Migration Review Tribunal and Refugee Review Tribunal
Annual Members' Conference

The Role of the Courts in Migration Law

Chief Justice Robert French AC
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Introduction

Migration policy has always played a significant part in Australian public policy debates. A consensus about the desirability of migrant inflow has, from time to time, been qualified by concerns about the burdens which population growth might place upon public services and infrastructure and upon the natural environment. There has always been a degree of political sensitivity about uncontrolled migrant entry and the risk of racial and ethnic tensions associated with it. For the first fifty years or so of the twentieth century, the white Australian nationalism, which had been one of the underpinnings of the federation movement, informed migration policy and a discriminatory application of migration laws, albeit to a degree which attenuated with the passage of time until the so-called White Australia policy was abandoned. It is not surprising, therefore, that in this contentious area of public policy, the courts have been invoked in the determination of disputes about the interpretation of migration laws and the exercise under them of official powers affecting people who want to enter into or remain in Australia.

In the last 20 years or so the judicial power has been invoked in the field of migration with far greater frequency than at any other time in our history. Parliament has legislated to try to confine the jurisdiction of the courts and the scope of judicial review. It is, however, a central feature of the Australian Constitution that judicial review of the exercise of power by Commonwealth officers is entrenched. It cannot be removed by statute nor side-stepped by the operation of privative clauses.

This presentation concerns the interaction between migration law and judicial review. It is important however that the power and trappings of the judicial process do not "divert [the] gaze from more fundamental, if less glamorous mechanisms to redress citizens grievances and to call government to account".[1] As Professor Robyn Creyke pointed out in 2006 the Australian administrative law system "provides a wide range of remedies with different levels of access and costs for users".

Both the Migration Review Tribunal ("the MRT") and the Refugee Review Tribunal ("the RRT") provide high volume merits review which is not confined, as is judicial review, to grounds related to the existence of jurisdictional error. It is a difficult and demanding task which the members of the Tribunals undertake. Few would regard it as glamorous. No doubt the incidence of judicial review applications leads many to think it is a thankless task. In that context it is interesting to note, as pointed out by Denis O'Brien, the Principal Member of the MRT and the RRT, in a paper given earlier this month,[2] that the number of judicial review applications and the number of successful judicial review applications in relation to Tribunal decisions has declined in recent times. The Annual Report of the MRT and RRT for 2009-2010 shows the MRT decided 7,580 cases in that year, and the RRT 2,157 cases. There were 242 judicial review applications in relation to MRT decisions, and 508 in relation to RRT decisions. About one-third of the MRT challenges and about 10% of the RRT challenges succeeded. The number of successful judicial review challenges as a percentage of the total number of decisions made by each of the Tribunals is very small, 0.7% and 1.4% respectively.

Neither the courts nor the Tribunals are the sources of substantive policy. Nor is it their function to prescribe mechanisms for the general administration of migration laws. They respond to particular disputes about, or challenges to, official

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1 Cranston R, *Law, Government and Public Policy* (Oxford University Press, Melbourne, 1987).

2 O'Brien D, "Merits Review Update – the challenges in bringing the Tribunals within mainstream administrative law", Law Council of Australia, 5th Annual CPD Immigration Law Conference, 12 March 2011.

action. In so doing, they are required to interpret and apply the law. Nevertheless, both judicial review and tribunal-based merits review support the basic values of administrative justice. Administrative justice includes the following elements:

1. Lawfulness – meeting the requirement that official decisions are authorised by statute, prerogative or the Constitution.

2. Good faith – that official decisions are made honestly and conscientiously.

3. Rationality – that official decisions at least comply with the logical framework created by the grant of power under which they are made.

4. Fairness – that official decisions are reached fairly, that is impartial in fact and in appearance.

5. Efficiency – a concept encompassing costs to the subject and to the public, timeliness and perhaps stress on users.

The utility of judicial review may be much debated by economists and legal researchers. The field of migration decision-making has at times been overburdened by its processes. There is, however, little room for debate that in that field judicial review has provided a basis for the development of principles of administrative justice in the Australian constitutional setting which apply well beyond the class of cases that arise under migration law.

Before making some further general observations about the work of the courts in this area, I would like to make some reference to the constitutional framework within which they operate and a little of its pre-history.

Migration before Federation

Prior to Federation, the Australian colonies had their own migration laws. Some were facultative, reflecting the need to attract migrants. Others were restrictive, reflecting fears of a mixed race society. In 1850, the Colony of New

South Wales passed "an Act to regulate the indenting of assisted immigrants and others in the United Kingdom and elsewhere and their employment in this Colony for a certain time after their arrival therein". This was the facultative side of migration law and policy.

Its obverse was reflected in the *Chinese Immigrants Regulation and Restriction Act 1861* (NSW). That Act specified, inter alia, that the maximum proportion of Chinese passengers permitted on vessels was one to every 10 tons of tonnage of the vessel subject to a penalty of 10 pounds per Chinese passenger in excess.[3] Chinese persons entering the colony were required to pay 10 pounds.[4] Certificates of exemption were available to Chinese persons within the Colony.[5] The Act was repealed in 1867. Other restrictive statutes followed, including the *Influx of Chinese Restriction Act 1881* (NSW) and the *Immigration Restriction Act 1898* (NSW).

The other colonies enacted similar suites of facultative and restrictive legislation. Victoria established an Agent-General in the United Kingdom and up to six Emigration Commissioners whose duty was to promote emigration from the UK to Victoria.

Inter-colonial conferences held in 1881, 1888 and 1896 led to endeavours by the colonies to enact uniform legislation restricting Chinese immigration. In March 1896, at an Inter-colonial Conference at which all colonies except Western Australia were represented, a resolution was passed that the provisions of the *Chinese Immigration Restriction Acts* should extend to all coloured races. Coloured Races Restriction Bills were passed in New South Wales, South Australia and Tasmania. They were reserved for the Queen's assent, but did not receive it.

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[3] *Chinese Immigrants Regulation and Restriction Act 1861* (NSW), s 3.

[4] *Chinese Immigrants Regulation and Restriction Act 1861* (NSW), s 5.

[5] *Chinese Immigrants Regulation and Restriction Act 1861* (NSW), s 8.

In the course of Jubilee celebrations in 1897, Joseph Chamberlain suggested to the Australian Colonial Premiers that restrictions on immigration should not be based on race or colour but rather on some other characteristic of aspiring immigrants. Reference was made to the *Immigration Restriction Act 1897* in Natal. This suggestion laid the foundation for the introduction into Australian colonial laws of the dictation test, which was a feature of the Natal Act. That Act prescribed, as a condition of entry, literacy in any European language. Adopted first in Western Australia, it ultimately found its way into the *Immigration Restriction Act 1901* (Cth). It was amended as a result of Japanese representations to further widen the dictation test to allow it to be given in "any prescribed language".[6]

At the time that the Australian colonies came together in the late nineteenth century to propose a constitution for an Australian federation, there was little doubt that the control of migrant entry and power with respect to aliens would be vested in the central government and that the white Australian nationalism, which was one of the underpinnings of the federation movement, would be reflected in laws which, if not overtly discriminatory on the grounds of race, were capable of discriminatory application.

The Constitution and Migration

At the first Constitutional Convention, held in Sydney in March 1891, a Constitutional Committee, chaired by Sir Samuel Griffith, set out a list of matters in respect of which the proposed Commonwealth Parliament should have legislative power. They included:

22. The regulation of immigration.
23. Naturalisation and aliens.

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[6] London HI, *Non-White Immigration and the 'White Australia' Policy* (New York: New York University Press, 1970) at 11.

Andrew Inglis Clark's draft constitution, prepared in 1891, which informed the ultimate shape of the Australian Constitution, included in the legislative powers of the Federal Parliament, power:

- to regulate the immigration of Aliens into any part of the Federal Dominion of Australasia;[7]
- to prevent the influx of criminals.[8]

The proposed legislative power to be conferred on the Commonwealth Parliament with respect to migration was adopted verbatim and without debate by the Convention of 1897-1898.[9] That power, which is found in s 51(xxxvii) of the Constitution, authorises the Parliament, subject to the Constitution, to make laws for the peace, order and good government of the Commonwealth with respect to "immigration and emigration". The Parliament is also authorised to make laws with respect to aliens under s 51(xix), and with respect to the influx of criminals under s 51(xxviii).

Reference should also be made, in this context, to the race power contained in s 51(xxvi) of the Constitution. That placitum confers on the Commonwealth Parliament the power to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws". Until the referendum of 1967, it contained an exclusion in relation to Aboriginal people. That exclusion was intended to leave the States free to legislate in respect of Aboriginal people. The scope of the power is not limited to immigrants but was indicative of the flavour of the times at Federation when it came to questions of race.

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7 Draft Inglis Clark Bill 1891, s 45(ix).

8 Draft Inglis Clark Bill 1891, s 45 (xxvii).

9 Quick J and Garran R, *The Annotated Constitution of the Australian Commonwealth* (London; The Australian Book Company, 1901).

The Constitution and judicial review

The role of the Courts in the review of decisions made under the *Migration Act 1958* (Cth) ("Migration Act"), and the legal and practical limits on legislative authority in relation to that role have been much influenced by s 75(v) of the Constitution.

The constitutionally entrenched jurisdiction of the High Court conferred by s 75(v) in relation to decisions of officers of the Commonwealth, a jurisdiction which extends to Ministers of the Crown and also to federal judges, is a bulwark of the rule of law which we owe to Andrew Inglis Clark, one of the drafters of the Constitution, who was the Attorney-General of Tasmania in 1891. We also owe it indirectly to the decision of John Marshall, Chief Justice of the United States in the famous case of *Marbury v Madison*,[10] decided in 1803. The decision in *Marbury v Madison* was of historic significance in the United States because it asserted the power of the Supreme Court of the United States to decide that a law of the United States legislature was void if it exceeded the law-making power conferred upon the legislature by the Constitution. Importantly for Australia, the law which was struck down in *Marbury v Madison* would have conferred on the Supreme Court original jurisdiction to issue writs of mandamus to public officers of the United States. Marshall CJ held that the Constitution of the United States did not authorise the conferring of that original jurisdiction.

Clark, who was concerned about the deficiency in the original jurisdiction of the US Supreme Court exposed in *Marbury v Madison*, included in his Draft Constitution a clause designed to avoid that deficiency. That clause became s 75(v), although not before encountering opposition from delegates who appeared not to have read *Marbury v Madison*, nor to have understood the US Constitution.

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[10] 5 US (1 Cranch) 137 (1803).

Edmund Barton who, at the urging of Clark, ultimately secured the inclusion of s 75(v) in the Constitution said:

> … I think that, as a matter of safety, it would be well to insert these words.[11]

Another delegate, Mr Symons, said: "They cannot do any harm."[12] Barton responded in terms which in the light of history may be seen as masterly understatement: "They cannot do harm and may protect us from a great evil."[13]

The writs for which s 75(v) provides have been designated by the High Court as "constitutional writs". The Court explained why in its decision in *Bodruddaza*[14] in 2007. The Court said:

> … what was to be protected in the Australian constitutional context was not only the rights of all natural and corporate persons affected, but the position of the States as parties to the federal compact, and jurisdictional error might arise from a want of legislative or executive power as well as from decisions made in excess of jurisdiction itself validly conferred. It is out of its recognition of these features of the remedies provided by s 75(v), and their high constitutional purposes, that in more recent years this Court has described the remedies there provided as "constitutional writs" rather than (as earlier and historically in England) as "prerogative writs".[15] (Footnotes omitted)

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[11] *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 4 March 1898, 1876.

[12] *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 4 March 1898, 1876.

[13] *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 4 March 1898, 1876.

[14] *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

[15] (2007) 228 CLR 651 at 665-666 [37].

The purpose of s 75(v) was described by Sir Owen Dixon in *Bank of New South Wales v The Commonwealth*[16] as being to "make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power".[17] In *Bodruddaza* the judges elaborated upon what Dixon J had said, linking the purpose of s 75(v) to the essential character of the judicial power. The object of preventing officers of the Commonwealth from exceeding federal power was not to be confined to the observance of constitutional limitations on the executive and legislative powers of the Commonwealth:

> An essential characteristic of the judicature provided for in Ch III is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers.[18]

Section 75(v) furthered that end through the control of "jurisdictional error". A decision affected by jurisdictional error will be vitiated and will be amenable to the writs and to certiorari. The words "jurisdictional error" are linked to the history of the ancestors of the constitutional writs. They were the prerogative writs generated by the Royal Courts of Justice in England to restrain inferior courts from exceeding their powers. The application of jurisdictional error in relation to administrative decisions today is concerned with the limits of executive power exercised under statute or directly under the Constitution.[19]

Examples of jurisdictional error include a mistake of law which causes the decision-maker to identify a wrong issue, ask itself a wrong question, ignore relevant material or rely upon irrelevant material. In some cases a decision-maker may make

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16 (1948) 76 CLR 1.

17 (1948) 76 CLR 1 at 363.

18 (2007) 228 CLR 651 at 668.

19 As to the equivalence of jurisdictional error and excess of power see Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action* (Lawbook Company, 4th ed, 2009 at [1.70].

an erroneous finding or reach a mistaken conclusion on the basis of which its authority or powers are exceeded. Other aspects of executive decision-making which may be challenged in the exercise of the constitutional jurisdiction may include bad faith or a breach of the rules of procedural fairness by the decision-maker. Those rules of procedural fairness are taken to apply to the exercise of public power unless clearly excluded.[20]

An overview of the history of migration laws after Federation

In 1901, the Commonwealth Parliament enacted the *Immigration Restriction Act 1901* (Cth) ("Immigration Restriction Act"). The Act embodied the dictation test devised in Natal. It prohibited the immigration into the Commonwealth of "[a]ny person who, when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer".[21] Persons who were accepted for entry were those possessed of a Certificate of Exemption signed by the Minister or an officer.[22] The Act consisted of only 19 sections. In the years that followed its enactment it was amended on a number of occasions, but by 1935 still consisted of only 19 sections. It had to be read with the *Pacific Island Labourers Act 1901* (Cth) and the *Contract Immigrants Act 1905* (Cth). A growth process began in 1950 when it expanded to 64 sections. The "dictation" test provision continued in force, along with the system of entry under Certificates of Exemption. It was that system which foreshadowed the entry permit and visa regimes which were to be found in later migration statutes.

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[20] *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 93 [126] per McHugh J.

[21] *Immigration Restriction Act 1901* (Cth), s 3(a).

[22] *Immigration Restriction Act 1901* (Cth), s 3(h).

The Migration Act repealed the Immigration Restriction Act.[23] Under the Migration Act a completely new statutory scheme for migration, deportation and emigration from Australia was established. Entry to Australia was to be regulated by entry permits, which would be granted or withheld by officers of the Department of Immigration.[24] If an immigrant were to enter Australia without an entry permit, that person was designated a prohibited immigrant.[25] The Migration Act also provided for the issue of temporary entry permits[26] and for their cancellation by the Minister "in his absolute discretion".[27] Aliens and immigrants could be deported under various circumstances.[28] The Migration Act also set up a system for the registration of immigration agents.[29] Altogether it constituted 67 sections.

The Migration Act continued to operate substantially in its original form for many years. Merits review was provided by non-statutory Immigration Review Panels and, in respect of refugees, by a committee known as the Determination of Refugee Status Committee.

In 1985, the Human Rights Commission and the Administrative Review Council each published reports on the operation of the Migration Act.[30] The Administrative Review Council recommended a new system of merits review involving immigration adjudications being made subject to review by the

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[23] It also repealed the *Pacific Island Labourers Acts* of 1901 and 1906 and the *Aliens Deportation Act 1948* (Cth).

[24] *Migration Act 1958* (Cth), s 6(2).

[25] *Migration Act 1958* (Cth), s 6(1).

[26] *Migration Act 1958* (Cth), s 6(6).

[27] *Migration Act 1958* (Cth), s 7(1).

[28] *Migration Act 1958* (Cth), ss 12 and 22.

[29] *Migration Act 1958* (Cth), ss 46-53.

[30] Human Rights Commission, *Human Rights and the Migration Act*, Report No 13 (1985); Administrative Review Council, *Review of Migration Decisions*, Report No 25 (1985).

Administrative Appeals Tribunal ("the AAT"). The recommendation was not immediately adopted, but in 1987 the Federal Government established a Committee to Advise on Australia's Immigration Policies. The Committee published a report in 1988.[31] It recommended a process of Internal Department Review, subject to review by the AAT.

The *Migration Legislation Amendment Act 1989* (Cth) introduced comprehensive amendments, including provisions for the control of entry into Australia by the use of entry permits and visas. Review of migration decisions was provided for in a new Pt III. That Part provided for internal review and created the Immigration Review Tribunal ("the IRT"). The Federal Court was given jurisdiction to entertain appeals on questions of law from its decisions.[32] The Court had a general jurisdiction to review administrative decisions made under the Migration Act conferred by the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Its judicial review jurisdiction under s 39B(1) of the *Judiciary Act 1903* (Cth) remained in place.

In August 1992, the Parliamentary Joint Standing Committee on Migration Regulation, which had been established in 1990, published a report entitled *Australia's refugee and humanitarian system: Achieving a balance between refuge and control*.[33] As a result of that report, the *Migration Reform Act 1992* (Cth) was enacted. Under the 1992 Amending Act the visa was made the single authority under which, for most purposes, a non-citizen could be permitted to enter into or remain in Australia. The Amending Act also established what the Minister

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[31] Committee to Advise on Australia's Immigration Policies, *Immigration: A Commitment to Australia* (1988).

[32] Section 26 of the *Migration Legislation Amendment Act* 1989 (Cth) inserted new ss 64V and 64X into the Migration Act.

[33] Parliamentary Joint Standing Committee on Migration Regulation, *Australia's refugee and humanitarian system: Achieving a balance between refuge and* control, Parl Paper 204/1992 (1992).

described in the Second Reading Speech as "a uniform regime for detention and removal of persons illegally in Australia".[34] The RRT was created to provide merits review of decisions relating to the grant of protection visas to persons claiming to be refugees. The provisions creating it commenced on 1 July 1993. The operational date of the rest of the amendments was deferred from 1 November 1993 to 1 September 1994.[35]

One part of the deferred provisions was Pt 8, which limited judicial review of specified classes of decision under the Act to the grounds set out in s 476. The restrictions imposed upon the grounds of judicial review were discussed in the Minister's Second Reading Speech. That speech reflected a concern held by the executive about the extent to which judicial review was having an impact on migration policy. The Minister said:

> Credible independent merits review will ensure that the Government's clear intentions in relation to controlling entry to Australia, as set out in the *Migration Act*, are not eroded by narrow judicial interpretations.[36]

The Minister also said:

> … the Government wishes to make the application of the legal concepts of migration decision making predictable. Judicial review rights for decisions on the grant or cancellation of a visa will be set out in the Migration Act. Judicial review will only be possible after the applicant has pursued all merits review rights or where merits review is not available. Grounds for review will include failure to follow the codified decision making procedures set out in the Act. As the codified procedures will allow an applicant a fair opportunity to

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[34] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 November 1992 at 2621.

[35] *Migration Laws Amendment Act 1993* (Cth).

[36] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 November 1992 at 2621.

> present his or her claims, failure to observe the rules of natural justice and unreasonableness will not be grounds for review.[37]

The grounds of review under s 476 as it stood after the 1992 amendments excluded ostensible bias as a basis for asserting breach of natural justice but allowed actual bias as a ground. A typical response by litigants was to run a case of actual bias in the Federal Court and if rejected on appeal, to seek special leave to appeal to the High Court. At the same time, the applicant for special leave would begin proceedings in the original jurisdiction of the High Court under s 75(v) of the Constitution, to be discussed further below, alleging ostensible bias as a fallback position. A variant of this approach was taken in *Minister for Immigration and Multicultural Affairs v Jia Legeng*.[38] Jia Legeng was a Chinese national living in Australia convicted of crimes and sentenced to imprisonment. His visa application was refused by a delegate of the Minister. He appealed to the AAT, which set aside the decision and remitted it to the Minister on the basis that the applicant was of good character. The Minister made some statements in a radio interview and wrote a letter to the President of the AAT expressing concern at the decision and the AAT's approach in similar cases. The Minister later cancelled the applicant's visa. The applicant sought judicial review in the Federal Court on a number of grounds, including actual bias on the part of the Minister. His application was dismissed, but an appeal to the Full Federal Court was allowed. The Minister then appealed to the High Court by special leave. At the same time, Mr Jia applied for writs of certiorari and prohibition pursuant to s 75(v) of the Constitution alleging that the Minister's decisions were induced or affected by bias or were made in circumstances where there was a reasonable apprehension of bias. The appeal and the application were heard concurrently. In the event, the Minister's decision was allowed and Mr Jia's application was dismissed.

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[37] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 4 November 1992 at 2623.

[38] (2001) 205 CLR 507.

The case was an example of the transaction costs which can be generated by attempts to limit access to the courts. On the other hand, the 1992 amendments and later changes affecting judicial review highlight the importance of courts scrupulously adhering to its proper limits.

New procedures for review tribunals requiring them to give notice to applicants of information that might be adverse to their applications for review were introduced by the *Migration Legislation Amendment Act (No 1) 1998* (Cth), which came into effect in 1999. The Minister, in the Second Reading Speech for the Bill, said it established "a code of procedure for both the Migration Review Tribunal and the Refugee Review Tribunal which is similar to that already applying to decisions made by the department".[39] The introduction of this measure was reflected in its application to the RRT, in the enactment of s 424A of the Migration Act. The history of this provision is some indication of the hazards of codification. I do not know how many decisions have been made which have involved challenges based on alleged non-compliance with s 424A. My impression is that there have been a significant number. Some of the difficulties generated by the codification of the procedural fairness requirements were discussed by Denis O'Brien in the paper he delivered at the Law Council of Australia's Immigration Law Conference earlier this month.

The High Court has considered s 424A on more than one occasion and has pointed out the limits of the obligations which it imposes on the RRT. In *SZBYR v Minister for Immigration and Citizenship*[40] the Court explained that the term "information" in s 424A does not extend to the RRT's thought processes or determinations. Nor is it related to the existence of doubts or inconsistencies or the absence of evidence. It is related to the existence of evidentiary material or

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[39] Australia, House of Representatives, *Parliamentary Debates* (Hansard) 2 December 1998 at 1123. The primary provisions were ss 359A and 359B in relation to the MRT and ss 424A and 425B in relation to the RRT.

[40] (2007) 235 ALR 609.

documentation. That proposition was restated recently in *Minister for Immigration and Citizenship v SZGUR.*[41]

With the enactment of the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) certain groups of provisions in the Migration Act were declared to be exhaustive of the natural justice hearing rule in relation to the matters they dealt with. Section 51A so provided in relation to provisions dealing with first line decisions. Sections 357A and 422B so provided with respect to procedural provisions relating to MRT and RRT decisions respectively. These sections were introduced as a response to the decision of the High Court in *Miah.*[42] They have generated some differences of view about their interpretation in the Federal Court. Section 51A provides:

> (1) This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
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> (2) Sections 49A to 494D, in so far as they relate to this Subdivision, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

The High Court discussed the operation of s 51A in *Saeed*[43] and the scope of the words "in relation to the matters it deals with". Accepting that the context for the enactment of s 51A and its parallel provisions in other parts of the Migration Act was the decision of the High Court in *Miah*, the Court said:

> The question whether s 51A in its operation has the effect contended for, of excluding the natural justice hearing rule, is to be answered by

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[41] (2010) 273 ALR 223 at [9].

[42] *Re Minister for Immigration and Multicultural Affairs Ex parte Miah* (2001) 206 CLR 57.

[43] *Saeed v Minister for Immigration and Citizenship* (2010) 41 CLR 252.

> having regard, in the first place, to the text of s 51A and the provisions with which it interacts.[44]

It was held in *Saeed* that the section did not exclude the operation of the common law rules of natural justice in relation to offshore visa applicants. That was because s 57, which required applicants to be provided, for comment, with information which was generally relevant and adverse to their claims applied only to onshore visa applicants.

While the common law rules of procedural fairness may have the vice of a degree of uncertainty so far as administrative decision-makers are concerned, they are flexible. Courts approaching the question whether and how they apply to a particular case will have regard to the practical exigencies of the kind of decision-making involved as well as the particular circumstances of the case. The Rules cannot be used to judicialise administrative processes. Codification, which is intended to bring about certainty, can create the potential for debate about the interpretation of the statutory words used, their scope and their application.

The same may be said about the very large array of statutory criteria for the grant and refusal of visas to be found in the *Migration Regulations 1994* (Cth). The opportunities for reviewable jurisdictional error in the interpretation of those criteria are legion. If they were intended to reduce ministerial discretion in the grant or refusal of visas it may be that they had that effect. If they were intended to reduce the scope for debate about the exercise of ministerial powers in this area, I suspect that they have not had the desired effect.

Following the events of 2001 when border protection became a major political issue, a package of eight amending Acts was passed. Three of those Acts were concerned with access to judicial review:

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[44] (2010) 41 CLR 252 at 265 [34].

- The *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) and the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth). These Acts excised certain offshore territories from the migration zone, being the zone within which a valid application for a visa may be made by a non-citizen.

- The *Judicial Review Act*, which introduced a new Pt 8 into the Migration Act and with it a new privative clause which applied to decisions under the Migration Act.

- The *Jurisdiction of the Federal Magistrates Service Legislation Amendment Act 2001* (Cth), which amended the new Pts 8 and 8A of the Migration Act to confer jurisdiction on the Federal Magistrates Court concurrent with that of the Federal Court (s 483A).

In the Second Reading Speech for the 2001 Judicial Review Bill, the Minister referred to the 1992 amendment. He said that the government at the time had intended that those changes would reduce Federal Court litigation and provide greater certainty as to what was required from decision makers, visa applicants and visa holders. Contrary to that intention, the volume of cases before the courts had not been reduced. Recourse to the Federal Court and the High Court was trending upwards despite access to independent merits review by the two Tribunals. The Minister said:

> The high level of litigation, particularly by twice refused refugee claimants, cannot remain unchecked. Increased litigation leads to increased costs and delays, and for those in detention, to a longer period of detention.[45]

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[45] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 September 2001 at 31560.

The Minister referred to s 75(v) of the Constitution and Parliament's inability to restrict access to the High Court by legislation. It was accepted that while access to the Federal Court and the scope of its judicial review jurisdiction could be changed by legislation, in practice this would deflect many cases to the High Court. The new privative clause which was introduced by the Bill was said to be based upon a very similar clause considered in the case of *Hickman*.[46] The Minister then said:

> Members may be aware that the effect of a privative clause such as that used in Hickman's case is to expand the legal validity of the acts done and the decisions made by decision-makers. The result is to give decision makers wider lawful operation for their decisions, and this means that the grounds on which those decisions can be challenged in the Federal and High Courts are narrower than currently.[47]

The privative clause provided that decisions made under the Migration Act:

- were final and conclusive;
- must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
- were not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.[48]

Had that section on its proper construction operated to oust the jurisdiction conferred by s 75(v) of the Constitution it would no doubt have been invalid.

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[46] *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.

[47] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 September 2001 at 31561.

[48] *Migration Act 1958* (Cth), s 474.

However, in *Plaintiff S157 v The Commonwealth*,[49] the High Court held that the section did not oust the jurisdiction because it did not extend to decisions affected by jurisdictional error. Such decisions were not decisions made under the Migration Act. This left open the full application of the constitutional jurisdiction under s] 75(v).

The importance of s 75(v) as an aspect of the rule of law in relation to executive power was underlined by an observation in *Plaintiff S157*:

> The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them.[50]

In order to avoid the High Court being swamped with cases brought in its original jurisdiction under s 75(v), the like jurisdiction has been conferred by statute upon the Federal Court and the Federal Magistrates Court. If a case is brought in the High Court under s 75(v) which could be heard in one or other of those courts, then the High Court has the power to remit the matter to the lower court.

One beneficial development was the conferral of jurisdiction in relation to Migration Act decisions on the Federal Magistrates Court. Before the conferring of that jurisdiction, primary judicial review of Tribunal decisions had to be sought in the Federal Court or in the original jurisdiction of the High Court. Typically, a single Federal Court judge would hear a review application in the original jurisdiction of the Court. An appeal from the decision of that judge would have to be heard by a bench of three Federal Court judges. The conferral of original jurisdiction on the

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[49] (2003) 211 CLR 476.

[50] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [104].

Federal Magistrates Court meant that the first line of judicial review could be dealt with in that Court and an appeal from a decision of a Federal Magistrate, heard by a single judge of the Federal Court. There was nevertheless a discretion for the Chief Justice to direct that an appeal from a Federal Magistrate be heard by a bench of three where the importance of the matter warranted such a direction. The impact of the burden on the Federal Court in the exercise of both original and appellate jurisdiction was dramatic.

The 2001 amendments to the Migration Act had been preceded by more than 100 amending Acts since 1958. By 2001, the Migration Act comprised over 740 sections. There were hundreds of migration regulations which were set out in two volumes.

There have been at least 53 amending Acts which have affected the Migration Act since the 2002 amendments. Some of these amendments have involved direct responses to the judicial review process. The *Migration Amendment (Duration of Detention) Act 2003* (Cth) "reaffirmed" that s 196 of the Migration Act precluded any discretion for any person or court to release from detention an unlawful non-citizen lawfully being held in immigration detention. The Second Reading Speech indicated that the legislation was a direct response to Federal Court decisions (beginning in 2002) that the Migration Act did not preclude the Court from making interlocutory orders for release pending the final determination of judicial review.

The *Migration Litigation Reform Act 2005* (Cth) introduced a new provision into the *Federal Court of Australia Act 1976* (Cth), s 31A, subs (2) of which provided:

> The court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
>
> (a) the first party is defending the proceeding or that part of the proceeding; and

(b) the court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

In subs (3) it was provided that a proceeding need not be "hopeless" or "bound to fail" for it to have no reasonable prospect of success. Although the section was directed at migration litigation it is of general application. It was designed to speed up the process of judicial review where unmeritorious cases were brought. The Explanatory Memorandum stated that the amendment arose from concerns about the volume of litigation within federal courts. It is not clear to what extent s 31A achieves what was intended for it. In judicial review proceedings, the questions before the Court will generally be questions of law to be decided on the papers. An argument that an application for judicial review has no reasonable prospect of success is likely to involve the same questions and take just as long as the actual hearing and determination of the application itself. It has the disadvantage that it can generate collateral litigation. If it is to be used it needs to be used with care and discrimination to ensure that the transaction costs of invoking it do not outweigh the benefit which it delivers.

A further legislative response to judicial decision making was seen in the *Migration Amendment (Review Provisions) Act 2007* (Cth). It was brought about by the decision of the High Court in *SAAP v Minister for Immigration, Multicultural and Indigenous Affairs*.[51] It introduced s 359AA, applicable to the MRT, and s 424AA, applicable to the RRT, and authorised the Tribunals to orally give to an applicant for review particulars of information that the Tribunal considered would be a reason or part of a reason for affirming the decision under review.

Time limits on judicial review applications and applications for extension of time limits, along with provisions relating to notification of parties, were dealt with

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[51] (2005) 228 CLR 294.

in the *Migration Legislation Amendment Act (No 1) 2008* (Cth), apparently as a response to *Bodruddaza v Minister for Immigration and Multicultural Affairs*[52] and *Minister for Immigration and Citizenship v SZKKC*.[53] The *Migration Amendment (Notification Review) Act 2008* (Cth) responded to problems arising from the notification process referred to, inter alia, in *VEAN of 2002 v Minister for Immigration, Multicultural and Indigenous Affairs.*[54] Another response to *Bodruddaza* appears in the *Migration Legislation Amendment Act (No 1) 2009* (Cth).

Presently before the Parliament there are at least four Bills, including two Private Members' Bills, relating to detention reform and procedural fairness and the detention of minors.

This outline of the history of the Act indicates that although judicial review does not determine public policy on migration matters there has been ongoing concern by the executive and legislative branches of government about the interaction between the operation of the migration laws and processes of judicial review.

The offshore processing regime

A recent and important invocation of the original jurisdiction of the High Court arose in the cases of *Plaintiff M61/2010E v The Commonwealth*.[55] The plaintiffs who were Sri Lankan citizens, arrived at Christmas Island by boat without a valid visa. They claimed that Australia owed them protection obligations. They were detained pursuant to s 189 of the Migration Act. Their claims for refugee status were assessed by officers of the Department of Immigration and Citizenship in what was said to be a non-statutory process. They were found not to be persons to

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[52] (2007) 228 CLR 651.

[53] (2007) 159 CLR 565.

[54] (2003) 133 FCR 570.

[55] (2010) 272 ALR 14.

whom Australia owed protection obligations. The departmental assessments were subjected to an independent merits review by persons contracted by the Department. Those reviewers also concluded that the plaintiffs were not owed protection obligations. The plaintiffs commenced proceedings in the original jurisdiction of the High Court alleging that they had been denied procedural fairness and that an error of law had been committed by the reviewers in not treating themselves as being bound by the relevant provisions of the Migration Act.

The plaintiffs were in the category of "offshore entry persons" for the purposes of the Migration Act. Section 46A provides that an application for a visa by such a person is not a valid application. However, under s 46A(2), if the Minister thinks it in the public interest to do so, the Minister may determine that s 46A(1) does not apply to an application by the person for a visa of a class specified in the Minister's determination. The power to so determine may only be exercised by the Minister personally (s 46A(3)). Section 46A(7) provides that the Minister does not have a duty to consider whether to exercise the power under subs (2). There is a similar provision in s 195A relating to persons in detention under s 189.

The Court held that the independent merits reviewer was bound to act according to law by applying relevant provisions of the Migration Act and decided cases. In each case the Court decided that a declaration should be made that the person who conducted the independent merits review made the error of law identified and that the plaintiff was not afforded procedural fairness. The Court summarised in its judgment the steps that led to those conclusions as follows:

(a) Because the Minister had decided to consider exercising power under either ss 46A or 195A of the Migration Act in every case where an offshore entry person claimed to be a person to whom Australia owed protection obligations, the refugee status assessment and independent merits review processes taken in respect of each plaintiff were steps taken under and for the purposes of the Migration Act.

(b) Because making the inquiries prolonged the plaintiffs' detention, the rights and interests of the plaintiffs to freedom from detention at the behest of the

Australian executive were directly affected, and those who made the inquiries were bound to act according to law, affording procedural fairness to the plaintiffs whose liberty was thus constrained.

(c) The inquiries were not made according to law and were not procedurally fair.

(d) Because the Minister was not bound to consider exercising either of the relevant powers, mandamus would not issue to compel consideration, and certiorari would have no practical utility. But in the circumstances of each case a declaration would be made.

Plainly the decision is of practical significance in the administration of migration law and policy. Beyond drawing attention to what was said in it, I make no further comment about sequelae.

By way of conclusion I want to say something about the limits of judicial review.

The limits of judicial review

It is as important today as it always was that courts entrusted with the function of judicial review of administrative decisions, whether they be migration decisions or any other class of decision, respect the limits of judicial review.

The principal object of judicial review is to ensure that when official action which affects the subject is challenged in the courts, it has been taken within the boundaries of constitutional statutory or executive power and that it should be set aside and reconsidered if it has not. There are particular species of judicial review which, by virtue of the statute creating them, have a factual or merits review character about them. So-called statutory "appeals" from administrative decision-makers to the Federal Court in the exercise of its original jurisdiction fall into that category. They include appeals from the Commissioner of Taxation, the Commissioner of Patents and the Registrar of Trade Marks. Another example is the other provisions for review by the Federal Court of decisions of magistrates, acting

administratively, about eligibility of persons for extradition. However, judicial review in the sense in which it is applied in the migration field to decisions of the MRT and the RRT is subject to the limitation described by Brennan J in *Attorney-General (NSW) v Quin*:[56]

> The duty and jurisdiction of the court to review administrative actions do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

Judicial review of administrative action requires the court to focus upon the constitutional and legal framework of the decision in question. Review by administrative tribunals on the other hand, has been properly described as part of the continuum of administrative decision-making. It can be regarded as more significant to applicants than judicial review because it can provide them with a complete answer not available through the courts. Moreover, they can be provided with that answer more speedily and less expensively than through judicial review. There is a degree of flexibility in tribunal processes. It has been said that the MRT and the RRT have a statutory function best described as inquisitorial, rather than as adversarial. That term, which is not without difficulty, has generated some exposition in recent times in the context of s 424 of the Migration Act read with s 414. The High Court in *Minister for Immigration and Citizenship v SZIAI*[57] discussed the application of the term "inquisitorial" to tribunal proceedings. The plurality judgment in that case said:

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[56] (1991) 170 CLR 1 at 35-36.

[57] (2009) 259 ALR 429 at 436.

> The duty imposed upon the tribunal by the *Migration Act* is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error.

These matters were also discussed briefly in the recent decision of the High Court in *Minister for Immigration and Citizenship v SZGUR*.[58]

It is a fact of life that even the taxonomy of administrative review processes can be the subject of debate among lawyers. Despite that, there is no doubt that there are great benefits to be derived from high volume, efficiently conducted review processes of independent tribunals such as the MRT and the RRT.

Conclusion

Judicial review is an inescapable feature of any society governed by the rule of law under a written constitution where the legislature and the executive have limited powers. Its application to sensitive areas of official decision making can sometimes generate inconvenience and cost and elicit legislative responses. That is part of the democratic process. Importantly, judicial review, while it has its place in affirming the rule of law and doing so publicly and in a principled way, is essentially on the sidelines of the important debates which determine the future direction of Australia's public policy in relation to migration.

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[58] (2010) 273 ALR 223 at 228-230.