FEDERAL COURT OF AUSTRALIA

SGBB v Minister for Immigration & Multicultural & Indigenous Affairs

[2003] FCA 709

MIGRATION – judicial review – persecution of particular social group – whether issue properly raised before Tribunal – whether unaccompanied youths without family support capable of constituting a particular social group – equality of result – whether jurisdictional error because Tribunal reached different results in similar cases

Migration Act 1958 (Cth) s 474

Judiciary Act 1903 (Cth) s 39B

Muin v Refugee Review Tribunal (2002) 190 ALR 601 cited

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002 (2003) 195 ALR 1 followed

Plaintiff S157/2002 v Commonwealth of Australia (2003) 195 ALR 24 followed

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 25 followed

Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389 followed

NAAV v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 193 ALR 449 not followed

Htun v Minister for Immigration and Multicultural Affairs (2001) 194 ALR 244 cited

SCAL v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 548 cited

Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs [2000] FCA 1801 cited

Minister for Immigration and Multicultural Affairs v Khawar (2002) 187 ALR 574 referred to

SBBK v Minister for Immigration (2002) 117 FCR 412 cited

Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 cited

Minister for Immigration, Local Government and Ethnic Affairs v Gray (1994) 50 FCR 189 cited

Bellinz v Federal Commissioner of Taxation (1998) 84 FCR 154 cited

Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 195 ALR 502 cited

Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 [2003] HCA 30 cited

WADZ v Minister for Immigration and Multicultural Affairs [2002] FCAFC 118 cited

Attorney-General (NSW) v Quin (1990) 170 CLR 1 cited

SGBB v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

S 293 OF 2002

SELWAY J

16 JULY 2003

ADELAIDE

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIA DISTRICT REGISTRY S 293 OF 2002

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SGBB
	APPELLANT

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGE:	SELWAY J
DATE OF ORDER:	16 JULY 2003
WHERE MADE:	ADELAIDE

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The judgment and orders of Federal Magistrate Raphael, given on 12 December 2002, be set aside.

3. There be substituted for the orders made on 12 December 2002, orders that:

   (a) A writ of certiorari issue, directed to the Refugee Review Tribunal, removing the decision made on 29 June 2002, into this Court, for the purpose of quashing it.

   (b) The decision be quashed.

   (c) A writ of mandamus issue, directed to the Refugee Review Tribunal, requiring it, to hear and determine the matter the subject of the decision, according to law.

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

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S 293 OF 2002

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	SGBB APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	SELWAY J
DATE:	16 JULY 2003
PLACE:	ADELAIDE

REASONS FOR JUDGMENT

History of the Proceedings

1 The appellant is now 18 years of age. He is a Hazara person of the Shi'ite Moslem faith. He comes from the Ghazni Province of Afghanistan.

2 He arrived in Australia by boat and without a visa in June 2001. He was and is an 'unlawful non-citizen' as defined in the *Migration Act 1958* (Cth) ('the Act'). He was taken into detention. On 2 November 2001, he applied for a protection visa. In order to obtain such a visa it was necessary that the respondent ('the Minister') be satisfied that 'Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol': s 36(2)(a) of the Act. In general terms such an obligation would arise if the appellant was a 'refugee' as defined in art 1A(2) of the Refugees Convention. Such a person must be unable or unwilling to return to his or her country of former habitual residence owing to a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'. The basis of the application by the appellant was that he had a well-founded fear of persecution on the basis of his Hazara

ethnicity and his Shi'ite religion if he was returned. Of course, at that time the Taliban were in control of Afghanistan, including the Ghazni Province.

3 The application was initially considered by a delegate of the Minister. The delegate gave her decision on 11 June 2002. By that time the situation in Afghanistan had changed greatly. The Taliban had been overthrown. The delegate accepted that the appellant would have had a well-founded fear of persecution at the time he left Afghanistan. She also accepted that the appellant was at significant risk if he was returned to Afghanistan. She noted that there may be considerable difficulties in re-uniting him with his family and that, being an unaccompanied minor, he was part of a group 'who would be particularly vulnerable if returned to Afghanistan at this time'. However, the delegate reached the conclusion that 'unaccompanied minors' are not a relevant social group. The delegate noted:

'…that the UNHCR considers that, although unaccompanied minors are not necessarily a group which continues to require protection within the definition of the Refugees' Convention, they constitute a group of persons who would be particularly vulnerable if returned to Afghanistan at this time.'

The delegate concluded that 'I do not accept that the applicant has reason to fear harm for a Convention reason.'

4 The appellant sought a review of that decision by the Refugee Review Tribunal ('the Tribunal'). On such a review the Tribunal may exercise all of the powers and discretions of the delegate: see s 415(1) of the Act. On 29 June 2002, the Tribunal affirmed the decision not to grant a protection visa.

5 The appellant sought orders of mandamus, prohibition and certiorari in this Court under s 39B of the *Judiciary Act 1903 (*Cth). That application was transferred to the Federal Magistrates Court pursuant to s 32AB of the *Federal Court of Australia Act 1976* (Cth). The learned Magistrate delivered his decision on 12 December 2002. There were three arguments addressed to the learned Magistrate:

(a) an argument that the Tribunal should have considered whether the appellant belonged to a particular social group, namely young people of Hazara ethnicity and Shi'ite religion. As to this argument, the learned Federal Magistrate held that the failure to consider a Convention ground that was open on the evidence did not give the Federal Court jurisdiction to intervene. He referred to s 474 of the Act and to the decision of the Full Court of this Court in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 193 ALR 449 ('*NAAV*'). As this is a decision which has since been qualified in the High Court, it will be necessary to refer to this argument at some length below;

(b) an argument that the Tribunal may have considered different evidence from that considered by the delegate. This is an increasingly popular argument purportedly based upon the High

Court's decision in *Muin v Refugee Review Tribunal* (2002) 190 ALR 601, but often based upon a misreading of that case. In this instance the learned Magistrate correctly dismissed the argument, there being no evidence that the appellant had been misled or that the procedure adopted was otherwise unfair;

(c) an argument that the Tribunal failed properly to consider the material put forward by the appellant. The Magistrate dismissed this argument on its merits.

6 Pursuant to s 24 of the *Federal Court of Australia Act 1976* (Cth) the appellant has appealed the decision of the Federal Magistrate to the Full Court of this Court. Under s 25(1A) of that Act the Chief Justice has advised that he considers it appropriate that the appellate jurisdiction of this Court be exercised by a single judge in this matter.

7 Dr Churches, who appeared for the appellant in this appeal put two arguments in support of the appeal, although in respect of both arguments he put an alternative proposition. First, he repeated the submission made to the learned Federal Magistrate that the Tribunal erred in not considering whether young people of Hazara ethnicity and Shi'ite religion are a particular social group. In the alternative, he argued that the Tribunal erred in not considering whether Afghan youths without familial support comprise a particular social group. Second, he submitted that the failure of the Tribunal to follow previous decisions on the same or similar facts constituted a 'failure of fairness' resulting in jurisdictional error. In the alternative, he argued that the Tribunal failed to take into account relevant material, namely the previous decisions of the Tribunal. This second argument, in both of its manifestations, was not put before the Federal Magistrate. No objection is taken to my considering it.

Particular Social Group

8 The learned Magistrate rejected the argument relating to a particular social group in reliance upon the decision of the Full Court of this Court *NAAV* and upon s 474 of the Act. That was perfectly understandable at the time. However, *NAAV* is no longer good law. The provisions of s 474 of the Act are now to be understood in the light of the recent High Court decisions in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 195 ALR 1 ('*S134*') and *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24 ('*S157*'). The effect of those decisions is that this Court does have jurisdiction under s 39B of the *Judiciary Act 1903* (Cth) where the relevant decision of the Tribunal would otherwise be a 'privative clause decision' for the purposes of s 474 of the Act but where the decision involves a 'failure to exercise jurisdiction [or] an excess of the jurisdiction conferred by the Act' (*S157* at [45, 76]).

9 The consequence is that the reason given by the learned Federal Magistrate for rejecting this argument was wrong in law. However, that is not the end of the matter. The question still remains whether the Tribunal committed a jurisdictional error.

10 The case put by the appellant before the Tribunal was not as clear as it could and should have been. Nevertheless it appears to me that it did raise the issue of the appellant being a member of a particular group, at least to an extent. The findings of the delegate in relation the position of unaccompanied minors was specifically referred to in the lengthy written submissions lodged with the Tribunal by the appellant's advisers. The submission included:

'We confirm that our client does not know where his family is and is unable to contact them. He sent a letter to them through Red Cross however has not received a reply. Our client is very young and alone and therefore would be more vulnerable to persecution if forced to return to Afghanistan.'

In the course of the hearing before the Tribunal the adviser also made submissions directly on the point:

'…we have a very unique case here and that is that not only is our client Ozara (sp?) (sic) a Shite Muslim (sic) which has been established and that's not in dispute, but he's very young. Very young and relatively uneducated. Well, he's not formally educated at all, which I think makes him even more vulnerable to persecution in addition to being…which I think needs to be taken into consideration as well.'

11 In my view the appellant did put his case, at least in part, on the basis of his age and of his being a member of a particular social group. The Tribunal member was obviously aware of the importance of the issue. During the course of the hearing the member expressed the following view:

'…which are that you're not only Hazara and a Shite, (sic) but you're also very young and particularly vulnerable to persecution if you return to your area and particularly given that you don't know where your family is.'

12 However, in its reasons the Tribunal did not consider the question in the context of the appellant being a member of a particular social group. Rather, the Tribunal understood the argument addressed to it as an argument that the appellant's fear of persecution on the basis of ethnicity and religion was likely, in his case at least, to be well-founded because he was an unaccompanied minor with no family support. The Tribunal said in its reasons:

'The applicant's solicitor submitted that this was a unique case in light of the applicant's age, his lack of formal education, and his ignorance of the whereabouts of his family in Afghanistan. She submitted that the Tribunal consider those factors, his ethnicity and his religion together when assessing his vulnerability to persecution in Afghanistan.'

13 It is understandable that the Tribunal considered the claim on this basis. Before the learned Magistrate and before me the argument (or, at least, an argument) put by the appellant in relation to particular social groups

identified the relevant social group as young Hazaras Shi'ite men. Even if that is considered as a particular social group, rather than an issue of ethnicity or religion it would seem that the answer would be the same. The Tribunal expressly rejected any argument that either Hazaras or Shi'ite people were now subject to persecution. The Tribunal concluded:

'In addition, I do not accept that there is a real chance that the applicant will be persecuted by Pashtuns, or members or supporters of the Taliban, in his local area, or in any area of Ghazni Province. I refer to reports that I accept as authoritative by DFAT (CX63521), Reuters (CX63441) and IRIN (CX62694).

…

Accordingly, I find that the applicant does not have a well-founded fear of being persecuted by Pashtuns, or supporters or members of the Taliban, in Ghazni Province for reasons of his Hazara ethnicity, his adherence to the Shi'a Muslim religion, or any other Convention reason.'

14 That conclusion necessarily excludes any suggestion that there is a sub-group of Hazaras or of Shi'ites, such as youths, who are subject to persecution. But it is clear from the comments of the member during the course of the hearing that she accepted that the appellant was 'more vulnerable to persecution'. The logical consequence would seem to be that the Tribunal member accepted, at least in the course of argument, that all youths in the situation of the appellant are 'more vulnerable to persecution', but that the reason for that was not because they were Hazara or Shi'ite.

15 What this highlights is the importance of correctly identifying the relevant group. See McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 ('*Applicant A*') at256-257 and Kirby J in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 ('*Dranichnikov 2003*') at 403-404 [69]-[70].

16 The Tribunal did not consider whether any other social group could or should be identified. The Tribunal did not even consider the question which was considered by the Ministerial delegate. It will be recalled that the delegate did consider whether unaccompanied minors are members of a group within the definition of the Refugees' Convention. The delegate, relying on the UNHCR, held that they were not. The issue is whether the Tribunal was obliged to consider whether there was a relevant social group. Dr Churches put his argument on the basis that it was a jurisdictional error if the Tribunal failed to consider a basis for the grant of a protective visa where there is evidence or material before the Tribunal which it accepts, or does not reject, and that evidence or material raises a case on that basis regardless whether the appellant has relied upon that basis. He relied upon the comments of Merkel J in *Htun v Minister for Immigration and Multicultural Affairs* (2001) 194 ALR 244 at 248 [13].

17 This may go too far. As Kirby J noted in *Dranichnikov 2003* at 405 [78]: '[t]he function of the tribunal, as of the delegate, is to respond to the case that the applicant advances.' And see also von Doussa J in *SCAL v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 548 ('*SCAL*') at [16]: '[n]either the delegate nor the Tribunal is obliged to consider claims that have not been made'. But this does not mean that the application is to be treated as an exercise in 19th century pleading. As it was put by the Full Court of this Court in *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs* [2000] FCA 1801 at [49]:

'The Tribunal must, of course, deal with the case raised by the material and evidence before it. An asylum claimant does not have to pick the correct Convention "label" to describe his or her plight, but the Tribunal can only deal with the claims actually made.'

Indeed, that case serves as an example of how the nature of the case as actually put can affect the obligation of the Tribunal in identifying the relevant social group. In that case the majority of the High Court were prepared to identify the relevant social group from the evidence and material put before the Tribunal by the applicant to explain his relevant 'fear' by reference to the 'peculiar circumstances that had impinged on his life' (see *Dranichnikov 2003* at 402 [63]).

18 The question, ultimately, is whether the case put by the appellant before the Tribunal has sufficiently raised the relevant issue that the Tribunal should have dealt with it.

19 On balance I am satisfied that the case presented by the appellant in this case did identify those particular aspects of the appellant's situation. It was clear that those aspects were relied upon by him as part of a claim to protection on the basis of membership of a particular social group. I refer in particular to the written submission made to the Tribunal on behalf of the appellant where the comments of the delegate were 'picked up'. The aspects relied upon were that the appellant was an unaccompanied young male and that he would be without familial support if he was returned to Afghanistan.

20 It follows that the Tribunal should have considered whether the identified group was a 'particular social group' for the purposes of the Refugee Convention and whether the appellant had a well-founded fear of persecution by reason of his membership of that group. See *Dranichnikov 2003* at 394 [26]. Failure to do so involved a jurisdictional error.

21 However, that jurisdictional error would not justify any relief unless it is at least arguable that the description 'unaccompanied young males without familial support', or 'unaccompanied young males' is capable of comprising a particular social group for the purpose of the Refugee Convention.

22 In considering this question reference must be made to the High Court's reasoning in *Applicant A,* in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574 ('*Khawar*') and in *Dranichnikov 2003*. In

Khawar, for example, the High Court identified the relevant 'social group' as married women living in a household which did not include a male blood relative. That group was not self-defined. But they shared a common situation based, in part, on social and other factors. The High Court proceeded on the basis that that common particular situation was sufficient to define the group. As it was put in *Khawar* by McHugh and Gummow JJ at [81]-[83]:

'The harm amounting to persecution which has been identified above must be suffered for a Convention reason. The case put here is that Mrs Khawar was a member of a particular social group in Pakistan. Again, the tribunal failed to make the necessary finding. It failed to determine whether Mrs Khawar was a member of such a group. It was open to the tribunal on the material before it to determine that there was a social group in Pakistan comprising, at its narrowest, married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by the members of the household. Other formulations have been referred to earlier in these reasons and nothing said here is intended to foreclose a finding that a group so defined existed. This is a matter for the tribunal on reconsideration of the case.

It may be that the members of a group under any of the above formulations are very numerous. **However, the inclusion of race, religion and nationality in the Convention definition shows that that of itself can be no objection to the definition of such a class.** Applicant A establishes that disagreement with a law of general application and fear of the consequences of the failure to abide by that law does not, on that account, constitute the persons in question a social group within the meaning of the Convention definition. That has no bearing upon the present case. Nor does the proposition, which also is to be derived from Applicant A, that ordinarily the enforcement of a generally applicable criminal law will not constitute persecution of a social group constituted by those against whom that law is enforced. (emphasis added)

Applicant A indicates that the particular social group cannot be defined solely by the fact that its members face a particular form of persecution so that the finding of membership of the group is dictated by the finding of persecution. Those considerations do not control the present case. The membership of the potential social groups which have been mentioned earlier in these reasons would reflect the operation of cultural, social, religious and legal factors bearing upon the position of women in Pakistani society and upon their particular situation in family and other domestic relationships. The alleged systemic failure of enforcement of the criminal law in certain situations does not dictate the finding of membership of a particular social group.'

See also the decisions of Tamberlin J in *SBBK v Minister for Immigration* (2002) 117 FCR 412 at [29-30] and of von Doussa J in *SCAL* at [17]-[21].

23 Given this approach there is no obvious reason why unaccompanied youths, or unaccompanied youths with no family connections could not constitute a 'particular social group' for the purpose of the Convention. This is not to say that they do. If there is such a group it may be that the appellant, at

18 years of age, is no longer a member of it. These are questions to be determined by the Tribunal not by this Court.

24 Given the jurisdictional error that I have identified in the approach of the Tribunal it is necessary for the matter to be returned to the Tribunal for it to determine according to law whether it is satisfied that the appellant is entitled to protection under the Convention. The Tribunal will need to consider the steps identified by Gummow and Callinan JJ in *Dranichnikov 2003* at 394 [26]:

'At the outset it should be pointed out that the task of the tribunal involves a number of steps. First the tribunal needs to determine whether the group or class to which an applicant claims to belong is capable of constituting a social group for the purposes of the Convention. That determination in part at least involves a question of law. If that question is answered affirmatively, the next question, one of fact, is whether the applicant is a member of that class. There then follow the questions whether the applicant has a fear, whether the fear is well-founded, and if it is, whether it is for a Convention reason.'

25 In answering the first question of whether there is a relevant particular social group the Tribunal will need to consider the circumstances as they exist in Afghani society, particularly in Ghazni Province. It will be necessary for it to determine whether, in light of those circumstances, there is a particular social group of which the appellant is a member.

Equality of Result

26 My conclusion on the above ground makes it strictly unnecessary to consider the second argument put by Dr Churches that there was a jurisdictional error in this case because the appellant had been refused a protection visa when others in a similar situation had been successful before either the delegate or the Tribunal. However, it was fully argued and it is appropriate that I say something about it.

27 It is trite to say it is undesirable that similar cases result in different conclusions. In this case the appellant called as a witness a person who, on the face of it, was in a similar situation to him, but who had been granted a protection visa by the same delegate who rejected the application by the appellant. The only obvious difference was that the other unaccompanied youth was only 13 years old. The appellant also referred to other decisions which, he said, also involved unaccompanied youths where protection visas had been given.

28 These cases were brought to the attention of the Tribunal member. As is apparent from the transcript they obviously caused the member some concern:

'The other thing that your advice has rightly pointed out is that there are not only decisions of delegates approving people for temporary protection visas, but in fact recent decisions of certain members of this tribunal which have done the same thing.

…

And I'm aware of those decisions. I was telling your adviser that every single Afghan decision that's made by the Tribunal was sent to all the members of the Tribunal, so we're reading each other's decisions nearly every day.

…

And the decisions by the particular member of the Tribunal referred to in your adviser's submission I've read very carefully…

…

…but it must be appreciated that each member of this Tribunal is independent and not bound by what other members do.

…

At the same time, that's extremely concerning to me if decisions are… different decisions are being made on cases where the facts are essentially the same.

…

Anyway I want you to know that we are taking these sorts of things very, very seriously.

…

The other thing that we were just discussing and I was conscious of this… when I was talking to you about those three reports, I understand that was a lot of difficult information for you to have to deal with.'

29 Furthermore, in the Tribunal's reasons, the Tribunal refers to this argument and to some of the decisions said to be inconsistent.

30 Dr Churches argued that it was necessary, at the very least, for the Tribunal to give its reasons for distinguishing the previous decisions. He also argued that principles of fairness required that the appellant be dealt with in the same way as others. He relied on English decisions, such as *Inland Revenue Commissioners v National Federation of Self-Employed and Small*

Businesses Ltd [1982] AC 617, 651G. He also relied on dicta from decisions of this Court, such as *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189, 206-208 and *Bellinz v Federal Commissioner of Taxation* (1998) 84 FCR 154 ('*Bellinz*'). I do not find these decisions to be of any assistance in this context.

31 The law in Australia is clear - judicial review under s 39B of the *Judiciary Act 1903* (Cth), based as it is on s 75(v) of the Commonwealth Constitution, is only available for jurisdictional error. This has been confirmed most recently in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 and in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30. Jurisdictional errors are to be identified by looking at the statutory context. Whatever may be the position under other statutory schemes (such as, perhaps, the review of taxation decisions considered in *Bellinz*), equality of treatment is not an essential pre-condition to jurisdiction under the Act. In the context of judicial review of decisions under the Act it is well nigh impossible to see how any such pre-condition could be implied in light of s 474 of the Act. Consequently, no jurisdictional error arises simply because the Tribunal, or a delegate, reaches a different result in a similar case.

32 In fact under the Act the Tribunal is required to act independently. See *WADZ v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 118 at [9]-[10]. It is not bound, whether on questions of law or fact, by its own previous decisions. It is responsible always for determining the actual case before it on the law and facts as they are at the time of decision. It would be preferable if that did not result in inconsistent decisions, but if it does then that is what the Act clearly permits, save only for jurisdictional error. As Brennan J famously remarked in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36: 'the court has no jurisdiction simply to cure administrative injustice or error.' It is not enough to identify apparent unfairness. It is fundamental to identify a jurisdictional error.

33 This does not mean that the Tribunal can ignore similar previous decisions made by it when they are relied upon by an applicant. For example, if the Tribunal had a practice of following its previous decisions then it may well be arguable that that practice could found a legitimate expectation that the Tribunal would continue to follow its previous decisions in a similar case. But even if that is conceded, it would do no more than give to an applicant who relied upon the previous decision a right to be heard as to whether or not the previous decision should be followed. However, the written submission made on the appellant's behalf to the Tribunal indicates that the appellant's advisers knew that the Tribunal was at liberty to depart from its previous decisions. And the Tribunal member made this perfectly plain to the appellant at the hearing. As Dr Churches conceded, there was no breach of the Tribunal's obligation to afford a fair hearing to the appellant.

34 In my view there was no jurisdictional error on this ground.

Conclusion

35 I allow the appeal for the reasons given above. I order the grant of certiorari so that the decision of the Tribunal is quashed. I also issue mandamus on the Tribunal requiring it to hear and determine the review application in accordance with the law.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Selway.

Associate:

Dated: 16 July 2003

Counsel for the Appellant:	Dr SC Churches
Solicitor for the Appellant:	Refugee Advocacy Service of South Australia
Counsel for the Respondent:	K Tredrea
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	30 June 2003
Date of Judgment:	16 July 2003