SAAK v Minister for Immigration & Multicultural Affairs [2002] FCAFC 86

SAAK v Minister for Immigration & Multicultural Affairs [2002] FCA 367

NOTE: CHANGES TO THE MEDIUM NEUTRAL CITATION (MNC)

The Federal Court adopted a new medium neutral citation (FCAFC) for Full Court judgments effective from 1 January 2002. Single Judge judgments will not be affected and will retain the FCA medium neutral citation.

The transitional arrangements are as follows:

- All Full Court judgments delivered *prior* to 1 January 2002 will retain the FCA medium neutral citation.
- All Full Court judgments delivered *between* 1 January 2002 to 30 April 2002 have been assigned **parallel** medium neutral citations in both the FCA and FCAFC series.
- All Full Court judgments delivered *from* 1 May 2002 will contain the FCAFC medium neutral citation only.

FEDERAL COURT OF AUSTRALIA

SAAK v Minister for Immigration & Multicultural Affairs [2002] FCA 367

MIGRATION – application for review of a decision of the Refugee Review Tribunal refusing to grant a protection visa – where claim of persecution rejected due to failure to raise claim at initial interview – whether Tribunal is required to expressly state that it is exercising caution in relying on initial interview evidence.

PRACTICE & PROCEDURE – application for review – form of application required under Order 54B rule 2 of the Federal Court Rules – whether application is incompetent where the required form is not completed in English – where Court has discretion to relieve for non-compliance – discretion generally exercisable to allow non-English speaking applicant to file form in a language other than English

Migration Act 1958 (Cth), ss 366C, 427(7), 476(1)(b), (c), (e)

Federal Court Rules, O 54B r 2, O 1 r 8

MIMA v Yusuf (2001) 180 ALR 1; [2001] HCA 30, considered

Sujeendran Sivalingam v MIMA (Unreported, Federal Court of Australia, 17 September 1998, O'Connor, Branson & Marshall JJ), considered

Abebe v Minister for Immigration and Multicultural Affairs (1999)197 CLR 510, considered

W168/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 538, considered

Rishmawi v Minister for Immigration and Multicultural Affairs [1999] FCA 611, considered

Filios v Morland (1963) 80 WN (NSW) 501, referred to

Dairy Farmers Co-operative Milk Co Ltd v Acquilina (1963) 109 CLR 458, referred to

Gradidge v Grace Bros Pty Ltd (1988) 93 FLR 414, referred to

R v Johnson (1987) 25 A Crim R 433, considered

Augustin v Sava (1984) 735 F 2d 32, considered

Professor James Hathaway, *The Law of Refugee Status* (1991)

Juliet Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers (2001) 13(3) *International Journal of Refugee Law* 293

Neal P Pfeiffer, 'Credibility Findings in INS Asylum Adjudications: A Realistic Assessment' (1983) 23 *Texas International Law Journal* 139 at 154

Savitri Taylor,'Informational Deficiencies Affecting Refugee Status Determinations: Sources and Solutions' (1994) 13(1) *University of Tasmania Law Review* 43

D Anker & R Rubin, 'The Right to Adequate Translation in Asylum Proceedings' (1986) 9 *Immigration Law Journal* 10

SAAK v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

S 189 OF 2001

NORTH, GOLDBERG & HELY JJ

28 MARCH 2002

MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S 189 OF 2001

ON APPEAL FROM A SINGLE JUDGE OF THE

FEDERAL COURT OF AUSTRALIA

BETWEEN:	APPLICANT SAAK OF 2001 APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT
JUDGE:	NORTH, GOLDBERG & HELY JJ
DATE OF ORDER:	28 MARCH 2002
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. Leave granted to the appellant to amend his notice of appeal in the form referred to in paragraph 2 of the notice of motion filed on 22 February 2002.

2. The appeal be dismissed.

3. The appellant pay the respondent's costs of and incidental to the appeal.

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 189 OF 2001

ON APPEAL FROM A SINGLE JUDGE OF THE

FEDERAL COURT OF AUSTRALIA

BETWEEN:	APPLICANT SAAK OF 2001 APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	NORTH, GOLDBERG & HELY JJ
DATE:	28 MARCH 2002
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal against a decision of O'Loughlin J made on 8 May 2001.

2 His Honour dismissed an application for review of a decision of the Refugee Review Tribunal (the Tribunal) made on 11 December 2000. In that decision, the Tribunal affirmed the decision of the delegate of the respondent not to grant the appellant a protection visa.

3 The appellant is a citizen of Iran who was born on 9 January 1969. He arrived in Australia on 14 February 2000.

4 The central claim made before the Tribunal by the appellant was that he feared persecution by reason of his involvement with the Mojahedin. He claimed, before the Tribunal, that he distributed tapes and pamphlets on

behalf of the Mojahedin. On one occasion he had a bag full of tapes and pamphlets as well as a small bag containing his wallet with personal details. He was a passenger on a motorcycle when the police ordered the driver to stop. The driver did not stop. The appellant threw the pamphlets on the road to create an obstacle. Whilst doing this, he dropped the bag containing his own bag, notebook, name and address, and photos. He was told that a few days later the security forces came looking for him.

5 This claim was made by the appellant in a written statement accompanying his application for a protection visa dated 9 July 2000. It was confirmed in oral evidence before the Tribunal on 23 November 2000.

6 The claim, however, was not made in the initial interview conducted on 20 February 2000.

7 The way in which the Tribunal dealt with the appellant's failure to make the claim in the initial interview is the subject of one of the arguments on the appeal.

the first interview ground of appeal

8 At the hearing before the Tribunal, the appellant explained why he had not mentioned his alleged involvement with the Mojahedin at the initial interview. The Tribunal summarised this evidence in its decision as follows:

"The applicant stated that he made no mention of the Mojahedin in his initial statement as he had been at sea for eight days and he had an Afghan interpreter. He agreed that he gave the information in his initial statement although he stated he never said he was a driver as he only worked as a salesman."

9 Following the hearing, the Tribunal wrote to the appellant on 28 November 2000 attaching the initial interview record and indicating that it provided a reason to affirm the decision under review, and inviting the appellant to comment on the information.

10 The Tribunal summarised the appellant's response in its reasons for decision as follows:

"The applicant and his adviser provided further written information to the Tribunal in relation to failure to raise his claims in his initial interview. He stated that the information had political ramifications and he was not sure if he could trust the officers at interview. He claimed he did not know where they would take the information if he told them. He stated that he was only given a form about personal details and not one about political asylum. Had he been given such a form he would have written his case on it. He also stated that he was given an Afghani interpreter. He stated that they speak Farsi but with a different dialect. He stated that he believed that his comments were misinterpreted, whereas if he had an Irani interpreter he would have been understood. He also stated that he was physically and spiritually wrecked as a result of his journey. He stated that he also explained

that he fled from Syria to Turkey with a fake passport but that this information was not in the record. He claimed that a Farsi interpreter listening to the tape may be able to clarify these points."

11 The Tribunal then set out country information concerning the Mojahedin. It emphasised that the Mojahedin had engaged in acts of violence and, as a result, suspected members of the organisation faced execution or long prison sentences in Iran if caught.

12 The Tribunal rejected the appellant's claimed involvement with the Mojahedin for two reasons. The first reason was the appellant's failure to mention in the first interview the claimed involvement with the Mojahedin. The second reason was that the appellant said that he supported the democratic goals of the Mojahedin, but did not support violence. The Tribunal did not accept that a person with the appellant's attitude and level of commitment would be a member of the Mojahedin.

13 As to the first reason for rejecting the appellant's claimed involvement with the Mojahedin, the Tribunal said:

"The applicant's main claim revolves around his claimed association with the Mojahedin. However the Tribunal does not accept that the applicant has any such association for the following reasons. Firstly if the applicant was involved and had to leave Iran after a dramatic escape during which he lost his wallet and other papers together with some Mojahedin propaganda the Tribunal would have expected that the applicant would have raised this initially. However he made no mention in his initial statement of the Mojahedin or his dramatic escape. The Tribunal has considered his explanation that he was ill from his travel and had an Afghan interpreter. However the applicant confirmed that he said most of what is contained in the record of this statement. He gave details about what he considered a low level family to be. In the Tribunal's view the details given by the applicant do not indicate he was in such a state as to be unable to answer questions. His answers also do not indicate any significant interpreter problem. The Tribunal also does not accept the applicant's assertion that he would have given his case for asylum if he had been provided with a proper form. The applicant was asked why he left his country and why he did not want to return. The absence of any mention of asylum does not explain why the applicant gave different reasons for leaving to the ones he has now given. The Tribunal also does not accept that having travelled all this way after having allegedly fled Iran that he would not initially reveal his claims because of political ramifications or confidentiality concerns. The Tribunal considers his failure to mention the Mojahedin or his escape from the police when he lost his personal papers indicated that he had no such involvement and made no such escape."

14 The criticism of the way in which the Tribunal dealt with the first interview was reformulated on appeal. The appellant sought to amend his notice of appeal in this respect by adding a new ground, namely, that the trial judge should have held that:

"in rejecting the applicant's claims on the basis of inconsistencies with information provided in an initial interview, or on the basis of the delay in raising such claims, the

Tribunal failed to direct itself – as it was obliged to – as to the caution required to be exercised before rejecting an applicant's claims for such reasons."

15 Mr Maxwell QC, who appeared, with Mr Horan of counsel, for the appellant, relied upon s 476(1)(b), (c) and (e) of the *Migration Act* 1958 (Cth) (the Act), which provide grounds of review as follows:

"(1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

…

(b) that the person who purported to make the decision did not have jurisdiction to make the decision;

(c) that the decision was not authorised by this Act or the regulations;

…

(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;"

16 The scope of these sections was explained in *MIMA v Yusuf* (2001) 180 ALR 1; [2001] HCA 30 by McHugh, Gummow and Hayne JJ at [83-4] as follows:

"there is no reason to give either para (b) or para (c) of s 476(1) some meaning narrower than the meaning conveyed by the ordinary usage of the words of each of those paragraphs. In particular, it is important to recognise that, if the tribunal identifies a wrong issue, asks a wrong question, ignores relevant material or relies on irrelevant material, it 'exceeds its authority or powers.' If that is so, the person who purported to make the decision 'did not have jurisdiction' to make the decision he or she made, and the decision 'was not authorised' by the Act.

Moreover, in such a case, the decision may well, within the meaning of para (e) of s 476(1), involve an error of law which involves an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found. That it cannot be said to be an improper exercise of power (as that expression is to be understood in s 476(1)(d), read in light of s 476(3)) is not to the point. No doubt it must be recognised that the ground stated in para (e) is not described simply as making an error of law. The qualification added is that the error of law involves an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found. That qualification emphasises that factual error by the tribunal will not found review. Adopting what was said in Craig, making an erroneous finding or

reaching a mistaken conclusion is not to make an error of law of the kind with which para (e) deals. That having been said, the addition of the qualification to para (e) is no reason to read the ground as a whole otherwise than according to the ordinary meaning of its language. If the tribunal identifies a wrong issue, asks itself a wrong question, ignores relevant material or relies on irrelevant material in such a way as affects the exercise of its powers, that will very often reveal that it has made an error in its understanding of that applicable law or has failed to apply the law correctly to the facts it found. If that is so, the ground in s 476(1)(e) is made out."

17 In the present case, the appellant contended that the Tribunal failed to approach the assessment of credit with the necessary caution, and, thereby, misunderstood its function. In the language of *Yusuf*, it asked itself the wrong question, that is to say, it misdirected itself by failing to exercise restraint in holding that the appellant was not a credible witness. Or, as Mr Maxwell put it – *"if the Tribunal fails to give itself the requisite direction as to the caution required in relation to evidence of this kind then it mistakes its task."*

18 Mr Maxwell contended:

"Where there is an identifiable class of evidence which is recurrent as it is in cases of this kind, that is to say, initial interview evidence, our submission is that there is a principle applicable to the evaluation of that evidence, that is to say, the tribunal must identify the particular attributes of the occasion on which the relevant statement is made, being attributes which members of this court have repeatedly identified, and we'll take your Honours to some examples, and if it doesn't do that then it's falling into error by treating it as if it were of the same type or class as the statement made for the purposes of the hearing."

19 And again:

"[W]hat is required is a clear acknowledgment of the danger from an evidentiary point of view, from a legal point of view, of attaching weight or too much weight to omissions from the initial interview."

20 The argument raises two issues – first, did the Tribunal fail to exercise sufficient caution in assessing the credit of the appellant by, in particular, relying upon the inconsistency between the first interview and the later evidence of the appellant, and second, if so, did such a failure provide a ground of review under s 476(1)(b), (c) or (e) of the Act?

21 That there is a need for the Tribunal to exercise care in relying on an inconsistency between the first interview and later evidence as the foundation for an adverse credit finding is recognised by the authorities and by text writers. It also reflects modern research concerning the proper approach to the assessment of credit by courts.

22 An oft-quoted starting point is taken from Professor Hathaway's *The Law of Refugee Status* (1991) at 84, as follows:

"First, the decision-maker must be sensitive to the fact that most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority. They may thus be less than forthright in their dealings with immigration and other officials, particularly soon after their arrival in an asylum state. The past practice of the [Immigration Appeal] Board of assessing credibility on the basis of the timeliness of the claim to refugee status, compliance with immigration laws, or the consistency of statements made on arrival with testimony given at the hearing is thus highly suspect, and should be constrained in [a] contextually sensitive manner."

[citations omitted]

23 In *Sujeendran Sivalingam v MIMA* (Unreported, Federal Court of Australia, 17 September 1998, O'Connor, Branson & Marshall JJ), the Full Court cited the above passage from Professor Hathaway and immediately beforehand at 13, said:

"We accept that refugee cases may involve special consideration arising out of problems of communication and mistrust, and problems flowing from the experience of trauma and stress prior to arrival in Australia."

24 And, in *Abebe v Minister for Immigration and Multicultural Affairs* (1999)197 CLR 510 at 577-8, Gummow and Hayne JJ said:

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

25 In *W168/00A v Minister for Immigration and Multicultural Affairs* [2001] FCA 538, the Full Court dealt with an appeal involving a decision of the Refugee Review Tribunal which found that the Sri Lankan appellant could not be believed because of inconsistencies in the accounts given by him to the delegate and to the Refugee Review Tribunal. Lee J said at [10]:

"An application for a protection visa is not determined by a judicial proceeding in which all relevant evidence is collected, presented and tested by parties to the proceedings. Determination of an application for a protection visa is an administrative function on limited material and limited inquiry, and the process does not provide a foundation on which a finding on credibility may be made with assurance. (See: S Kneebone, The Refugee Review Tribunal and the Assessment of Credibility: An Inquisitorial Role(1998) 5 A J Admin L 78.)"

26 His Honour then referred to the passage from Professor Hathaway's work referred to earlier in these reasons and said at [12]:

"adverse decisions on credibility by the Tribunal should be restricted to the most obvious cases if the risk of injustice to applicants is to be avoided."

27 In recent times research has shown that some of the traditional methods used by courts to determine creditworthiness are unreliable. For instance, it is recognised that the confident liar is no longer necessarily to be

preferred over the reticent teller of truth. The demeanour of a witness has assumed less importance in the assessment of credibility.

28 In relation to asylum determinations, it has been accepted that the special circumstances of such applications will often render the usual techniques of credibility evaluation inadequate: see generally, Juliet Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers (2001) 13(3) *International Journal of Refugee Law* 293; Neal P Pfeiffer, 'Credibility Findings in INS Asylum Adjudications: A Realistic Assessment' (1983) 23 *Texas International Law Journal* 139 at 154; Savitri Taylor,'Informational Deficiencies Affecting Refugee Status Determinations: Sources and Solutions' (1994) 13(1) *University of Tasmania Law Review* 43.

29 In particular, there are some factors which may result in the asylum seeker failing to disclose an important part of a claim at an early stage.

30 Mistrust of authority arising from dangers under an authoritarian regime from which the asylum seeker has fled may make that person reluctant to disclose information to the authorities in the country of flight, especially on first contact with authority on arrival. If the level of mistrust is high, it may mean that the applicant will not relate a critical element of a claim at the first interview. In those circumstances, the failure to disclose the relevant event comes from fear, not from the fact that the event did not occur.

31 Then, the circumstances which gave rise to the need for flight may have been so traumatic as to cause psychological harm in the form of Post-Traumatic Stress Disorder (PTSD). Pfeiffer (above) at 148-9 describes some symptoms of this condition which may explain the failure to disclose information about traumatic events:

"If an applicant is suffering from PTSD, his memory of the persecution may be impaired. Among the varied reactions that are associated with PTSD, two symptoms are particularly relevant to the asylum applicant's circumstances. Many PTSD sufferers experience a loss of memory and confusion, a psychological defence mechanism which lessens their stress responses. By not remembering specific details, the applicant delays acceptance of the trauma and the negative emotions associated with the memory of the event."

32 Against this background, it is necessary to consider whether the Tribunal approached the task of assessing the credibility of the appellant's claim to involvement with the Mojahedin, by reference to the first interview, with the necessary caution.

33 The critical factor upon which the appellant relied was the failure of the Tribunal to state that it had taken a cautious approach to this assessment, and the failure to state that it had regard to the circumstances in which the interview occurred. From this omission, Mr Maxwell submitted, the Court should infer that the Tribunal failed to treat the assessment with the necessary caution.

34 Very often the Refugee Review Tribunal expressly refers to the approach it intends to take to the assessment of evidence. There are many examples of Tribunal decisions which acknowledge the constraints referred to by Professor Hathaway and the authorities concerning the assessment of credit. The practice of recording the general approach which the Tribunal intends to take to the assessment of credit is a valuable one. Thereby, the Tribunal reminds itself of the proper approach to its task, and also provides a reassurance to the reader that the proper approach has been taken. In the end, however, the reasons of the Tribunal should disclose whether the proper approach has in fact been taken. This is the safeguard against the problem which arises where the Tribunal records the self direction, but does so in a hollow, formulaic way as a means to attempt to immunise the decision against criticism for failure to take the proper approach to the assessment of credit.

35 In the present case, the Tribunal did not state the approach it intended to take to the significance of the first interview in relation to the claim that the appellant was involved with the Mojahedin.

36 However, the process of evaluation actually undertaken by the Tribunal, although not expressly stated, demonstrated that it approached the assessment of credit in a cautious way by taking into account the circumstances in which the first interview was held and the explanation which the appellant relied upon.

37 The Tribunal recorded the appellant's evidence at the hearing concerning the reason for his failure to mention at the first interview his alleged involvement with the Mojahedin (see par 8 of these reasons).

38 After the hearing the Tribunal sought further information about the first interview, and referred to the further information provided by way of explanation (see par 10 of these reasons).

39 Then, in its "Findings and Reasons", the Tribunal again referred to the explanations given by the appellant for his failure to raise his alleged involvement with the Mojahedin at the first interview. In the passage extracted at par 13 of these reasons, the Tribunal considered the appellant's explanation and gave reasons for rejecting them.

40 The way in which the Tribunal set out and dealt with the first interview evidence demonstrates that it gave serious and careful consideration to the explanations provided by the appellant. The decision itself evidences the exercise of the requisite caution. There is no basis for an inference that the Tribunal failed to approach the task on the wrong basis.

41 It was not necessary in this case for the Tribunal to explain that the circumstances of the first interview may make it an unreliable basis for a conclusion as to the creditworthiness of the appellant, because the appellant himself raised the matters which generally make the first interview an unreliable foundation for an adverse credit finding. Further, Tribunal explained the reasons for rejecting those limitations in this case. Whilst it was not

necessary for the Tribunal to make an explicit reference to the caution which should be exercised in these circumstances such references would not have been wasted.

42 In the light of the conclusion that the Tribunal did exercise the necessary caution in assessing the appellant's claimed involvement with the Mojahedin by reference to the first interview, it is unnecessary for us to consider the second question, namely, whether the failure to exercise the necessary caution provides a ground of review under s 476(1)(b), (c) and (e).

the form of the application ground of appeal

43 A further ground of appeal concerned the form of the application for review filed in the Court. Order 54B rule 2 of the *Federal Court Rules* requires that an application for review in a case such as the present be in accordance with Form 56. The appellant filed a document which was in the form of the Form 56, but was completed in the Farsi language not in English.

44 The primary judge upheld the respondent's objection to competency on the ground that the document could not be regarded as an application for judicial review because it failed to comply with the rules of Court. His Honour also said that the document should not have been received because it was not in English.

45 In the event, the primary judge took a practical approach and requested the respondent to provide a translation of the document. His Honour then considered the grounds contained in the translated document. As those grounds did not disclose any reviewable error by the Tribunal, he dismissed the application.

46 On the main argument advanced on the appeal concerning the adverse credibility finding reliant on the first interview evidence, we have also found that there was no reviewable error by the Tribunal. Thus, whether the primary judge was correct in holding that the document filed in the Farsi language was not a valid application, is not necessary to decide an academic question. Even if the appellant succeeded in that challenge to his Honour's decision, the appeal would be dismissed because the appellant has failed on a critical issue in the appeal.

47 Although it is not necessary for the disposition of the appeal, it is desirable that we record our view concerning the conclusion of the primary judge that an application completed in a language other than English is, by reason of that fact, not a valid application and should not be received by the Court.

48 The Court has power to dispense with compliance with the requirements of the rules: Order 1 rule 8. If there is an implicit requirement

that Form 56 be completed in English, the Court may, under Order 1 rule 8, in appropriate circumstances, relieve from non-compliance with that requirement. In *Rishmawi v Minister for Immigration and Multicultural Affairs* [1999] FCA 611 Kiefel J applied this rule to hold that a Form 56 which did not contain any grounds for the application for review was nonetheless effective to invoke the Court's jurisdiction to review the decision in question.

49 Where an applicant does not speak English and has no, or limited, access to translator services, it will generally be appropriate for the Court to dispense with any requirement that Form 56 be completed in English. The essential concern of the Court must be to adopt a process for communication which allows for an exchange between the Court and the litigants, and between the litigants themselves. In fact, this is the course which the primary judge adopted when he had the documents translated.

50 The position is similar to that which arises when a non-English speaker desires to give oral evidence in a proceeding. The judge has a discretion to allow the evidence to be given in that person's language and to allow for the evidence to be translated so that it can be understood by the Court and the other parties: *Filios v Morland* (1963) 80 WN (NSW) 501; *Dairy Farmers Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458, 464.

51 In *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414, the applicant in proceedings in the Compensation Court was deaf mute. A sign language interpreter was provided for her use. In the course of the hearing a question of admissibility of evidence arose. The interpreter began to interpret counsel's submissions and the exchanges with the judge. The judge directed that there be no further interpretation of the argument or exchanges. The Court of Appeal (Kirby P, Samuels and Clarke JJA) held that the discretion to refuse a party the right to interpretation had miscarried. Samuels JA described the principle governing the participation of an interpreter, at 425, as follows:

"[A]ny party who is unable (for want of some physical capacity or for lack of knowledge of the language of the court) to understand what is happening must, by the use of an interpreter, be placed in the position in which he or she would be if those defects did not exist. The task of the interpreter in short is to remove any barriers which prevent understanding or communication. This must, of course, be subject to the overriding right of the judge, first to determine whether those barriers exist and, secondly, to decide in what way the corrective mechanisms may be applied without disrupting or adversely affecting the forensic procedures which he is charged to undertake."

52 It seems that Samuels and Clarke JJA regarded this approach as consistent with *Filios* and *Acquilina*. Kirby P (as he then was), on the other hand, saw in the more recent Queensland case of *R v Johnson* (1987) 25 A Crim R 433 an example of a changing attitude in the Australian judiciary. The change had led to a more liberal view of the exercise of the discretion, that is to say, an enlargement of the right to an interpreter. His Honour favoured that change. He said that it reflected a growing appreciation of the importance of allowing persons to communicate to the court in their own language. It was

therefore consistent with the changing nature of Australia's ethnic composition.

53 That more liberal approach can be seen in s 366C of the Act, which provides for a right to an interpreter before the Migration Review Tribunal, as follows:

"(1) A person appearing before the Tribunal to give evidence may request the Tribunal to appoint an interpreter for the purposes of communication between the Tribunal and the person.

(2) The Tribunal must comply with a request made by a person under subsection (1) unless it considers that the person is sufficiently proficient in English.

(3) If the Tribunal considers that a person appearing before it to give evidence is not sufficiently proficient in English, the Tribunal must appoint an interpreter for the purposes of communication between the Tribunal and the person, even though the person has not made a request under subsection (1)."

The equivalent provision which applies to the Refuge Review Tribunal (s 427(7)) is in less prescriptive terms.

54 The same procedural rights apply in favour of asylum seekers in the United States of America: see D Anker & R Rubin, 'The Right to Adequate Translation in Asylum Proceedings' (1986) 9 *Immigration Law Journal* 10. In *Augustin v Sava* (1984) 735 F 2d 32 the US Court of Appeals 2nd Circuit explanation that the procedural protections followed from the statutory right to a hearing, and said, at 37-8:

"Without attempting precisely to map the contours of due process in the immigration area, we think that the protected right to avoid deportation or return to a country where the alien will be persecuted warrants a hearing where the likelihood of persecution can be fairly evaluated. Since Congress intended this right to be equally available to all worthy claimants without regard to language skills, we think that an applicant for relief under s 1253(h) must be furnished with an accurate and complete translation of official proceedings. As a sequel to this right, translation services must be sufficient to enable the applicant to place his claim before the judge. A hearing is of no value when the alien and the judge are not understood. Gonzales v Zurbrick, 45 F.2d 934, 937 (6 Cir. 190). The very essence of due process is a 'meaningful opportunity to be heard". Hewitt, supra, 459 U.S. at 490 (Stevens, J., dissenting). To erect barriers by requiring comprehension of English would frustrate the inclusive aim of the UN Protocol and the intent of Congress."

55 Applying the approach taken in these cases to the discretion to allow a witness to give evidence in a person's native language, especially in asylum cases, leads to the conclusion that ordinarily a person unable to speak English and without access to translation services (for instance, by reasons of being in detention) would be permitted to file a Form 56 filled out in a language other

than English. Whether the person seeking to file the document is ultimately given leave to do so is a question to be determined by the Court. The application is not invalid by being in another language. It must be accepted for filing by the Court.

conclusion

56 For the foregoing reasons, the appeal must be dismissed with costs.

I certify that the preceding fifty-six (56) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 28 March 2002

Counsel for the Applicant:	Mr C M Maxwell QC, with Mr C Horan
Solicitor for the Applicant:	Jeremy Moore & Associates
Counsel for the Respondent:	Ms S Maharaj
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	26 February 2002
Date of Judgment:	28 March 2002