their children were confined to another room, where the Applicant was alleged to be a supporter of the LTTE, kicked in the stomach and warned she would be killed if she was seen outside. At that time she was four months pregnant.

23 The Tribunal referred to the medical report to which I have referred at [15]. In the course of its summary of that report, the Tribunal said:

> It states that her husband was also assaulted and threatened and that her children were traumatised and that she "has other information she was only prepared to reveal to a female case officer."

24 Apart from this passage, there is no mention in the Tribunal's reasons for decision of the possibility that the first applicant could provide further information about the July 1995 incident.

25 The Tribunal accepted some of the applicants' claims. It also rejected a number of crucial elements of those claims. As to the events of July 1995, the Tribunal said:

> In regard to the assault in July 1995, the sworn evidence of each Applicant was that members of PLOTE came to the house and demanded the use of a motorbike. They left in anger on the first occasion after the applicant spouse said that the person who wanted to ride the motorbike was too small and could not handle it. The evidence about events at that stage does not disclose that they were accused of LTTE connections. Some time later, they claim that many men returned in a van — somewhere between five and in excess of ten. The Applicants state that they became angry after the Applicant asked for identification or a search warrant, separated the Applicants and assaulted them. It is plausible that they then made or insinuated some accusations about the LTTE, but they left after a short time and did not attack the Applicants in the following six months before they left for Colombo. Nor, it seems, did they inform the government security officials that the Applicants might be associated with the LTTE, as those officials did not approach them over such a suspected connection before they left Vavuniya …
>
> The delay in leaving Vavuniya supports the conclusion that the incident with PLOTE was an isolated attack and the Applicants did not fear further attacks. That conclusion is borne out by the fact that no such further attack was made.
>
> The Tribunal has some doubts about the medical certificate the Applicant produced in support of her claims of assault in Vavuniya. It was not submitted until almost three years after it was written and the explanation that there was confusion between the Applicant and her adviser was not particularly convincing, partly because there seemed to be no need to reproduce it if each of those people believed it had already been submitted. It is written in two hands and the information it contains about being struck in the chest with a club is at odds with the Applicant's claim that she was kicked in the stomach. It makes no referrals to other practitioners, although the Applicant says she was referred, but did not follow up that advice. Despite the misgivings about the medical evidence, the Tribunal is satisfied, in all of the circumstances, that PLOTE members assaulted the Applicants after they refused to bow to their demands to use their motorbike. It is not satisfied that the assault was motivated by any Convention reason, notwithstanding the insults and threats directed at the Applicants. While the Tribunal accepts that the Applicants and others had to vacate their houses while PLOTE and other groups searched for LTTE suspects, the Applicants were not harmed during those episodes. Given that members of PLOTE did not harm the Applicants either before or after the assault in mid-1995, despite having ample opportunity to do so, and in light of the discussion above, the Tribunal is satisfied that the assault was an isolated incident that was unrelated to the Convention and concludes there is not a real chance the Applicants face persecution for a Convention reason from PLOTE or other militant groups that operate in Vavuniya.

26 The Tribunal also summed up in relation to the July 1995 incident as follows:

> It finds that they were assaulted in 1995 by PLOTE members who became angry when they cast doubt on the ability of one of the members to ride a motorcycle but

> it is satisfied that they are not suspected of affiliation with the LTTE, either by government officials or their allied militant groups, and do not face a real chance of persecution for that reason.

27 The Tribunal found that the applicants could return to Vavuniya, where the chances of persecution were remote. If they remained anxious about going there, it would be reasonable that they relocate to Colombo. After discussing at length the treatment of Tamils generally by security forces, the Tribunal returned to the issue. It said:

> In considering the Applicants' claims, the Tribunal finds that they were born and spent most of their lives in Vavuniya. It accepts that the Applicant was detained and mistreated by the IPKF in 1987, but that group returned to India in the early 1990's [sic] and the Applicant and her family did not encounter any further serious harassment at the hands of the Sri Lankan authorities or its agencies, save for an assault in 1995 when PLOTE members came to their house. As discussed above, that assault was an isolated incident, motivated by anger or revenge and unrelated to the Convention. It was not repeated during the following period the Applicants remained in Vavuniya and there is not a real chance it might be repeated in the foreseeable future.

The first applicant's affidavit

28 The first applicant has sworn an affidavit on 6 July 2004. It was filed in this Court on the following day. It sets out information that she said she would have provided to the Minister's delegate, if given the opportunity of an interview with a female case officer. She also says that she would have provided the information to the doctor whom she had consulted but, even when she saw a female doctor, her interpreter was her brother-in-law. Because the Tribunal member was male, and there were always men present, she did not disclose the additional information to the Tribunal.

29 The second applicant has also sworn an affidavit on 6 July 2004, which is filed in this proceeding. In it, he says that he is aware that the first applicant has prepared an affidavit concerning an incident that occurred in Sri Lanka in July 1995. He is aware that, in that affidavit, the first applicant has disclosed information that he does not know and that she does not want him to know, because "of the culture of the Sri Lankan people". The second applicant wishes to respect the decision of the first applicant not to disclose that information to him. He does not wish to see her affidavit and does not want to be informed of its contents.

30 In the course of the hearing in this Court, whenever the contents of the relevant parts of the first applicant's affidavit were discussed, the other applicants chose to absent themselves from the courtroom.

31 In order to deal with the application before the Court, it is necessary to discuss the matters raised in the first applicant's affidavit in these reasons for judgment. Because of the sensitivities of the applicants about the details contained in the first applicant's affidavit, it is necessary for me to express in these reasons for judgment the basis on which I make orders, so as to expose my reasoning publicly, but without disclosing details of what the first applicant has said at [13]-[21] of her affidavit. It is unnecessary to recount those details in order to explain my reasoning.

32 In the course of the hearing of this application, counsel for the Minister indicated to the Court that she required the first applicant to be available for cross-examination on her affidavit. I indicated that I did not consider

cross-examination to be appropriate, if it were to be directed to the question whether I should accept the first applicant's account of the details of the July 1995 incident. It appeared to me that the affidavit had been tendered as evidence of what the first applicant would have said to the Minister's delegate, and to the Tribunal, if she had been given a proper opportunity to put her case. It would be wrong for me to make a finding about whether anything that the first applicant said in the affidavit, about the events of July 1995, did or did not occur. The facts of the case were a matter for determination, first by the Minister's delegate, and second by the Tribunal. They are not matters for the Court. Counsel for the respondents confirmed that the affidavit was tendered on the basis that it was intended to satisfy any requirement that the applicants be able to show that, if they had been afforded procedural fairness, the result might have been different. On this basis, counsel for the Minister withdrew her request to cross-examine the first applicant. I take the view that the evidence at [13]-[21] of the first applicant's affidavit constitutes evidence of what the first applicant would have said, had she not felt constrained by the presence of men at the Tribunal hearing.

Procedural fairness

33 The concept that was known for many years as natural justice, and is now called procedural fairness, is an element of the administrative decision-making process. It requires that, before making a decision adverse to the rights or interests of a person affected by the decision, the decision-maker afford to that person an opportunity to be heard in relation to the subject-matter of the decision. This requirement applies to decisions under the *Migration Act*. A decision as a result of a process in which procedural fairness has been denied will be a decision based on jurisdictional error. See *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at [5] per Gleeson CJ, [41] per Gaudron and Gummow JJ, [169] per Hayne J and [210] per Callinan J. Such a decision is "regarded, in law, as no decision at all". See *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; (2002) 209 CLR 597 at [51] per Gaudron and Gummow JJ; *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ. Such a decision is certainly not a "decision … made … under this Act", for the purposes of the definition of "privative clause decision" in s 474 of the *Migration Act*. See *Plaintiff S157/2002* at [86]-[87] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ. As a consequence, s 474(1) of the *Migration Act* does not operate to prevent application being made to the High Court, pursuant to s 75(v) of the *Constitution of the Commonwealth*, for writs of prohibition and mandamus (and incidentally for a writ of certiorari), and does not prevent the High Court remitting such an application to be dealt with by this Court.

34 It has been recognised, at least since *Calvin v Carr* [1979] 1 NSWLR 1 at 14-15, that the nature and quality of the hearing to which a person is entitled will depend upon the kind of function exercised by the decision-maker and the circumstances in which that function is being exercised. There are no hard and fast "rules" of procedural fairness, prescribing in detail the procedures that every decision-maker must follow. It is necessary to look at any relevant statutory provisions, the nature of the function being exercised pursuant to those provisions and the manner in which the issues in the particular case are presented, in order to judge what amounts to procedural fairness.

35 The circumstances of the present case, relevant to a consideration of what amounts to procedural fairness, plainly include the fact that the first applicant is female and the fact that she is not only ethnically, but also culturally, Tamil. The willingness, and often the very ability, of people to talk about their experiences are affected by what are described as "gender issues", and by cultural norms. This is now so well understood that it hardly seems necessary to state it. There is a common awareness that it is unwise for a professional decision-maker to adopt a uniform approach in gathering material relevant to the making of decisions, irrespective of sex or cultural background. Proper performance of the task involves abandoning assumptions about how people "normally" react to events and about their ability to recount those events. Proper performance of the task involves attempting to understand the constraints under which those to be affected by the decisions, and others they may call upon to provide evidence on their behalf, may behave.

36 It might be thought that considerations of gender issues and cultural factors have no place in the functioning of the Tribunal, or had no such place in August 2000, when the Tribunal conducted its hearing. It might be considered that the Court should not adopt a particular policy position in favour of gender equity, or some particular attitude to cross-cultural awareness, and attempt to impose that position, or that attitude, on the Tribunal. For this reason, it is important to refer to documents that were in evidence before the Court.

37 In a media release, dated 3 June 1996, the then Minister announced the release for public comment of draft guidelines dealing with gender-related claims by asylum seekers (the gender guidelines). In a subsequent press release, dated 15 July 1996, the then Minister announced the finalisation of the gender guidelines, announcing the commitment "to ensure bona fide refugees are given every opportunity to present their case in a sensitive and fair process". The Minister said that the gender guidelines "will ensure that decision-makers deal with gender-related claims in a sensitive and consistent manner". In both media releases, the Minister noted "that women refugees and asylum seekers might face particular problems in seeking protection". The problems to which the then Minister referred included "difficulties in discussing claims related to sexual violence or cultural difficulties". It was also announced that the gender guidelines would be "used by all officers of the Department making decisions on refugee cases".

38 The gender guidelines are in a 22-page document, dated July 1996. In para 2.2, they list international instruments in which obligations to protect the human rights of women, including refugee women, may be found. It is unnecessary for me to set out that list here. It is reproduced conveniently in the judgment of Branson J in *Khawar v Minister for Immigration and Multicultural Affairs* [1999] FCA 1529; (1999) 168 ALR 190 at [38]. In para 2.11 of the gender guidelines, it is recognised that:

> Guidelines for officers which specifically address women's needs are important if women's claims of persecution, including gender-based persecution, are to be properly heard and assessed. When applying for humanitarian visas, women may face particular problems, such as difficulties in making their case to decision makers, especially when they have had experiences which are difficult and painful to describe. There may also be social and cultural barriers to lodging applications and/or pursuing claims related to their own experiences.

39 Paragraph 3.12 of the gender guidelines contains the following:

> Many women face particular difficulties when discussing gender-related claims which may include rape, or other forms of sexual violence, domestic violence and discrimination. In particular, women may experience difficulty in recounting sexual torture or rape in front of family members. Some women, because of the shame they may feel over what has happened to them, may understandably be reluctant to identify the true extent of persecution they have suffered because of their continuing fear and distrust of people in authority. They may also be afraid to reveal their experiences because they are so traumatised by them or because they fear reprisals from their family and/or community. Female applicants who are survivors of torture and trauma, in particular, require a supportive environment where they can be reassured of the confidentiality of the gender-sensitive claims they are making.

40 Following para 3.13 appears the statement that:

> In the vast majority of cases women who have experienced torture and/or trauma have suffered these abuses at the hands of men. Coupled with a fear and distrust of authorities, this fact is likely to seriously inhibit the capacity of a female applicant to divulge details of her experiences to a male interviewer.

41 According to para 3.26 of the gender guidelines:

> If an officer feels that a female applicant has further claims of a sensitive nature that have not been discussed during any stage of the interviewing process, the applicant should be encouraged to provide any supplementary information that she feels may support her claims. Alternatively, if an applicant has difficulty in speaking about her persecution, she may be more comfortable putting her claims in writing.

42 It is recognised in para 3.27 that it is:

> unlikely that a woman whose written claims are part of an application supplied by other members of her family unit or who is interviewed in the presence of other family members will discuss the circumstances surrounding a sexual assault.

43 The gender guidelines also recognise that a failure to raise a gender-related claim on several occasions should not necessarily cast doubt on the credibility of a person who raises it at a later date.

44 There can be no doubt that the gender guidelines were ignored altogether in dealing with the first applicant's claims. The two sentences I have quoted at [13], from the first applicant's statement accompanying her original application for a protection visa, could not be construed as anything other than giving notice that she had more to say about the July 1995 incident, and that she was sensitive about saying it to a man. At the very least, this should have sounded warnings to the Minister's delegate that there may have been gender-related claims and that there were cultural reasons why the first applicant did not wish to reveal them to a man. Anyone making a serious attempt to comply with the gender guidelines would have arranged to interview the first applicant in a manner that would have been conducive to ascertaining what she wanted to say. As it was, the Minister's delegate dealt briefly with the July 1995 incident in written reasons, without mentioning either the first applicant's claim to have been kicked, or her statement that she had more to say about the incident.

45 The Tribunal had even more reason to suppose that there were gender-related matters that the first applicant would not speak about in the presence of men, for cultural reasons. It would be extremely unlikely that the Tribunal member had not read the first applicant's statement attached to her original application for a

protection visa. The statement is mentioned early in the Tribunal's reasons for decision. Later in its reasons for decision, as I have said at [23] and [25], the Tribunal referred in some detail to the medical report, to which I have referred at [15], even to the point of quoting from it the statement that the first applicant "has other information she was only prepared to reveal to a female case officer". An examination of the transcript of the Tribunal hearing makes it clear that at no stage did the Tribunal member make any attempt to encourage the first applicant to reveal this information. He did not make the obvious suggestion that, if her husband and the male migration officer would leave the hearing room, she might be able to reveal the other information to the Tribunal member, through the female interpreter. It is even possible that, in her response to the Tribunal member's question whether she had been traumatised by what had happened to her in Sri Lanka (which I have quoted at [20]), the first applicant was making a coded request for help in revealing the further information that she had. Even if this were not the case, the Tribunal member clearly had no interest in pursuing the issue, despite the fact that it was obviously raised. Far from giving the first applicant the opportunity to put her claims in writing, if she could not bring herself to reveal them to him, as suggested in para 3.26 of the guidelines, the Tribunal member refused to receive any written submissions after the hearing.

46 Counsel for the applicants contended that the first applicant had been denied procedural fairness by the Minister's delegate. This is perhaps a difficult argument to sustain, in the light of the express provision of s 54(3) of the *Migration Act* allowing a decision to be made without giving an applicant an opportunity to make oral or written submissions, and s 55(2), which expressly provides that the Minister is not required to delay making a decision because an applicant has indicated that he or she intends to give further information. It is unnecessary to determine the question, however. Any denial of procedural fairness on the part of the Minister's delegate was capable of being cured by proper procedure at the Tribunal level.

47 The Tribunal certainly had an obligation to afford the first applicant a hearing. Section 425(1) of the *Migration Act* imposes an obligation on the Tribunal to invite an applicant to appear before it to give evidence and present arguments. The Tribunal sent the applicants' migration agent a notice containing such an invitation. It is established by authority, however, that the giving of such an invitation is not the end of the Tribunal's obligation pursuant to s 425(1). The hearing to which an applicant for review is entitled must be a hearing in reality. See *Minister for Immigration and Multicultural Affairs v Cho* [1999] FCA 946; (1999) 92 FCR 315 at [33] per Tamberlin and Katz JJ and [66]-[68] per Sackville J, and *Sook Rye Son v Minister for Immigration and Multicultural Affairs* [1999] FCA 7; (1999) 86 FCR 584 at [36]-[37] per Moore J.

48 Counsel for the Minister attempted to argue that the Tribunal was not itself bound by the gender guidelines. The gender guidelines themselves refer to "officers" and "decision-makers". As I have said, their promulgation was announced by the former Minister. They bear the title of the Department. The Tribunal is established separately from the Department, by s 394 of the *Migration Act*. It is plainly intended to be independent of the Minister and the Department (which makes it rather odd that it should act through the same solicitors as the Minister in a case such as the present). The Tribunal does not function in isolation from the Department, however. Its statutory duty, pursuant to s 414(1) of the *Migration Act*, is to review decisions made by officers of the

Department in their capacity as delegates of the Minister. For that purpose, pursuant to s 415(1), the Tribunal has all of the powers and discretions conferred on the person who made the decision. In effect, the Tribunal stands in the shoes of the Minister's delegate, when it exercises its function of reviewing a decision of such a delegate. It would be anomalous, if not offensive to reason, to suggest that the Tribunal could ignore guidelines prepared for the benefit of officers of the Department when exercising powers as delegates of the Minister. The Tribunal and the Migration Review Tribunal routinely make use of other guidelines, particularly those contained in the Department's Procedures Advice Manual (PAM III). Further, in general practice direction No 8 of the Tribunal, made pursuant to s 420A of the *Migration Act*, there is express recognition of the need to deal appropriately with gender-related issues.

49 The gender guidelines are not some heavy-handed regime imposed on decision-makers as a result of the adoption of some particular policy position. Nor can they be reduced to the status of ideals, promulgated to the public, but ignored by decision-makers whenever their application would give rise to inconvenience. They represent nothing more or less than the recognition of the appropriate way in which to deal with the difficulties some people have in expressing themselves publicly about some matters, as a result of cultural constraints. The Tribunal does not afford a proper hearing to a person when it fails to give that person an opportunity, readily available, to communicate about such matters. In *Khawar* at [38], Branson J said that reference could be made to the gender guidelines to ascertain "the appropriate approach to be adopted by a decision-maker assessing a gender-based claim for a protection visa". Her Honour's judgment was given some nine months before the Tribunal hearing in the present case.

50 In the present case, the Tribunal failed to afford the first applicant a proper opportunity to provide further information, when the Tribunal member was aware she was capable of providing information that might have been relevant to her claim. It should have been obvious to the Tribunal member that there were gender-specific issues about which the first applicant could speak if given a proper opportunity.

51 At the very least, the Tribunal member should have referred to the issue in the course of the hearing. I cannot accept the submission made by counsel for the Minister that the Tribunal member was entitled to assume that the first applicant had said all that she wished to say about the July 1995 incident. It was far too obvious that there was at least a risk that the fact that the Tribunal member was male, and the fact that there were other men present, might have been a reason why the first applicant had held back information. It would not have occasioned difficulty for the Tribunal member to raise the question. Not a great deal of sensitivity would have been required for the Tribunal member to suggest that the first applicant could give evidence to him, through the female interpreter, in the absence of the second applicant and the migration agent. Alternatively, it would have been relatively easy for the Tribunal member to have acceded to the migration agent's request for the opportunity to make written submissions, suggesting that arrangements might be made for the first applicant to say in writing anything more that she wished to say about the July 1995 incident. In effect, the Tribunal member ignored the real likelihood that the first applicant's evidence on the subject had not been exhausted. In

doing so, the Tribunal member denied the first applicant a proper hearing. The Tribunal denied the first applicant procedural fairness, and thereby failed to provide a hearing that accorded with its statutory obligation.

52 It cannot be said that the denial of procedural fairness made no difference to the outcome. Had the Tribunal been aware of what the first applicant says in the last sentence of [14] of her affidavit, it might well have found that the assault of the first applicant by PLOTE members in July 1995 was far more serious than it had supposed. The first applicant's chances of persuading the Tribunal that she had been persecuted by PLOTE members would certainly have been increased. More importantly, had the Tribunal been aware of the matters referred to at [15] and [16] of the first applicant's affidavit, the Tribunal's finding that the July 1995 incident was "an isolated incident" might not have been made. Had the Tribunal been aware of the power that the PLOTE members acquired to ruin the first applicant's life, and of the ongoing effect of that power, its conclusions as to the future might also have been different. The Tribunal might have taken a different view about the likelihood of ongoing persecution of the first applicant by pro-government Tamil organisations, and about the capacity of the applicants to solve any problems by relocating to Colombo. In the words of para 4.19 of the gender guidelines:

> an overall understanding of the role and perception of women in the applicant's society will demonstrate the extent of the persecution a woman would face if she were to return.

53 It follows from what I have said that, if the first applicant is entitled to pursue the ground of denial of procedural fairness in this proceeding, then the applicants are entitled to succeed. It is therefore necessary to examine the effect of the earlier proceedings on the entitlement to pursue that ground in this proceeding.

The effect of previous proceedings

54 There is a sense of unreality about dealing with the question whether the applicants are disentitled from seeking relief with respect to the Tribunal's decision, by reason of their involvement in previous proceedings in this Court and the High Court, in relation to that decision. The Tribunal either is already a party to this proceeding, or will become a party to it upon the making of the order to which I have referred at [10]. Both the Tribunal and the Minister will therefore be bound by the finding that the Tribunal has denied the first applicant procedural fairness, and the conclusion that, as a consequence, the Tribunal's decision is flawed by jurisdictional error. The result of that conclusion is that the decision is "regarded, in law, as no decision at all". See *Plaintiff S157/2002* at [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ. Both the Tribunal and the Minister are therefore bound to take the view that the statutory obligation of the Tribunal, pursuant to s 414 of the *Migration Act*, to review the decision of the Minister's delegate, has yet to be performed. In those circumstances, the Tribunal has the power, and probably the duty, to perform its statutory function. See *Bhardwaj*. Even without the grant of any of the remedies sought in this proceeding, the applicants would be entitled to have their application for review of the decision of the Minister's delegate dealt with by the Tribunal according to law. It is nevertheless appropriate to consider whether the relief sought can and should be granted. A formal quashing of the Tribunal's decision and a command to the Tribunal to exercise its function might well have

practical consequences. In addition, the nature of any order for costs of this proceeding might depend upon whether orders of the kind sought are made.

55 The principal obstacle to the applicants' claiming relief in the present case is their involvement in the earlier proceedings. Counsel for the Minister contended that this involvement gives rise to an estoppel against the applicants, preventing them from bringing this proceeding. Alternatively, it was submitted that I should refuse to deal with the application, on the basis that it is an abuse of the process of the Court.

56 For the purpose of dealing with these submissions, it is necessary to consider four concepts: res judicata, or cause of action estoppel; issue estoppel; estoppel in respect of issues not raised in previous litigation, on the basis that they ought to have been raised, as explained in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 (*Anshun* estoppel); and abuse of the process of the Court. The principles relevant to the first three of these concepts are set out helpfully in the judgment of Sackville J in *BC v Minister for Immigration and Multicultural Affairs* [2001] FCA 1669; (2001) 67 ALD 60 at [17]-[27], [29]-[30], [36], [39] and [50]. In *BC v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 221, the Full Court dismissed an appeal from Sackville J's judgment. The Full Court did not deal with the principles discussed by Sackville J. It confined its attention largely to the question whether "special circumstances" existed, on the facts of the particular case, for the purposes of the application of *Anshun* estoppel. For present purposes, I am content to regard what Sackville J said as stating the law on res judicata, issue estoppel and *Anshun* estoppel.

57 On this basis, the following issues arise in the present case:

- Is the "cause of action" in the present case the same as the "cause of action" raised by the applicants in any previous proceeding and finally determined in that proceeding?
- Is any issue in the present proceeding, on which the applicants must succeed if they are to establish their entitlement to relief in the present case, an issue of law or fact that has been determined against them in a judicial proceeding?
- If the denial of procedural fairness ground is a new ground, ought the applicants to have raised it in any previous proceeding?
- If so, has such proceeding been the subject of a final determination by a court?
- Do "special circumstances" exist that would lead the Court to permit the applicants to raise denial of procedural fairness in the present case?

58 Counsel for the Minister also argued that this proceeding amounts to an abuse of the process of the Court and ought to be dismissed accordingly.

59 As a first step, it is necessary to turn to the record of the previous proceedings, in order to see what grounds were relied upon and what issues were raised in those proceedings.

60 In proceeding No V789 of 2000, the applicants invoked the jurisdiction then given to this Court by s 476(1) of the *Migration Act*. The grounds on which such an application could be made were specified in that subsection. The application filed on 12 October 2000 did nothing but repeat five of those grounds; it contained no particulars of them. Subsequently, the applicants filed an amended application, relying on four grounds: that the Tribunal did not observe procedures that were required to be observed in connection with the

making of the decision; that the Tribunal did not have jurisdiction to make the decision; that the decision was not authorised by the legislation; and that the decision involved an error of law. The particulars of those grounds raised s 430 of the *Migration Act* and contended that the Tribunal had failed to set out its reasons, its findings on material questions of fact, or the evidence on which its findings were based, in relation to certain findings of fact. Those findings were specified as follows:

> (a) The Tribunal's statement that "The Tribunal does not accept that LTTE cadres visited the [First] Applicant in Colombo prior to her departure for Australia. One reason for disbelieving her is that she has stated she was in hiding at a friend's place, disguised as a Muslim …"
> (b) The Tribunal's statement that "The Tribunal is satisfied that the PLOTE demand for payment … was merely financially motivated and was unrelated to Convention reasons."
> (c) The Tribunal's statement that "It is not satisfied that the assault [by PLOTE members in the 1995 incident] was motivated by any Convention reason, notwithstanding the insults and threats directed at the Applicants … the Tribunal is satisfied that the assault was an isolated incident that was unrelated to the Convention and concludes that there is not a real chance the Applicants face persecution for a Convention reason from PLOTE or other militant groups that operate in Vavuniya."
> (d) The Tribunal's statement that "The Tribunal does not accept that the Applicant was detained by the EPDP in Colombo and that she was forced to disguise herself as a Muslim after her release … Indeed it is implausible that neither the [First]Applicant nor her spouse would report the EPDP harassment to the authorities …".

61 The applicants also alleged that the Tribunal failed to give "proper genuine and realistic consideration to the aspects of the applicants' claims set out" in those particulars. They also contended that the Tribunal erred in considering that, if there were a personal motive for assault of the applicants by members of the PLOTE, there was neither persecution for a Convention reason, nor a well-founded fear of persecution for a Convention reason. Finally it was contended that the Tribunal erred in considering that, if there were a financial motive for the exaction of bribes from the applicants by members of PLOTE, there was neither persecution for a Convention reason, nor a well-founded fear of persecution for a Convention reason.

62 In written contentions, the applicants' counsel in that case addressed the July 1995 incident by arguing that there was nothing in the Tribunal's reasons explaining its conclusion that the PLOTE attack had nothing to do with a Convention ground.

63 The applicants contended that the failure of the Tribunal to explain why it regarded the July 1995 incident as a matter of private revenge, completely unrelated to the Convention, was a breach of its obligations under s 430 of the *Migration Act*. In supplementary written contentions, counsel for the applicants in that case changed the emphasis of the argument in relation to the July 1995 incident, by contending that the Tribunal had not discharged its function to "consider" or "review" the decision of the Minister's delegate, by failing to consider whether the assault by PLOTE members was in part for the reason of the applicant's race or imputed political opinion.

64 North J dismissed the application. In his reasons for judgment, his Honour found that the Tribunal had complied with its obligations to give reasons,

pursuant to s 430 of the *Migration Act*, in relation to all of the issues raised, including the July 1995 incident. His Honour further recorded that the contention that the Tribunal had failed to give proper, genuine and realistic consideration to the applicants' claims was put only in a formal sense by counsel for the applicants, who recognised that the Full Court in *Minister for Immigration and Multicultural Affairs v Anthonypillai* [2001] FCA 274; (2001) 106 FCR 426 had rejected the proposition that such an argument was available under the grounds on which an application could be made to this Court to review a decision of the Tribunal.

65 The applicants appealed from the judgment of North J. The grounds of appeal again raised a failure by the Tribunal to comply with its obligations under s 430, in relation to two issues, one of which was the July 1995 incident. The grounds of appeal also raised the contention that the Tribunal had failed properly, or at all, to consider the claims of the applicants in relation to those matters. By an order made by consent on 25 October 2001, French J dismissed the appeal with costs.

66 In proceeding No M110 of 2001, the applicants applied to the High Court of Australia for an order nisi, seeking a writ of prohibition, a declaration, a writ of certiorari, a writ of mandamus and an injunction, in relation to the Tribunal's decision. The grounds specified in the draft order nisi filed in that Court alleged error of law, taking irrelevant considerations into account or failing properly to take account of relevant considerations, acting without jurisdiction in misinterpreting or misapplying the relevant law, and making a decision so unreasonable that no reasonable tribunal could have made it. The grounds were particularised in three ways, one of which was an allegation that the Tribunal failed to consider that, even if the members of PLOTE who assaulted the applicants did so for reasons unrelated to the Convention, they might also have been motivated by reasons of race or political opinion. On 14 November 2001, the first applicant swore an affidavit, which was filed in the High Court in that proceeding. The affidavit was intended to provide evidence in support of an application to enlarge the time limits, fixed by the *High Court Rules 1952* (Cth), for bringing the application for an order nisi. It did not deal in any significant way with the merits of the case. On 31 July 2002, Hayne J ordered by consent that further proceedings in the application for an order nisi be remitted to this Court. On 3 June 2003, by consent, Ryan J dismissed the application with costs.

67 It is clear from this history that the applicants have not raised the issue of denial of procedural fairness in any previous proceeding. It is not surprising that they did not raise this issue in proceeding No V789 of 2000, because s 476(2)(a) of the *Migration Act* then provided that "a breach of the rules of natural justice" in connection with the making of a decision was not a ground upon which an application could be made under s 476(1). Although denial of procedural fairness could have been raised in proceeding No M110 of 2001 in this Court, it was not raised. In neither proceeding did the material advert to what the first applicant had not said, but might have said, in relation to the July 1995 incident. There has therefore been no judicial determination of the question whether the Tribunal denied the applicants procedural fairness by failing to give the first applicant a proper opportunity to tell her full story. There can therefore be no res judicata estoppel, or issue estoppel, in relation to that point. I respectfully adopt what Sackville J said at [36] in *BC*, and regard the ground of denial of procedural fairness as founding a separate legal claim for relief, and therefore as

constituting a separate cause of action from those which were agitated by the applicants in the earlier proceedings. It is a claim distinct from those raised in the earlier proceedings. The distinction is evidenced by the fact that a denial of procedural fairness could have been raised in the High Court, even though it could not have been raised in this Court, when Pt VIII of the *Migration Act* was in its earlier form.

68 It is clear from the order made by Hayne J on 31 July 2002, remitting proceeding No M110 of 2001 from the High Court to this Court, that what was remitted was an "application for an order nisi". That phrase appears in the first two paragraphs of the order. It would have been open to the applicants at any time before an order nisi was made to withdraw that application and to make another application for an order nisi, subject to any issue of time limits. See *SZFOG v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1374. An order of a court dismissing an application for an order nisi is regarded as an interlocutory judgment, not as a final judgment. See *NAHQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 297; (2003) 134 FCR 377, followed (despite the expression of some doubt about its correctness) in *Applicant S422 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 89; (2004) 138 FCR 151. If the application had been heard, the hearing would normally have been on the basis that the Court was determining whether, if an order nisi were made, it should be made absolute. See O 51A, r 5 of the *Federal Court Rules 1979* (Cth). If the application had been dismissed after a hearing, the fact that no order had been made under O 51A, r 5(2), the terms of the reasons for judgment, and the form of the order made dismissing the application might have given rise to the conclusion that the judgment was to be considered as final, and not as interlocutory. See *Applicants S61 of 2002 v Refugee Review Tribunal* [2004] FCAFC 150; (2004) 136 FCR 122 at [31]-[40], followed in *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 172 at [21]-[25]. In the present case, that did not occur. The application was dismissed by order made by consent. The order was made at the initiative of the applicants. It was the equivalent to the withdrawal of the application for an order nisi. It was not therefore a final judgment of the Court. It is not to be taken as a judgment on the merits.

69 It follows that, even if it might be said that the applicants ought to have raised the denial of procedural fairness issue in proceeding No M110 of 2001, they cannot be estopped from raising it now, because that proceeding was never the subject of a final judgment. There has been no previous judicial determination of a proceeding in which the issue of denial of procedural fairness could have been raised. There is no possibility in this proceeding of a judgment being given that is at variance, or in conflict, with any previous judgment. On this view, no occasion arises to consider whether there are "special circumstances", for the purposes of the application of the principles of *Anshun* estoppel.

70 If it were necessary to look for "special circumstances", they undoubtedly exist in the present case. As I have said, the applicants had no entitlement to raise denial of procedural fairness as a ground for challenging the validity of the Tribunal's decision at the time they instituted proceeding No V789 of 2000. At the time when they were engaged in proceeding No M110 of 2001, the applicants had a male solicitor acting for them. The cultural constraints, to

which I have referred earlier, prevented the first applicant from revealing the true extent of what had happened to her in the course of the July 1995 incident. The failure to raise denial of procedural fairness in that proceeding was not the result of inadvertence or negligence. It was the result of the operation of the very same factors that had constrained the first applicant from telling her full story in the original application for a protection visa and before the Tribunal. As she saw it, there was a real need to ensure that the story was not told in circumstances that would bring the details to the attention of her husband, or of other men. If it were necessary to do so, I should find that special circumstances existed and that *Anshun* estoppel does not operate to prevent the applicants from raising denial of procedural fairness to the first applicant in this proceeding.

71 In these circumstances, it would be unrealistic to suggest that the making of the application in the present proceeding amounts to an abuse of the process of the Court. It is a sufficient answer to this argument to say that the applicants are perfectly entitled to mount a case based on denial of procedural fairness, when such a case has not been the subject of any prior proceeding, and there are good reasons why the first applicant would have been reluctant to reveal the information that would have formed the basis for raising the procedural fairness issue. It is in the interests of justice that the first applicant should have her day in court on that issue. See *SZFOG* at [22]-[38].

Time limits

72 Counsel for the Minister contended that, so far as it involves applications for writs of certiorari and mandamus, the application to the High Court in the present proceeding was outside the time limits specified in the *High Court Rules*. By O 55, r 30 of the *High Court Rules*, as applicable at the time of the Tribunal's decision, the time limit for an application for a writ of mandamus was two months. In the case of a writ of certiorari, by O 55, r 17 of the *High Court Rules*, the time limit was six months from the date of the decision. By O 60, r 6 of the *High Court Rules* in the form in which they then were, there existed a general power to enlarge such time limits, now found in r 4.02 of the *High Court Rules*.

73 A variety of views has been expressed in this Court as to whether time limits in the *High Court Rules* are of any relevance once an application has been remitted to this Court. Many of the authorities are referred to in *Applicant S422 of 2002* at [11]-[15] per Dowsett and Lander JJ. At [16]-[34], their Honours expressed the view that the provisions of the *High Court Rules* had no role to play once a remitter, such as that in the present case, had occurred. The question was said by two subsequent Full Courts to be unresolved. See *M111 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 97 at [5] and *Applicant S70 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 182 at [15]. I am persuaded by the reasoning of Dowsett and Lander JJ in *S422*. The better view is that the proceeding is governed by the *Federal Court Rules* as to procedural matters, once it has been remitted to this Court, and that issues of time limits are procedural, and not substantive, matters.

74 There is a further element in the present case. Without objection on behalf of the respondent, on 7 June 2004, I made an order that the applicants file and serve an amended application for an order of review. The amended application was filed on 22 July 2004. It invokes the jurisdiction conferred on this Court by s 39B of the *Judiciary Act*. The issue of denial of procedural fairness was raised

for the first time in that amended application. The draft order nisi filed on behalf of the applicants in the High Court in this proceeding was in the same terms as that filed on their behalf in proceeding No M110 of 2001. In my view, the jurisdiction conferred on this Court by s 39B was invoked by the amended application, independently of the remitter of the application for an order nisi filed in the High Court. The relevant time limit applicable to the making of an application to this Court is that found in s 477(1) of the *Migration Act*. That time limit is applicable "in respect of a privative clause decision". As I have said, the effect of the High Court's judgment in *Plaintiff S157* is that, if a decision is the result of jurisdictional error, it does not fall within the definition of "privative clause decision" in s 474(2) of the *Migration Act*. Accordingly, in a case involving jurisdictional error, such as the present, there is no provision for a time limit on applications to this Court.

75 For these reasons, no enlargement of time is necessary. If it were, then I should grant an enlargement of time in the highly unusual circumstances of the present case. As I have said, it is only because the first applicant has finally had the benefit of female legal advisers that she has felt able to divulge the details of the July 1995 incident. The consequence of enlarging time will be that the first applicant will be able to have her case determined by reference to the material on which it should have been determined in the first place. Apart from the costs of this proceeding, and the expense of undertaking the processing of the applicants' application to review the Minister's delegate's decision, there will be no prejudice to the Minister or the Tribunal. In the circumstances, the delay in commencing this proceeding is explained by the nature of the case and the cultural constraints on the first applicant. Acknowledging the need for an end to litigation, and for the acts of public officials not to be seen as vulnerable to challenge after a significant lapse of time, the need to do justice to the applicants' case requires that any necessary enlargement of time be granted. The effect of jurisdictional error, to which I have referred at [54], is also relevant.

76 The same considerations mean that the lapse of time should not be regarded as justifying the exercise of discretion against the applicants, when considering whether to grant the relief sought. As I have said, the conclusion that the Tribunal denied the first applicant procedural fairness, and that its decision was therefore the result of jurisdictional error, is sufficient to cause that decision to be regarded as no decision at all, in law. Although it must be acknowledged that the remedies sought in this case are all discretionary remedies, the scope of the discretion to refuse them once jurisdictional error has been found to exist must be narrow. Indeed, it would create great uncertainty if the Court orders left the impression that there had been a valid decision, when the Court found that, because of jurisdictional error, there was no decision at all, in law.

Conclusion

77 For the reasons I have given, a writ of certiorari should be issued, directed to the Tribunal, removing its decision of 1 September 2000 into this Court, for the purpose of quashing it. That decision should be quashed. A writ of mandamus should be issued, directed to the Tribunal, requiring it to hear and determine the application of the applicants for review of the decision of the Minister's delegate according to law. It is unnecessary to consider whether to grant a writ of prohibition (which may be of no effect in any event), an injunction or a declaration, and the application, in so far as it seeks those remedies, should be dismissed.

78 In the ordinary course, the usual rule, that costs follow the event, should govern the exercise of the discretion to award costs. Both counsel, and the solicitors instructing them, on behalf of the applicants have been prepared to give their services to the applicants for nothing in this proceeding. The involvement of junior counsel and the solicitors came about in consequence of referrals of the applicants, pursuant to the scheme operated by the Court under O 80 of the *Federal Court Rules*, both dated 3 June 2004. The involvement of senior counsel similarly came about by reason of a referral pursuant to O 80, dated 30 November 2004. By O 80, r 9(1), those legal practitioners are barred from seeking or recovering any professional fees or disbursements for the legal assistance they give. Order 80, r 9(2) provides an exception to this rule, to the extent of fees and disbursements that another party is required to pay, if an order for costs is made in favour of a litigant who is assisted under the scheme. It is therefore possible for me to make the usual order as to costs. In my view, it should be made.

Orders accordingly

Solicitors for the applicants: *Mallesons Stephen Jaques*.

Solicitors for the respondents: *Clayton Utz*.

ALEXIS WALLACE