RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

New laws for handling complaints against judges

On 22 November 2012, laws to improve the way complaints against federal judges are handled passed Parliament.

Attorney-General Nicola Roxon welcomed the passage of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012* and the *Courts Legislation Amendment (Judicial Complaints) Bill 2012* as an important part of the Government's court reform package.

'Australia's courts are held in the highest regard and our judiciary take their responsibilities very seriously,' Attorney-General Nicola Roxon said.

'These reforms ensure complaints against federal judicial officers are handled fairly and transparently while maintaining the constitutional independence of the judiciary.'

The legislation supports and augments existing complaints pathways, both within the federal courts and before the houses of parliament.

The *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012* provides a mechanism that would assist the Parliament's consideration of the removal of a judge from office under paragraph 72(ii) of the Constitution.

'The changes enable Parliamentary Commissions to be established to investigate the most serious of allegations where a judge's misbehaviour or capacity may warrant their removal from office,' Ms Roxon said.

The *Courts Legislation Amendment (Judicial Complaints) Bill 2012* will implement measures to assist Chief Justices of the Federal Court, the Family Court and the soon to be Federal Circuit Court of Australia, when managing complaints within the courts.

Chief Justices will have the option to establish a Conduct Committee to investigate and report to them about a complaint.

'The Australian Government has put federal courts back on a firmer financial footing, with an additional $38 million over four years, changing court fees structures, and introducing legislation to merge the administrative functions of the Family Court and the Federal Magistrates Court,' Ms Roxon said.

'The laws passed today are part of a broad reform agenda that also includes expanding the diversity of judicial appointments, establishing the Military Court of Australia and introducing a new name for the Federal Magistrates Court of Australia that better reflects its modern role in the federal judicial system.'

http://pandora.nla.gov.au/pan/132822/20130204-0704/www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/22November2012-Newlawsforhandlingcomplaintsagainstjudges.html

Review of the Commonwealth FOI Act

Eminent former long-standing public servant Dr Allan Hawke AC will conduct an independent review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010*.

On 31 October 2012, Attorney-General Nicola Roxon announced that Dr Hawke will review the effectiveness of the Government's recent Freedom of Information law reforms. About $41 million of taxpayer money was spent by the Federal Government in 2011-12 processing FOI requests. The review will consider how the Government's FOI costs could be reduced, including the Information Commissioner's recent recommendations regarding the current charging regime.

'The review will consider how these Acts and related laws continue to provide an effective framework for access to government information,' Ms Roxon said.

'Importantly, the review will also assess the impact of reforms to Freedom of Information laws in 2009 and 2010.'

In 2011-12, more than 22,000 FOI requests were determined at an average cost of $1,876 per request.

'A wide range of stakeholders and users of Freedom of Information laws will be consulted as part of the review, which is expected to be completed within a six month timeframe.

'I look forward to receiving Dr Hawke's report on his review, which will be tabled in the parliament.'

Under FOI legislation, the review is required to happen two years after the majority of the Government's Freedom of Information reforms commenced in November 2010.

Dr Hawke commenced his review in November 2012.

http://pandora.nla.gov.au/pan/132822/20130204-0704/www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/31October2012ReviewoftheFOIAct.html

Exposure Draft Human Rights and Anti-Discrimination Bill 2012

The Commonwealth Attorney-General and the Minister for Finance and Deregulation have released exposure draft legislation for the consolidated anti-discrimination law.

The Bill consolidates the five existing Commonwealth anti-discrimination acts into a single comprehensive law. The Bill was drafted following these key principles:

- lift differing levels of protections to the highest current standard, to resolve gaps and inconsistencies without diminishing protections;
- clearer and more efficient laws provide greater flexibility in their operation, with no substantial change in practical outcome;

- enhance protections where the benefits outweigh any regulatory impact;
- voluntary measures that businesses can take to assist their understanding of obligations and reduce occurrences of discrimination; and
- a streamlined complaints process, to allow more efficient resolution of disputes that arise.

On 21 November 2012 the Senate referred the exposure draft of the Bill to the Senate Legal and Constitutional Affairs Committee for inquiry and report. The reporting date was 18 February 2013.

More information on this public consultation process is available from the Senate Committees website.

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/anti_discrimination_2012/info.htm

http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx

Victorian Government to strengthen oversight of privacy and data protection

On 20 December 2012, Victorian Attorney General Robert Clark announced reforms to strengthen data security and the privacy and protection of personal information within the Victorian public sector.

The new Privacy and Data Protection Commissioner will be responsible for oversight of the current Victorian privacy and law enforcement data security regimes, as well as for the implementation of a new Victorian Protective Security Policy Framework (VPSPF).

The VPSPF will involve a new classification and information security framework for information held by government departments and agencies.

'The new office of the Privacy and Data Protection Commissioner will bring together the skills and resources of the Privacy Commissioner and the Commissioner for Law Enforcement Data Security,' Mr Clark said.

'Mr David Watts, who is currently the Commissioner for Law Enforcement Data Security, will lead the transition project to bring the two existing bodies into the one new entity.'

The new Office will have responsibility for oversight of the current privacy regime and Victoria Police law enforcement data security, and for implementing and monitoring compliance with the new VPSPF.

Mr Clark said an integrated, whole of government approach to data security, including protective security, was an essential part of strengthening the privacy and protection of personal information handled by and on behalf of the Victorian public sector.

'This new combined oversight role will be better able to respond to the new and emerging challenges affecting information privacy and data protection, including those identified by the Victorian Auditor-General in his 2009 Report on Maintaining the Integrity and Confidentiality of Personal Information,' Mr Clark said.

'The Government committed prior to the 2010 election to strengthening the protection of citizens' private information from inappropriate collection or use by government, and this reform is part of delivering on that commitment.

'The reform creates a more streamlined system that will have broader and more comprehensive oversight of the privacy and information security regime for the Victorian public sector.

'At the same time, the Victorian Government is responding to trends worldwide towards more open access to information, which the Government has endorsed through its DataVic Access Policy.'

Mr Clark said these changes would not alter any legal obligations under the Victorian privacy regime or under the law enforcement data security regime.

Legislation to establish the new Privacy and Data Security Commissioner will be introduced into Parliament in 2013.

http://www.premier.vic.gov.au/media-centre/media-releases/5729-government-to-strengthen-oversight-of-privacy-and-data-protection.html

Royal Commission into Institutional Responses to Child Sexual Abuse

On 13 February 2013, the Australian Government introduced legislation to amend the *Royal Commissions Act 1902* to assist the work of the Royal Commission into Institutional Responses to Child Sexual Abuse.

The amendments will allow one or more of the six Royal Commissioners to conduct hearings. The Royal Commissions Act currently only permits hearings to be conducted by all members of a multi-member Commission or by a quorum.

This amendment will assist the Commission to distribute its hearing work efficiently where this is appropriate.

The other purpose of the Bill is to allow the Commissioners to receive information from those affected by child abuse at less formal 'private sessions'.

For many, telling their stories of child sexual abuse will be very traumatic and these private sessions will mean that people affected by this crime can voluntarily participate in the Royal Commission in a less formal setting than a hearing.

People attending a private session would not be required to give evidence under oath, and their information would be used in a way that did not disclose their identity. The Commissioners could also authorise people to support a person attending a private session.

The Royal Commission is as much about assisting victims of past abuse to be heard, as it is about investigating systemic failures to prevent future abuse.

The proposed amendments will provide similar protection to participants who give information at a private session as would apply if they were giving evidence at a formal hearing.

http://www.pm.gov.au/press-office/royal-commission-institutional-responses-child-sexual-abuse

Coalition Government appoints IBAC Commissioner and Victorian Inspector

The Victorian Coalition Government has appointed Mr Stephen O'Bryan SC as the first permanent Commissioner of Victoria's Independent Broad-based Anti-corruption Commission (IBAC).

Premier Ted Baillieu and the Minister responsible for the establishment of an anti-corruption commission Andrew McIntosh also announced that Mr Robin Brett QC has been appointed as the inaugural head of the new Victorian Inspectorate, which will oversee IBAC and a number of other integrity bodies.

Mr Baillieu said he was confident both men would carry out their new duties with distinction.

'We have implemented the most significant integrity reforms in Victoria's history,' Mr Baillieu said.

'With these appointments, a new era begins for Victoria's integrity system.'

'Victorians elected us to carry out these reforms and create IBAC. With the appointment of Stephen O'Bryan and Robin Brett that mission is now in very good hands,' Mr McIntosh said.

Stephen O'Bryan was admitted to the Bar in 1983 and was appointed Senior Counsel in 2003. He has extensive experience in the field of administrative law, including in Royal Commissions, boards of inquiry and coronial inquests.

Mr O'Bryan will become IBAC's first permanent commissioner, taking over from acting Commissioner Ron Bonighton.

'IBAC gives Victorians the security of knowing that public money is not being misused and that public officials are carrying out their duties lawfully for all Victorians,' Mr O'Bryan said.

Robin Brett was admitted to the Bar in 1979 after five years as Victorian Parliamentary Counsel. He was appointed Queen's Counsel in 1996.

Mr Brett now assumes responsibility for the new Victorian Inspectorate, which has important powers to oversee IBAC's activities, including the assessment of material gained through covert and coercive methods.

Both appointments commenced on 1 January 2013.

The Coalition Government has also been advised that an IBAC CEO will commence work early next year. In the meantime, acting IBAC Commissioner Ron Bonighton has appointed an interim CEO.

Mr Baillieu also took the opportunity to thank Ron Bonighton for his important work with IBAC thus far.

'Ron Bonighton has spent his entire career giving outstanding public service to the people of Australia. As acting IBAC Commissioner he has undertaken the vital capacity-building work

necessary to allow IBAC to fulfil its functions. He is to be commended, and I thank him for his invaluable contribution,' Mr Baillieu said.

Early next year, legislation will be introduced to confer the pension entitlements of those who take up the positions of IBAC Commissioner and head of the Victorian Inspectorate, further entrenching the independence of these roles.

Legislation currently before Parliament will also give IBAC clearing house powers under the new simplified and streamlined protected disclosure regime.

The Coalition Government has also created the Public Interest Monitor to appear in the public interest at hearings where warrants for the use of covert and coercive powers are being sought. Mr Brendan Murphy QC has already been appointed as principal Public Interest Monitor.

http://www.premier.vic.gov.au/media-centre/media-releases/5643-coalition-government-appoints-ibac-commissioner-and-victorian-inspector.html

Sri Lankan refugees v Commonwealth of Australia (Department of Immigration & Citizenship)

Former President of the Australian Human Rights Commission, Ms Catherine Branson QC, has found that 10 Sri Lankan refugees with adverse security assessments from the Australian Security Intelligence Organisation (ASIO) were arbitrarily detained in closed immigration detention facilities.

The action has also affected three Sri Lankan children who have been granted protection visas but are residing in immigration detention with their parents.

'It appears that no comprehensive and individualised assessment has been undertaken in respect of each complainant to assess whether they pose any risk to the Australian community and whether any such risk could be addressed (for example by the imposition of particular conditions) without their being required to remain in an immigration detention facility' Ms Branson said. Ms Branson did not express any view as to what the outcome of any such consideration in each particular case would be.

Seven of the complainants arrived at Christmas Island between June and July 2009. Five other complainants initially sought to enter Australia on board the Oceanic Viking and were eventually brought to Australia from Indonesia in December 2009. One child was born in immigration detention after arriving in Australia.

All of the complainants were found to be refugees, either by Australia or by the UNHCR. All of the adult complainants eventually received an adverse security assessment from ASIO recommending that a protection visa not be granted.

Ms Branson found that the Department of Immigration and Citizenship failed to ask ASIO to assess whether six of the refugees were suitable for community based detention while they were waiting for their security clearance. Information provided by ASIO suggested that community detention assessments could be conducted within 24 hours. Instead, these six refugees were held in closed detention for between 5 months and 21 months while a security assessment in relation to the grant of a visa was carried out.

Ms Branson also found that after the complainants received their adverse security assessment from ASIO, the department failed to assess whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention. Instead, the Minister determined not to allow anyone with an adverse security assessment in relation to a visa application to be placed in community detention.

However, it appears that this determination was based on an incorrect view that advice from ASIO about whether a visa should be granted also amounted to advice from ASIO about whether community detention was appropriate.

The failure of the department to take these steps raised the real possibility that each of the complainants was either detained unnecessarily or detained in a more restrictive way than their circumstances required. The detention of the complainants in these circumstances was arbitrary and in breach of article 9(1) of the ICCPR.

In the case of the Rahavan family of two parents and three children, Ms Branson found that the failure to consider fully alternatives to closed detention amounted to a breach of articles 3 and 37(b) of the Convention on the Rights of the Child.

Ms Branson recommended that the Minister indicate to his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention merely because the department has received advice from ASIO that the person not be granted a visa on security grounds.

Ms Branson also made a series of recommendations to the department. First, that the department refer each of the complainants to ASIO for advice as to whether less restrictive detention could be imposed, if necessary subject to special conditions to ameliorate any identified risk to security.

Secondly, that similar advice be sought in relation to other people in immigration detention with adverse security assessments.

Thirdly, that the department refer cases back to the Minister for consideration of alternatives such as community detention with details of how any potential risk identified by ASIO could be mitigated.

Fourthly, that Australia continue actively to pursue alternatives to detention, including the prospect of third country resettlement, for all people in immigration detention who are facing the prospect of indefinite detention.

The last recommendation was noted by the department. The other recommendations were not accepted by the Minister or the department.

The Commission's report was tabled in Parliament on 26 November 2012.

http://www.humanrights.gov.au/legal/humanrightsreports/AusHRC56.html.

http://www.humanrights.gov.au/about/media/media_releases/2012/110_12.htm

Recent Decisions

Are Commonwealth departments subject to NSW state privacy legislation?

AGU v Commonwealth of Australia (GD) [2013] NSWADTAP 3 (21 January 2013)

This decision of the Appeal Panel of the Administrative Decisions Tribunal (the ADT) concerned the application of the *Privacy and Personal Protection Act 1998* (NSW) and *Health Records and Information Privacy Act 2002* (Cth) to Commonwealth agencies.

When applying for a disability support pension AGU disclosed to Centrelink that he had a chronic medical condition. When AGU consulted Jobfind, a disability employment service provider, he discovered that his file included information about his medical condition. AGU assumed that Centrelink disclosed that information to Jobfind.

AGU contended that Centrelink, which is part of the Commonwealth Department of Human Services, was liable for contravening various Health Privacy Principles in the NSW *Health Records and Information Privacy Act 2002* (*HRIP Act*) and sought relief under the *Privacy and Personal Information Protection Act 1998* (*PPIP Act*). Both Acts 'bind the Crown in right of New South Wales and also, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.' Its 'other capacities' include the Crown in right of the Commonwealth. This liability of the Crown provision overrides the common law presumption that the Crown is immune from civil suits.

AGU argued, among other things, that the liability of the Crown provision is a substantive provision and that regardless of the statutory scheme, that provision makes Commonwealth departments and agencies subject to the *PPIP Act* and the *HRIP Act* (*Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 448 (*Henderson*)).

The ADT found that while the High Court in *Henderson* was satisfied that the liability of the Crown provision meant that the Commonwealth was bound by the *Residential Tenancies Act 1987* (NSW), that finding was made in the context of the facts of that case. In *Henderson*, the High Court did not set down a general principle that a liability of the Crown provision in State or Territory legislation makes the Commonwealth liable. Whether or not the Crown is liable will depend on the particular statutory context. The ADT found that in the *PPIP Act* (and *HRIP Act*) there was no such intention.

The ADT held that the obligations under the *PPIP Act* apply to 'public sector agencies' including Government departments (section 3). 'Government' is defined in the *Interpretation Act 1987* (NSW) as the 'Government of New South Wales'.

The only textual support for AGU's view was that the *PPIP Act* exempts a 'law enforcement agency' from compliance with certain provisions. 'Law enforcement agency' is defined in section 3 of the *PPIP Act* and includes a number of Commonwealth law enforcement bodies, including the Australian Federal Police.

The ADT found that the need for the definition of 'law enforcement agency' to include the Commonwealth law enforcement bodies arises from the fact that a 'public sector agency' will be exempt from laws preventing disclosure of certain personal information if it discloses that information to a 'law enforcement agency' (section 23(5)(b)). 'Law enforcement agencies' are not themselves liable under the *PPIP Act* unless, like the NSW Police Force, they also fall within the definition of a 'public sector agency'.

Procedural fairness and the unrepresented litigant

Teuila v Minister for Immigration and Citizenship [2012] FCAFC 171 (28 November 2012)

The Appellant was born in New Zealand in January 1991. In October 2010 while living in Australia she gave birth to her son, Ezekiel. During her time in Australia, the Appellant accumulated a significant criminal record.

In March 2012, a delegate of the Immigration Minister cancelled her visa pursuant to section 501(2) of the *Migration Act 1958* (Cth). In June 2012 the Appellant sought a review of this decision by the Administrative Appeals Tribunal and in June 2012 that Tribunal affirmed the delegate's decision. That decision was appealed to a single judge of the Federal Court and in September 2012 that appeal was dismissed.

The Appellant then appealed to the Full Federal Court. She contended, among other things, that the Tribunal denied her procedural fairness by failing to advise her of a relevant consideration, namely the best interests of her child.

The Minister argued that the fact a copy of (1) the Notice of Intention to Consider Cancellation of a visa, (2) a copy of Direction No 41 (which expressly refers to the best interest of the child as a relevant consideration in these cases), (3) the Delegate's statement of reasons, (4) the Departmental issues paper; and (5) the Minister's Statement of Facts and Contentions, were all available to the Appellant and this was sufficient notice that the best interests of Ezekiel would be a relevant issue to be taken into account by the Tribunal.

The Court expressed considerable reservation about whether an unrepresented party is adequately put on notice of the potential importance of a primary consideration by simply being provided with such documents.

However, the Court held that notwithstanding the fact that the Appellant's attention was not expressly directed to the need to address the best interests of Ezekiel, it cannot be concluded in the present case that she has been denied a 'reasonable opportunity' to present her case. Whatever reservation may be expressed regarding the desirability or otherwise of leaving the task of distilling the issues that need to be addressed (especially the task of distilling those issues from a mass of other factual issues) to an unrepresented party, it cannot be concluded that the Appellant was not on notice of the need to give consideration to the best interests of Ezekiel from the materials available to her. The issue was raised, and she was given a 'reasonable opportunity' to respond.

Was the District Court exercising administrative or judicial powers?

Straits Exploration (Australia) Pty Ltd & Anor v Kokatha Uwankara Native Title Claimants & ors [2012] SASCFR 121 (5 November 2012)

This was an appeal from a determination made under Part 9B of the *Mining Act 1971* (SA) (the *Mining Act*) by a District Court Judge sitting as a Judge of the Environment, Resources and Development Court of South Australia (the ERD Court).

The Appellants, two joint venture partners, wished to conduct mining exploration at Lake Torrens in South Australia. The Appellants, within the *Mining Act* regime, sought to negotiate a native title mining agreement with the native title parties but were unsuccessful. In August 2010, the Appellants made an application to the ERD Court for a determination authorising mining operations at Lake Torrens. The District Court judge determined that the mining operations may not be conducted.

Before the Full Court, the Appellants contended, among other things, that the District Court Judge in making the determination had proceeded under a serious misconception of the role that he was to perform. The Appellants argued that the Judge had proceeded as though he was dealing with issues arising in a trial requiring resolution by way of judicial determination, whereas under the *Mining Act* he was engaged in the process of making an administrative decision. The Appellants also submitted that in the course of the hearing the Judge denied them procedural fairness by finding that the Appellants had breached their exploration licence without adequate notice. Such a finding could result in criminal sanctions.

The Full Court held that the Judge misunderstood his role causing him to embark on a judicial determination of fact, rather than making an administrative decision as was required under Part 9B of the *Mining Act*. The particular provisions of Part 9B of the *Mining Act* show that this is so:

- First an exploration authority granted under the *Mining Act* confers no right to carry out mining operations affecting native title on native title land, unless the holder of the authority 'acquires' the right to carry out mining operations on the land by an agreement, or by determination of the ERD Court authorising those operations. Claimants in judicial proceedings do not generally 'acquire' rights; their rights are determined or declared, and remedies are given for their denial by others;
- Secondly, a determination of the ERD Court can be overruled by the Minister. The conferral of that executive power on the Minister to override the ERD Court's determination is a strong indication that the ERD Court's functions is arbitral because it can be presumed that the legislature would not provide for administrative overruling of a judicial decision by the executive government; and
- Finally, a determination has no effect and is not binding until registered with the Mining Registrar; and once registered is, subject to its terms, binding on and enforceable by or against the original parties to the proceedings and against the holders from time to time of native title and the holders from time to time of any relevant exploration authority or production tenement.

The Full Court also found that the District Court Judge denied the Appellants procedural fairness. The Full Court held that the nature of the impugned findings, particularly findings of criminal conduct by the District Court Judge, were so serious, affecting the reputation of the Appellants and their officers and employees and their financial interests and future livelihoods, that the Judge's failure to accord procedural fairness constituted a jurisdictional error which, by itself, invalidated the determination. In the Full Court's view, the requirements of procedural fairness necessitated that the Judge should have given the Appellants fair notice that he had contemplated making findings in the impugned terms, and afforded the Appellants a reasonable opportunity to address them before the matter was decided. This did not occur.

A recent migration decision of the High Court

Tahiri v Minister for Immigration and Citizenship [2012] HCA 61 (13 December 2012)

The plaintiff, a citizen of Afghanistan, arrived in Australia unaccompanied when he was 17 years old. He was granted a protection visa. On the plaintiff's proposal, the plaintiff's mother (Mrs Tahiri) made an application for an offshore refugee and humanitarian visa. The application was combined with that of Mrs Tahiri's four other children who are under 18 years old and all citizens of Afghanistan. Mrs Tahiri claimed that she and children had been

residing in Pakistan for the past six years and that the children's father had left her seven years earlier to go to Kandahar to work and had disappeared.

A delegate of the Minister refused the applications because the delegate was not satisfied that Public Interest Criteria (PIC) 4015 was met in relation to the children. PIC 4015 relevantly requires a delegate to be satisfied either that the law of the children's home country permitted their removal, or that each person who could lawfully determine where the children were to live consented to the grant of the visa.

In a proceeding commenced in the original jurisdiction of the High Court, the plaintiff sought to have the delegate's decision quashed and the defendant compelled to determine the visa application according to law.

The plaintiff argued that it was not open to the delegate to find that the 'home country' of the children was Afghanistan, on the basis that the only finding the delegate could reasonably have made on a correct legal understanding of PIC 4015 was that each of the children was 'usually a resident' of Pakistan. The High Court found that this argument could not be sustained. Assuming the delegate accepted that the children had lived with Mrs Tahiri at an address in Pakistan for over six years before the making the visa application, that factor alone was not sufficient to compel the conclusion that they were each 'usually a resident' of Pakistan. The circumstances of their arrival, the fact that they were illegal residents in Pakistan and the fact that they had recently visited Afghanistan were capable of being considered countervailing factors.

The plaintiff also argued that the only finding the delegate could reasonably have made on a correct legal understanding of PIC 4015 was that Mrs Tahiri was the only person who could lawfully determine where the children were to live. The High Court held that the content of foreign law (in this case who could lawfully determine whether the children live under Afghani law) is a question of fact. In this case, the plaintiff did not establish that the delegate could not reasonably take the view that Afghan law applied to the relationships between the children and their father, if he were alive, and between the children and his relatives, if he were dead.

The High Court also held that there was no breach of procedural fairness. The High Court found that Mrs Tahiri was sufficiently alerted to the critical issues on which the application turned by the letter which set out the terms of PIC 4015 and invited her to provide evidence that PIC 4015 was satisfied in relation to the children. While the High Court acknowledged that the delegate may have referred to undisclosed material, the Court found that that material had not been shown to be adverse in any relevant sense. The delegate did not treat it as contradicting Mrs Tahiri's claim that the husband was missing and did not use it to make any finding as to the husband's current location assuming him to be alive.