

# DELAY TOTALLY INVALIDATES AN ADMINISTRATIVE DECISION

## *NAIS AND OTHERS V MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS AND ANOTHER* (2005) 223 ALR 171

KIP WERREN\*

The question before the High Court in *Nais and Others v Minister for Immigration and Multicultural and Indigenous Affairs and Another*<sup>1</sup> ('*Nais*') was whether excessive delay nullified an administrative decision. The majority of Gleeson CJ, Kirby, Callinan and Heydon JJ, over the dissenting judgments of Gummow and Haynes JJ, held that excessive delay did vitiate the administrative decision in this particular case.<sup>2</sup> It was also noted that the rules of procedural fairness are not necessarily breached by inordinate delay but rather delay may deny an applicant the opportunity to have their case properly considered.<sup>3</sup>

Thus, denial of procedural fairness can arise not only from a denial of an opportunity to present a case but also from a denial of opportunity to properly consider the case.<sup>4</sup> In *Nais* the Refugee Review Tribunal ('the RRT') had hindered itself from giving proper consideration to the oral evidence presented to it by allowing the extreme delay to occur. Thus '[t]he loss of an opportunity is what makes the case of unfairness.'<sup>5</sup>

### I. THE BACKGROUND

The appellants were husband and wife and their daughter. They were citizens of Bangladesh. They arrived in Australia on

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\* Associate Lecturer, School of Law, University of New England.

<sup>1</sup> (2005) 223 ALR 171.

<sup>2</sup> This note will concentrate on the majority's views.

<sup>3</sup> *Nais*, above n 1, 172–3 (Gleeson CJ, Gummow J).

<sup>4</sup> *Ibid* 196–7, 216 (Kirby, Callinan and Heydon JJ).

<sup>5</sup> *Ibid* 174 (Gleeson CJ).

3 August 1996 on visitor visas for a period to expire on 3 February 1997. On 28 January 1997 the husband and wife applied for protection visas on their own behalf and on behalf of their daughter under the *Migration Act 1958* (Cth).

The husband and wife were part of a ‘mixed marriage’ in that the husband was a Muslim and the wife was a Roman Catholic. The daughter had been baptised a Catholic and subsequently raised in that faith. The husband and wife claimed that they had been attacked and vilified because of their ‘mixed marriage’ and as a consequence they had a well-founded fear of persecution. On 27 May 1997 a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs (‘the Minister’) refused to grant protection visas.

An application to review the decision of the delegate of the Minister was made to the RRT on 5 June 1997. On 15 April 1998 the appellants were asked to give evidence in support of their claims at a hearing before the RRT. A hearing took place in May 1998 but no further communication with the appellants took place until a second hearing was set down for 19 December 2001. On 20 December 2002 notification was given that the RRT would hand down its decision on 14 January 2003, over five and half years since the first application to the RRT. The RRT affirmed the decision not to grant protection Visas.

The appellants applied to the Federal Court<sup>6</sup> for judicial review of the RRT’s decision but Justice Hely dismissed the application. They then unsuccessfully appealed to the Full Court of the Federal Court.<sup>7</sup>

In appeal to the High Court, the appellants adopted the essential features of what Finkelstein J had stated in his dissenting judgment in the Full Federal Court. This was that the effect of the delay would be to undermine the RRT’s ability to fairly access the appellant’s demeanour and subsequently weigh all the claims and facts.

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<sup>6</sup> *Nais and Others v Minister for Immigration and Multicultural and Indigenous Affairs and Another* [2003] FCA 333.

<sup>7</sup> *Nais v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 85 (Hill J, Marshall J, Finkelstein J dissenting).

## II. THE DECISION OF THE HIGH COURT

Justices Callinan and Heydon stated that the only way the High Court could correct an administrative decision involving excessive post-hearing delay was jurisdictional error.<sup>8</sup> Jurisdictional error totally invalidates an administrative decision because it involves the administrative body taken on powers that it does not properly possess. Thus, if an administrative body mistakenly makes an error of law ‘which causes it to identify a wrong issue ... to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or reach a mistaken conclusion and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers...’<sup>9</sup> then the error is a jurisdictional error.

Throughout the judgments, discussion arose over the distinction between pre-hearing delay and post-hearing delay.<sup>10</sup> In regards to pre-hearing delay a writ of mandamus can be issued to require the exercise of jurisdiction. Before *Nais* there was no authority that post hearing delay constituted unfairness.<sup>11</sup>

It should be noted at this point that the reasoning in the dissenting judgments of Gummow and Haynes JJ are flawed in that they cross the divide between merits review and judicial review. It was their opinion that the appellant is required *to prove* that post hearing delay denied the appellant procedural fairness. Such an approach would take the court outside its supervisory role and would require it to ‘stand in the shoes of the primary decision maker.’

Chief Justice Gleeson stated that the RRT ‘by its unreasonable delay, created a real and substantial risk that its own capacity for competent evaluation was diminished ...’<sup>12</sup> The RRT had denied procedural fairness to the appellants because the RRT’s assessment procedure relied heavily upon evaluating the credibility of the appellants<sup>13</sup> and the extreme delay ‘impaired’ the RRT’s ability to properly appraise the candour and

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<sup>8</sup> *Nais*, above n 1, 213.

<sup>9</sup> *Craig v South Australia* (1995) 184 CLR 163, 179.

<sup>10</sup> *Nais*, above n 1, 180, 191, 202–3 (Gummow, Kirby and Hayne JJ).

<sup>11</sup> *Ibid* 191, 214 (Kirby, Callinan and Heydon JJ).

<sup>12</sup> *Ibid* 174.

<sup>13</sup> *Ibid*.

dependability of the appellants.<sup>14</sup> Moreover, the procedures were controlled by the RRT and it allowed the inordinate delay to affect its evaluation of the oral and written evidence.<sup>15</sup>

Justice Kirby agreed with Gleeson CJ that ‘in order to make good a claim of unfairness, it is sufficient that there was a substantial risk that the Tribunal’s capacity to assess fairly the appellant’s evidence and to carry out its functions ... was impaired by the procedures adopted ...’<sup>16</sup> Furthermore, Kirby J adopted a two-step approach in scrutinising the invalidating effect of post-hearing delay upon an administrative decision.<sup>17</sup> First, if the delay is prima facie one that ‘gives ground for real concern’<sup>18</sup> citing *Dyer v Watson* [2004] 1 AC 379, 402 then the second step is to closely examine the state of affairs and the consequences of the delay.<sup>19</sup>

Justices Callinan and Heydon did not refer to a ‘substantial risk’ threshold but they did indicate that a tribunal can impair itself to such a degree when it allows excessive delay that it prevents itself from properly evaluating the evidence before it.<sup>20</sup>

### III. CONCLUSION

The decision of the RRT was dependent to a high degree on the demeanour and credibility of the appellant’s oral evidence and simply stated the RRT did not believe the appellant’s evidence. The husband and wife conceded at one stage that they had invented two specific claims to bolster their case. The daughter was not believed because it was considered that her demeanour did not indicate that she was upset in recounting an incident that occurred to her on her way to church. The first hearing in which the parents gave evidence took place four and half years before the final decision and the evidence given by the daughter in the second hearing took place over 12 months before the final

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<sup>14</sup> Ibid 174.

<sup>15</sup> Ibid 175.

<sup>16</sup> Ibid 197.

<sup>17</sup> Ibid 190.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid 216.

decision. The RRT's decision was not made fairly since it had to weigh the evidence given by the appellants over a divergent period of time along with written material and it could not be said that this was carried out satisfactory or fairly.<sup>21</sup> As pointed out by Kirby J, inordinate delay may entice or appear to entice a decision maker into making the easier decision.<sup>22</sup>

Justices Callinan and Heydon make the point that *Nais* is a 'very exceptional case' and the 'circumstances' were very particular to the RRT.<sup>23</sup> Nonetheless, the High Courts decision in *Nais* is authority for the proposition that excessive delay in a post-hearing decision can totally invalidate an administrative decision.

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<sup>21</sup> Ibid 215 (Callinan and Heydon JJ).

<sup>22</sup> Ibid 192.

<sup>23</sup> Ibid 216.