FEDERAL COURT OF AUSTRALIA

WAAD v Minister for Immigration & Multicultural Affairs [2002] FCAFC 399

MIGRATION – judicial review – Refugee Review Tribunal – protection visa – application of "real chance" test – mistaken finding of fact – Tribunal's failure to consider possible occurrences

PRACTICE AND PROCEDURE – appeal – out of time – extension granted

Migration Act 1958 (Cth) s 476(1)(b), (c), (e)

Federal Court RulesO 52 r15(1), r15(2)

Burns v Grigg [1967] VR 871 applied

Gallo v Dawson (1990) 93 ALR 479 applied

Hughes v National Trustees Executors & Agency Co of Australasia Ltd [1978] VR 257 applied

Jess v Scott (1986) 12 FCR 187 applied

Minister for Immigration & Ethnic Affairs v Guo (1997) 191 CLR 559 applied

Ratnam v Cumarasamy [1965] 1 WLR 8 applied

Surita v Immigration and Naturalization Service 95 F3d 814 (9th Cir 1996) referred to

Craig v South Australia (1995) 184 CLR 163 applied

Abebe v Commonwealth (1999) 197 CLR 510 applied

Karanakaran v Secretary of State for the Home Department [2000] 3 All ER 449 cited

N1202/01A v Minister for Immigration & Multicultural Affairs [2002] FCAFC 94 cited

Minister for Immigration & Multicultural Affairs v Yusuf (2001) 180 ALR 1 applied

W396/01 v Minister for Immigration & Multicultural Affairs (2002) FCAFC 103 applied

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

Re Minister for Immigration & Multicultural Affairs; Ex parte "A" (2001) 185 ALR 489 referred to

WAAD v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

W 460 of 2001

LEE, R D NICHOLSON & FINKELSTEIN JJ

6 DECEMBER 2002

PERTH

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W 460 of 2001

On Appeal from a Single Judge of the Federal Court of Australia

BETWEEN:	WAAD Appellant
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS Respondent
JUDGES:	LEE, RD NICHOLSON & FINKELSTEIN JJ
DATE OF ORDER:	6 DECEMBER 2002
WHERE MADE:	PERTH

THE COURT ORDERS THAT:

1. The time for filing a notice of appeal be extended to the date of lodgement of the notice of appeal.

2. The appeal be allowed.

3. The Orders made on 31 July 2001 be set aside and in lieu thereof it be ordered:

   "(1) The decision of the Tribunal made 20 February 2001 be set aside and the matter remitted to the Tribunal for re-determination.

   (2) The respondent pay the applicant's costs."

4. The respondent pay the appellant'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	
WESTERN AUSTRALIA DISTRICT REGISTRY	W 460 of 2001

On Appeal from a Single Judge of the Federal Court of Australia

BETWEEN:	WAAD Appellant
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS Respondent

JUDGES:	LEE, RD NICHOLSON & FINKELSTEIN JJ
DATE:	6 DECEMBER 2002
PLACE:	PERTH

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal against orders made on 31 July 2001 by a Judge of this Court (Emmett J), dismissing an application to review a decision of the Refugee Review Tribunal ("the Tribunal"), notice of which was filed out of time. For reasons which are set out below we extended the time to file the notice of appeal.

2 The appellant, his wife, and two children then aged 14 and 7, all Iranian citizens, left Iran in May 2000. They arrived in Australia in November 2000 and have been held in "immigration detention" at all times thereafter. The appellant claims to be entitled to the grant of a protection visa under the *Migration Act 1958* (Cth) ("the Act"). His application for a protection visa was refused by a delegate of the respondent, and that refusal was upheld by the Tribunal. In dismissing the application for review of the Tribunal's decision, the trial Judge gave oral reasons for his decision. The written form of those reasons was published on 4 September 2001, and probably received by the appellant shortly thereafter. His Honour dismissed the application because "[t]here is nothing … to suggest that any of the … grounds in s 476(1) of the [Migration] Act are applicable" to permit review of the decision.

3 At the hearing below the appellant, who does not understand English, was represented by counsel appointed to act *pro bono publico* under the Federal Court Rules. At the commencement of the hearing before us the appellant was not represented, but when it became apparent that the appeal raised an arguable issue, arrangements were made for the appellant again to be represented by *pro bono* counsel. We wish to record our appreciation to counsel for agreeing to appear on short notice.

4 Pursuant to O 52 r 15(1) of the Federal Court Rules ("the Rules"), the notice of appeal from the judgment below had to be filed and served within twenty-one days after the date of pronouncement of the judgment, namely by 21 August 2001. If time were to run from the publication of the written reasons for judgment (which is not what the Rules provide but which, for the moment, may be taken as a convenient reference point), the notice of appeal should have been filed and served by 25 September 2001. As it turned out, the appellant did not file and serve his notice of appeal until 2 October 2001.

5 The appellant relies upon O 52 r 15(2) to bring his appeal out of time. The rule provides that "the Court or a Judge for special reasons may at

any time give leave to file and serve a notice of appeal". It is plain that the grant of leave under O 52 r 15(2) is not automatic. As the Judicial Committee of the Privy Council pointed out in *Ratnam v Cumarasamy* [1965] 1 WLR 8 at 12:

"The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion."

6 In cases under r 15(2) there is an added burden. An extension of time will only be granted "for special reasons". The meaning of this was considered by the Full Court in *Jess v Scott* (1986) 12 FCR 187 at 195 where it was said:

"It should not be overlooked that r 15(2) enables leave to be given 'at any time'; the 'special reasons' relevant to such a power cannot but describe an elastic test, suitable for application across a range of situations, from an oversight of a day to a neglect persisted in during a prolonged period. It would require something very persuasive indeed to justify a grant of leave after, for example, a year; equally, it may be said, something much less significant might justify leave where a party is a few days late. 'Special reasons' must be understood in a sense capable of accommodating both types of situation. It is an expression describing a flexible discretionary power, but one requiring a case to be made upon grounds sufficient to justify a departure, in the particular circumstances, from the ordinary rule prescribing a period within which an appeal must be filed and served."

7 The discretion to extend time is given for the purpose of enabling the court to do justice between the parties: *Hughes v National Trustees Executors & Agency Co of Australasia Ltd* [1978] VR 257 at 262; *Gallo v Dawson* (1990) 93 ALR 479 at 480. So, for example, where the delay is short and no injustice will be occasioned to the respondent, justice will usually be done if the extension of time is granted.

8 In the present case part of the delay may be explained by the fact that the written reasons for judgment were not available until 4 September 2001. Indeed, we note in passing that the notice of appeal that was filed without leave identified 4 September 2001 as the date of the judgment against which the appeal was brought. Thus, the delay between the giving of oral reasons and the provision of written reasons accounts for about five weeks of the period of delay, which in total is about six weeks. If one were to begin the count when the reasons became available, the delay is of the order of one week. Bearing in mind that this case is concerned with a claim by an individual for refugee status, who neither speaks nor understands English, let alone the legal system of this country, that the individual had no legal representation when he filed his notice of appeal, and that the Minister is not in any way prejudiced by an extension of time, it would be wrong to refuse the extension, subject to what follows.

9 An extension of time within which to file an appeal will not be granted without a consideration of the putative appellant's prospects of successfully prosecuting his appeal: *Hughes* at 264; see also by way of analogy *Burns v*

Grigg [1967] VR 871 at 872. In this case, at the forefront of the Minister's opposition to the application for an extension was the contention that the appeal does not have sufficient prospect of success to make it just that the prospective appellant be permitted to proceed with it. For the reasons set out below, we are of the opinion that the appeal has sufficient strength to warrant there being an extension of time in which to file the notice of appeal.

10 Before dealing with the appeal it is necessary to mention briefly the basis of the appellant's application for the grant of a visa under the Act.

11 Section 65 of the Act provides that if the Minister is satisfied that, *inter alia*, the criteria prescribed for a visa by the Act or the regulations have been satisfied, the Minister is to grant a visa but if the Minister is not so satisfied the grant of a visa is to be refused. At material times, s 36(2) of the Act provided the following criterion in respect of a protection visa:

"A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

12 In s 5 of the Act, "Refugees Convention" and "Refugees Protocol" (together referred to hereafter as "the Convention") are defined respectively as "the Convention relating to the Status of Refugees done at Geneva on 28 July 1951" and "the Protocol relating to the Status of Refugees done at New York on 31 January 1967". The term "protection obligations" is not defined in the Act and is not a term used in the Convention.

13 The Convention is an international treaty under which the "Contracting States" have agreed to apply the provisions of the Convention to "refugees". Sub-Article 1(A) of the Convention defines a "refugee" as follows:

"For the purposes of the present Convention, the term 'refugee' shall apply to any person who:…(2)…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;…"

14 As a Contracting State, Australia has accepted the obligations imposed upon it under international law by reason of accession to the Convention. Numerous obligations in respect of refugees are set out in the Convention, including an undertaking by a Contracting State not to discriminate against a refugee, and to offer a refugee some of the opportunities available to a national of that State. All of those obligations could be said to meet a broad meaning of the phrase "protection obligations under the…Convention" but, having regard to the purpose of s 36(2), the phrase as used in that section may be taken to refer to an obligation imposed by the Convention that is a direct, rather than indirect, obligation to protect a refugee, namely, not to penalize, or restrict the movement of, a refugee who has entered Australia without authority, having come directly from a territory where the life or freedom of that person was threatened for a Convention

reason (Art 31), and not to expel or return a refugee from Australia to the frontiers of territories where the life or freedom of the refugee would be so threatened (Art 33).

15 The appellant claimed that if he were required to return to Iran he would be imprisoned and mistreated for two reasons. The first is because of imputed political opinion resulting from his sister's involvement with the Mujahideen-e-Khalq ("Mujahideen") and the assistance he had given her in undertaking Mujahideen activities. The second is because he left Iran illegally.

16 We now turn to the material upon which the appellant relied to establish his fear of persecution. That material can be divided into two categories, those facts that were accepted by the Tribunal and those that were rejected. We begin with the first category.

17 The Mujahideen is Iran's largest opposition group. It supports clandestine resistance to the regime in Iran, distributing newspapers and pamphlets and supporting the families of imprisoned Mujahideen members. From time to time it carries out terrorist attacks in Iran. According to the Australian Department of Foreign Affairs and Trade (DFAT), the treatment meted out to members of the Mujahideen by the ruling party is varied. Much will depend on the circumstances of the case. A supporter may not be treated too harshly if nothing can be proven. Greater punishment would follow for someone regarded as an active supporter, for example, one caught distributing pamphlets or writing slogans. The department's advice went so far as to suggest that, at the extreme, a Mujahideen supporter may be summarily executed. The evidence that was before the Tribunal also suggested that relatives of people who occupied high-level positions in the Mujahideen might be in some danger of arrest or other unfavourable attention from the Iranian authorities. On the other hand, there was evidence to the effect that it was unlikely that a person would be arrested or harassed by the Iranian authorities simply because that person was related to a Mujahideen supporter who had sought refugee status outside Iran.

18 The appellant's sister had been an active member of the Mujahideen. At her request, the appellant would deliver parcels of pamphlets and leaflets to other members of the organisation. This occurred on a number of occasions between 1983 and 1991. The appellant also assisted his sister's political activities by driving her to different places in his car, between 1991 and 1995. The appellant's sister fled Iran in 1995 after the Iranian authorities had become aware of her activities. She was granted refugee status in the United Kingdom. It is to be inferred that the Tribunal accepted the appellant's evidence that following the departure of his sister, the Iranian intelligence service, Ettela'at, searched the home of his parents on numerous occasions and became aware of the activities the appellant had carried out for the Mujahideen on behalf of his sister. It is also to be inferred that the Tribunal accepted the appellant's claim that in 1996 the appellant's father was held for three or four days by the Sepah Pasdaran (Revolutionary Guards), interrogated about his daughter, and given 70-80 lashes.

19 The appellant, whilst visiting his parents' house, was summarily arrested in September 1999 by the Sepah Pasdaran and interrogated over a period of one week about his knowledge of his sister's activities and his own involvement with the Mujahideen. While in detention the appellant was slapped, punched and kicked by his interrogators. The appellant said the assaults were of such force that he lost several of his teeth, and because the Tribunal did not reject the claim , it is to be assumed that the Tribunal also accepted this assertion to be true. It is to be noted that this event occurred four years after the appellant's sister had fled Iran and three years after his father had been arrested and lashed.

20 To this point the Tribunal's findings are consistent only with the conclusion that the appellant had been persecuted for a Convention reason. But that was not sufficient to entitle him to a protection visa. The appellant was required to go further. He had to show that it was likely he would be persecuted for a Convention reason when he returned to Iran. In some jurisdictions a finding of past persecution triggers a presumption that the asylum seeker has a well-founded fear of future persecution which would provisionally establish the asylum seeker's refugee status and eligibility for asylum. This is the position in the United States; see *Surita v Immigration and Naturalization Service* 95 F3d 814 (9th Cir 1996). There is no such presumption in this country. The Tribunal must be satisfied on all the evidence that the putative refugee faces a "real chance" of future persecution. If a visa applicant has already suffered persecution at the hands of his Government, that is a "reliable guide" for determining what will happen to him in the future: *Minister for Immigration & Ethnic Affairs v Guo* (1997) 191 CLR 559 at 575. However, although the Tribunal found that the appellant had been persecuted in the past, it was not satisfied that he would be subject to the same treatment in the future. It is necessary to examine why the Tribunal reached this conclusion.

21 In addition to the fact of his past persecution, the appellant sought to rely on two additional circumstances to show that he faced a real chance of future persecution. The first was that he had been, or believed that he had been, kept under surveillance by the security forces after his release from custody in September 1999. The Tribunal did not accept this allegation, though there was no material before the Tribunal which would enable it to say positively that the appellant was not kept under surveillance. Obviously the appellant did not know if it were a fact that he was under surveillance, but he believed it to be so. The second matter was the appellant's claim that in late 1999 and early 2000 letters from the Revolutionary Court were delivered to his parents' house directing him to present himself before the court. The appellant said that "they had wanted him to be formally invited so that later on they would have a reason, they could show that there had been a legal finding against him". The appellant said that the system was that upon his failure to respond to the third letter, a warrant for his arrest would be issued, and he left Iran ten days before that was likely to occur. He asserted that in May 2000 he, with his wife and two children, left the country on a false passport or passports. The appellant told the Tribunal that he took the letters with him

when he left Iran but they had been lost at sea when the first vessel they boarded to take them to Australia capsized.

22 The Tribunal did not accept that the appellant had received these letters. The Tribunal found "it implausible that the authorities would have issued him with summonses if they had suspected him of serious offences". This conclusion was founded on information the Tribunal had obtained from DFAT, which, according to the Tribunal, was to the effect that "an individual charged with serious offences in Iran would not be summoned to appear in court. They would be arrested …". The Tribunal stated that since it did not accept that the appellant had received letters from the Revolutionary Court directing him to attend the court, it "consider[ed] that the [appellant] was of no interest to the Iranian authorities at the time that he left Iran, notwithstanding the authorities' knowledge of his own and his sister's activities in support of the Mujahideen". The Tribunal then said that for that reason it "[did] not accept" that the appellant and his family left Iran on false passports or that the appellant's brother had lost his job or that his father had been further harassed after the appellant had left Iran. It is plain that the Tribunal purported to base its "non-acceptance" of those elements of the appellant's claims entirely on its treatment of the three letters.

23 The DFAT information to which the Tribunal referred comprised answers to a number of questions posed by an officer in the Minister's department who was seeking information in relation to a different protection visa application. For the purposes of obtaining that information the officer described the background of the case for which the information was sought. The background was that the visa applicant was from Iran, and had handed the officer what purported to be two original arrest warrants, stating that those warrants had been given to his wife. The officer did not know how the visa applicant's wife had managed to retain the warrants, rather than hand them to the authorities. The officer explained that, having regard to that background, to determine the veracity of the claim, the officer required the following information:

"(1) What is the procedure for the issuing and execution of arrest warrants in Iran?

(2) Would an original or a copy of the warrant be given to a family member (or spouse) if the person wanted for arrest was not available?

(3) Is an arrest warrant the property of the issuing authority and is it likely that a person or their spouse must return the warrant to the authorities after it has been served?

(4) Is it possible that such arrest warrants are forgeries?"

24 To dispose of this appeal it is not necessary to refer to the answer to each question. It is sufficient to note the answer to the second question, which is the only answer that contains information which might support the Tribunal's conclusion. That answer is:

"In the case of lesser charges, including misdemeanours such as breach of trust or failure to pay alimony, the defendant receives a summons to appear in court. The summons is issued by the judicial authorities and sent to the address of the defendant, by the bailiff of the Ministry of Justice. Unlike arrest warrants, a summons can be served regardless of whether or not the defendant is present and can be kept by the individual concerned. In contrast, an individual charged with serious offences such as manslaughter or major drug offences would not be summonsed [sic] to appear in court. Rather, a person charged with an offence of this severity, would simply be arrested by police who would possess an arrest warrant."

25 It will immediately be evident that this information has little to do with the appellant's case. First, it is by no means apparent, and could not have been apparent to the Tribunal, that the procedures outlined by DFAT had any application to the Revolutionary Court. Second, the information details the procedure in relation to the issue of summonses, yet, strictly, the appellant did not assert that he had been served with a summons. He said he had been asked by letters from the Revolutionary Court to appear before it. Third, even if the appellant should be understood as saying that he had been served with summonses to attend before the Revolutionary Court, he had not alleged that he was being charged with the commission of a serious offence, or indeed that it had been alleged that he had committed any offence. Moreover, and this is the fourth point, when the appellant had been taken into custody in 1999, that was not pursuant to a summons or a warrant of arrest. Why, in that circumstance, the Tribunal should be of the opinion that the appellant could only be taken into custody under a warrant, and not be subject to summary arrest upon appearance before the Revolutionary Court, is impossible to say. It is certainly not a view that is justified by the evidence. In reaching this conclusion, the Tribunal appears to have lost sight of the evidence that there is a good deal of arbitrariness in the Iranian legal system, so that what occurs is often dependent on individuals and circumstances. According to the evidence, summary executions for political reasons still occur in Iran and there is an infinite variety of means by which Iranian citizens are mistreated by their government.

26 In its written statement of reasons the Tribunal referred to a report by the Research Directorate of the Canadian Immigration and Refugee Board dated 11 March 1998 (IRN 28971.E), which provided information on the treatment of relatives of supporters of the Mujahideen in Iran. Reasons provided by the Tribunal in other cases show that the material available to the Tribunal included a later report prepared by that Directorate, dated 12 March 1999, (IRN 31309.E) which dealt directly with the documents issued by the courts of Iran and the consequences of failing to respond to notices to appear. That report confirmed the general tenor of the appellant's claims in respect of the notices issued to him and his apprehension that he could be arrested upon arriving at the Revolutionary Court in response to such a notice. The manner in which such information is registered in electronic form and accessed by the Tribunal members is described in *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at [107] and [109]. It may be expected that a specialist Tribunal would bring such pertinent knowledge into account in

the making of its decision. (See: *Re Minister for Immigration & Multicultural Affairs; Ex parte "A"* (2001) 185 ALR 489 at [46]).

27 The foregoing shows there are relevant matters which the Tribunal appears to have overlooked. According to the appellant, the mistreatment that he suffered caused him to flee Iran with his family. It cannot be said of the appellant, as it might be said of many other people who claim asylum, that he was leaving a country where he found himself in desperate circumstances, with a view to seeking a brighter future. The appellant's evidence was to the effect that he had left behind a home and apparently a good job with a reasonable income. He had up-rooted his family and put their lives and his own at risk by boarding vessels of uncertain seaworthiness to reach Australia. Obviously, there must be some reason why the appellant would do that. The acceptance by the Tribunal of almost all of the appellant's claims, sufficient to support a conclusion that the appellant had suffered persecution and may have a well-founded fear that persecution may occur in the future, made it necessary for the Tribunal to exercise great care in examining the remainder of the appellant's claims as to why he left Iran, before the Tribunal could say that it was satisfied that there was no real risk that the safety or freedom of the appellant would be at risk if the appellant were returned to Iran.

28 Having declined to accept the appellant's claim that he received the three letters from the Revolutionary Court, the Tribunal then said it was not satisfied that there was a real chance that the appellant would face persecution if he were returned to Iran. This is the reason for that conclusion:

"Since I do not accept the [appellant's] account of his having been issued with three summonses in October/November 1999, January/February 2000 and March/April 2000, I consider that the [appellant] was of no interest to the Iranian authorities at the time that he left Iran, notwithstanding the authorities' knowledge of his own and his sister's activities in support of the Mujahideen. I do not consider that the authorities had any continuing interest in the [appellant] after they released him in September 1999. I consider that this conclusion is consistent with the information available to me that the treatment of supporters of the Mujahideen-e-Khalq is varied and that the period for which someone is detained will depend on the security situation at the time and on the assumed importance of the person in security terms … Given the peripheral nature of the [appellant's] own activities, I consider that his release after seven days is an accurate reflection of the Iranian authorities' assessment of his importance."

29 There are real difficulties with this finding. Once the Tribunal accepted that, as recently as September 1999, the appellant had been subjected to persecution for a Convention reason based on his and his sister's political activities, that finding pointed to the possibility that such persecution might occur again in the future. As regards what might happen in the future, one might put to one side the appellant's claim that he had been under surveillance after his release from detention, because the appellant himself was not certain that this had occurred. But the three letters (in the passage just cited the Tribunal referred to them as summonses) should be viewed in a different light. It may be that the appellant invented the receipt of the letters,

but the Tribunal's rejection of the appellant's claim was not based on material that supported that conclusion.

30 The question now is what follows from the error on the part of the Tribunal in misunderstanding the material before it and the law to be applied to that material. In *Craig v South Australia* (1995) 184 CLR 163 the High Court stated (at 179):

"If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some 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."

31 The first thing that can be said is that by virtue of the lack of a significant foundation for its finding that the letters could be disregarded, the Tribunal was not in a position where it could say (if it had directed its attention to the issue), that it had no real doubt that its finding in that regard was correct. Indeed, a view that there was no doubt as to the correctness of the related finding that the appellant would not be arrested as a result of his failure to attend before the Revolutionary Court would have been irrational in light of the evidence that was before the Tribunal.

32 In that circumstance, to assess properly whether there was a "real chance" that the appellant may face persecution if returned to Iran, the Tribunal was required to consider the appellant's claim on the basis of whether it could exclude the possibility that the appellant would be subjected to such persecution. This would oblige the Tribunal to recognise, and allow for the possibility, that the appellant had been served with three letters to appear before the Revolutionary Court.

33 The cases have established that proper construction of the Act requires the Tribunal to determine whether it is satisfied, as required by s 65 of the Act, by taking into account the possibility that a claimed event may have occurred, notwithstanding that the Tribunal was not satisfied that it did occur.

34 As Gleeson CJ and McHugh J said in *Abebe v Commonwealth* (1999) 197 CLR 510 at [83], the fact that an applicant:

"…might fail to make out an affirmative case in respect of one or more of the [claimed events] did not necessarily mean that [the] claim for refugee status must fail. As Guo [per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ at 575-576] makes clear, even if the Tribunal is not affirmatively satisfied that the events deposed to by an applicant have occurred, the degree of probability of their occurrence or non-occurrence is a relevant matter in determining whether an applicant has a well-founded fear of persecution. The Tribunal 'must take into account the chance that the applicant was so [persecuted] when determining whether there is a well-founded fear of future persecution' [Guo at 576]."

35 Such a construction has been accepted as consonant with the manner of assessment of refugee status in the United Kingdom. As stated by Brooke LJ in the Court of Appeal (Robert Walker LJ agreeing) in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 at 469-470:

"For the reasons much more fully explained in the Australian cases, when considering whether there is a [real risk] of persecution for a convention reason if an asylum seeker is returned, it would be quite wrong to exclude matters totally from consideration in the balancing process **simply because the decision-maker believes, on what may sometimes be somewhat fragile evidence, that they probably did not occur**." (Emphasis added).

36 The statement by the Tribunal that it "[did] not accept" that the appellant had received letters from the Revolutionary Court soon after release by the Sepah Pasdaran did not dispose of the appellant's application. Clearly that statement by the Tribunal was not a finding that the appellant was not a credible witness nor a positive finding, based on probative material, that the claimed event did not occur. It was an expression of the Tribunal's view on the likelihood of the occurrence of that event and a statement by the Tribunal that it was unpersuaded by the appellant's account that it had occurred.

37 Given that the Tribunal accepted most of the significant elements of the appellant's claims, the Tribunal's failure to accept that the letters had been received as claimed was obviously a qualified finding, if it may be described as a finding. As noted already, this was not a case in which the Tribunal found the appellant to be a dishonest witness, or in which a positive finding had been made, on probative material and logical grounds, that an event central to the appellant's claims had not occurred. The Tribunal had not reached the stage that it had no real doubt about its findings on past and future events so that "a finding that […the appellant] had a well-founded fear of persecution for a Convention reason would have been irrational" (*Guo* per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ at 576). Not having reached that degree of persuasion, the Tribunal was obliged to have regard to the possibility of the occurrence of the claimed events in assessing the degree of risk of persecution faced by the appellant (*Abebe* per Gleeson CJ and McHugh J at [85]-[86]).

38 The question the Tribunal had to address was whether the appellant had a well-founded fear of persecution for a Convention reason having regard to possible past occurrences and possible future events. (See: *Abebe* per Gummow and Hayne JJ at [192], [199]). The Tribunal had to consider the possibility that notices from the Revolutionary Court had been received by the appellant as claimed by him, and also, therefore, that the appellant and his family had departed Iran on false passports and that his family in Iran had been harassed after the appellant left Iran. The Tribunal had to assess the risk that the appellant may suffer persecution if returned to Iran by having regard to the possibility that the claimed events had occurred and by balancing the material as a whole. (See: *N1202/01A v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 94 at [54]).

39 The Tribunal failed to carry out that task and as a result it failed to consider relevant material and to address the correct question as it was required to do by law. (See: *Minister for Immigration& Multicultural Affairs v Yusuf* (2001) 180 ALR 1 per McHugh, Gummow and Hayne JJ at [82]-[85]; *W396/01 v Minister for Immigration & Multicultural Affairs* (2002) FCAFC 103 at [33]). Accordingly, ground for review of the Tribunal's decision arose under s 476(1)(b), (c) or (e) of the Act.

40 It follows that the time for filing a notice of appeal should be extended, the appeal allowed and the matter remitted to the Tribunal for re-determination.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Court.

Associate:

Dated: 6 December 2002

Counsel the Appellant:	H N H Christie (*pro bono publico*)
Solicitors for the Appellant:	Christie & Strbac (*pro bono publico*)
Counsel for the Respondent:	P Macliver
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	12, 14 February 2002
Date of Filing Written Submissions:	25 February, 1 March 2002
Date of Judgment:	6 December 2002