<u>Working with inquisitorial Tribunals, and some suggestions for reform.</u>

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Introduction.

The Refugee Review and Migration Review Tribunals have several distinctive characteristics which determine the sort of strategy which you might adopt in order to give your client the best chance of success.

A number of these features limit the control which the applicant and his or her representative have over the conduct of the proceedings and the defining issues.

Power with respect to the proceedings is concentrated in the Tribunal. Unlike the AAT, it is not party driven. Indeed, the Act stresses the limited role of representatives (or "assistants") with respect to the MRT hearing (at sections 366A and 366B of the Act) and simply prohibits "representation" in the RRT (at section 427 (7)).

Nor, as in the ancient Roman system of civil law still practiced in many parts of Europe today, or in the Coroner's Court, is there a lawyer assisting the Tribunal and conducting the questioning, thus separating the role of observing and judging from the role of asking the questions.

However, the reality is that there is still room for effective advocacy in the Refugee and Migration Review Tribunals, and inquisitorial bodies in general.

In the following short paper, I will consider some of the distinctive features of these two Tribunals, and discuss their implications for effective advocacy.

I will conclude with a few thoughts about a more "applicant-friendly" system, which might form part of a larger discussion during the session.

Part I - Advocacy in the Refugee and Migration Review Tribunals.

But first to advocacy in the RRT and MRT settings. Perhaps the most important feature is that much of the advocacy occurs before you step into the hearing room.

Pre-hearing.

I – the process is paper-driven; written advocacy is critical.

Though the oral hearing represents a critical opportunity for your client, the process is heavily paper-driven. Before a hearing is even scheduled, the Tribunal will already have reviewed the Departmental file, including the previous statements and records of interview of the client, together with any material you have submitted on the review, and have considered the possibility that the matter can be determined favourably on the papers (as the legislation allows it to do; at sections 360(2) and 425(2) of the Act) .

In other words, the Tribunal will have already begun the evaluative process.

The pre-hearing work thus represents a critical opportunity to present evidence and shape the argument in a way which may benefit your client.

This requires you to analyse the material which was before the Department, and look at both the reasons why the Department refused to grant the visa, and any other weakness or difficulty with the evidence.

This exercise needs to be undertaken with reference to each matter with respect to which the Tribunal needs to be satisfied.

What is vital is that the critical points on which the case will turn are identified and addressed through the provision of further material and/or carefully constructed submissions.

Move to the points of tension, and focus only on what is genuinely in issue. The shorter and simpler the submissions, and the fewer the documents provided in support, the better.

Casey Miles [2013] NSWSC 927[1] is a good illustration of the advantages of identifying the critical documents and issues upon which a decision turns, from another area of practice.

In that case, a State statutory compensation scheme provided that a party could apply for a further medical assessment on the basis that there was additional relevant information capable of leading to a different result on the further assessment.

The first application contained whole folders of material, a review of that material, and very lengthy submissions on every aspect of the case. The application for a further assessment was unsuccessful.

I drafted a second application. On that application, I culled all of the additional material filed except for two documents. I drafted submissions which were five pages long explaining why those two documents satisfied the statutory criteria for referral.

As it happened, I relied on one document more than necessary. The decision-maker only needed one of those documents to satisfy herself that the statutory criteria were met.

This application worked for two reasons; first, the most persuasive documents were no longer buried in a sea of submitted material, and second, the submissions clearly identified the statutory criteria and why they were met.

Regularly I see cases for judicial review with bundles of "relevant" documents in refugee matters taking up more than one binder. Endless amounts of non-specific country information are particularly unhelpful.

As yourself what documents either currently before the Tribunal (through the Departmental file) or which are available to you directly support something which you need to establish to win the case?

Apart from addressing any information used adversely by the Department in the first-instance refusal, your submissions should be confined purely to those documents you have

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The Supreme Court decision itself is also a useful application of the principle that there is no *res judicata* and no *estoppel* in administrative law. It is a matter of statutory interpretation whether a power is spent, and when it is enlivened, or revived.

identified as supporting your case, and you need to identify with precision what facts support your case, with references, and why they support your case.

Critically, if you are not sure whether something is relevant, or might help, *leave it out*. If you have doubts, it almost certainly won't help, it will only distract.

Ideally, work with DFAT material. After all, whether it is correct or not, the Tribunal believes it.

Beware of generic submissions. Treat each case differently, and move straight to the points of tension. I regularly see written submissions which contain large sections of elegantly worded argument which were clearly first drafted for another case, and are of marginal if any relevance to the applicant for review.

The RRT might be able to get away with template decisions (see *SZQHH v MIMIA* (2012) 200 FCR 223), but you will harm your client if you rely on template submissions!

II – your witness will be largely on his or her own; prepare them for the hearing.

Another important aspect of pre-hearing preparation, particularly for the RRT, is the preparation of witnesses. We all know that you cannot coach a witness (see, for instance, rule 68(b) of the NSW Bar Rules, or rule 24.1.2 of the NSW Solicitors' Rules), but that is quite a different matter from testing a witness, and querying and testing inconsistencies, and explanations for inconsistencies.

You will assist your client with a fairly vigorous approach to their evidence. If it does not sound remotely persuasive to you, it should be explored further with the client. If you are not convinced, the Tribunal is unlikely to be.

Regularly, I see matters which were determined in the RRT on the basis that evidence given in the Tribunal was inconsistent with earlier evidence, or otherwise thoroughly implausible.

The oral hearing – the process is flexible.

Tribunal members do hold a lot of hearings, and they have a fairly clear idea of how they want to conduct them.

Moreover, both the Migration and Refugee Review Tribunals have practice directions which I am sure you are familiar with.

However, the reality is that there remains a lot of ambiguity with respect to what a legal representative can or can't do at a Tribunal hearing, and a lot of flexibility in the way that hearings can be held.

One response, as a profession, is to press for clearer guidelines on how the process should work (see, for instance, the very useful submissions of the Law Institute of Victoria, of 18 December 2013[2]).

The other is to embrace the ambiguity, and to recognise the freedom that it creates to negotiate the hearing and interaction that you want.

There is a general rule in the Coroner's Court which you should follow, which is that your interventions should be sparing, simple, and effective. Every intervention risks a little bit of good-will, particularly in a system which is so centred upon the Tribunal itself.

In inquests, there is always a particular direction you want to steer the coroner in (though this may change as the inquest evolves).

One simple example of coronial steering is demonstrated by the following account of an inquest into the suicide of a young Aboriginal teenager in a country town. This young boy had presented to the Emergency Department at a local hospital after several suicidal gestures or attempts (which they were became clearer in retrospect) over the preceding week.

I was representing the psychiatrist responsible for the decision not to detain this boy in a forensic unit, because the psychiatrist did not form the view that he was at risk of harming himself at that point in time.

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[2] Effectiveness and fairness of review applications at the Migration and Refugee Review Tribunals, 18 December 2013, Law Institute of Victoria; http://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Administrative-Law-Human-Rights/Submissions/Effectiveness-and-fairness-of-review-applications-.aspx?rep=1&glist=0&sdiag=0&h2=1&h1=0

This judgment was reached when he the psychiatrist was on call, in the middle of the night, over the phone, on the basis of a conversation that he had with a psychiatric nurse.

This young aboriginal boy was found hanged in his grandmother's garage two days later.

One phrase formed the basis of my intervention; the psychiatric nurse was my doctor's "eyes and ears". Every question of the psychiatric nurse was focused on this concept; "What did you see when….? What do you hear? What did you observe….?"

The phrase "She was his eyes and ears" appeared in the coroner's findings, and the coroner made no adverse findings against my client. A concrete theme, carefully worked into written or oral submissions, will often find its way into the thinking of the decision-maker.

Accepting that interventions should be sparing and calculated, the question is when do you intervene, and how?

I – Do not allow a hearing to go ahead where the interpreter is inadequate.

One situation in which you should nearly always intervene is where there is a problem with an interpreter. Ideally this is a question which should be explored prior to the hearing, when the interpreter arrives.

If necessary, ask the hearing officer or presiding member for five minutes to explore with the interpreter and the applicant whether the applicant is comfortable with the interpreter, both with respect to their ethnic or regional background, and with how they are able to communicate with each other.

Sometimes an interpreter may simply be inappropriate for the applicant in question; depending upon the particular person and circumstances, it may be a problem if an interpreter is or was a member of the ethnic or political group from which the applicant claims to fear harm, or it may be inappropriate for a woman to have a male interpreter.

More commonly, the interpreter may speak a different dialect, or simply interpret very inaccurately.

Poor interpreting or an inappropriate interpreter will increase the risk of adverse credibility findings; non-existent inconsistencies will emerge, and answers will appear evasive, hesitant, and non-responsive.

After all, the answers which the Tribunal is listening to are the answers given through the interpreter; thus the hesitant, non-responsive, and vague answers of the interpreter will be wrongly attributed to the applicant.

That you are entitled and obliged to raise your concerns with the interpreter at the earliest opportunity is reinforced by clauses 59 and 60 of the Principal RRT Member's *Practice Direction No 4* and clauses 60 and 61 of the equivalent *MRT Practice Direction No 5*.

You should inform the Tribunal of the problem you have with the interpreter in as much detail as possible, and explain to the Tribunal that you are concerned that the inadequacy or other issue with the interpreter will lead to a failure on the part of the Tribunal to discharge its statutory obligation to afford the applicant a hearing as required by section 360 and section 425[3].

If the Tribunal is feeling inclined to go on, the Tribunal should be aware that it will not necessarily be enough to attempt to correct interpreting errors after a hearing through translation of the transcript.

For a particularly woeful example of poor interpreting which could not be rescued in this fashion, see *SZGWN v MIC* [2008] FCA 238, where parts of the transcript are reproduced (at [25] – [29]).

II – your client is drowning and the Tribunal is running amok.

Let's assume that there is no issue with the interpreter, and the hearing is going ahead. You have a sinking feeling, as the line of questioning clearly suggests that the excellent work you did addressing any inconsistencies and shaping the issues has not had the desired effect.

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[3] *SCAR v MIC* [2003] 128 FCR 553, at [37]. For an example of woeful interpreting, see *SZGWN v MIC* [2008] FCA 238, [25] – [29].

The Tribunal member is becoming increasingly irritated, is pursuing apparently trivial inconsistencies, is not allowing the Applicant to complete their replies and is bordering on openly sceptical. Much of what is troubling you is in the tone.

In addition, the applicant is looking and sounding flustered and appears to now be answering questions that he or she is not being asked, and not answering the questions which are being asked.

Indeed, you are doing your best to suppress your own now quite considerable doubts about what he or she is saying.

You can take a very Zen Buddhist approach if you like, observing what is happening, not judging it to be either good or bad, simply living in the moment.

However, you may make the judgment that it is appropriate to do something. Trust your gut, is perhaps one piece of advice.

A minimally confrontationalist approach would be to observe that the applicant appears tired, or confused, and may need a break. This may also give the Tribunal an opportunity to reflect.

On the other hand, a shot across the bows may be required. How close to the bows is a matter of judgment.

Because of the lack of separation between interrogator and decision-maker, the Tribunal is necessarily in the arena. A vigorous testing of the evidence is to be expected[4], and may even be required for the purposes of procedural fairness (*SZBEL* (2006) 228 CLR 152 illustrating how far this obligation may go).

There is a fine line between vigorous testing of the evidence, and giving the impression that nothing that the applicant could say or do could change the Tribunal's line.

The line was crossed in *SZRUI* [2013] FCAFC 80; there, the Tribunal's intemperate moral judgments, lack of respect, and sustained rudeness was sufficient to ground a reasonable

[4] "Robust and vigorous testing of the evidence does not sustain an allegation of apprehended bias"; *SZOAF v Minister for Immigration and Citizenship* [2010] FCA 431 at [17].

apprehension of bias (though no in the mind of the Federal Magistrate from which the matter was appealed!).

In that case, there is almost nothing to do but to hold on tight and start drafting an application to the Federal Circuit Court. However, in less extreme cases, a query about the relevance of the questioning, or an expression of concern about the tone together with a reminder of the importance of the perception of a fair hearing might be considered.

You perhaps would not go as far as one member of the Bar appearing before a judge who was not fully receptive to his argument. That particular barrister interrupted his argument to observe;

"I note that Your Honour has turned round in his chair, now has his back to me, and is looking at the clock. Would Your Honour like me to pause until Your Honour turns to face me?"

III – engaging the Tribunal, and ensuring that the issues concerning to the Tribunal are addressed.

More commonly, what you really want to do is tease out the Tribunal's concerns, and do your best to address them on the spot. Often they will be quite apparent from the hearing. On other occasions, you may wish to ask the Tribunal to outline what it is concerned about.

Either way, you should address what concerns you can on the spot.

A good Tribunal is an engaged Tribunal. It is always worth trying to engage the Tribunal in a conversational way.

In some circumstances, there may be a few questions which the Tribunal could ask your client which would elicit answers which you know would be helpful. You might suggest to the Tribunal that those questions be asked.

Other issues may need to be dealt with by way of further material, and it is worth asking for time to put that material on. It goes without saying that if the Tribunal asks you whether you wish to put further material on, you should take that opportunity.

One way or another, you need to tackle what is troubling the Tribunal head-on.

Part II - what sort of reforms would create a fairer Tribunal system?

These are just a few fairly obvious strategies for dealing with these two Tribunals. I will conclude, as I said, by indulging in a few constructive criticisms of the legislative scheme under which the Tribunals operate, and consider some other models. Hopefully, with the opportunity presented by this panel, and a very informed and experienced group of participants, this might generate discussion about reforms, though perhaps they would be more modest ones than the ones I propose.

Structural reform.

First of all, the structure of the Tribunals, with one person asking both the questions and judging the answers, is problematic. There is a tendency for the Tribunal to become wedded to its own cross-examination, if I could put it that way, rather than to be a disinterested observer.

Moreover, the risk of a *perception* of bias is greatly increased where the decision-maker is asking the questions.

I – the AAT model.

Two models provide an answer to this problem. First, as in the AAT, the Department could be represented, and full representation afforded for the Applicant.

Not only does this model relieve the Tribunal of the responsibility of asking the questions, freeing it up to simply evaluate the responses to questions, it also counters the perception that the Tribunal really also represents the interests of the Department, as they are separately represented.

It also allows the applicant to present his or her case in the manner that he or she wishes, rather than simply reacting, more often than not in a defensive way, to the line of questioning of the Tribunal.

II – the coronial model.

An alternative model is the coronial model. Questions would be asked by a legal officer assisting the Tribunal. The Applicant, or the Applicant's representative, would have a limited right to ask questions, with leave granted by the Tribunal.

Appeal to the AAT, either from the Minister, or the MRT or AAT.

In the alternative, an appeal could lie directly from the MRT and RRT to the AAT. A similar system is currently used with respect to some social security decisions, and some decisions of Medicare-related bodies (such as the rather Orwellian sounding "Medicare Participation Review Committee", which sits to consider the disqualification of doctors for some transgressions related to the Medicare system).

A bundle of agreed documents.

Another improvement would be a requirement that the Tribunal prepare in advance an indexed, numbered bundle of documents which would be supplied to the Applicant, as happens in the AAT. Similarly, a brief is provided to the parties in a coronial matter. The Tribunal would not travel beyond these documents, and any documents supplied by either the Tribunal or the Applicant at the hearing.

Conclusion.

Decisions made by the RRT have profound consequences for the vulnerable people who seek their relief, and they also involve the application of some of Australia's most significant international treaty obligations. MRT decisions too often have profound consequences for those who appear before them.

It seems to me that there is a massive power imbalance between those who seek protection, and those who decide their fate, and that a number of features of the legislative scheme exacerbate rather than relieve that imbalance.

While I have suggested a number of fairly obvious steps which might give the applicant the best chance, and wrest some control back to the applicant, there are no doubt less radical steps which might be taken to make the review process fairer, in order to allow applicants to make the most persuasive case for the visa they seek.