FEDERAL COURT OF AUSTRALIA

SAAG v Minister for Immigration & Multicultural & Indigenous Affairs

[2002] FCA 547

MIGRATION – protection visa – appeal from decision of Refugee Review Tribunal – whether the Tribunal addressed the applicant's claim to have a well-founded fear of persecution - whether reasons for decision disclosed lack of good faith on the part of the Tribunal – whether the decision represented a bona fide attempt to pursue the power conferred - scope and content of the bona fide proviso to the Hickman principle.

ADMINISTRATIVE LAW – privative clause – application of Hickman principles – scope and content of the bona fide proviso to the principle – whether decision of Tribunal made in absence of good faith so as to permit review of the decision under s39B of the *Judiciary Act 1903* (Cth).

Migration Act 1958(Cth)

Migration Legislation Amendment (Judicial Review) Act 2001(Cth)

Judiciary Act 1903 (Cth)

Abebe v Commonwealth(1999) 197 CLR 510 - referred to

Briginshaw v Briginshaw (1938) 60 CLR 361 – referred to

Commissioner of Taxation v Stokes (1996) 141 ALR 653 - applied

Daihatsu Australia Pty Ltd v Commissioner of Taxation (2001) 184 ALR 576 – applied

Ismail v Minister for Immigration & Multicultural Affairs [1999] FCA 1555; (1999) 59 ALD 773 – cited

Minister for Immigration & Mjulticultrual Affaris v Yusuf (2001) 180 ALR 1 – cited

O'Toole v Charles David Pty Ltd (1990) 171 CLR 232 – discussed

R v Coldham; Ex parte Australian Workers' Union (1983) 153 CLR – cited

R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598 – applied

W 148/00A v Minister for Immigration & Multicultural Affairs (2002) 185 ALR 703 - applied

Yit v Minister for Immigration & Multicultural Affairs [2000] FCA 885 – applied

SAAG v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

S.184 of 2001

MANSFIELD J

10 MAY 2002

ADELAIDE

IN THE FEDERAL COURT OF AUSTRALIA	
SOUTH AUSTRALIA DISTRICT REGISTRY	S.184 OF 2001

BETWEEN:	SAAG APPLICANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	MANSFIELD J
DATE OF ORDER:	10 MAY 2002
WHERE MADE:	ADELAIDE

THE COURT DECLARES THAT:

1. The decision of the Refugee Review Tribunal given on 1 October 2001 is invalid and of no effect.

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.184 OF 2001

BETWEEN:	SAAG APPLICANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS RESPONDENT

JUDGE:	MANSFIELD J
DATE:	10 MAY 2002

PLACE: ADELAIDE

REASONS FOR JUDGMENT

1 The applicant applied on 19 October 2001 for review of a decision of the Refugee Review Tribunal (the Tribunal) given on 1 October 2001. The Tribunal affirmed a decision of a delegate of the respondent made on 28 June 2001 not to grant to the applicant a protection visa for which he had applied on 4 May 2001 under the *Migration Act 1958* (Cth) (the Act). The applicant had applied for that visa following his arrival in Australia on 11 April 2001.

2 Because the application to the Court was made after the commencement of the amendments to the Act effected by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), the Act as amended by that amending Act applies to the Court's consideration of the application. The Court has jurisdiction pursuant to s 39B of the *Judiciary Act 1903* (Cth) to grant relief under certain circumstances, but otherwise has no jurisdiction under any other statute to review the decision of the Tribunal: see ss 475A and 477 of the Act. Moreover, the Tribunal's decision is a "privative clause decision" within the meaning of s 474(2) of the Act, so that s 474(1) of the Act applies. It provides that the decision of the Tribunal is final and conclusive, cannot be challenged or reviewed or called in question in any court and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

3 The respondent acknowledges that, despite the literal breadth of s 474(1) of the Act apparently operating as a clause ousting the jurisdiction of the Court, the Court may nevertheless review the decision of the Tribunal and make orders under s 39B of the Judiciary Act in certain limited circumstances. He accepts that the scope of that review is, at least, as discussed by Dixon J in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616:

"It is of course, quite impossible for the Parliament to give power to any judicial or other authority which goes beyond the subject matter of the legislative power conferred by the Constitution. … It is equally impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition. But where the legislature confers authority subject to limitations, and at the same time enacts [a privative clause] it becomes a question of interpretation of the whole legislative instrument whether transgression of the limits, so long as done bona fide and bearing on its face every appearance of an attempt to pursue the power, necessarily spells invalidity. In my opinion, the application of these principles [in this case] means that any decision given by a Local Reference Board which upon its face appears to be within power and is in fact a bona fide attempt to act in the course of its authority, shall not be regarded as invalid."

The respondent accepts that those principles articulated by Dixon J remain authoritative. He further contends that no error of the kind necessary to attract relief under s 39B of the Judiciary Act within those principles has been identified.

4 To be eligible to be granted the visa, it was necessary for the delegate of the respondent and, on review, the Tribunal to be satisfied that the applicant met the criteria for the grant of the visa specified in the Act and in the Migration Regulations. Relevantly for present purposes, s 36(2) of the Act specifies that a criterion for the grant of the visa is that the delegate of the respondent and, on review, the Tribunal be satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol, using those terms as defined in the Act (the Convention). That in turn meant, in this matter, that the delegate of the respondent and, on review, the Tribunal had to be satisfied that the applicant is a "refugee" as defined in Article 1A(2) of the Convention, namely 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; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

the applicant's claims

5 The applicant is a young man, now aged about 18. He claims to be a national of Afghanistan, of Hazara ethnicity and of the Shi'a religion. He claims to be uneducated and illiterate.

6 The applicant claimed to have a well-founded fear of persecution if he were to return to Afghanistan because of the Taliban. He said that he came from the sub-village of Gurdon, Utqol village, in the Jaghori District of the Ghazni Province. He said he did not attend school, and from about the age of 10 he had worked as a kitchen hand in the family tea house in the Utqol Bazaar until shortly prior to his departure from Afghanistan. That bazaar is about 15 to 20 minutes walk from his home, his home being one of about eight houses in the sub-village of Gurdon. He also said that his sub-village was about 20 to 30 minutes walk to the town of Angori. In the application for the visa, the applicant described himself as being one of eight siblings. His eldest brother is dead and an older brother is missing. His parents, three sisters and two older brothers continue to live in Afghanistan. He arrived in Australia without documentary evidence of his identity or nationality.

7 The Tribunal did not accept that the applicant is a national of Afghanistan or that he has ever resided in Afghanistan. It found that the applicant was an untruthful witness. It described his evidence as "inconsistent, evasive and inherently unconvincing in significant respects". It gave reasons for that view. The applicant contested the reasoning of the

Tribunal in a way which did not specifically direct attention to any error of the kind necessary to attract relief under s 39B of the Judiciary Act, but which nevertheless suggested that it did not properly approach its task. In this matter, it is helpful, in my view, to compare the Tribunal's reasons why it found the evidence of the applicant untruthful with the nature of the applicant's claim and his response.

consideration of the tribunal's reasons

8 The Tribunal described the applicant as having given inherently unconvincing evidence in relation to his education. He told the Tribunal that two of his brothers had commenced schooling at the age of six and had completed a number of years of education, but that he did not go to school until he was aged 14 or 15 (and then only for short periods each day to a mosque for Koran education) simply because he had not wanted to. The applicant maintains that that is not inherently unconvincing, but quite logical. He says he was always reluctant to go to school, and so his father encouraged him to work (as he did) from a young age.

9 It is not apparent to me why the Tribunal regarded the applicant's evidence in that respect as inherently unconvincing. *In W 148/OOA v Minister for Immigration & Multicultural Affairs* (2002) 185 ALR 703, [2001] FCA 679, Tamberlin and R D Nicholson JJ at [67] said obiter:

"Where the question of credibility is determinative of a tribunal decision, to simply assert that the tribunal considers the applicant's account to be "implausible" or "highly unusual" does not constitute a finding on the question raised. Such expressions are more in the nature of observations or side comments rather than findings. The reasoning process and supporting evidence that forms the basis on which a finding that evidence is rejected should be disclosed and clear findings made in direct and explicit terms. It is not sufficient simply to make general passing comments on general impressions made by the evidence where the issue is important or significant."

I respectfully share those views. They would seem to apply with equal force to the observations of the Tribunal now under consideration, although of course the Tribunal does not fall into reviewable error by failing to comply with s 430 of the Act: *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 180 ALR 1.

10 In the same section of its reasons, the Tribunal noted that the applicant claimed illiteracy as the reason why he could not answer a question about his passport, and that he then gave inconsistent evidence about how he had known that the passport had been in his own name. It said that it did not accept the applicant is as uneducated as he has claimed, nor did it accept that he is illiterate. Its conclusion in that regard is dependent upon its view as to the reliability of his evidence about his education.

11 The inconsistency to which the Tribunal refers appears in a passage in the Tribunal's recital of the applicant's evidence in the following terms:

"In response to being questioned about whether his own name had been on the passport he used to leave Pakistan, the applicant replied that he was illiterate and that he guessed that the smuggler had written his name in it. He then said that the smuggler told him that the passport was in his name."

Those answers are not inconsistent, but complementary. The Tribunal's recital of the course of the hearing does not indicate how the applicant had not answered a question about his passport. He appears from that recital to have done so. In his "affidavit", that is his statement filed in support of his application to the Court, the applicant explains that the smuggler asked his name to write it later in the passport, so that when he later received the passport, he had no reason to think that it was not in his own name, although he could not read it. He claims to have responded accordingly to the Tribunal. I take that "affidavit" as a form of submission about the Tribunal's criticism of his evidence about his passport. I accept the applicant's submissions in that regard. The respondent did not point to any material which warranted the Tribunal's finding of inconsistency in his evidence on the topic, nor any evidence from which it could then rationally infer that the applicant was not illiterate as he claimed. It was not suggested that his explanation for how his name came to be on the passport, or how he came to know or understand that his name was on the passport, was inconsistent with other evidence or otherwise had characteristics which rendered it not credible.

12 The second general reason that the applicant's evidence attracted criticism from the Tribunal was his "impersonal and evasive evidence" about the impact of the Taliban on his life. The Tribunal described that evidence in forceful terms in the following passage:

"The applicant gave impersonal and evasive evidence about the impact of the Taliban on his life at the hearing. He said that the Taliban told everyone in his area that they were infidels and that they had to pray with open hands. The Taliban also sent everyone to fight. In an attempt to obtain unrehearsed and personal evidence from the applicant, he was questioned about how he knew the Taliban had been sending people to fight in his area. Initially, he would not answer the question. Upon repetition of the question, he provided the evasive response that the Taliban sent people to fight Massoud. As he had mentioned Massoud he was given an opportunity to talk about Massoud. His evidence about Massoud, the former leading commander of the Northern Alliance, was scant and cliched. His claim that Massoud had visited the Jaghori district, was inherently unconvincing and clearly concocted to create a nexus between a well-known Afghan political and military figure and the applicant's alleged place of residence in Afghanistan."

13 The "evasive response" following the applicant first apparently refusing to answer the question is recorded by the Tribunal in the following passage:

"The applicant was asked what he knew about the Taliban taking Shi'as away to fight. He responded that he would answer questions if they were asked of him. When the question was repeated, he responded that the Taliban took everyone

and sent them to fight. He was asked to confirm that they took everyone, at which point he qualified his answer by saying that the Taliban only took the boys. He was asked what else he knew about the Taliban taking Shi'as away to fight. He responded that he knew that the Taliban wanted them to fight Massoud. In response to being asked what he knew of Massoud, he said that Massoud was a Tajik commander who fought against Taliban commanders. When asked to identify Massoud's home area in Afghanistan, he responded that he had forgotten it. He then said that Massoud was a good man and that he had been to Jaghori. When asked how many months or years ago Massoud had been to Jaghori, he responded that he had not known that he would be asked such questions at the Tribunal hearing. He then said that he did not know when Massoud had been in Jaghori."

14 The inference that the Tribunal drew from that evidence is again hard to understand. It is true that his evidence about Massoud was scant. I do not understand the reference to it being "cliched". The Tribunal does not explain why that is so. The Tribunal does not explain why his claim that Massoud had visited the Jaghori District was "inherently unconvincing and clearly concocted" to create a nexus between the applicant's home area and Massoud. He did not volunteer that information but responded to questions of the Tribunal. The applicant's comments in submission (again not evidence) in his "affidavit" are that Massoud was a Tajik commander in a different province of Afghanistan, about whom he had heard. He and other Hazara people think he is a good person because he fights the Taliban. He never claimed to be a political commentator on Afghan politics or to know the kind of details requested. He had heard from others about Massoud's visit to Jaghori. As comments upon the Tribunal's reasoning, I accept that nothing is disclosed in the Tribunal's decision which could indicate why the Tribunal might have expected the applicant to have a greater knowledge of Massoud or of his visit to Jaghori than the applicant provided. There is nothing in the independent country information quoted by the Tribunal which could give rise to any such expectation. As the record of the hearing as noted by the Tribunal indicates, the applicant's answer to the question about what else he knew of the Taliban taking Shi'as away to fight was that he knew the Taliban wanted them to fight Massoud. That is a responsive answer. It is not correct to describe it as an "evasive response" by attributing that answer to a different question, namely how he knew the Taliban had been taking people to fight in his area.

15 The third aspect of the applicant's evidence to which the Tribunal referred concerned his claim that the Taliban had sent Hazara men to the front line. It was described as "implausible in light of the nature of the military conflict in Afghanistan." The basis was identified as independent country evidence that it is unlikely that the Taliban would use Hazara soldiers on the front line, and that the Taliban used trained soldiers of whom a significant number are recruited from Pakistan. The Tribunal said:

"I accept this evidence and note that I have been unable to find authoritative evidence to support the applicant's assertion that Hazaras had been used as 'gun fodder' on the front lines in Afghanistan; nor authoritative evidence that the Taliban has employed untrained soldiers at the front lines."

16 The applicant's response in his affidavit is simply to describe the Tribunal's views as being other than in accordance with reality. He refers to the forced conscription of civilian Afghans, particularly Hazaras, to the war front. He refers to a number of his friends who have been given visas by the respondent or through the Tribunal on that very basis.

17 In fact, such of the independent country information as related specifically to the position of Hazaras in Afghanistan consistently points to Hazaras being targeted by the Taliban for expulsion or harassment and mistreatment. It refers to numerous human rights violations committed by the Taliban particularly against the Hazaras. I have reviewed all of the independent country information apparently before the Tribunal as being the material submitted to the Tribunal by the Secretary of the Department of Immigration & Multicultural Affairs. The picture is consistent.

18 More importantly, the Tribunal's description of Dr Maley's evidence that it is "unlikely" that the Taliban would use Hazara soldiers on the front lines is unfairly selective. That information was obtained from a recorded conversation which took place in an information seminar for refugee status determination authorities in Australia on 25 February 2000. Dr Maley was one of three participants. It concerned particularly refugees claiming to be from Iraq and Afghanistan. Dr Maley was asked specifically for information about the Hazara in Kabul. He referred to the ideological disposition of the Taliban as being inimicable to the position of the Hazara Shi'a people. He referred also, in response to another question, as follows:

"Amongst the boat people there a large number of people from Ghazni who claim to be subject to forced military conscription, people who are Hazaras. It is certainly plausible that they would come from Ghazni, as Ghazni has a large Hazara population. It is unlikely they would be used as front line soldiers in combat against other groups because their reliability would have to be suspect under the circumstances; on the other hand it is quite likely that they would be forced to undertake menial tasks as part of military operations.

They were alluding to the fact that they were used as 'fodder'?

… Land mine clearance? That is perfectly plausible. … The aim of military mine clearing is simply to breach a path through which you can move the bulk of your force and you are prepared to accept higher level casualties and if you are putting Hazaras in to walk through the minefield and blow up as many mines as possible, they [the Taliban] would see that as killing two birds with the one stone. Getting rid of heretics and clearing the land for their forces."

In response to the next question, Dr Maley said that there were so many Hazara single male claimants between 16 and 45 years of age because it is possible for the family to liquidate their assets and obtain enough money to get one person out through a smuggling network, in the expectation that that member would then sponsor other family members to re-join them at some point in time.

19 Clearly, the Tribunal's use of Dr Maley as support for the proposition that the Taliban would not use Hazara soldiers at the front line is selective. It takes that remark of Dr Maley out of context. One need only read the whole answer to see that. It is hard to understand how the Tribunal could use one part of Dr Maley's answer at that seminar out of context and incomplete, to support a description of the applicant's claims as implausible, but at the same time, in relation to the same answer, regard it as not "authoritative evidence" to support the applicant's claim that Hazaras have been used as gun fodder on the front lines in Afghanistan. That is particularly so having regard to the Tribunal having quoted the relevant part of Dr Maley's material in its recital of the independent country information.

20 The Tribunal's next reason for rejecting the applicant's evidence about his personal exposure to the Taliban was that it was "inconsistent" and "inherently unconvincing". It criticises the applicant for being unable to recall whether the Taliban had visited his home on two, three or four occasions. It suggests he had difficulty in identifying the language in which they communicated, and then gave unconvincing evidence about having spoken to them in Dari and about having replied to his father in Pashtu.

21 In fact, in the Tribunal's recital of his evidence at the hearing, he was asked whether he had ever spoken to a Talib. He said they came to his father's tea house. He then said that he had talked to them on one occasion to ask them to pay for food and they beat him and his father. He was asked what language they had spoken and he said they had spoken Pashtu. He was asked how he had understood them, given he did not speak Pashtu, and said that his father spoke Pashtu and that the Taliban had spoken to his father.

22 The Tribunal does not say why the applicant's answers about his exposure to the Taliban are "inherently unconvincing" or are "inconsistent". His explanation that he had spoken to his father in Dari, and that his father had communicated in Pashtu does not of itself present as unconvincing. The remarks of Tamberlin and R D Nicholson JJ in *W148/OOA* again seem apt to apply to this part of the Tribunal's decision.

23 Next, the Tribunal addressed the evidence of the independent witness presented by the applicant. His written statement is quoted. It relevantly reads:

" I know [the applicant]. We lived in the same village and the same area but house distance 20 to 30 minutes. I saw him in his father hotel before six months on Saturday before I leaving my country. He was washing the dishes. I saw him in his father hotel and restaurant last time with his father in Bazaar Utqol."

If accepted, that evidence provided confirmation of the applicant's claims as to his Afghani origins. The Tribunal found that the independent witness was not a credible witness for two reasons. One was his description of geography compared to that of the applicant. The other was his oral evidence as to how he had met the applicant,

compared to his statement. It was said to be inconsistent with that statement and "inherently unconvincing". It also suggested that his evidence about when the Taliban took over the Jaghori District was "vague and inherently unconvincing", suggesting that that witness had not been living in the Jaghori District at the time.

24 The Tribunal explained that that witness in his statement had said that he had come from the same village as the applicant, but at the hearing that he travelled north east some 20 to 30 minutes from his village of Gardo to Utqol Bazaar where he had met the applicant. It is a mis-statement in substance to attribute to that witness the claim in his statement that he said he came from the same village as the applicant. Although the word "same village" is used, it is used together with the reference to the same area and a house distance of 20 to 30 minutes. It does not give the picture which the Tribunal ascribed to that statement, as living in the same sub-area of eight or so houses to which the applicant referred. The applicant points out that his evidence was consistent with the evidence of the witness that they are from the same area, with a 20 to 30 minute walking distance apart. The Tribunal also remarked upon an irregularity or inconsistency in that the witness' village was Gardo and that the Tribunal identified that as being north of Jaghori, whereas the Utqol Bazaar and the applicant's town was south-east of Jaghori, so that he could not have walked north-east 20 or 30 minutes from his village of Gardo to reach the Utqol Bazaar, as he said. That apparent incongruity does not appear to have been put to either the applicant or to the witness. In fact the Tribunal has recorded the witness as saying "that his village of Gardo was part of the village of Utqol, and that he would travel north-east 20 or 30 minutes to reach Utqol Bazaar". It may be that there are two villages of Gardo. It could of course be a significant matter if the witness claimed to live close to the applicant when he lived well remote from the applicant. Given the description of living in a "village of Gardo which was part of the village of Utqol", and the Tribunal's understanding of the location of Gardo as well remote from Utqol, the Tribunal might well have invited comment on its concern.

25 The Tribunal also described the witness' evidence of his meeting with the applicant in Utqol Bazaar as "inconsistent with his written statement and inherently unconvincing". Its reasons for that are firstly that the witness was unable to describe the interior of the tea house, despite having asserted in writing that he had seen the applicant washing dishes inside the tea house, and when that was put to him that he responded "unconvincingly" that he had seen the applicant washing dishes outside the tea house.

26 As far as it goes, that is an accurate transcription of what is recorded by the Tribunal in that part of the conversation. The witness sent to the Court on 10 January 2002 a letter about the Tribunal's reasons. I have treated it as part of the applicant's submission. The witness says that he said he saw the applicant inside the tea house collecting dishes, and that he then brought them outside the tea house to wash them. That is why he described having seen the applicant inside the tea house and described him as having washed dishes outside the tea house. In this instance, that submission is capable of explaining the evidence of the witness that he could not describe the inside of the tea house, and had not been inside it. But, in my view, it was open to the

Tribunal to have taken the view that the witness' statement did refer to having seen the applicant washing dishes in the tea house, and so to find that he had somewhat altered his story. That may have been a strict approach to evidence provided in a handwritten statement from an inmate of the Woomera Immigration Reception and Processing Centre, particularly when it is not a detailed statement and was written in less than fluent English. However, the Tribunal's approach was one which was open to it.

27 The Tribunal also had a language analysis conducted of a recording of an interview with the applicant. The "expert opinion" was that the speech on the tape is Dari, and that the person speaking has probably his language background in Afghanistan. The "Explanation" section of that report referred to the applicant as having a "slight Pakistani accent" and that his dialect "reminds mostly the one spoken in Quetta: Baluchistan". The Tribunal attributed no evidentiary weight to that report, in the absence of evidence of the experience and qualifications of the author, and its contents.

28 The Tribunal concluded:

"In light of my finding that the applicant was not a truthful witness I do not accept that he is an Afghan national nor that he has ever resided in that country. It follows that I reject his claim to fear being persecuted by the Taliban in Afghanistan for reasons of his ethnicity and religion. Consequently, I find that he does not have a well-founded fear of being persecuted by the Taliban in Afghanistan for a Convention reason."

29 It is apparent that I consider that the Tribunal has taken an uncompromising approach to its assessment of the reliability of the applicant's claims. The Tribunal said that it expressly had regard to the comments of Gummow and Hayne JJ in *Abebe v Commonwealth* (1999) 197 CLR 510 at 577-8 to the following effect:

"… the fact that an applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising. It is necessary always to bear in mind that an applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself."

Those views are also expressed in Hathaway *"The Law of Refugee Status"*, Butterworths Canada, 1991 at 84-86. The learned author states (omitting footnotes);

"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 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 the testimony given at the hearing is thus highly suspect, and should be constrained in the contextually sensitive manner discussed previously in Chapter 2.

Second, it is critical that a reasonable margin of appreciation be applied to any perceived flaws in the claimant's testimony. A claimant's credibility should not be impugned simply because of vagueness or inconsistencies in recounting peripheral details, since memory failures are experienced by many persons who have been the objects of persecution. Because an understandable anxiety affects most claimants compelled to recount painful facts in a formal and foreign environment, only significant concerns about the plausibility of allegations of direct relevance to the claim should be considered sufficient to counter the presumption that the sworn testimony of the applicant is to be accepted as true.

… Ultimately, however, even clear evidence of a lack of candour does not necessarily negate a claimant's need for protection:

> Even where the statement is material, and is not believed, a person may, nonetheless, be a refugee. "Lies do not prove the converse." Where a claimant is lying, and the lie is material to his case, the [determination authority] must, nonetheless, look at all of the evidence and arrive at a conclusion on the entire case. Indeed, an earlier lie which is openly admitted may, in some circumstances, be a factor to consider in support of credibility.

> Given the objective focus of the Convention definition, the purpose of eliciting evidence from the claimant herself is not to ascertain whether she harbours a subjective fear of return. Rather, it is to establish how circumstances in the homeland impact on her own security, and why she feels compelled to seek protection abroad."

Those remarks have been cited with approval by Judges of the Court from time to time: see per Lee J in *Ismail v Minister for Immigration& Multicultural Affairs* [1999] FCA 1555; (1999) 59 ALD 773. It is hard to resist the conclusion that the Tribunal in this instance may have overlooked such considerations. However, ultimately, the assessment of the credit of an applicant for a protection visa is essentially a function of the Tribunal. An apparently harsh or uncompromising approach to that task on its part does not of itself amount to a reason to set aside its decision under s 39B of the Judiciary Act.

consideration

> 30 As noted above, the respondent accepts that notwithstanding the broad terms of s 474(1) of the Act, the Court has power to set aside the Tribunal's decision if it falls within a proviso to what are called the *Hickman* principles. Those provisos require that the decision:

"… is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body." (per Dixon J in Hickman at 615.)

In this matter there has been no contention that the grant of the Tribunal's powers and functions under the Act are not within legislative power. Its decision appears to

relate to the subject matter which the Act provides for it to address. Before addressing whether the Tribunal made a bona fide attempt to exercise its power, it is desirable to consider one other matter put by the applicant.

31 The applicant claimed in his oral contentions that the interview conducted by the officer of the respondent upon or shortly after his arrival in Australia on 21 April 2001, was conducted through an interpreter who did not effectively convey to the interviewer that which the applicant was saying. I do not consider that that matter, even if established, gives rise to any basis upon which the Court could make an order under s 39B of the Judiciary Act. As can be seen from the Tribunal's reasons, its decision was not really based upon what was said by the applicant at that initial interview, but rather upon what was said by the applicant at the hearings before the Tribunal and upon the independent country information. Consequently, even if that assertion were made out, it would not demonstrate error on the part of the Tribunal which independently could activate the power of the Court to make an order under s 39B of the Judiciary Act.

32 As noted above, the respondent acknowledges that s 474(1) of the Act must be read as being subject to the *Hickman* principles. Those principles reconcile the prima facie inconsistency between the privative clause which appears to provide that the Tribunal should operate free of any judicial supervision, and the terms of the Act which require the Tribunal to proceed in a certain way, and which are subject to the jurisdiction of the High Court under s 75(v) of the Constitution: see *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415.

33 The relevant proviso within the *Hickman* principles in this matter is that the Tribunal's decision involved a bona fide attempt to exercise its power. (*Hickman*, at 615 per Dixon J). There has been little consideration by the High Court of the scope and content of those provisos, as remarked by Mason CJ in *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 249 (*O'Toole*). Mason CJ, with whom Brennan J agreed (at 275), said at 249-250 that in the absence of full argument he would not accept that the subjective intentions or motivations of the decision-maker could not be established by extrinsic evidence or that the lack of bona fides must emerge from an examination of objective considerations arising on the face of the record. Dawson J, with whom Toohey J generally agreed but without mentioning the particular point at 309, took a firmer view at 305. His Honour said that the particular privative provision:

"… does not preclude a court from going behind an award to investigate whether it represents a bona fide attempt to pursue the power conferred … The contrary was not argued and it is plain that what appears on the face of the record cannot be binding when matters such as the good faith of the tribunal are called in question."

The comments of Deane, Gaudron and McHugh JJ at 287 are to the contrary of that position. In that case, that issue was not decisive of the outcome. The view firmly espoused by Dawson J has been adopted by Aronsen and Dyer, *Judicial Review of Administrative Action* 2ed, 2000, pp 693-694. In this matter, the matters which might

indicate a lack of good faith on the part of the Tribunal are apparent from its reasons for decision. There has been no attempt to adduce extrinsic evidence from which lack of good faith on its part might be shown.

> 34 I respectfully agree with Finn J in *Daihatsu Australia Pty Ltd v Commissioner of Taxation* (2001) 184 ALR 576; [2001] FCA 588 at [34] that it is not appropriate in a matter such as the present to attempt a comprehensive exposition of what is and what is not countenanced by the expression "bona fide attempt to exercise [a] power". As his Honour said, the burden of the expression has been illustrated by example. I will not repeat the examples his Honour there gave. They were but examples. Also in the context of ss 175 and 177 of the Income Tax Assessment Act 1936 (Cth), the Full Court (Spender, Burchett and Hill JJ) in *Commissioner of Taxation v Stokes* (1996) 141 ALR 653; [1996] FCA 1128 upheld a finding that there had been no bona fide attempt by the Commissioner of Taxation to exercise the power of assessment not by any mala fide on his part but because the power had not been exercised so as to create a definitive liability: see at [67]. That case too illustrates that no comprehensive exposition of what is meant by the expression under consideration should be undertaken.
>
> 35 I am also mindful of the judicial strictures against making a finding of lack of good faith on the part of an administrative decision maker too readily. The reasons for that approach are clear. Again, they are discussed by Finn J in *Daihatsu* at [32] and [36]. It will be a rare and extreme case in which an administrative decision maker will be shown not to have acted in good faith. I am conscious that I should not:

" … make the leap too readily from factual error or faulty reasoning (even serious factual error or misconceived reasoning) to a finding …"

of lack of good faith. That reference is to the judgment of Sackville J in *Yit v Minister for Immigration & Multicultural Affairs* [2000] FCA 885 at [32] in the context of an allegation of actual bias so as to enliven the former s 476(1)(f) of the Act, but is I think equally applicable to my present consideration. I have not made a finding of actual bias on the part of the Tribunal, but those strictures apply equally to the step of finding a lack of good faith on its part.

> 36 I am mindful that a finding that a decision of the Tribunal was not made in good faith will be exceptional. However, in this matter I have concluded that the Tribunal's decision was not made in good faith. I have reached that conclusion by inference from my consideration of the Tribunal's reasons as a whole, and not by taking any particular part of its reasons in isolation. I will not repeat the analysis of the Tribunal's reasons discussed above. In my judgment, its reasons go beyond the Tribunal making findings of fact or making observations which involve it making errors of fact or law, or simply reaching views which lack logic or which are wrong. The firm persuasion which I hold is that the Tribunal approached its review of the applicant's claims on the basis that it should look for reasons why it could reject those claims. In other words, in my judgment, its reasons overall show that it did not address the applicant's claims by asking whether he has a well-

founded fear of persecution for a Convention reason, but in substance by asking whether there was evidence which would enable it to reject the applicant's claims. That conclusion is reached notwithstanding that in its consideration of the definition of "refugee" it has referred to the relevant decisions of the High Court and notwithstanding that, at the commencement of the "findings and reasons" section of its decision the Tribunal quotes the observations of Gummow and Hayne JJ in *Abebe* at 577-8 set out in [29] above. At no point in its reasons thereafter do those considerations appear to attract any attention. Instead, each of the factors upon which the Tribunal relied to reject the applicant's claim as to his nationality demonstrates upon analysis in the ways I have referred to above a rigid and at times inexplicable finding adverse to him. The selective and unfair use of the opinions of Dr Maley about whether the Taliban use Hazara men at the front lines, in the way I have explained above, does not seem to me to admit of error on the part of the Tribunal, given the context in which Dr Maley's views were expressed and also and independently of that context given that the Tribunal has referred to the relevant passage in its recital of independent country information. As I have said, however, it is not one factor but each of the considerations about the Tribunal's reasons for its decision which I have addressed above which has led me to my conclusion.

37 In my judgment, in the circumstances, the appropriate order is to declare that the Tribunal's decision is invalid so that, in effect, it is set aside. The consequence will be that the applicant has a validly instituted application for review before the Tribunal which must now be heard by the Tribunal.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 1 May 2002

Counsel for the Applicant:	The applicant appeared in person.
Counsel for the Respondent:	Mr S Lloyd

Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	4 February 2002
Date of Judgment:	10 May 2002