JUDGMENT No. 910 / 94

CATCHWORDS

ADMINISTRATIVE LAW - IMMIGRATION LAW - application for refugee status - whether review delegate should have held oral hearing - incorrect translation of significant answer - incomplete record of interview - whether procedural unfairness - primary decision-makers failed to put material, upon which they relied, to applicants - failure cured by review process - whether review delegate obliged to take into account certain cables and opinions concerning conditions in China - applicants took part in protest at departmental detention centre - protest attracted considerable publicity - whether that protest had to be taken into account - application to adduce new evidence - whether Court should itself make declaration of refugee status.

Migration Act 1958 (Cth) ss.4, 22AA, 39, 411, 413

Chen Zhen Zi v. Minister for Immigration, Local Government and Ethnic Affairs (1994) 48 FCR 591
Sean Investments Pty Ltd v. MacKellar (1981) 38 ALR 363
Minister for Aboriginal Affairs v. Peko-Wallsend Ltd (1986) 162 CLR 24
Brown v. Dunn (1894) 6 R 67 (HL)
Seymour v. Australian Broadcasting Commission (1977) 19 NSWLR 219
R. v. Birks (1990) 19 NSWLR 677
Sordini v. Wilcox (1983) 70 FLR 236
Minister for Immigration and Ethnic Affairs v. Conyngham (1986) 11 FCR 528

LI SHI PING and LIU XIU LING v. MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS
WAG 98 of 1994

CORAM: SHEPPARD, GUMMOW & CARR JJ.
PLACE: PERTH
DATE: 28 NOVEMBER 1994

IN THE FEDERAL COURT)
OF AUSTRALIA)
WESTERN AUSTRALIA) No. WAG 98 of 1994
DISTRICT REGISTRY)
GENERAL DIVISION)

B E T W E E N: LI SHI PING and LIU XIU LING

Appellants

and

MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS

Respondent

CORAM: SHEPPARD, GUMMOW & CARR JJ.
PLACE: PERTH
DATE: 28 NOVEMBER 1994

MINUTE OF ORDERS

THE COURT ORDERS THAT:

1. The parties file an agreed short minute of orders, reflecting the accompanying reasons, within 7 days.

2. Failing agreement on the abovementioned minute, the appeal be relisted for mention, by videolink, on a date to be fixed between 7 December 1994 and 16 December 1994.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA)
WESTERN AUSTRALIAN DISTRICT REGISTRY) No. WAG98 of 1994
GENERAL DIVISION)

On appeal from a Judge of the Federal Court of Australia.

BETWEEN: LI SHI PING
LIU XIU LING
Appellants

AND: MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS
Respondent

BEFORE: SHEPPARD, GUMMOW, CARR JJ
PLACE: PERTH
DATE: 28 NOVEMBER 1994

REASONS FOR JUDGMENT

Sheppard J: In this matter I have had the opportunity of reading the reasons for judgment to be delivered by Carr J. I agree with his Honour's conclusions, with his reasons therefor and with the orders which his Honour proposes.

I certify that this is a true copy of the reasons for judgment herein of the Honourable Mr Justice Sheppard.

Associate

Dated 28 November 1994.

IN THE FEDERAL COURT OF AUSTRALIA)
WESTERN AUSTRALIAN DISTRICT REGISTRY) No. WAG98 of 1994
GENERAL DIVISION)

On appeal from a Judge of the Federal Court of Australia.

BETWEEN LI SHI PING
LIU XIU LING
Appellants

AND MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS
Respondent

BEFORE: SHEPPARD, GUMMOW, CARR JJ.
PLACE: PERTH.
DATE: 28 NOVEMBER 1994.

REASONS FOR JUDGMENT

GUMMOW J.:

I agree with the orders proposed by Carr J. I agree with his Honour's reasons for disposing of the appeal in this way.

I certify that this is a true copy of the reasons for judgment of the Honourable Mr Justice Gummow.

Associate: 

Date: 28 November 1994.

IN THE FEDERAL COURT)
OF AUSTRALIA)
WESTERN AUSTRALIA) No. WAG 98 of 1994
DISTRICT REGISTRY)
GENERAL DIVISION)

B E T W E E N: LI SHI PING and LIU XIU LING

Appellants

and

MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS

Respondent

CORAM: SHEPPARD, GUMMOW & CARR JJ.
PLACE: PERTH
DATE: 28 NOVEMBER 1994

REASONS FOR JUDGMENT

CARR J.

Introduction

This is an appeal from the judgment of a judge of the Court, Drummond J., in which his Honour:

- dismissed the application of Li Shi Ping ("Mr Li") for an extension of time within which to lodge an application for review and dismissed Mr Li's application and amended application for review;
- extended the time for Liu Xiu Ling ("Ms Liu") to lodge an application for review;
- set aside the decision of the respondent's delegate dated 3 September 1992 that Ms Liu is not a refugee; and
- remitted Ms Liu's application for refugee status to the respondent for determination according to law.

The appellants relied on a number of grounds of appeal. These will be dealt with after the facts of the matter have been referred to. At this point it should be mentioned that the appellants primarily seek orders that declarations be made that each appellant has refugee status. Alternatively, they seek orders that the matters be remitted for reconsideration by the Refugee Review Tribunal, in the case of Ms Liu directing the Tribunal to take into account matters additional to the matter which his Honour directed should be taken in account.

Factual Background

On 10 May 1992 Mr Li, Ms Liu and eight other people arrived in Australia from the Peoples' Republic of China, of which they are nationals, aboard a boat subsequently codenamed "Jeremiah". Mr Li and Ms Liu applied for refugee status on 16 May 1992. They are now the only members of the group who remain in Australia, the other eight having been deported on 23 October 1992.

The appellants' case at first instance and on appeal was, primarily, that they were denied procedural fairness. It is thus appropriate to set out the various procedures which were adopted by the respondent's officers following the appellants' arrival in Australia. This narrative is taken from the relevant portion of his Honour's reasons for judgment, in relation to most of which there is no dispute between the parties. Where there was dispute, that will be mentioned.

Upon arrival, the appellants along with other members of the "Jeremiah" group, were taken to a detention centre near Darwin and interviewed by the

Compliance Section of the Department of Immigration ("the Department"). The purpose of these interviews was to seek to confirm their identities, how they came to Australia, where they came from and why they came here. All indicated that they wished to apply for refugee status. The process for the determination of refugee status ("DORS") was then set in train. On 15 May 1992 the entire group attended a meeting with a Mr Illingworth of the DORS Branch of the Department. Also present were a Mr Michael Ian Kennedy and Mr Justin Kevin Rickard. Both Mr Kennedy and Mr Rickard are solicitors associated with an organisation known as Australian Lawyers for Refugees Incorporated ("ALRI"). ALRI is an incorporated non-profit association whose function is to provide legal assistance to persons applying for refugee status. Mr Kennedy is the Secretary of ALRI and Mr Rickard was a solicitor contracted to it to provide assistance to members of the "Jeremiah" group. Mr Illingworth read a statement to the group which included the United Nations Convention ("the Convention") definition of a refugee and an outline of the procedures which would be followed in assessing their applications for recognition as refugees. He informed the group that Mr Rickard and Mr Kennedy were independent lawyers who were available to help them with their applications, should they wish to avail themselves of such assistance. In his statement to the group Mr Illingworth emphasised the importance of providing all details which they considered relevant to their application for recognition as refugees and that it was extremely important to tell the truth, as their credibility would be of fundamental importance to the determination of whether or not refugee status would be granted. The statement which Mr Illingworth read out also contained an assurance that any information given to the Australian authorities during the refugee determination process would be

treated as confidential and would not be disclosed to the Chinese authorities. Copies of Mr Illingworth's statement, translated into Cantonese, were handed out to each member of the group.

After Mr Illingworth's address, Mr Kennedy and Mr Rickard, with an interpreter, met the group for about two hours. They explained that they were there to assist members of the group with legal advice and they then helped them complete the relevant application forms. The next day (16 May 1992) Mr Kennedy and Mr Rickard again met with the entire group for a little over an hour. Mr Kennedy once more explained the DORS interview process. He read out the Convention definition of a refugee and stressed the importance of disclosing any political activity in which members of the group may have been involved while in China. He described both the type of questions they were likely to be asked in the Departmental interview and the nature of the activities and incidents which would be relevant to their applications. Mr Kennedy also spoke of the importance of making full, accurate and truthful statements, both in their meetings with the ALRI personnel and at the Departmental interview. Prior to their DORS interviews, one of the ALRI representatives, either Mr Rickard, Mr Kennedy or a Mr Smyth, another ALRI solicitor, met with each applicant to obtain details of their background and to explore possible grounds for their claims to refugee status. An ALRI representative again met with each applicant immediately prior to those interviews to run through the basis of their claim and to give them advice about which aspects of their background they should stress.

On 21 and 25 May 1992 respectively, Mr Li and Ms Liu were separately interviewed by the Minister's delegates, Mr Laidlaw and Ms Birrell, who had to make the primary decisions on whether they were entitled to refugee status. These DORS interviews were tape recorded, with the acquiescence of the appellants. Transcripts of the interviews were in evidence before his Honour. Two tapes were made of each interview, one copy was retained by the delegate and the other given to ALRI for each appellant. ALRI had tape-recorders available for the appellants to listen to the tapes should they wish to do so. Some members of the Jeremiah group did review their interviews with ALRI personnel but neither Ms Liu nor Mr Li did so. The ALRI lawyer assigned to each appellant was present, with his own interpreter, throughout each DORS interview and was free to interject whenever he considered appropriate. Each DORS interview commenced with a standard statement by the interviewing delegate, which included another reading of the Convention definition of a refugee and the giving of an assurance that all information provided by the appellant would be treated in confidence and nothing would be passed on to the Chinese government. Each appellant was informed of the importance of providing all information relevant to his or her claim for refugee status. Each was advised to stick closely to the questions asked by the interviewer and told that he or she would have an opportunity at the end of the interview to say anything they wished and to provide any additional information on matters which had not been directly raised in the questions asked of them.

Towards the end of the interview each appellant was given 10 to 15 minutes alone with the ALRI lawyer to discuss what had been said in the interview. After

this, the interview was resumed, the appellant having a further opportunity to add any information he or she wanted to provide. Mr Rickard's evidence was that during his meeting with Ms Liu in the break towards the end of the interview, he asked her whether there was any more information she wished to add, to which she replied in the negative.

After the interviews, the appellants had three days in which they could add any further information they wished. During this period, the appellants were advised on several occasions that they were able to put forward further information. Neither Ms Liu nor Mr Li proffered any further information for consideration by the respective delegate during this period. Ms Liu claimed that she attempted to speak with Mr Rickard during this period, but was unable to contact him. Mr Rickard said that not only did Ms Liu not inform him that she wanted to add further information or send any message to that effect to him, but also that, during this three day period, he saw Ms Liu in the camp compound and spoke to her. At no stage did she indicate that she wished to say anything further. The trial judge did not regard Ms Liu as a credible witness and was not prepared to accept her evidence unless corroborated. Mr Li does not dispute that he made no attempt to provide any further information after the interview, but claims that he had no opportunity to add any further material.

All the applications by members of the "Jeremiah" group were rejected by the primary delegates. All then applied to have the relevant decision reviewed by the Refugee Status Review Committee ("RSRC") and a Ministerial review delegate. The RSRC recommendation on each application for review was adverse to the appellants

and a copy of such recommendation was sent to each appellant who then had seven days to respond to it.

Both appellants claimed that they were not given an opportunity to comment either on the decision of the primary delegate or on the RSRC's recommendation. The trial judge rejected this evidence and found that Mr Li consulted Mr Smyth in relation to the application for review of the primary decision and the response to the RSRC recommendations. As to Ms Liu, on 30 May 1992 Mr Rickard had called a meeting to inform her of the decision. Mr Rickard left the room only while the interpreter read out to her the primary delegate's reasons for rejecting her application. His Honour accepted the evidence of Mr Rickard that he had asked Ms Liu whether she wished to appeal and, when she replied in the affirmative, he discussed the decision with her in order to determine the basis on which the appeal should proceed and whether any further material should be added. Ms Liu did not suggest that there were any errors in the primary delegate's summary of her case, nor that she wished to add further information on the appeal. Mr Rickard then prepared the appeal submissions and met Ms Liu on 5 June 1992 to discuss them with her. The interpreter read out the submissions to her and Mr Rickard told her that there were strong grounds for review of the primary decision on the basis of a want of procedural fairness. Ms Liu was then given an opportunity to add any further material or make any alterations, but did not wish to do so.

On about 28 or 29 July 1992 members of the "Jeremiah" group (who by then had been transferred to the Department's detention centre at Port Hedland in

Western Australia), commenced a hunger strike in protest against what they perceived to be unfairness on the part of the Department in its assessment of their applications.

On 4 August 1992, the day before the closing date for the lodgment of their responses to the RSRC recommendations, the group commenced a demonstration on the roof of the Port Hedland Detention Centre. Four banners painted in Cantonese writing on sheets were prominently displayed on the roof of the Detention Centre. These signs read:

> "We are ten Chinese refugees arrived in Australia on 10th May"
>
> "Hunger strike"
>
> "Protesting to the Australian Immigration Department for not assessing our cases fairly"
>
> "Rather die in Australia than going back to China to be persecuted".

On the first day of the demonstration, two members of the group, including Mr Li, jumped from the roof as part of their protest. Mr Li sustained back injuries which resulted in his being hospitalised for a number of months. On the following day Ms Liu jumped from the roof. The injuries she sustained have rendered her paraplegic.

There was evidence that these demonstrations, and in particular the display of the banners, the jumps from the roof and the resultant injuries, received considerable publicity via television and other media. On 3 September 1992 the review delegate rejected the appellants' applications for refugee status. On 10 November 1992 the appellants lodged in this Court applications seeking review of those decisions. The hearing took place in July and August 1993 and on 19 August 1994 the learned trial

judge gave judgment, the terms of which are summarised above.

The Appeals

In his amended notice of appeal Mr Li appeals from the dismissal of both his application for an extension of time and his application for review. Ms Liu appeals from so much of the order remitting her application for refugee status as depends upon the holding that, upon such remission, the respondent is confined to reconsideration of the only matter identified by his Honour as an error of law on the respondent's part. The error of law so identified by the learned trial judge related to Ms Liu's employment prospects if she is returned to China. Mr Barnsley, the review delegate, was prepared to accept that it was likely that Ms Liu will continue to face employment difficulties on return to China, in that she may be denied employment by her work unit. Mr Barnsley was prepared to accept, for the purpose of considering Ms Liu's submissions, that these employment difficulties resulted from her political activities and those of her father. However, Mr Barnsley was not prepared to find that this amounted to a denial of the right to earn a living, but merely a limitation on the field in which this can be done. It was, so his Honour held, implicit that had Mr Barnsley considered that Ms Liu's inability to obtain employment by her work unit amounted to a denial of the right to earn a living, this would have amounted to persecution within the Convention definition. As his Honour noted, such circumstances would be well capable of constituting persecution within the Convention definition of "refugee": see *Chan v. Minister for Immigration and Ethnic Affairs* (1988) 169 CLR 379 at pp.430-431. The only evidence before Mr Barnsley relating to the consequences of being denied employment by a work unit in China was to the effect

that once sacked from a work unit for political activities a person would be very likely confined to obtaining employment in the private sector. The evidence was that employment in the private sector in China accounted for less than 1% of all urban workers. Employment would therefore be extremely difficult to find. His Honour held that it was not open for Mr Barnsley to draw the distinction (which he had drawn) between a denial of Ms Liu's right to earn a living and a mere limitation on her right in that regard. Hence there was error of law on his part.

The relevant legislative and regulatory provisions

Section 22AA of the *Migration Act* 1958 provides:

> "If the Minister is satisfied that a person is a refugee, the Minister may determine, in writing, that the person is a refugee".

By s.4 of the Act, the term "refugee" is declared to have the same meaning as it has in Article 1 of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January, 1967. Under those instruments, the term "refugee" means 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 .."

Section 39 of the Act, as amended by the *Migration Legislation Amendment Act* 1994 came into force on 1 September 1994 (by virtue of the provisions of s.6 of the *Migration Laws Amendment Act* 1993) and reads:

"Transitional - refugee Applications

39. If:
    (a) an application for:
        (i) a determination by the Minister that a person is a refugee within the meaning of the Principal Act as in force immediately before 1 September 1994; or
        (ii) ...
    was made before that date; and
    (b) before that date, the application has not been finally determined (within the meaning of the Principal Act);
then, on and after that date, the provisions of the Principal Act (including provisions relating to review of decisions) apply as if the application was an application for a protection visa (within the meaning of the Principal Act as in force on that date)."

The following provisions are extracts from ss.411 and 413 of the Act:

"411. (1) Subject to subsection (2), the following decisions are RRT -reviewable decisions:
(a) a decision, made before 1 September 1994, that a non-citizen is not a refugee under the Refugees Convention as amended by the Refugees Protocol (other than such a decision made after a review by the Minister of an earlier decision that the person was not such a refugee);
...
(2) The following decisions are not RRT-reviewable decisions:
(a) decisions made in relation to a non-citizen who is not physically present in the migration zone when the decision is made;
(b) decisions in relation to which the Minister has issued a conclusive certificate under subsection (3).
..."

"413. (1) This section applies to an RRT - reviewable decision covered by paragraph 411(1)(a) or (b) if
(a) an application was made before 1 July 1993 for review of the RRT-reviewable decision; and
(b) if, at the time when the application was made, there were in force regulations dealing with applications for review of such a decision - the application was made in accordance with those regulations; and
(c) any of the following sub-paragraphs applies.
    (i) no decision on the review was made before the commencement of this section,
    (ii) all of the following sub-paragraphs apply·
        (A) a decision (the "initial review decision") on the review was made before the commencement of this section;
        (B) the initial review decision was quashed or set aside by a court before the commencement of this section;
        (C) the matter to which the initial review decision relates was referred by the court for further consideration;

> (D) no decision on that further consideration was made before the commencement of this section;
>
> (iii) all of the following sub-subparagraphs apply:
>
> (A) a decision ("the initial review decision") on the review was made before the commencement of this section;
>
> (B) the initial review decision is quashed or set aside by a court after the commencement of this section;
>
> (C) the matter to which the initial review decision relates is referred by the court for further consideration.
>
> . . .
>
> (2) A valid application is taken to have been made under s.412 for review of the RRT-reviewable decision.
>
> (3) No action is to be taken to review the RRT reviewable decision otherwise than under this Part.
>
> (4) This section has effect despite any other provision of this Act or the regulations.
>
> . . .".

After the hearing of this appeal, the parties filed written submissions on the matter of how Ms Liu's application for determination of refugee status should be dealt with in view of the recent amendments to the Act and what consequential orders should be made in the case of Mr Li, should his appeal be successful.

The appellants submitted that in that event both applications would need to be assessed de novo, while the respondent contended that those circumstances would require the primary decision to be reviewed by the Refugee Review Tribunal.

The Issues

A. Whether the review delegate should have held an oral hearing?

His Honour held that there was no unfairness in not affording to the appellants an oral hearing before the review delegate. The credibility of both appellants was a central matter, but there had been an oral hearing before the primary decision-maker and the credibility of neither appellant was in issue at the review stage. Accordingly,

applying the Full Court decision in *Chen Zhen Zi v. Minister for Immigration, Local Government and Ethnic Affairs* (1994) 48 FCR 591 his Honour held that there was no requirement for an oral hearing to be conducted at the review stage.

The appellants submitted that, contrary to the conclusion drawn by the learned trial judge, their credibility was in issue at the review stage. In respect of Ms Liu, his Honour's conclusion that there was no issue as to her credibility was based on a concession that the primary delegate had reasonably accurately summarised the applicants' claims. After noting this his Honour observed:

> "Mr Barnsley's function at the review stage was therefore to consider whether, on those facts, Ms Liu qualified for recognition as a refugee. No question of credibility was involved for him."

The appellants contended that there was an important difference between accurately summarising *an applicant's claims* and accepting the claims as being facts.

The only matter (and it was a most important matter) drawn to our attention as involving Ms Liu's credibility was the circumstances of her father's imprisonment. Mr Barnsley's description of the relevant portion of Ms Liu's claims was in these terms:

> "Her father misappropriated money from his work unit and gave it to the student movement."

It is common ground that the interpreter assisting the primary decision-maker wrongly translated what Ms Liu said about this matter. The correct translation is "he secretly took the money out from his work unit and gave it to the students". Counsel

for the appellants said that the correct translation indicated that the money was Mr Liu's money and not that of his work unit. Accordingly, the father's transgression was a political transgression not a criminal one and this was a very significant difference. Ms Liu had never stated as a fact that her father had misappropriated the money. The respondent submitted that there was no significant difference between the translation and the mistranslation. His Honour held that even though Mr Barnsley may have acted on the basis of an incorrect translation, any error he may have made as a result was one of fact. The relevant passage in the transcript before the primary delegate in which the mistranslation occurred is as follows:

> "A. INTERPRETER: Well, my father gave the students money but the money is from his work unit, from his work ---
> Q63 BIRRELL. So on behalf of the whole work unit? Did other people in the work unit give money too?
> Answer: INTERPRETER: Actually, it's not legal; we just took the money from the work unit and gave it to the Chinese students. (Emphasis added)"

Without appreciating the significant difference between withdrawing one's own money secretly from a work unit and giving it to dissident students on the one hand and misappropriating moneys belonging to a work unit on the other, any difference between the two translations does not, at first glance, appear to be particularly significant. Ms Liu gave evidence before his Honour that her father was entitled to the money which he gave to the students. It is true that the learned trial judge made a strong general finding against her on credibility but there was no specific credibility finding against her on this point. Another minor confusion is the reference in the passage underlined above to "we" which one would have thought would read "he".

A further complaint made by the appellants concerned the records of the

primary interviews which were before Mr Barnsley on review. In the case of Ms Liu there was no transcript of the relevant interview before Mr Barnsley when he made his review decision. There was only the tape-recording and when that tape-recording was transcribed it was found that the tape given to Mr Barnsley was incomplete to the extent of what was later found to be twenty-one pages of transcript.

The tape-recording of Mr Li's evidence was also incomplete. An effort had been made to remedy this by reproduction of notes made by a Mr S. Laidlaw at the time and at some subsequent stage. No copy of Mr Laidlaw's notes was made available to the appellants for comment. However, unlike the situation in relation to Ms Liu, we were not taken to any material which would suggest that any question of credibility was involved in Mr Li's case at the review stage.

I have examined the reasons given by the primary decision-maker (Mr Laidlaw) and by Mr Barnsley in respect of Mr Li's application. In my view, the only relevant matter was whether Mr Li had made statements of his political opinions before leaving China. There is no reference to this claim in Mr Laidlaw's reasons for decision and Mr Barnsley states that Mr Li had not made such a claim prior to the review stage. Mr Barnsley made the following findings on this point:

- "there is no supporting evidence or detail of his claim that he has stated his political opinions in the PRC;
- Given the lack of specific claims, there is no evidence before me linking adverse treatment with political opinion."

The evidence shows (Appeal Book pp.1378-1380) that, as mentioned above, the tape-recording of Mr Li's interview with Mr Laidlaw failed at 12.45 pm and resumed at 1.34 pm (some 49 minutes). There is a typed version headed "the notes which were taken during the 45-odd minutes of the interview when tape two, side two should have been recording". These notes comprise forty-one lines of typed text, some of which is so abbreviated as to be virtually meaningless.

In my view, the reasonable possibility remains that Mr Li may have made some reference during the course of that interview to a political statement made by him in China - see for example the third of the four paragraphs which comprise the abbreviated notes of what took place whilst the tape-recorder was not working. In *Chen's* case (at p.602) the Full Court concluded:

> "... the rules of natural justice do not mandate an oral interview by the decision-maker with every applicant for refugee status, although in particular cases, for example where a real issue of credibility is involved or it is otherwise apparent that an applicant is disadvantaged by being limited to submissions or responses to the decision-maker in writing, it may be that observance of the fundamental requirements of natural justice can only be satisfied by a determination made upon an oral hearing."

It is clear that the above reference was to an oral hearing upon departmental review of an initial adverse decision. It is also clear that the references above to "particular cases" were only examples of cases in which unfairness might arise.

In my view, the hiatus equivalent to twenty-one pages of transcript of the tape-recording in Ms Liu's case coupled with the mistranslation of a vital answer had the result that the procedure was unfair to the extent that an oral hearing should have

been conducted before Mr Barnsley. Similarly, in respect of Mr Li the 45 or 49 minutes gap in tape-recording with what I regard to be an inadequate transcript of what took place during that period resulted in unfairness to the extent that Mr Li should have been accorded an oral hearing by Mr Barnsley to clear up whether it was during that stage of the interview that Mr Li referred to political statements which he may have made in China.

B. Failure to put certain material to the appellants

The appellants further complained that each of the primary decision-makers had failed to put to the appellants certain material upon which they had relied in reaching their decisions. This material was obtained when the appellants and other members of the "Jeremiah" group were interviewed by the Compliance Section of the Department. His Honour rejected these complaints. His Honour held that any procedural unfairness which may have arisen at the primary level because of the primary decision-makers' use of such material, was cured because the appellants had notice of the material and an opportunity to respond to it at the next stage (the review).

In argument before us Dr Cameron, counsel for the appellants, argued that not only was the material from the Compliance interviews of the appellants and other members of the "Jeremiah" group used by the primary decision-makers but also on review by Mr Barnsley. Eventually Dr Cameron withdrew that argument and expressly abandoned any submission that the review delegate may have looked at Compliance files other than those of the appellants. Nevertheless, it was submitted

that in each case the primary decision-maker's decision was "infected" by the fact that reference had been made to the abovementioned material without giving the appellants an opportunity to comment on that material. It was submitted that this infection "contaminated" the evidence before the primary decision-maker and similarly contaminated Mr Barnsley's decision.

I agree, respectfully, with his Honour's conclusion that any deficiency in procedural fairness in this regard which may have arisen at the primary level due to the primary decision-maker's use of such material was cured by the fact that the applicants and their advisers had both notice of the material and an opportunity to respond to it before Mr Barnsley made his decision on review.

C. Failure to take into account

Another matter upon which the appellants relied at first instance and on appeal was that the review delegate failed to take into account certain cables which were said to be in his constructive possession. The evidence was that the review delegate made reference to a Department of Foreign Affairs and Trade (Beijing Embassy) cable dated 23 June 1992 obtained in response to a request for information to assist in the determination of refugee status for the members of another group of Chinese people who travelled to Australia by boat, a group known as the "Isabella" group. The appellants complain that four earlier cables from Australian Embassy officers in Beijing and Shanghai were in the respondent's possession at the time when Mr Barnsley made his decisions, and that those four cables contained information, not included in the cable of 23 June 1992, which supports their claims to recognition as

refugees. By failing to refer to those cables, it was submitted that Mr Barnsley's decision miscarried. It was not suggested that the four cables were in Mr Barnsley's personal possession, or even that he was aware of their existence. The appellants relied upon a form of constructive possession. His Honour held that there was no obligation on the respondent to consider every document in the Department's possession. The decision of what material from the range of relevant material was to be taken into account was generally one for the decision-maker alone and it was only when material which must be taken into account is ignored that the decision was reviewable. His Honour held that Mr Barnsley was entitled to refer to the cable dated 23 June 1992 without being in any way bound to refer to the four earlier cables and those cables were not matters which Mr Barnsley was required to take into account. His Honour relied upon the following passage in the reasons for judgment of Deane J. in *Sean Investments Pty Ltd v. MacKellar* (1981) 38 ALR 363 at p.375:

> "In a case such as the present, where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards. The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide."

Mr R. O'Connor QC, senior counsel for the appellants, distinguished *Sean Investments Pty Ltd v. MacKellar* on the basis that in that case relevant considerations were not specified whereas in the present matters there were specified relevant considerations to be taken into account which arose from the word "refugee", its Convention definition and what was said by the Full High Court in *Chan's* case. In my view, the submission confuses taking into account relevant considerations with

taking into account particular pieces of evidence. The relevant consideration which the respondent was obliged to take into account was - what might happen to the appellants if they are returned to China? It is quite clear that the respondent's delegate did take that consideration into account and in doing so relied on the abovementioned cable dated 23 June 1992. I cannot accept the proposition that in so doing there was an improper exercise of power. The appellants relied on *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1986) 162 CLR 24, but in my view the four earlier cables cannot be regarded as being in or any way near the category of the information in that case which related to correction of the Aboriginal Land Commissioner's report. The status of the document which contained that information was derived from the Commissioner's report which the High Court held was, by necessary implication from the relevant legislation, a document which the Minister was bound to take into account.

The appellants' submission boils down to the proposition that there was an obligation on the respondent's part to review all of the DFAT cables received, to select from them the four cables upon which the appellants rely and to prefer the contents of those cables to the cable upon which Mr Barnsley in fact relied. His Honour held that there was no such burden on Mr Barnsley to seek out this further information and that it was up to him to decide what other information might aid him in his task. I agree with his Honour's conclusion and his reasons for reaching that conclusion. To hold otherwise would be to conduct a review on the merits and usurp the administrator's function: *Minister for Aboriginal Affairs v. Peko Wallsend Ltd* per Mason J. at pp.40-41.

D. Failure to consider whether the appellants might be classified as "anti-revolutionary criminals"

The appellants complained that Mr Barnsley had given no weight to the suggestion that either of them might be classified as "anti-revolutionary criminals". Mr Barnsley's conclusion was that there was no evidence to suggest that the appellants' fears of being so classified were well-founded. Reliance was placed on a 1991 United States State Department's report of human rights practices in China. The learned trial judge held that as:

- this was the only evidence to which the appellants were able to point;
- the report referred to prominent organisers of the mass demonstrations occurring in China in 1989 as being likely to be classified as "anti-revolutionary criminals";
- the political profiles of the appellants were not comparable to such organisers;

then Mr Barnsley's conclusion was open to him.

The appellants submitted that there was other material "which should have been before the decision maker". The first four documents referred to by counsel were the four cables referred to above. I have already dealt with that matter, immediately above. The next category of documents comprised two reports, one being a report dated 27 March 1992 by Mr Michael Dutton, and the other a paper prepared in August 1991 by a Ms Shelley Warner. The first paper is entitled "Some General Points on the Laws and Regulations which could relate to the Guangxi 'boat people's' case". The title of the second paper is "Prospects for Chinese Nationals who return to China". Reference was also made to an opinion prepared by Professor A.E.S. Tay on

the position of Chinese Nationals who have applied for refugee status abroad should they be returned to China. The opinion is undated. Finally, reliance was placed on two paragraphs of an affidavit filed by Mr Li in support of his application for judicial review. His Honour took the view that Mr Barnsley was not required to consider these documents and all the information contained in them but that even if the contrary were true, the evidence before him did not support the submission that Mr Barnsley had failed to take into account relevant considerations arising from this material. His Honour referred to the following matters:

- that relevant passages and materials from the Dutton and Warner reports were referred to by Ms Liu in her application for review, to which a copy of Ms Warner's report was annexed, and by both applicants in their responses to the RSRC's recommendations;
- Mr Barnsley in each of his decisions stated that he took all this material into account;
- in his summary of the applicants' claims and submissions at the start of his reasons, Mr Barnsley noted these submissions;
- in relation to the possible application of "Neibu" [internal documents and directives in China], Mr Barnsley expressly stated that he had considered the material in the reports by Mr Dutton and Ms Warner,
- material from those reports is specifically dealt with in the DFAT cable of 23 June 1992.

Professor Tay's opinion is a detailed review of the range of legal and administrative provisions applicable to refugees who are returned to China. The report is fortified with practical insights and anecdotal evidence. The DFAT cable of 23 June 1992 can be similarly described. In my view, for the same reasons as outlined above in relation to the four earlier cables, Mr Barnsley was not bound to take into account Professor Tay's opinion. For the same reason, in my view there is no substance in the submissions made by the appellants insofar as they concern Mr Dutton and Ms Warner's reports. As to Mr Li's affidavit, that document came into existence on 23 November 1992, three months after Mr Barnsley's decision. Insofar as these materials

are relied upon also to persuade the Court itself to declare the appellants to be refugees, I deal with that matter below.

E. The Port Hedland demonstrations

The appellants submitted at first instance and on appeal that their participation in the demonstration at Port Hedland was a matter which Mr Barnsley was required to take into account and which he had not taken into account. In rejecting this submission, his Honour relied on the decisions of *Heshmati v. Minister for Immigration, Local Government and Ethnic Affairs* (unreported, 22 November 1990) upheld on appeal by the Full Court in *Somaghi v. Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 and *Heshmati v. Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 123. His Honour found that the appellants' conduct had been engaged in for the sole purpose of obtaining refugee status. Accordingly, applying the principles outlined in those two decisions, the appellants were not entitled to rely upon the events which took place in Port Hedland to justify a claim to refugee status.

The appellants say that his Honour was wrong to make these findings of fact and that they engaged in these activities at Port Hedland because they had a well-founded fear of persecution if they were returned to China. In the course of establishing that, so it was put, the appellants got up on the roof to protest at the way their applications were being treated. They had a hunger strike because they did not think that they had been properly represented at an earlier stage and did not think

that the Department was properly considering the matter.

In my view, his Honour's findings of fact should not be interfered with. His Honour has had the benefit of seeing the witnesses give their evidence and made adverse findings on their credibility. The submission was made that Ms Liu was not cross-examined on the reasons why she protested at Port Hedland and jumped from the roof and that the rule in *Browne v. Dunn* (1894) 6 R 67 (HL) prevented an adverse conclusion from being drawn as against what was deposed to by her in her affidavits. His Honour's findings on this point were in the following terms:

> "I do not accept that their actions were a genuine protest against the prevailing situation in China. Rather, were they designed to promote their chances of being recognised as refugees and so of being allowed to stay in Australia, by putting pressure on the Department. Criticism of the Chinese government in the course of this demonstration was very much incidental to the group's primary purpose."

Given the conclusions as to Ms Liu's credibility, in my opinion his Honour was not obliged to accept Ms Liu's evidence on this point even though she may not have been cross-examined on it. The rule in *Browne v. Dunn* is applied nowadays to ensure that proceedings, whether civil or criminal, are on an overall view conducted fairly and the practical content of the rule needs to be related to the circumstances of the particular case: *Seymour v. Australian Broadcasting Commission* (1977) 19 NSWLR 219; *R. v. Birks* (1990) 19 NSWLR 677. In the present matter it was obvious that Ms Liu's credibility was generally in issue. In those circumstances, it was not, in my opinion, unfair that the primary judge, having found Ms Liu not to be a credible witness and having decided not to accept her evidence unless corroborated, decided against accepting her assertions about why she took part in the protests at Port Hedland.

The relevant ground of the appellants' grounds of appeal reads as follows:

> "...his Honour erred in fact and/or in law .. by not finding that the Appellants jumped from the roof [of the Port Hedland detention centre] in an attempt to kill themselves rather than return to China to face persecution."

I would accept the respondent's submission that this ground could only relate to whether the applicants had a subjective fear of persecution. This was never an issue. It was common ground that the applicants had a genuine subjective fear of persecution. The issue was whether that fear was well-founded.

In my opinion, it was for the decision maker to decide whether to take the matter of the Port Hedland demonstrations into account and, if he did, the weight to be attributed to it. It was not a matter which the decision maker was bound, as a matter of law, to take into account.

In respect of the question whether their fear of persecution was well-founded, the appellants contended that their cases were such that this Court (both at first instance and on appeal) should itself determine whether they satisfied the definition of refugee.

The appellants sought to adduce new evidence, both at first instance and on appeal, as to the treatment accorded to other members of the Jeremiah group when they returned to China. In particular, the appellants had sought to rely on affidavits from Mr Guo Wei Wong and Mr Guo Wei Ze who, after having been deported to China, had made a further escape to Australia. The essence of their affidavits was that the Chinese authorities had imprisoned and maltreated them because of the Port

Hedland demonstrations and had shown a particular interest in the participation by the appellants in those demonstrations. The appellants submitted that if this Court decided that it should itself determine the question of whether they satisfied the definition of a refugee, then as part of that exercise, we should consider the evidence contained in the affidavits from Messrs Guo.

The basic submission was that the decision should not be remitted to the respondent unless there was still an area for residual judgment. The learned trial judge should, it was submitted, have found that as there was persecution of Ms Liu on political grounds in relation to employment that was sufficient for a finding by the Court that she was a refugee. There was no need, in those circumstances, to remit the matter to the respondent. Reliance was placed on *Sordini v. Wilcox* (1983) 70 FLR 236 at 331, 347 and *Minister for Immigration and Ethnic Affairs v. Conyngham* (1986) 11 FCR 528 at pp.536-538. It was argued that the learned trial judge was wrong in holding that there was a residual discretion in the review delegate.

The truth of the matter is that Mr Barnsley did not make a finding that Ms Liu's employment difficulties were in fact related to political activities of her father and herself. As his Honour noted, Mr Barnsley merely accepted for the purpose of argument that that was so because he concluded that, even putting her case at its highest, it could not amount to persecution, it was unnecessary for him to consider whether her exclusion from employment was in fact by reason of her political opinion.

In my opinion, Ms Liu's application should be remitted to the respondent so that this factual aspect, which has now become relevant, may be decided. In my respectful view his Honour correctly applied the principles outlined in *Conyngham* and correctly distinguished the taxation cases including *Kolotex Hosiery (Aust) Pty Ltd v. Commissioner of Taxation* (1975) 132 CLR 535.

In *Conyngham*, Sheppard J. (with whom Beaumont and Burchett JJ agreed) made this observation (at p.541) as to whether the primary judge in that case had erred in making a declaration rather than remitting the matter for further consideration:

> "If the decision-maker, although his discretion has miscarried, is left with a residual discretion under the statute to decide the ultimate question favourably or unfavourably to the successful applicant, the order which the court makes should, notwithstanding the width of s.16 of the Act, usually, if not invariably, be one which remits the matter for further consideration according to law."

In *Sordini v. Wilcox* the Court exercised its powers under s.16 of the *Administrative Decisions (Judicial Review) Act* and substituted its discretion for that of the Review Committee but that was due to the particular circumstances of that case and the conclusion that "...it would be awkward, somewhat invidious, and a waste of time and money, to refer the matter back to the Review Committee for further consideration" - see p.347. *Sordini's* case was explained in *Conyngham* on the basis that it was, implicitly, an appropriate case where the order accompanying the order setting aside a decision might be one compelling a decision of a particular kind - see Sheppard J. at p.536.

In these matters, the ultimate question is not so much the exercise of a residual discretion but a finding whether the status of a refugee exists. That depends on the resolution of as yet unresolved factual matters. Those matters bear upon the question whether the applicants' (admitted) subjective fear of persecution is objectively well-founded. In turn, the determination of that question will involve questions of credibility on such issues as the degree to which the applicants were involved in political activity which would give rise to a real chance of persecution if returned to China. For the Court to take on the role of deciding these issues as part of judicial review of administrative action would, in my opinion, be to usurp the function of the decision-maker.

Kolotex was a taxation appeal under Part V of the *Income Tax Assessment Act* 1936 (Cth). In one sense, as Mr O'Connor put it in argument, that case involved the decision of an administrator (the Commissioner of Taxation) being reviewed by a judicial body (the High Court) and that Court reaching its own conclusion on a matter where the Commissioner's satisfaction was involved. However, *Kolotex* was an appeal on the merits not by way of traditional judicial review of administrative action. The evidence before the Court was such that the Commissioner, if he had properly directed himself, could not have been satisfied on the matters upon which he was required to be satisfied. That is a very different situation, in my view, to the present circumstances.

It is thus not necessary to consider the admission of the evidence from Messrs Guo. It is common ground that if we set aside the review decision in respect of Mr Li

then both applications will be heard by the Refugee Review Tribunal. The evidence of Messrs Guo can be put before that tribunal.

Conclusion

For the above reasons I would dismiss the appeal brought by Ms Liu but on the basis that there are at least two issues which need reconsideration in her case rather than the one basis upon which Drummond J. remitted her application for reconsideration. I would allow the appeal by Mr Li, grant his application for an extension of time in which to apply for judicial review, and set aside the review decision in respect of his application. I would make no order as to costs in respect of Ms Liu's appeal but would order the respondent to pay the costs in respect of Mr Li's appeal.

In the light of the fact that the two matters were heard together and the mixed success of Ms Liu's appeal, I would make no order as to costs in respect of her appeal but would order the respondent to pay the costs in respect of Mr Li's appeal.

I certify that this and the preceding twenty-eight (28) pages are a true copy of the Reasons for Judgment of Justice Carr.

Associate: Stephen Baird

Date: 28 November 1994

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Solicitor for the Applicant:	Patrick J. Gethin
Counsel for the Respondent:	C.J.L. Pullin QC, with him S. Bhojani
Solicitors for the Respondent:	Australian Government Solicitor
Date of Hearing:	18 October 1994
Date of Judgment:	28 November 1994