FEDERAL COURT OF AUSTRALIA

NAIS v Minister for Immigration & Multicultural & Indigenous Affairs

[2004] FCAFC 1

MIGRATION – appeal from a decision of a single judge affirming a decision of the Refugee Review Tribunal where there was a substantial delay between the first hearing and the decision of the Refugee Review Tribunal – whether delay in and of itself between the hearing and the decision of the Tribunal amounts to a denial of natural justice – whether prejudice to the applicants can be inferred

Migration Act 1958 (Cth), s 420

Judiciary Act 1903 (Cth), s 39B

Cobham v Frett [2001] 1 WLR 1775, referred to

Fox v Percy (2003) 1997 ALR 201, applied

Craig v South Australia (1995) 184 CLR 163, applied

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611, referred to

Re Minister for Immigration & Multicultural Affairs; ex parte Lam (2003) 195 ALR 502, applied

Application of New York, Susquehanna and Western Railroad Company 25 NJ 343, 136 A2d 408 (1957), referred to

Holloway Sand & Gravel Company Inc v Department of Treasury 152 Mich App 823, 393 NW2d 921 (1986), referred to

Gregerson v Board of Review of the Industrial Commission of Utah 841 P2d 720 (1992), referred to

Helfand v Division of Housing and Community Renewal 182 Misc 2d 1, 696 NYS2d 630 (1999), referred to

Harris v District of Columbia Commission on Human Rights 562 A2d 625 (1989), referred to

Master Craft Engineering Inc v Department of Treasury 141 Mich App 56, 366 NW 2d 235 (1985), referred to

Muin v Refugee Review Tribunal (2002) 190 ALR 601, referred to

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, referred to

Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2, (2003) 195 ALR 24, referred to

NAAG of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 713; (2002) 195 ALR 207, referred to

NAIS, NAIT AND NAIU v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

N 546 OF 2003

HILL, MARSHALL AND FINKELSTEIN JJ

11 FEBRUARY 2004

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 546 of 2003

ON APPEAL FROM A SINGLE JUDGE OF THE COURT

BETWEEN:	NAIS
	FIRST APPELLANT

	NAIT SECOND APPELLANT NAIU THIRD APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	HILL, MARSHALL & FINKELSTEIN JJ
DATE OF ORDER:	11 FEBRUARY 2004
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellants pay the respondent's costs of 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	
NEW SOUTH WALES DISTRICT REGISTRY	N 546 of 2003

ON APPEAL FROM A SINGLE JUDGE OF THE COURT

BETWEEN:	NAIS FIRST APPELLANT NAIT SECOND APPELLANT NAIU THIRD APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	HILL, MARSHALL & FINKELSTEIN JJ
DATE:	11 FEBRUARY 2004
PLACE:	SYDNEY

REASONS FOR JUDGMENT

HILL J

1 I have had the advantage of reading in draft form the reasons of Finkelstein J. His Honour sets out in some detail the claims made by the appellants before the Refugee Review Tribunal ('the Tribunal') and the delay which resulted in the Tribunal's decision being given some five and a half years from the time the appellants sought review by the Tribunal of the decision of a delegate of the respondent Minister not to grant to them a protection visa. I am therefore relieved of the necessity to set out in my reasons the detailed facts or a chronology.

2 There are two issues which arise for decision in this Court. The first is whether gross delay on the part of the Tribunal, calculated at least from the time the Tribunal concludes its hearing (or perhaps from the time the evidence is taken) and ending with the time the Tribunal delivers reasons may constitute jurisdictional error so as to provide a ground of relief under s 39B of the *Judiciary Act 1903* (Cth). The second is whether, in the event the first question is decided in the affirmative, the facts of the present case involve such a gross delay as would constitute jurisdictional error.

3 It may be accepted that gross delay in the delivery of judgment by a judge at first instance in a civil case will be a ground for an appellate court setting aside the judgment and ordering a new trial, at least where there is reason to believe that the judgment contains errors that "are probably, or even possibly, attributable to the delay": *Cobham v Frett* [2001] 1 WLR 1775. If the appeal court forms the view that to allow the judgment to stand would be unfair to the party seeking to set it aside, it will do so. While it may be inappropriate to speak of onus arising in the case of an appeal, it is clear that the appellant seeking to set aside a judgment on the basis of delay would have to satisfy the appeal court that to allow the judgment to stand would be unsafe.

4 The basis of the appeal court so acting is not related to jurisdictional error as that expression is used in the context of administrative law. Rather, the basis of an appeal Court ordering a new trial is that the appellant has not had a fair trial. It may not be appropriate to order a new trial in a case where the appeal Court on an appeal may itself make findings of fact. This would, for example, be the situation in this Court where the appeal is an appeal de novo, although the power of this Court to do so is ordinarily subject to the rule that the appeal Court will not lightly overrule factual findings of a trial Judge who has had the advantage of seeing the witnesses and forming a view as to matters of credit: *Fox v Percy* (2003) 197 ALR 201.

5 The situation is different in the case of Australian federal judicial review in three respects. First an administrative tribunal is not a court exercising judicial power. Secondly, the court on judicial review is not concerned with the correctness of the decision as an appeal court is. It is not a ground of judicial review as such that the decision of an Administrative

Tribunal is wrong or even unsafe. Thirdly, in an appeal to a Court of Appeal, the appellate court may allow an appeal where there is either legal or factual error. In proceedings for judicial review, by contrast, the Court will have no power to make findings of fact. Indeed, it will be bound to accept the tribunal's factual findings, but subject to the overall caution that the court will only intervene to grant relief under s 39B of the *Judiciary Act* where there is jurisdictional error.

6 Just what constitutes jurisdictional error may be a matter of debate, at least at the margin. However, it is not in dispute that jurisdictional error will include the various categories referred to in the well-known passage from the judgment of Brennan, Deane, Toohey, Gaudron and McHugh JJ in *Craig v South Australia* (1995) 184 CLR 163 at 179 where their Honours, after noting the distinction between administrative tribunals on the one hand, with no power in a constitutional sense in Australia to exercise judicial power and courts which did exercise judicial power, said:

'If such an administrative tribunal falls into an error of law which cause it to identify a wrong issue, to ask itself a wrong question, to ignore circumstances, to make an erroneous finding or to reach a mistaken conclusion and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.'

7 In this passage their Honours were not, necessarily, seeking to define exhaustively the categories of jurisdictional error. However, in general terms it can be said that what is involved in the concept of jurisdictional error is that there has been some error committed by a tribunal (usually a legal error) which takes its decision outside what would otherwise properly be an exercise of its jurisdiction. It is now clear that a denial of natural justice (or properly, procedural fairness) will constitute jurisdictional error. So too there will be jurisdictional error where an administrative Tribunal has not undertaken a real review as required by the legislation under which it is acting, because, for example, it has asked itself the wrong question. In such a case the Tribunal will have acted outside its jurisdiction.

8 The question then is whether excessive delay is capable of amounting to jurisdictional error.

9 As is already apparent there are at least two ways in which this question might be answered in the affirmative. The first would be a case where the excessive delay could be said to amount to a failure on the part of the Tribunal to conduct a review at all. Just as addressing the wrong question might involve acting outside jurisdiction so it may be said that a delay in giving a decision might be so excessive that it could be said not to involve an exercise of the Tribunal's jurisdiction. An alternative path to an affirmative answer is, it can be argued, where the delay as such can be said to be so excessive that it amounts to a failure to afford the applicant natural justice. That might be the case where the delay was so excessive that it worked unfairness to an applicant.

10 Mere delay would not make out either ground. While it is true that s 420(1) of the *Migration Act 1958* (Cth) ("the Act") requires the Tribunal in carrying out its function to pursue the objective of providing a mechanism of review that is, inter alia, 'quick', it must be accepted, as the High Court said in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 635 that the section does not mandate the method by which the Tribunal is to reach its decision. That being said, however, the delay may be so excessive that it might be concluded that what was undertaken by the Tribunal was simply not a review at all so that the Tribunal acted outside its jurisdiction or simply did not exercise that jurisdiction.

11 The argument that excessive delay could constitute a denial of procedural fairness may be thought novel in that no case in this country or in the United Kingdom has so held in an administrative law context. Ordinarily procedural fairness arises in the context of failure by an administrative Tribunal to give an applicant the right to be heard. This does not, however, mean that the categories of procedural fairness are limited to this one principle. And it is important to note that, as the Chief Justice said in *Re Minister for Immigration & Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 at [36] – [38], behind the concept of natural justice lies the concept of "fairness". However, it cannot be extrapolated from what his Honour said that every occasion where there is a lack of fairness will amount to a denial of natural justice.

12 In the United States it has been held that an administrative decision can be set aside were there has been "inordinate delay": *Application of New York, Susquehanna and Western Railroad Company* 25 NJ 343, 136 A2d 408 (1957) (Supreme Court of New Jersey). However, the decision rests upon the conclusion that such delay is a denial of due process. A decision of a State Tax Tribunal was set aside on appeal by the Court of Appeals of Michigan in *Holloway Sand & Gravel Company Inc v Department of Treasury* 152 Mich App 823, 393 NW2d 921 (1986) (Ct of Appeals, Michigan) where there was "inordinate delay" between hearing and decision but no juridical basis was given for so doing and see too *Gregerson v Board of Review of the Industrial Commission of Utah* 841 P2d 720 (1992) (Ct of Appeals of Utah), *Helfand v Division of Housing and Community Renewal* 182 Misc 2d 1, 696 NYS2d 630 (1999) (Supreme Court, New York Country), and *Harris v District of Columbia Commission on Human Rights* 562 A2d 625 (1989) (District of Columbia Court of Appeals) and *Master Craft Engineering Inc v Department of Treasury* 141 Mich App 56, 366 NW 2d 235 (1985) (Ct of Appeals, Michigan). There is a suggestion in these cases that there is a need for the appellant to show that the inordinate delay caused prejudice. Again the judgments do not discuss the basis of a need to show prejudice as a basis of relief. In some cases one would think, prejudice could be inferred from the extent of the delay.

13 The first of the American cases referred to above cited the text of Professor Davis, "*Administrative law"* (1st ed, 1951) p 294 in support of the proposition that "undue administrative delay has been held a denial of due process". It may be noted, however, that Professor Davis cites a number of

examples of cases where courts in the United States had refused to intervene where the delay had been as long as four years. The 2nd edition of the work omitted discussion of the question.

14 To the extent that the American cases depend upon the constitutional requirement of due process there is a danger in applying them to Australian situations. The concepts of procedural fairness and due process are not equivalents. However, as presently advised I am of the view that jurisdictional error would be established in a case where there was inordinate delay and the delay was of such an extent that there was a real likelihood that anything which the appellant might have said to the Tribunal by way of evidence or submission would not be recalled by it. This is because in such a case the appellant's right to be heard was not an effective right as a result of the delay.

15 Whether a case of inordinate delay is capable of falling within the category of denial of natural justice or within the category of failure to conduct a real review, (and there is no reason why the two categories are mutually exclusive) the Tribunal's decision will only amount to jurisdictional error where the delay is of such a magnitude as to lead to the conclusion that it is more probable than not that there has been a miscarriage of justice. It may suffice if the Court concludes that there is a real likelihood of injustice to the appellant. It is not necessary in the present case to distinguish between these two formulations. The former formulation seems to be accepted by Finkelstein J in his Honour's reasons for decision, when his Honour says that to succeed on the appeal the appellants would need to show either than the Tribunal had forgotten the evidence led or alternatively no longer could adequately or fairly assess that evidence.

16 An appellant will never be able to prove that a Tribunal member actually forgot what evidence was led or what submissions were made since the Tribunal member may not be required to give evidence nor could his or her papers be subpoenaed: *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 (see also s 435(1) of the Act and s 60(1) of the *Administrative Appeals Tribunal Act 1975* (Cth)). It may well be that there could be a case where the delay was so inordinately long that these matters could be simply inferred. But whether the test to be adopted in one of probability or one of real likelihood (a matter that I do not need to decide in the present case) the present in my view is not a case where the delay is so inordinate that it would be concluded either that the Tribunal member more likely than not could not recall some or all of the evidence or submissions put nor is the present a case where it has been shown that there was a real likelihood of the Tribunal having done so. My reasons for reaching this conclusions are as follows:

17 It seems to me that the relevant time period to consider in determining whether a delay was so excessive as to give rise to either jurisdictional error is not the time from the institution of the application to the Tribunal for review (that occurred on 5 June 1997) but rather the time which elapsed from the conclusion of the proceedings (which may be either the

conclusion of the evidence or the conclusion of the hearing) and the giving by the Tribunal of its reasons. It will be recalled that evidence was heard in what may be called two tranches. That is to say that after oral evidence was heard initially on 6 May 1998, the Tribunal held a further oral hearing on 19 December 2001. That second oral hearing was followed by written submissions the last of which was lodged with the Tribunal on 15 March 2002. The Tribunal's reasons were prepared on 20 December 2002 – nine months after final submissions and just over 12 months from the last hearing of oral evidence.

18 Nine months, or for that matter twelve months are very long times indeed. As Finkelstein J has pointed out it may well be that unless the Tribunal member had made notes of his initial views of credibility these initial views may well have been lost in the time which passed from the hearing of evidence to the delivery of reasons. On the other hand it may well be the case, I do not know, that the Tribunal member did keep notes, or was able to recall from a reading of the transcript or from listening to a tape recording of the proceedings the views he held at the time. That does not seem to me to be so improbable as to be able to be rejected. Certainly the Court knows nothing about any notes which the Tribunal member kept at the time nor whether the Tribunal member listened to a recording of the proceedings. The Court is, however, well aware that all proceedings of the Tribunal are taped and reading a transcript of proceedings even up to a year later could easily bring back to mind the reactions which the Tribunal member had when originally hearing the evidence.

19 The problem I have is that there is nothing which requires me to reach one conclusion in preference to another as to what consequences were likely to have flowed from the delay which occurred. For my part I do not think that it is a necessary inference just from the delay itself that the Tribunal member was unable as a result of that delay to fulfil his function of reviewing the decision of the respondent Minister or to be fair to the appellants. At best, so far as the submissions of the appellants are concerned, all that can be said in their favour is that there is a possibility (and it is no more than a possibility) that there may have been injustice to the appellants as a result of the delay. The present is not a case where the extent of the delay is such that lack of fairness is plain to see. I should add that there is nothing before the Court to suggest that the Tribunal member acted other than in good faith in conducting the review. It is not suggested otherwise.

20 I would accordingly dismiss the appeal and order the appellants to pay the respondent Minister's costs of it.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Hill

Associate:

Dated: 11 February 2004

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 546 of 2003

ON APPEAL FROM A SINGLE JUDGE OF THE COURT

BETWEEN:	NAIS FIRST APPELLANT NAIT SECOND APPELLANT NAIU THIRD APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	HILL, MARSHALL & FINKELSTEIN JJ
DATE:	11 FEBRUARY 2004

PLACE: SYDNEY

REASONS FOR JUDGMENT

MARSHALL J

21 This is an appeal from a judgment of Hely J, dismissing applications by the appellants for judicial review of a decision of the Refugee Review Tribunal ("the RRT"). On 14 January 2003, the RRT handed down its decision, dated 20 December 2002, affirming the decision of a delegate of the respondent not to grant the first appellant a protection visa.

22 The relevant applications for protection visas were lodged on 23 January 1997. They were refused by a delegate of the respondent on 27 May 1997. An application by the first appellant for review of the delegate's decision was lodged with the RRT on 5 June 1997. Letters in support of the review application were sent to the RRT by the first appellant's lawyers on 7 October 1997. On 15 April 1998, the RRT wrote to the first appellant, providing him with an opportunity to give oral evidence on 6 May 1998.

23 At the Tribunal hearing on 6 May 1998 the appellants appeared together with their representative. A further written submission from the appellant's representative, dated 9 June 1998, was received by the RRT on that day.

24 On 23 November 2000, the first appellant notified a change in his residential address to the RRT. On 18 December 2001, the first appellant's solicitors provided documents relating to the third appellant. The solicitors also requested a "reasonable time" to make further written submissions. A further oral hearing was held on 19 December 2001, at which evidence was given by the second and third appellants and by a family friend. It was not until over 12 months later that the RRT gave its decision, although the last written submission on behalf of the appellants was lodged with the RRT on 15 March 2002.

25 At [2] of his reasons for judgment, Hely J noted that:

"The application was therefore "pending" in the RRT for a period in excess of five years. This seems an extraordinary delay."

26 No point was taken before Hely J about the delay having any legal consequences; although at the hearing before his Honour the appellants were not represented.

27 The appellants are citizens of Bangladesh. They entered Australia on 3 August 1996. The first and second appellants are husband and wife and the third appellant is their daughter. The basis of the claims of the first and second

appellants is that they have a well founded fear of persecution if returned to Bangladesh on account of having entered into a mixed marriage. The first appellant is a Muslim and the second appellant is a Catholic. The third appellant's claim is that she has a well founded fear of persecution as the child of a mixed marriage.

28 The first and second appellants claimed that they were harassed and attacked whilst living in Bangladesh because they were in a mixed religion marriage. The precise claims made are set out at [5] of the reasons for judgment of Hely J, and I adopt them by reference. At [7] his Honour records the RRT as making the following findings:

"- the State recognises mixed religion marriages and does not condone or sanction discrimination of those marriages;

- the RRT had been unable to find any reference to particular people in Bangladesh suffering adversely as a consequence of being involved in a marriage between people of different faiths;

- however, such a union could, in certain circumstances, result in a couple being ostracised and bereft of communal or familial support, particularly in the case of people from rural areas;

- any harm a person may face for reasons of a marriage to a person of another faith will depend on the particular circumstances and demands of the family or community and whether or not they are dependent on the support from those people;

- the applicants (the husband and the wife) have not suffered harm amounting to persecution for reasons of their marriage in Bangladesh in the past nor do they face a real chance of harm amounting to persecution for reasons of their status as a couple in a mixed faith marriage. Any fears they claim to hold in that regard are not well founded;

- the daughter did not suffer harm amounting to persecution in Bangladesh; and

- whilst the daughter will suffer hardship in attempting to integrate into Bangladeshi society because she is an apparently talented child who has been raised in foreign society with a strong Western influence, that does not amount to persecution."

29 Before Hely J the appellants did not identify any jurisdictional error which was made by the RRT in its reasons for decision. At [17] his Honour said:

"Ultimately the decision of the RRT rested on its findings concerning the credibility of the claims made by the applicants in relation to particular instances of harassment and violence that they said they had suffered in Bangladesh as a result of their marriage. The RRT comprehensively rejected these claims. The rejection of those claims was not attended by jurisdictional error."

30 On the appeal, counsel for the appellants sought leave to amend the notice of appeal to raise one ground. That ground was that:

"His Honour erred in not finding that in the circumstances of the case involving a delay of five years and seven months between the application for review to the RRT and the decision by the RRT:

(a) the RRT had not bona fide exercised its power and/or

(b) the RRT denied the [appellants] procedural fairness."

31 At paragraph 8 of his written outline, counsel for the appellants submitted that:

"It is submitted that a delay in determining a protection visa of over five and a half years is so inconsistent with Australia's obligations under the Convention and so inconsistent with the clear legislative purpose of Part 7 by creating an informal and quick Tribunal that it cannot be regarded as a bona fide exercise of power."

Section 420 of the *Migration Act 1958* (Cth) ("the Act") provides that:

"(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case."

32 In *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21, (1999) 197 CLR 611 at 635, [76] and [77], Gaudron and Kirby JJ observed that s 420 "serves to describe the general nature of review proceedings" and has "but only an indirect effect, on review proceedings". Their Honours also said that s 420 does not "mandate specific procedures to be observed by the Tribunal or the method by which it is to reach its decision."

33 Counsel for the appellants cited no authority in support of his proposition that a delay, of the type that occurred in this case between an application to the RRT and its determination, results in the RRT committing a jurisdictional error. The proposition cannot be maintained. There is no indication within the text of the Act that s 420 must be strictly complied with, such that an act done in breach of the provision should be treated as invalid: see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389-390.

34 In written submissions, filed after the hearing of the appeal, the appellants submitted that the essential question for determination was whether the RRT adopted "an unfair procedure" which might give rise to injustice: see *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2, (2003) 195 ALR 24 at [37] per Gleeson CJ. It was submitted that, in assessing the appellants' credibility and in assessing country information, an unexplained inordinate delay by the RRT may lead to injustice. In my view, in the present case the delay was not entirely unexplained, given the chronological aspects of the matter referred to above. I see no basis for concluding that the procedure adopted by the RRT was unfair in the circumstances of this matter.

35 In my view, whilst it is undesirable that an application before the RRT take such an inordinate time to determine, there is no denial of procedural fairness in the RRT's decision occasioned by the relevant member's delay in coming to the decision. Further, in this matter, it appears that the delay was partly attributable to the RRT making inquiries from independent experts concerning the appellants' claims regarding inter-religious marriage in Bangladesh. Additionally, the reasons for decision were published only nine months after the receipt of the last set of written submissions from the appellants.

36 The above circumstances do not demonstrate any lack of bona fides in the RRT in the exercise of its power. As Allsop J said in *NAAG of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 713; (2002) 195 ALR 207 at [24]:

"Bad faith is not just a matter of poor execution or poor decision-making involving error. It is a lack of an honest or genuine attempt to undertake the task in a way of meriting personal criticism of the Tribunal or officer in question."

It cannot be said that the RRT did not make an honest or genuine attempt to perform its task.

37 Before finalising these reasons for judgment I had the benefit of reading, in draft form, the reasons for judgment of Finkelstein J. I do not doubt that an unreasonable delay, which results in prejudice to a losing party, may amount to a denial of procedural fairness to that party. It is also possible that an administrative tribunal may unfairly reflect, in an adverse way, upon the demeanour of an applicant in its reasons for decision in circumstances where the evidence was given so long ago that it could not reasonably remember the demeanour in question. However, the decision of the RRT in the matter subject to review before the primary judge did not turn on any question involving the demeanour of the appellants. The main findings of the RRT were that:

- the "core elements" of the appellants' original claims were fabricated;
- the first appellant and his wife colluded in the falsification; and
- the first appellant and his wife admitted the fabrication.

38 The RRT acknowledged that the additional claims were capable of being credible but ultimately did not accept them, finding, in addition, that they were fabricated.

39 As noted at [5] and [6] above, although the primary judge considered there to be extraordinary delay, no point was taken before the primary judge about the delay having any legal consequences. In my opinion the delay was inordinate and in ordinary circumstances no RRT member should take so long to determine a review application. However, given the explanations for the delay discussed above, in the circumstances I consider that the delay did not deprive the appellants of their right to have their review application dealt with in accordance with law. Consequently, I would dismiss the appeal with costs.

I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated: 11 February 2004

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	N 546 of 2003

On appeal from a single judge of the Federal Court of Australia

BETWEEN:	NAIS, NAIT and NAIU Appellants
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS Respondent

JUDGES:	HILL, MARSHALL & FINKELSTEIN JJ
DATE:	11 FEBRUARY 2004
PLACE:	SYDNEY

REASONS FOR JUDGMENT

FINKELSTEIN J

40 I am in no doubt that this appeal should be allowed. The sorry saga begins in late 1996 when the first appellant, NAIS, the second appellant, his wife NAIT, and the third appellant, their daughter NAIU, (we are not permitted to refer to them by their actual names) arrived in Australia from Bangladesh. Bangladesh is a Muslim country. It is a place where Islamic extremists harass and sometimes attack Christians and members of other religious minorities. Too often the government fails to investigate or prosecute the perpetrators. The husband is a Muslim and his wife is a Catholic. They claim to have been severely mistreated because of their inter-religious marriage. So, upon their arrival in Australia they applied for protection visas on the basis that they are Convention refugees. A delegate of the Minister refused their applications. The appellants took their case to the Refugee

Review Tribunal. It took the tribunal an extraordinary length of time, some five and a half years, to conduct the review. At the end of that process the tribunal affirmed the delegate's decisions. There was then an unsuccessful challenge to the tribunal's decision before a judge. We now have the appeal from the judge. The only ground of appeal is delay. This ground was not argued before the judge, but that does not prevent the point being taken on appeal.

41 To understand the significance of the tribunal's delay, it is necessary, first, to describe the basis upon which the appellants claimed refugee status. In the first instance, their claims were set out in statutory declarations which accompanied their protection visa applications. They said that while they were living in Bangladesh they were harassed and attacked on numerous occasions on account of their mixed religion marriage. The husband said that after the marriage in 1984, his family had tried to kill him. His wife's family had also tried to physically harm him. After a stay in Saudi Arabia, the family returned to Bangladesh and, in 1988, the husband and wife took up employment with the Australian Embassy. One day in June 1989 the husband was asked by the Embassy to go to the local bank. On his way he was severely beaten by two men who threatened to kill him. After a period working for the Embassy in Laos, the family returned to Bangladesh in January 1996. A month later a man was stabbed outside their apartment. The husband feared that the assailants intended to murder him. In April 1996, the daughter, who was then aged six, was confronted by a number of men on her way to church and a knife held to her throat. The wife had also been attacked on her way to church and as a result suffered a miscarriage. The wife said that shortly after the family's return from Laos her husband's brother, apparently without the consent of herself and her husband, had taken their daughter from school to teach her about Islam. Both the husband and wife were worried for the daughter.

42 Although the applications for review were lodged with the tribunal on 5 June 1997, the tribunal did not hear the applications until 6 May 1998 (the first hearing). The husband and wife gave oral evidence at the first hearing. Their evidence was in some respects different from that contained in the statutory declarations. First, they claimed that local villagers had flogged the husband and dragged him around the village with a garland of old shoes around his neck. Second, the husband said a man had banged on his door and attempted to stab him when he opened the door. The tribunal member questioned the truthfulness of this evidence. After a short recess the husband and wife conceded that the flogging incident had been fabricated. The husband also conceded that his account of the attempted stabbing was false and had been put forward to strengthen his case.

43 Following the first hearing, but unbeknown to the appellants, the tribunal conducted an enquiry into the treatment of inter-religious marriages in Bangladesh. The evidence does not indicate when this investigation commenced. It is, however, clear that the enquiry was taking place in 1999 and, for reasons which will soon become apparent, may have extended into 2001. At all events, the enquiry was being undertaken at that point because the tribunal had not formed the view that the appellants' claims should be

disbelieved. So much was expressly conceded (and correctly so) by counsel for the Minister.

44 The enquiry produced information from three people who had been interviewed by the tribunal. The interviewees were a former president of the Bangladeshi community in New South Wales and two academics. The tribunal also obtained a document from the Australian High Commission. It included the statement that: "Marriages between people from different religions are specifically recognised in Bangladeshi law…and such marriages are readily accepted in Bangladesh…We are not aware of anyone suffering discrimination or disadvantage as a result of a mixed religion marriage." By way of comparison, one of the interviewees stated that people in mixed religion marriages might be ostracised by communities in Bangladesh.

45 It must have been obvious to the tribunal that its delay in completing the review (it was now three and a half years since the first hearing) could affect its ability to fairly consider the claims. Accordingly, on 30 November 2001, the tribunal wrote to the husband advising him that:

"The Member your case has been constituted to will shortly finalise the matter. However, as it is a considerable time since he heard your case he has decided to reopen the hearing and invites you to attend to provide any further issues you may have had since the hearing.

He instructs me to inform you that the purpose of this is only to consider new issues and not to repeat what has already been covered in the hearing."

46 The tribunal then held a second hearing on 19 December 2001. At the second hearing the tribunal apprised the appellants of the new information it had obtained and invited them to comment on it. The husband said that he was mentally upset and did not want to give evidence. The wife made some general observations in relation to the new material and gave further evidence. The daughter, who was by then twelve, also gave evidence. In relation to the knife attack, the daughter confirmed that the incident had occurred and explained that the situation was defused by her mother's intervention. The appellants' adviser asked to be given copies of the tapes and transcripts of the interviews. That material was sent to him on 5 February 2002. The following month the adviser filed further submissions which, I assume, dealt with the new material.

47 Although the evidence was by that stage complete it still took the tribunal a further ten months to hand down its decision. The tribunal did not explain why it took so long to deal with the case. (It will be appreciated that by this time four and a half years had elapsed since the first hearing and the delivery of the decision). Whatever may be the legal consequences of this inordinate delay at least the tribunal should have explained the cause and, if appropriate, given an apology.

48 It is now necessary to explain how the tribunal dealt with the claims. First, however, I wish to make some background observations. Applications for review before the tribunal follow a common path. The tribunal will have before it the application for the protection visa. The application will contain the applicant's reasons for claiming to be a refugee. Often those reasons will be amplified by a written statement and supporting documents. The documents may contain information personal to the applicant and details about the human rights position in the applicant's country of nationality.

49 An important feature of proceedings before the tribunal is that they are not adversarial: they are inquisitorial. The tribunal is the inquisitor and its usual function is to assess the truthfulness of the applicant's claims. For that purpose the tribunal will have regard to whatever written material it has been provided as well as the evidence of the applicant and his witnesses. In most cases the outcome will depend upon whether the tribunal accepts or rejects the applicant's story. That is, the applicant's creditworthiness is usually of central importance to the process.

50 Turning now to the reasons, the first part briefly explained the chronological background of the applications and set out the relevant statutory provisions. The tribunal then reproduced portions of the statutory declarations and summarised the oral evidence given at the first hearing. This was followed by a summary of what occurred at the second hearing. The tribunal dealt in some detail with the evidence given by the daughter, in particular her evidence in relation to the knife attack.

51 The next section was headed "Findings and Reasons". Beneath the sub-heading "The Applicants' Claimed History" the tribunal summarised the appellants' claims in support of their asserted fear of persecution. Under the sub-heading "Credibility" the tribunal separately assessed the veracity of each of these claims. The tribunal considered that the delay in lodging a protection visa application (some five months after the appellants' arrival in Australia) was inconsistent with their claimed fear of persecution. The tribunal noted that the appellants had resiled from the claim that the husband had been beaten by villagers and forced to wear a necklace of shoes. It considered this abandoned claim to be "one instance of a series of fabrications and concoctions to provide a basis for a refugee claim". The tribunal drew a similar conclusion in relation to the husband's false account of the knife attack against him. The tribunal then proceeded to reject as untruthful all other events relied on by the appellants in support of their claim for refugee status. The tribunal found the husband's claimed attack at the bank was "implausible". While the tribunal accepted that a man had been stabbed outside the appellants' home, it did not accept that the incident was linked in any way to the marriage of the adult appellants. In relation to the alleged "kidnapping" of the daughter, the tribunal accepted that the behaviour of the husband's brother was "inappropriate" but that his conduct was not persecutory in nature. As regards the claimed knife attack on the daughter, the tribunal considered the claim was fabricated. This was notwithstanding that the daughter herself had adopted the evidence previously given by her parents. The tribunal said that the daughter "displayed no signs of trauma or

concern" when giving evidence in relation to the matter, as if this proved she was not telling the truth. The tribunal did accept, however, that the wife had been attacked while travelling to church and had suffered a miscarriage as a result, but said that the incident was not connected to her marriage. At the end of this section the tribunal said: "I find that the core elements of the Applicants' claims to have suffered harm for reasons of their status as a family of mixed religions through the marriage of the parents are fabricated and concocted for the purpose of providing a basis for a claim for refugee status".

52 The tribunal then set out its findings of fact and summarised its assessment of the status of mixed religion marriages in Bangladesh. It found that "the state recognises marriages of mixed faiths, it does not sanction persecution of people in such relationships. Any harm a person may face for reasons of marriage to a person of another faith will depend on the particular circumstances and demands of the family or community and whether or not they are dependent on the support from those people." It concluded that the appellants did not suffer harm amounting to persecution in Bangladesh on account of the mixed faith marriage of the husband and wife and would not suffer persecution upon return.

53 The tribunal's delay in handing down its decision is (at least by reference to reported cases) without precedent. Public confidence in the administration of justice exists when the public believes that judges and administrative decision-makers administer the law with competence, fairness and impartiality. A decision-maker's tardiness undermines the loser's confidence in the correctness of the decision when it is eventually delivered and, importantly, weakens public confidence in the judicial process: *Goose v Wilson Sandford & Co* (unreported, Court of Appeal, Peter Gibson, Brooke and Mummery LLJ, 13 February 1998 at [112]). In some jurisdictions, a court has no power to hand down a decision after a fixed period. In Nigeria, for example, the Constitution requires courts to deliver judgments within 3 months of the conclusion of a hearing. A delayed judgment is of no legal effect: *Odi v Osafile* [1985] 1 NWLR 17, 43-44. In the absence of this type of legislation (which may be draconian but is understandable), courts must ensure that decision-makers do nothing to disappoint the community's justifiably high expectations.

54 The issue in this case, however, is whether the tribunal's decision can be set aside because of delay. The appellants' case is that we should infer that by the time it came to deliver its decision the tribunal had forgotten large parts of the essential facts and evidence and had no clear recollection or impression of the demeanour of the appellants or their credibility as witnesses.

55 It may be accepted that however long a delay between the hearing of a case and delivery of judgment, mere delay does not result in error of law. On the other hand, if there be unreasonable delay which results in a real and substantial risk of prejudice to the losing party (remembering that the tribunal member cannot be called to give evidence as to the effect of the delay), then principle suggests that should be sufficient to set aside the decision. Do the cases support such a view?

56 The effect of unreasonable delay in the delivery of a judgment in curial proceedings has been considered on a number of occasions. It is generally accepted that where there has been inordinate delay coupled with evidence that the judge may be unable to recall the evidence or remember the demeanour of witnesses the appeal court is entitled to look "with especial care" at the judge's findings, even those findings of fact which are ordinarily protected from review on the basis that the judge had the advantage of seeing the witnesses: *Goose v Wilson Sandford & Co* (unreported, Court of Appeal, Peter Gibson, Brooke and Mummery LLJ, 13 February 1998 at [113]); *R v Maxwell* (unreported, Supreme Court of New South Wales Court of Criminal Appeal, Spigelman CJ, Sperling and Hidden JJ, 23 December 1998, 24); *Cobham v Frett* [2001] 1 WLR 1775, 1783.

57 In an extreme case the decision may be set aside on the basis that there has been a miscarriage of justice. According to the criminal law, an accused is entitled to a trial where the law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. A failure in any of these respects can result in a miscarriage of justice and a new trial may be ordered: *Mraz v The Queen* (1955) 93 CLR 493, 514; *TKWJ v R* (2002) 193 ALR 7 at 13-14, 22-23, 33. Similar principles apply in civil litigation. If the judge forgets the essential facts and evidence or, in a case where it matters, has no clear recollection of the demeanour of important witnesses, there may be a miscarriage of justice: *Laminex (Australia) Pty Ltd v Smeeth* [1999] NSWCA 462. And where the losing party has been denied a fair hearing by reason of the delay there will be a rehearing.

58 A recent discussion of the applicable principles can be found in *Cobham v Frett* [2001] 1 WLR 1775. This was a civil appeal based on excessive delay between the conclusion of the trial and the delivery of judgment. The judgment of the Privy Council was delivered by Lord Scott. He accepted that the impugned decision could be set aside if there was an injustice to the losing party. He put it this way at (1783-1784):

"In their Lordships' opinion, if excessive delay, and they agree that 12 months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant."

59 Do these principles apply to administrative decisions? Here the law is rather scant. There are a few English cases where it was held that a delayed decision could be set aside on *Wednesbury* grounds (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). The cases are *R v Secretary of State for the Home Department; Ex parte Rofathullah* [1989] 1 QB 219; *R v Secretary of State for the Home Department; Ex parte Shquipe Gecaj* [1998] Imm AR 11. However, neither of these cases concerned a situation where there had been a hearing followed by an inordinate delay in the delivery of reasons.

60 Two Canadian cases are instructive. They are *Grbic v Canada (Minister of Citizenship and Immigration)* 2000 ACWSJ 511928 and *Orgona v Canada (Minister of Citizenship and Immigration)* 2001 ACWSJ 611915. In each case the applicant sought judicial review of the decision of the Convention Refugee Determination Division of the Immigration and Refugee Board, a body which carries out functions similar to the Refugee Review Tribunal. The issue in each case was whether the applicant had been denied procedural fairness because the tribunal member had fallen asleep during the course of the hearing. Each case proceeded on the assumption that if the facts were made out the applicant would have been denied a fair hearing such as would justify the quashing of the decision.

61 As a matter of principle (which in part is based on the cases to which I have referred) I am of opinion that if it can be shown that there is a real and substantial risk that an administrative decision-maker has either forgotten important evidence or is unable properly to resolve disputed questions of fact because he cannot recall the witnesses' demeanour his decision is flawed in two respects. In the first place it is the duty of the tribunal to determine the truth of asserted facts, analyse the law applicable to those facts and determine the case in accordance with the law as interpreted and applied to the facts. If the tribunal purports to undertake this task without regard to important evidence because it has been forgotten or seeks to resolve difficult questions of fact without taking into account the demeanour of witnesses when that demeanour is important then it is not carrying out its proper function. Indeed, for the tribunal to proceed in these circumstances would be for it to act in abuse of its power.

62 The second way of looking at the matter (accepting of course that grounds for judicial review have blurred edges which may overlap: *Boddington v British Transport Police* [1999] 2 AC 143, 170) is that in the assumed circumstances the tribunal has failed to act fairly, that is it has failed to accord natural justice. Natural justice has a number of aspects. One fundamental aspect is the duty to afford an affected person the opportunity to make representations: *Delta Properties Pty Ltd v Brisbane City Council* (1955) 95 CLR 11, 18. Sometimes this will involve putting matters to the person and allowing him a chance to comment: *Kioa v West* (1985) 159 CLR 550, 628-629. A corollary of the basic right to make representations is that the representations should be taken into account: *Wiseman v Borneman* [1971] AC 297, 315. What is the point of giving someone a right to be heard unless, in arriving at the decision, the decision-maker considers the evidence and has regard to the manner in which it is given.

63 The appellants lost their case before the tribunal because their evidence was not believed. The tribunal was only entitled to reject their evidence after giving full consideration to what was said and the manner in which it was said, if necessary in light of other relevant facts known to the tribunal. To succeed on the appeal the appellants must show that there is a real and substantial risk that the tribunal has either forgotten much of the evidence that was led so many years ago or that it can no longer adequately and fairly assess the veracity of the witnesses who gave that evidence. It is

impossible for the appellants to make out the first point. The evidence was transcribed. A reading of the tribunal's reasons, in particular those parts of the reasons which record the appellants' claims, suggests that it took most of its summary of the evidence from the transcript. On one view, it may be said that in its reasons the tribunal did little more than summarise the transcript.

64 The appellants' demeanour stands in a different light. The transcript discloses nothing about demeanour. Hence the tribunal must rely on its memory and any notes that may have been taken. It is common enough for decision-makers to make notes recording their impression of witnesses. That may have happened here. But if notes were taken, their content was not sufficient for the tribunal, at least before it conducted its enquiry after the first hearing, to find against the appellants on credit. In this connection, it is the first hearing which is the critical hearing because most of the appellants' evidence was given on that occasion. Moreover, it was this evidence with which the tribunal was principally concerned in its reasons, basing its findings on the appellants' credibility with particular reference to that evidence.

65 This is not to suggest that there was not material available to the tribunal which adversely affected the appellants' credit. The fact was that the husband and wife had admittedly given false evidence in some respects. This would no doubt trouble the tribunal. But the tribunal knows that many refugees have good reason to distrust persons in authority and may be less than honest in the evidence they give when they seek asylum. To reject the remainder of their evidence for the simple reason that the husband and wife had acknowledged giving false evidence is a highly suspect practice. J Hathaway makes the good point that even clear evidence of lack of candour does not necessarily negate a claimant's need for protection. The tribunal is still required to look at all of the evidence and arrive at its conclusion on the entire case: J Hathaway, *The Law of Refugee Status*, 1991 at 86. So it was with the tribunal. Before it rejected their evidence, the tribunal was required (and it no doubt attempted) to assess the appellants' creditworthiness by having regard, among other things, to their demeanour. Was the tribunal in a position to discharge that obligation four and half years after the appellants gave their principal evidence? I have no doubt that the answer is in the negative. The opposite conclusion is simply fanciful. Were it not for the second hearing, I even doubt that the tribunal would have recognised the appellants if it ever saw them again.

66 I would allow the appeal, set aside the decision of the trial judge, set aside the decisions of the tribunal and remit the applications for reconsideration. Further, in my view, the appellants should have their costs of the appeal and of the hearing below.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of

the Honourable Justice Finkelstein.

Associate:

Dated: 11 February 2004

Counsel for the Appellant:	Mr J R Young
Counsel for the Respondent:	Mr D Jordan
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	26 November 2003
Date of Judgment:	11 February 2004