The Minister and Rebenta Pty Ltd argued that the decision was provisional, and there was 'no final decision made which could properly have been made the subject of an appeal under s 46 of the AAT Act.' Crispin J upheld this submission.

On appeal to the Federal Court, the clubs argued that the tribunal had made a final decision, and that the only thing remaining to be settled was the form of the orders.

The Minister and Rebenta Pty Ltd continued to argue that the appeal was incompetent because the tribunal had made a decision that was provisional in form and substance.

Higgins J noted that that:

> … preliminary rulings or findings, even if they render the content of the consequent decision inevitable are not themselves 'decisions' within the meaning of provisions such as that to be found in s 46(1) of the AAT Act.

His Honour remarked that 'It has consistently been held that the term 'decision' in that context refers to a 'final decision': *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; 94 ALR 11.

In reaching his decision (with which Heerey and Mansfield JJ agreed), Higgins J:

- compared LPE Act provisions that established 'final or operative' decisions with those provisions that established decisions that were simply 'steps along the way'. The judge held that the decision to conduct a preliminary assessment was a step along the way to the final decision of approving (or not approving) a development application; and

- referred to the conditional nature of the Tribunal's approval. The judge noted that it was not within the Tribunal's power to ensure or effect compliance with the conditions.

Accordingly, the Tribunal had not yet completed its task, and the Federal Court should not pre-empt the decision to be made by it. The appeal was incompetent and was dismissed. The matter was remitted to the Administrative Appeals Tribunal for final determination.

Hui Zhong Xu v Minister for Immigration and Multicultural Affairs Federal Court of Australia, Full Court, 11 November, 17 December 1999 [1999] FCA 1741

Refugees - Decision of RRT - Written statement of reasons for decision - Whether tribunal failed to set out findings on material questions of fact - Meaning of "material questions of fact" - Whether the Tribunal erred in reproducing in block

form a summary of oral and documentary evidence from a previous case - Whether failure to comply with s 430 of Migration Act gave rise to the ground of review under s 476(1)(a)

The appellant was a Chinese citizen who applied for a protective visa. As prescribed by s 36 of the *Migration Act 1958* the criteria for a protective visa was that the person is required to be a refugee under the convention relating to the status of refugees. Article 1A of the Convention defined a refugee as any person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, member 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.

In November 1997 the Refugee Review Tribunal (RRT) held that the appellant was not a refugee and therefore not entitled to a protection visa. The Federal Court set aside this decision. In November 1998 the RRT (second Tribunal) held the appellant was not a refugee and therefore again was not entitled to a protective visa. An application to the Federal Court (in respect of the second Tribunal) was also dismissed. The appellant then appealed to the Full Federal Court.

The appellant argued that the second Tribunal decision failed to set out findings on a material question of fact, namely whether or not documents provided by him corroborating his account were forgeries, in contravention of s 430(1)(c) and that this involved a ground of review under s 476(1)(a).

The appellant's second contention was that the second Tribunal erred in law in reproducing in block form the summary of the oral and documentary evidence in the first tribunal's decision, and that this constituted a constructive failure independently to review the evidence and comply with s 430(1)(d) of the Act and this also involved a ground of review under s476(1)(a).

Section 430 of the *Migration Act 1958* provides that where a decision is made on review, the Tribunal must prepare a written statement that:

(a) sets out the decision of the Tribunal on the review; and

(b) sets out the reasons for the decision; and

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which findings of fact were based.

Section 476 of the *Migration Act 1958* sets out the grounds for review of decisions of the RRT by the Federal Court. Section 476(1)(a) provides as a ground of review "...that procedures that were required by this Act or the Regulations to be observed in connection with the making of the decision were not observed".

The Full Federal Court dismissed the appeal. The Court held that the findings by the tribunal in relation to documents submitted by the appellant allegedly corroborating

his account of events were not material questions of fact (within s 430 (1)(c)). The Full Court's view is that material questions of fact were to be determined by reference to the statutory context and not by reference to pieces of evidence.

Of particular interest, Whitlam and Gyles JJ commented that a statutory provision may expressly or impliedly oblige the decision maker to take certain facts into account when making a decision. However, where a statute does not expressly or impliedly constrain the decision maker, the decision maker is the sole judge of materiality and there can be no judicial review of that question, no matter how wrong or illogical the decision maker is seen to be by the judge. Whitlam and Gyles JJ conclude that in those circumstances, a fact is only material if the decision maker considers it to be so. Whitlam and Gyles JJ also noted that for a judge to conclude that a fact is material, otherwise than by holding that an Act requires the fact to be considered, then that plainly involves a merits review which the High Court has said emphatically should not happen.

The Full Federal Court also held that the appellant's case did not make out any constructive failure to review independently and digest the evidence, even if such failure when made out could be brought within s 430(1)(d) of the Act.

Finally, Whitlam and Gyles JJ held that a failure to comply with s 430 of the Act did not give rise to a ground of review under s 476(1)(a) of the Act. Division 5 of Pt 7 provided a mechanism by which the parties were informed of the reasons for the decision, rather than dealing with the *making* of the decision itself. The procedures laid down by Division 5 were not "in connection with making of the decision" but rather were in connection with the promulgation of the reasons for the decision. The judges stated that the correct question is not whether the procedure is in connection with the decision, but rather, is it in connection with *making* the decision. There is a difference in substance between these concepts. Therefore it followed that the written statement of reasons prepared pursuant to 430(1) was not reviewable pursuant to s476(1)(a).