HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

RE REFUGEE REVIEW TRIBUNAL & ANOR RESPONDENTS

EX PARTE MANSOUR AALA PROSECUTOR

Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57
16 November 2000
S185/1999

ORDER

1. *Order absolute for a writ of prohibition prohibiting the second respondent from taking action on the decision of the first respondent made on 3 April 1998.*

2. *Order that time be extended and that a writ of certiorari issue to quash the decision of the first respondent made on 3 April 1998.*

3. *In respect of the application by the prosecutor dated 4 October 1996, Order absolute for a writ of mandamus requiring the first respondent to consider and determine the application according to law.*

4. *Second respondent to pay costs of prosecutor, both in respect of the order nisi and the hearing before Full Court.*

Representation:

P E King with K M Hawes for the prosecutor (instructed by the prosecutor)

No appearance for the first respondent

T Reilly with G A Mowbray for the second respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Re Refugee Review Tribunal; Ex parte Aala

Immigration – Refugees – Review Tribunal – Failure to afford procedural fairness – Prosecutor denied opportunity to be heard on matters affecting credibility – Whether prosecutor denied possibility of a successful outcome.

Administrative law – Constitutional writs – Nature of Constitutional writ of prohibition – Procedural fairness – Availability of writ of prohibition for failure to accord procedural fairness – Whether prohibition available as of right or by discretion – Whether application should be rejected due to delay.

Constitutional law – Construction of Constitution – Meaning to be given to words in s 75(v) – Relevance of meaning at time of commencement of Constitution.

Words and phrases – "a writ … of prohibition", "procedural fairness", "prerogative writ".

Constitution, ss 75(iii), 75(v).
Migration Act 1958 (Cth).

1 GLEESON CJ. The facts, which are not in dispute, are set out in the reasons for judgment of other members of the Court.

2 The issues are whether, in the events that occurred, involving an erroneous statement by the Refugee Review Tribunal as to the material which was before the Tribunal, there was a denial of procedural fairness, and, if so, whether the consequence is that prohibition should go under s 75(v) of the Constitution.

3 As to the first issue, the statement in question covered a matter which had a bearing upon the credibility of the prosecutor. It misled the prosecutor, as a consequence of which he was deprived of the opportunity to answer, by evidence and argument, adverse inferences which were based in part upon a misunderstanding of his previous conduct. Had he been given an opportunity to correct the misunderstanding, a different view might have been taken as to his credibility.

4 It cannot be concluded that the denial of that opportunity made no difference to the outcome of the proceeding[1]. The Tribunal's conclusion that certain information given by the prosecutor was a concoction was based, in part, upon an unwarranted assumption as to what the prosecutor had previously told various authorities; an assumption which, according to the evidence, the prosecutor could and would have corrected had he not been inadvertently misled by the Tribunal. It is possible that, even if the prosecutor had been given an opportunity to deal with the point, the Tribunal's ultimate conclusion would have been the same. But no one can be sure of that. Decisions as to credibility are often based upon matters of impression, and an unfavourable view taken upon an otherwise minor issue may be decisive. As a result of the conduct of the Tribunal, the prosecutor was deprived of a fair opportunity of presenting his case, and of correcting an erroneous and unfavourable factual assumption relevant to his credibility. The circumstance that this resulted from an innocent mis-statement does not alter the position. The question concerns the nature and extent of the statutory power exercised by the Tribunal, and the condition that the power be exercised in a manner which was procedurally fair; not the good faith of the Tribunal.

5 I agree with what has been said by Gaudron and Gummow JJ as to availability of prohibition as a remedy, under s 75(v) of the Constitution, in a case of denial of procedural fairness, and as to the discretionary nature of the remedy.

6 I agree with the orders proposed by Gaudron and Gummow JJ.

---

1 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145 per Mason, Wilson, Brennan, Deane and Dawson JJ.

7 GAUDRON AND GUMMOW JJ. The first respondent is the Refugee Review Tribunal ("the Tribunal"), established under Div 9 (ss 457-470) of Pt 7 of the *Migration Act* 1958 (Cth) ("the Act"). The second respondent is the Minister responsible for the administration of the Act, the Minister for Immigration and Multicultural Affairs ("the Minister").

8 The prosecutor is an Iranian citizen who arrived in Australia in 1991. The Tribunal found that he had been a "low level" employee of Savak, the secret police of the former Shah, that he had an insignificant involvement with the Mujahadeen, which opposed the regime established after the fall of the Shah, and that between approximately 1981 and 1988 he had been involved in the sale of properties of the former Shah and his associates. The Tribunal was not satisfied that, in the years before the prosecutor came to Australia, the interest in and treatment of the prosecutor by the Komiteh (the "morals police") amounted to persecution. Nor were the arrest and alleged execution, after the prosecutor's departure, of his business colleague, Ali Tehrani, events from which any adverse consequences might flow to the prosecutor. The result was that the prosecutor did not satisfy the Tribunal that he had a well-founded fear of persecution in the necessary sense.

9 The prosecutor was previously the applicant and appellant in litigation in the Federal Court of Australia against the Minister. The jurisdiction of the Federal Court was that conferred by Pt 8 (ss 474-486) of the Act. The litigious history and the relevant factual findings by the Tribunal are detailed in the judgment of Callinan J. However, it is convenient to refer here to some aspects of that history, and will be necessary to do so in further detail later in these reasons.

10 The result of previous exercises of the judicial power of the Commonwealth has been an affirmation by the Federal Court of the decision of the Tribunal, in turn affirming the determination of a delegate of the Minister not to grant the prosecutor a "protection visa"[2]. Nevertheless, in the present proceeding in this Court under s 75(v) of the Constitution, the prosecutor seeks orders to the contrary effect, namely orders quashing that decision of the Tribunal and requiring the Tribunal to redetermine the application to review the determination by the delegate.

---

2 A criterion for the grant of such a visa is that the prosecutor is a person to whom Australia has protection obligations under the Convention relating to the Status of Refugees as amended by the 1967 Protocol ("the Convention"). As to the Convention and Protocol, see *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55 at [107].

11 No relief is sought from this Court which would quash the order of the Full Court dismissing the appeal from the order of Branson J affirming the decision of the Tribunal. Nevertheless, the effect of the relief sought in this Court would be to outflank and collaterally impeach the respective rights and liabilities under the Act of the prosecutor and the Minister by quashing the administrative decision which the order of the Federal Court affirmed.

12 The pursuit of this course is open to the prosecutor as a consequence of the holding in *Abebe v The Commonwealth*[3] that Pt 8 of the Act is valid. The present significance of *Abebe* is its rejection of a proposition that the right put in issue in the Federal Court application under Pt 8 was the right of the Minister to act upon or to give effect to the decision of the Tribunal, rather than a right to have that decision set aside on one or other of the grounds permitted by s 476. The ground upon which relief is sought in this Court is one denied consideration by the Federal Court by par (a) of s 476(2). This specifies as a ground upon which an application may not be made to the Federal Court a complaint:

> "that a breach of the rules of natural justice occurred in connection with the making of the decision".

13 In this Court, the prosecutor obtained an order nisi requiring the Tribunal and the Minister to show cause before the Full Court why prohibition should not issue, why certiorari should not issue removing the decision of the Tribunal into this Court to be quashed, and why mandamus should not issue directing the Tribunal to consider according to law the prosecutor's application for a protection visa. It will be apparent that the claims for certiorari and mandamus are consequential upon that for prohibition.

14 The power of this Court to issue certiorari is not stated in Ch III of the Constitution. Rather, in a matter such as the present, the conferral of jurisdiction to issue writs of prohibition and mandamus implies ancillary or incidental authority to the effective exercise of that jurisdiction. In the circumstances of this matter, that includes authority to grant certiorari against the officer of the Commonwealth constituting the Tribunal[4]. The matter may also attract the exercise of the powers conferred in general terms by s 31 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act")[5].

---

3 (1999) 197 CLR 510.

4 *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 33. See also *Glover v Walters* (1950) 80 CLR 172 at 174-175.

5 *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 604, 618, 630. Section 33(1) of the Judiciary Act empowers the High Court to direct the issue of certain writs, but

(Footnote continues on next page)

15 The prosecutor asserts that prohibition lies because the decision of the Tribunal was made beyond its jurisdiction. This was because it was made in breach of the rules of natural justice, and the Minister will act upon that decision unless prohibited from doing so. The relevant "rule" of natural justice is that requiring procedural fairness.

16 This raises important, and threshold, questions respecting the meaning and scope of the term "prohibition" in s 75(v) of the Constitution. In particular, there are questions whether a denial of procedural fairness by an officer of the Commonwealth, such as the officer constituting the Tribunal in this case, results in the officer exceeding jurisdiction or, even if it does not do so, whether prohibition nevertheless may lie. Acceptance that prohibition would lie even if there had been no action which was taken or threatened in want of or in excess of jurisdiction would cut across the basic proposition that prohibition in s 75(v) is concerned with the prevention of ultra vires activity by officers of the Commonwealth. There is a further question whether, as a matter of discretion, prohibition may be refused, particularly where any denial of procedural fairness is classified as "trivial".

17 Before considering the merits of the complaint of the denial of procedural fairness, it is convenient to turn to these threshold questions. We conclude that (i) the denial of procedural fairness by an officer of the Commonwealth may result in a decision made in excess of jurisdiction in respect of which prohibition will go under s 75(v); (ii) if there has been a breach of the obligation to accord procedural fairness, the consequences of the breach were not gainsaid by classifying the breach as "trivial" or non-determinative of the ultimate result – the issue is whether there has or has not been a breach of the obligation; (iii) the practical content of the obligation, and thus the issue of breach, may turn upon the circumstances of the particular case; and (iv) the remedy of prohibition under s 75(v) does not lie as of right, but is discretionary.

---

their specification does not (s 33(2)) limit by implication the power of the High Court to direct the issue of any writ. Section 31 empowers the High Court to make such "judgments" (defined in s 2 as including orders) as are necessary for the doing of complete justice in any cause or matter pending before it; cf *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 33; *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 396 [33].

Prohibition, procedural fairness and s 75(v) of the Constitution

18 Section 75(v) may not add to the jurisdiction conferred by s 75(iii). It appears that s 75(v) was included as a safeguard against the possibility that the provision in s 75(iii) respecting matters in which a person being sued on behalf of the Commonwealth is a party would be read down by reference to decisions construing Art III of the United States Constitution[6].

19 Nevertheless, in *R v Federal Court of Australia; Ex parte WA National Football League*[7], Barwick CJ referred to the term "prohibition" in s 75(v) as importing "the law appertaining to the grant of prohibition by the King's Bench". However, in the operation of s 75(v) of the Constitution, terms such as "prohibition" and "jurisdiction" are not simply institutions or concepts of the general law. They are constitutional expressions[8].

20 The term "prerogative writ" came to be used in England with respect to prohibition and other writs because they were conceived as being intimately connected with the rights of the Crown and to ensure that the prerogative was not encroached upon by disobedience to the prescribed structure for the administration of justice[9]. In Australia, the Parliament consists of the Queen, the Senate and the House of Representatives (Constitution, s 1) and the executive power of the Commonwealth is vested by s 61 in the Queen and is exercisable by the Governor-General as the Queen's representative. However, save perhaps provision in s 72(i) for appointment of judges by the Governor-General in Council, the Crown is not an element in the Judicature established by Ch III. In *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[10], Deane and Gaudron JJ said that, taken together, s 75(iii) and s 75(v) had the effect of ensuring "that there is available, to a relevantly affected citizen, a Ch III court with jurisdiction to grant relief against an invalid purported exercise of Commonwealth legislative power or an unlawful exercise of, or refusal to exercise, Commonwealth executive authority".

---

6 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 608-609; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 363-368; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 178-179, 204, 221, 231-232.

7 (1979) 143 CLR 190 at 201.

8 See *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 652-653.

9 *Worthington v Jeffries* (1875) LR 10 CP 379 at 382; *de Smith's Judicial Review of Administrative Action*, 4th ed (1980) at 584.

10 (1995) 183 CLR 168 at 204-205.

21 What is thereby enforced is the fidelity required by covering cl 5 to the Constitution itself rather than any fidelity owed to the Crown as a particular element in the constitutional structure. The term "prerogative writ" has been used as a convenient shorthand, particularly to differentiate in s 75(v) writs of mandamus and prohibition from an injunction. But it is an inapt description of any remedy granted by a court exercising the judicial power of the Commonwealth. If any shorthand expression is to be used, "constitutional writ" would be preferable.

22 Prohibition goes against officers of the Commonwealth in circumstances not contemplated by the Court of King's Bench and not within the expression "excess of jurisdiction" as understood in England. Thus, an officer of the Commonwealth may be restrained by prohibition in respect of activity under an invalid law of the Parliament or of activity beyond the executive power of the Commonwealth identified in s 61 of the Constitution. Further, the common law did not have to take into account the errors of a superior federal court in determining the constitutional limits of its own jurisdiction, a point developed by Brennan J in *R v Ross-Jones; Ex parte Green*[11]. Hence the force of the statement by Mason, Brennan and Dawson JJ in *Re Grimshaw; Ex parte Australian Telephone and Phonogram Officers' Association*[12]:

> "The jurisdiction of this Court to grant prohibition under s 75(v) of the Constitution directed to a non-judicial tribunal is not necessarily governed by the same principles as those which govern the common law jurisdiction of a superior court to grant prohibition to an inferior court."

23 Nevertheless, in considering the particular relationship between prohibition, excess of jurisdiction and denial of procedural fairness, some assistance is derived from considering the state of affairs in the administration of prohibition both in England and in the Australian colonies at the time of the commencement of the Constitution, and thereafter.

24 The phrase "a writ … of prohibition" has no meaning other than as a technical legal expression. The same is true of the term "patents of inventions" in s 51(xviii) which was construed in *Grain Pool (WA) v The Commonwealth*[13]. An appreciation of the essential characteristics of such an expression is assisted by an examination that involves legal scholarship in preference to intuition or

---

11 (1984) 156 CLR 185 at 217-218.

12 (1986) 60 ALJR 588 at 594.

13 (2000) 74 ALJR 648; 170 ALR 111.

divination. The examination appropriately may include the understanding of that expression at the time of the commencement of the Constitution and thereafter.

25 That is not to adopt the proposition that the Constitution should be interpreted merely with the text in one hand and a dictionary in the other[14]. Nor is it to tie constitutional interpretation solely to past states of affairs. However, on analysis, it may appear that the limitation which the Minister contends attaches to s 75(v), so that it does not authorise prohibition where the complaint is of denial of procedural fairness, did not apply to prohibition as understood at the commencement of the Constitution. If that be so, and this limitation is not required for the adaptation of the remedy for the exercise of the judicial power of the Commonwealth under s 75(v), then it should not now be read into the constitutional provision.

26 We begin with New South Wales legislation enacted in the first year of federation. Section 32 of the *Industrial Arbitration Act* 1901 (NSW), which established the Court of Arbitration, provided:

> "Proceedings in the court shall not be removable to any other court by certiorari or otherwise; and no award, order, or proceeding of the court shall be vitiated by reason only of any informality or want of form or be liable to be challenged, appealed against, reviewed, quashed, or called in question by any court of judicature on any account whatsoever."

In *The Master Undertakers' Association of NSW v Crockett*, Isaacs J said[15]:

> "By sec 32 no power exists of appeal or review of its decisions, always supposing, of course, they are within its jurisdiction and not contrary to natural justice."

27 This indicates that breach of the rules of natural justice did not go to jurisdiction, but nevertheless might lead to the quashing of the proceedings in question. Earlier, in *Ex parte McShane*[16], Hargrave J had said that prohibition issued out of the Supreme Court of New South Wales on two grounds:

> "where there is want of jurisdiction, and where the proceedings have been against natural justice".

---

14 See the remarks of Learned Hand J in *Cunard SS Co v Mellon* 284 F 890 at 894 (1922).

15 (1907) 5 CLR 389 at 395.

16 (1878) 1 SCR (NS) (NSW) 10 at 13.

On the other hand, speaking in the House of Lords, Lord Selborne had said that, if the decision-maker under a statutory power had done anything "contrary to the essence of justice", then "[t]here would be no decision within the meaning of the statute"[17]. This suggested that a breach of the rules of natural justice would go to the statutory jurisdiction of the decision-maker, and so was a ground of interference within the doctrine of jurisdictional error.

28 In his work, published in 1887, *Informations (Criminal and Quo Warranto), Mandamus and Prohibition*, Shortt, when discussing prohibition, referred to the well-developed practice of the King's Bench in issuing prohibition to the Court of Admiralty and to the ecclesiastical courts. This activity had a long history. Sir John Holt CJ granted prohibition[18] where a Consistory Court had refused to the prosecutor, a coroner, a copy of the libel instituting proceedings against him for supposed profanation in a cemetery in digging a corpse for a view. A statute of 1414[19], with the expressed object of relieving the need to approach the Royal Courts for prohibition, obliged the ecclesiastical courts to see that the libel was "granted and delivered to the Party without any Difficulty"[20]. Holt CJ determined that the prohibition would issue[21] "only *quousque*, which is *ipso facto* discharged by granting a copy of the libel".

29 Much later, it was suggested in this Court in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* that[22]:

> "the tenor of the writ might perhaps be moulded to meet the situation and the board and its delegate prohibited *quousque*, eg until they were satisfied lawfully or until they abandoned the unlawful course or criterion: see per *Willes* J in *Mayor of London v Cox*[23], and in *White v Steele*[24]".

---

17 *Spackman v Plumstead Board of Works* (1885) 10 App Cas 229 at 240.

18 Anon (1704) 6 Mod 308 [87 ER 1047].

19 2 Hen V s 1, c 3.

20 The statute did not extend to proceedings in the Admiralty Court: Anon (1699) 1 Ld Raym 442 [91 ER 1194].

21 Anon (1704) 6 Mod 308 at 308 [87 ER 1047 at 1048].

22 (1953) 88 CLR 100 at 118.

23 (1867) LR 2 HL 239 at 275, 276.

24 (1862) 12 CB (NS) 383 at 412 [142 ER 1191 at 1202-1203].

30 As the decision of Holt CJ indicates, prohibition lay against the ecclesiastical and admiralty courts where there had been what now would be identified as a denial of procedural fairness. More broadly, prohibition issued where those courts, acting by the rules of the civil law, had decided matters of common law arising incidentally before them in a manner different from that in which the common law courts would have decided them[25]. This was so although what appeared to be involved was error within jurisdiction. Shortt added[26]:

> "In such cases, though the matter of the suit before the Court Christian or the Admiralty Court were clearly within the jurisdiction of such Court, and though the erroneous judgment might possibly have been corrected on appeal, prohibitions have from very early times been granted."

The learned author took this as an instance of the cases referred to by Eyre LCJ in delivering the opinion of the judges to the House of Lords in *Home v Earl Camden*[27]. His Lordship said[28]:

> "It undoubtedly belongs to the king's temporal courts to restrain courts of peculiar jurisdiction from exceeding the bounds prescribed to them; and by far the greater part of the instances in our books, in which prohibitions have issued, are cases of plain excess of jurisdiction. But some of the instances go beyond an excess of jurisdiction, and seem rather to fall under the head of wrong and injustice done to the party, by refusing him, in the course of a proceeding strictly within the jurisdiction, some benefit or advantage to which the common or statute law intitled him, perhaps in opposition to the civil or canon law, by which the general proceedings of those courts are regulated."

31 The Lord Chief Justice was speaking in a litigation respecting the Prize Court. He spoke of the previous struggle for jurisdiction between the ecclesiastical and the temporal courts[29]. Even after the introduction of the

---

25 For example, by denying a plea raising the *Statute of Limitations* 1623 (*Berkeley v Morrice* (1668) Hardres 502 [145 ER 569]) or by misconstruing one of the Enclosure Acts (*Gould v Gapper* (1804) 5 East 345 [102 ER 1102]).

26 *Informations (Criminal and Quo Warranto), Mandamus and Prohibition*, (1887) at 437.

27 (1795) 2 H Bl 533 [126 ER 687].

28 (1795) 2 H Bl 533 at 535-536 [126 ER 687 at 689].

29 *Home v Earl Camden* (1795) 2 H Bl 533 at 533-534 [126 ER 687 at 688].

Judicature system a century later, in *Mackonochie v Lord Penzance*[30], the Queen's Bench Division issued prohibition against Lord Penzance in his capacity of Dean of the Arches. Further, as late as 1872 prohibition still lay to the Court of Admiralty[31]. This was a sequel to "the judicial strife" carried on in the sixteenth and seventeenth centuries between the Courts of King's Bench and the admiralty courts in the course of which "matters raged so high that a war was declared between the two courts, and prohibitions were hurled from Westminister [sic] Hall without much order"[32].

32 In *Mackonochie*, Earl Cairns approved[33] the judgment of Thesiger LJ in the Court of Appeal, in which a distinction was drawn between the implied power of a court or tribunal to regulate matters of its practice and procedure (in respect of which generally an appeal, not prohibition, was the remedy) and a statutory provision relating to these matters (which might go to jurisdiction). Thesiger LJ did contemplate prohibition in respect of procedural irregularities in the first category where there had been violation of "some fundamental principle of justice"[34], but unlike Lord Selborne in *Spackman*, did not link this with the statutory implication of a condition requiring observance of the rules of natural justice.

33 There were many nineteenth century authorities in which procedural irregularities, within jurisdictional limits, were held not to attract prohibition[35]. They involved such unsuccessful complaints as unreasonable refusal to adjourn so that a defendant might obtain legal assistance[36]; trying a defendant at an

---

30 (1881) 6 App Cas 424.

31 *James v South Western Railway Co* (1872) LR 7 Ex 287. See *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 385.

32 *The People ex rel Adams v Westbrook* 89 NY 152 at 155-156 (1882).

33 (1881) 6 App Cas 424 at 440.

34 *Martin v Mackonochie* (1879) 4 QBD 697 at 731-732.

35 They are collected in the article by D M Gordon, "The Observance of Law as a Condition of Jurisdiction", (1931) 47 *Law Quarterly Review* 386 at 404-406; cf *Ex parte Lovell; Re Buckley* (1938) 38 SR (NSW) 153 at 165-167.

36 *R v Biggins* (1862) 5 LT 605. The remedy sought was certiorari. See, more recently, *R v Visiting Justice at Her Majesty's Prison, Pentridge; Ex parte Walker* [1975] VR 883 at 894-897 and *R v Secretary of State for the Home Department, Ex parte Al-Mehdawi* [1990] 1 AC 876. In the latter case, the House of Lords held there was no denial by the decision-maker of natural justice, and no ground for

(Footnote continues on next page)

unreasonably short time after laying of the information[37]; and refusing to hear a party's evidence[38]. Further, in *Hooper v Hill*[39], Davey LJ referred to the line to be drawn, albeit with difficulty, "between what is excess of jurisdiction and what is at most an indiscretion". His Lordship observed that what appeared to be the practice in the Birmingham County Court of publishing a list of cases to be tried on a day in vacation when it was known that the judge would not be there was "not at first sight one to be commended", but continued that he could not say "that the practice in itself involves any excess of jurisdiction"[40].

34 The position in England at the time of the commencement of the Constitution was that (i) there was some support for the proposition that prohibition might lie in respect of at least some sufficiently serious denials of procedural fairness but that (ii) it was not clear whether this was to be understood as included within notions of jurisdictional error or was placed outside it as an independent head of complaint. The law was in a state of development. The doctrinal basis for the constitutional writs provided for in s 75(v) should be seen as accommodating that subsequent development when it is consistent with the text and structure of the Constitution as a whole.

35 The position in the colonies before the commencement of the Constitution also supports such an approach. In New South Wales, the establishment by statute of Courts of Petty Sessions and Small Debts Courts gave rise to a series of cases in which prohibition was granted in respect of procedural irregularities said to amount to a denial of natural justice. In *Ex parte Lucas*[41], a more limited view of what amounted to a denial of natural justice was taken by Cullen CJ after a review of these cases. The passage in the judgment of Eyre LCJ in *Home v Earl Camden*, set out above, was repeated by his Honour[42]. He also referred to the

---

certiorari, where the applicant had been deprived of his opportunity of being heard because of the default of his advisers, to whom he had entrusted the conduct of the matter.

37 *R v Hughes* (1879) 4 QBD 614 at 625; cf in New South Wales *Ex parte McShane* (1878) 1 SCR (NS) (NSW) 10 at 13.

38 *Haggard v Pélicier Frères* [1892] AC 61 at 63, 68.

39 [1894] 1 QB 659 at 664.

40 [1894] 1 QB 659 at 664.

41 (1910) 10 SR (NSW) 325.

42 (1910) 10 SR (NSW) 325 at 331-332.

discussion by Maule J in *Ex parte Story*[43] of cases where prohibition had gone where an ecclesiastical court had been proceeding against a person "who has never been called into it at all", this being "proceeding in a manner that is contrary to natural justice". Cullen CJ approved[44] a passage in the judgment of Owen J in *Ex parte Fealey*[45] where that judge had observed that the erroneousness or injustice in the judgment of an inferior court did not make it contrary to natural justice; Owen J had continued[46]:

> "A decision contrary to natural justice is where the presiding Judge or Magistrate denies to a litigant some right or privilege or benefit to which he is entitled in the ordinary course of the proceedings, as for instance where a Magistrate refuses to allow a litigant to address the Court, or where he refuses to allow a witness to be cross-examined, or cases of that kind. That conduct is said to be contrary to natural justice, and is a ground for the interference of this Court".

The New South Wales decisions, unlike those in England concerned with the ecclesiastical and admiralty courts, which owed their existence to "common law" in a broad sense of that term[47], were concerned with inferior courts and tribunals owing their existence purely to statute.

36 The course of development in the case law since federation shows that there was force in the statement made in 1931, but with reference to the nineteenth century cases, as follows[48]:

> "Some principles early became so universally observed, so characteristic of all curial methods, that they became implied conditions of regularity in all judicial proceedings.[49] The ordinary right of tribunals to regulate their

---

43 (1852) 12 CB 767 at 776-777 [138 ER 1106 at 1110].

44 (1910) 10 SR (NSW) 325 at 334.

45 (1897) 18 NSWLR (L) 282.

46 (1897) 18 NSWLR (L) 282 at 288-289.

47 Wade and Forsyth, *Administrative Law*, 7th ed (1994) at 627.

48 Gordon, "The Observance of Law as a Condition of Jurisdiction", (1931) 47 *Law Quarterly Review* 386 at 396.

49 It is now doubtful whether there are more than two invariable conditions of regularity: (1) that a tribunal shall be disinterested, (2) that the *audi alteram partem* principle shall be observed. The House of Lords in *Local Government*

(Footnote continues on next page)

> own practice does not extend to abrogation of these principles, which only statute can make inapplicable. Disregard of them will always be error, whatever the circumstances and whatever the *cursus curiae*." (footnote partially omitted)

37 In *Fairmount Investments Ltd v Secretary of State for the Environment*[50], Lord Russell of Killowen (with whose speech Lord Diplock, Lord Simon of Glaisdale and Lord Edmund-Davies agreed) had to consider a statute empowering the English High Court to quash a compulsory purchase order if satisfied that the order was not within the statutory power or that the interests of the applicant had been substantially prejudiced by non-compliance with its requirements. His Lordship said[51]:

> "There was a certain amount of discussion before your Lordships on the significance and applicability of the phrase 'may quash' and on the difference between the phrase 'not within the powers of this Act' and 'the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with'. In my view the instant appeal does not require discussion of these points: for I am satisfied that if the true conclusion is that the course which events followed resulted in that degree of unfairness to Fairmount that is commonly referred to as a departure from the principles of natural justice it may equally be said that the order is not within the powers of the Act and that a requirement of the Act has not been complied with. For it is to be implied, unless the contrary appears, that Parliament does not authorise by the Act the exercise of powers in breach of the principles of natural justice, and that Parliament does by the Act require, in the particular procedures, compliance with those principles."

> *Board v Arlidge* [1915] AC 120, negatived a number of supposed invariable conditions suggested in the Court of Appeal, [1914] 1 KB 160. Similarly, in *Board of Education v Rice* [1911] AC 179, the House of Lords, in affirming the Court of Appeal on one narrow ground, discountenanced many extravagant *dicta* of the Lords Justices … Lord Loreburn ([1911] AC 179 at 182) mentions *obiter* as the invariable duties of a tribunal that it 'must act in good faith and listen fairly to both sides.' …

50 [1976] 1 WLR 1255; [1976] 2 All ER 865.

51 [1976] 1 WLR 1255 at 1263; [1976] 2 All ER 865 at 871-872.

This involved (as Lord Diplock later indicated in *Attorney-General v Ryan*[52]) acceptance of an approach taken long before by Lord Selborne in *Spackman*[53], and was repeated in the leading English texts[54].

38 On various occasions it has been assumed that prohibition under s 75(v) issues in respect of failure to observe the rules of natural justice[55]. In *Abebe v The Commonwealth*[56], Gaudron J left open the question whether procedural fairness is to be seen as a common law duty or an implication from statute. Her Honour referred to the support for the first view by Mason J in *Kioa v West*[57] and that for the second view by Brennan J in the same case[58].

39 In *Kioa*, Brennan J described the rule as an implication to be drawn from legislation conferring decision-making authority, the implication being that "observance of the principles of natural justice conditions the exercise of [a statutory power to affect rights and interests]"[59]. His Honour developed these

---

52 [1980] AC 718 at 730.

53 (1885) 10 App Cas 229 at 240.

54 *De Smith's Judicial Review of Administrative Action*, 4th ed (1980) at 244; Wade and Forsyth, *Administrative Law*, 7th ed (1994) at 465. See also *R v Chairman of General Sessions at Hamilton; Ex parte Atterby* [1959] VR 800 at 809-810.

55 See, for example, *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 116-119; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552; *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 263, 267; *Re Grimshaw; Ex parte Australian Telephone and Phonogram Officers' Association* (1986) 60 ALJR 588 at 591-592.

56 (1999) 197 CLR 510 at 553 [112].

57 (1985) 159 CLR 550 at 584.

58 (1985) 159 CLR 550 at 615.

59 (1985) 159 CLR 550 at 615.

views in later cases[60] and with some support by Deane J in *Haoucher v Minister for Immigration and Ethnic Affairs*[61]. In *Annetts v McCann*, Brennan J said[62]:

> "[T]he common law will usually imply a condition that a power be exercised with procedural fairness to parties whose interests might be adversely affected by the exercise of power. This is the foundation and scope of the principles of natural justice. The common law confers no jurisdiction to review an exercise of power by a repository when the power has been exercised or is to be exercised in conformity with the statute which creates and confers the power. …
>
> When a writ of prohibition or an injunction is sought to restrain the exercise of a power, the applicant must show that there is a failure to satisfy some condition governing the proposed exercise of the power; for example, that the repository of the power has failed to accord natural justice to a person whose interests are liable to be affected adversely by the proposed exercise."

40 The reasoning of Brennan J in these judgments is consistent with the proposition respecting "*Wednesbury* unreasonableness" – which Gummow J adopted in *Minister for Immigration and Multicultural Affairs v Eshetu*[63] – stated by Brennan CJ in *Kruger v The Commonwealth*[64]. This is that, "when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised". This reasoning should be accepted with respect to the remedy of prohibition provided for in s 75(v) of the Constitution. It represents the development of legal thought which began before federation and accommodates s 75(v) to that development.

41 It follows that, if an officer of the Commonwealth exercising power conferred by statute does not accord procedural fairness and if that statute has not, on its proper construction, relevantly (and validly) limited or extinguished

---

60 These include *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 40 and *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 591.

61 (1990) 169 CLR 648 at 652.

62 (1990) 170 CLR 596 at 604-605. It is immaterial for present purposes that Brennan J dissented in that case.

63 (1999) 197 CLR 611 at 650 [126].

64 (1997) 190 CLR 1 at 36.

any obligation to accord procedural fairness, the officer exceeds jurisdiction in a sense necessary to attract prohibition under s 75(v) of the Constitution.

42 Different considerations arise where the Commonwealth officer is a member of a federal court. There, procedural fairness is a concomitant of the vesting of the judicial power of the Commonwealth in that federal court and s 75(v) operates to maintain s 71 of the Constitution. Again, where the officer of the Commonwealth executes an executive power, not a power conferred by statute, a question will arise whether that element of the executive power of the Commonwealth found in Ch II of the Constitution includes a requirement of procedural fairness[65]. It is unnecessary to pursue that question further in the present case, but if that requirement is included then prohibition will lie to enforce observance of the Constitution itself. Nor does any question arise here of attempted abrogation by statute of any requirement of procedural fairness. Rather, s 476(2)(a), in limiting the grounds which may be taken in the Federal Court, assumes the existence of the requirement in respect of decisions under the Act which include those of the Tribunal[66].

Prohibition and discretion

43 In the nineteenth century English decisions, there was much debate as to whether, although it was not a writ of course, prohibition was to be granted as a matter of right and was not to be denied on discretionary grounds[67]. Debate turned partly on the question of significance to be attached to the identity and interest of the prosecutor and partly on the doctrinal basis founding the issue of the writ. In *Chambers v Green*[68], Sir George Jessel MR, drawing support from Willes J (delivering for himself, Blackburn J, Pigott B, Shee J and Smith J answers to questions put by the House of Lords in *Mayor, &c, of London v Cox*[69]), distinguished the position of a prosecutor who is a stranger to the

---

65 See *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 278, 280-281, 302-303; *The Commonwealth v Northern Land Council* (1993) 176 CLR 604.

66 See s 475(1)(b).

67 Sir Thomas Bingham, "Should Public Law Remedies be Discretionary?", [1991] *Public Law* 64 at 66.

68 (1875) LR 20 Eq 552 at 555. Prohibition issued out of Chancery, but the practice differed from that at common law: *Mayor, &c, of London v Cox* (1867) LR 2 HL 239 at 290-291.

69 (1867) LR 2 HL 239 at 279-280.

proceeding of the inferior court or tribunal. Where the prosecutor was a stranger, there was a discretion to refuse prohibition, whilst, as Willes J had also emphasised[70], where the prosecutor was a party to the proceeding in the inferior court or tribunal, there was no discretion, and the view of earlier judges including Holt CJ that a discretion existed was incorrect. The rationale given by Jessel MR for the distinction was the unfairness involved where neither party disputed the jurisdiction but a third party did so. Awareness of the distinction drawn in the English decisions appears to underline the dictum in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*[71]:

> "[I]t must be borne in mind that, subject to certain limitations not here material, while prohibition is not a writ of course, it is a writ which goes as of right when the prosecutor is directly affected by the course pursued by a tribunal to which the writ lies and the prosecutor shows satisfactorily that the tribunal is about to act to his detriment in excess of its authority."

44 By the time of federation in this country, the view was taken by the New York Court of Appeals that[72]:

> "[t]he writ of prohibition is an extraordinary remedy, and should be issued only in cases of extreme necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity, or by appeal, and it is not demandable as matter of right, but of sound judicial discretion, to be granted or withheld, according to the circumstances of each particular case".

The contrary view in England that, even where the prosecutor was a stranger, there was no discretion, was attributed by the New York Court of Appeals to the vigour with which the Court of King's Bench had carried on its struggle with the

---

70 (1867) LR 2 HL 239 at 278.

71 (1953) 88 CLR 100 at 118-119.

72 *The People ex rel Adams v Westbrook* 89 NY 152 at 154-155 (1882). See also High, "A Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto, and Prohibition", (1874), Art 765. *Westbrook* was applied by the New York Court of Appeals in *The People ex rel Livingston v Wyatt* 79 NE 330 at 334 (1906) and *The People ex rel Cuvillier v Hagarty* 144 NE 917 (1924). Cardozo J was a party to *Hagarty*. In federal jurisdiction, power was conferred by statute to issue the "extraordinary writs", including prohibition, to the District Courts in aid of appellate jurisdiction, but, as Harlan J put it in delivering the opinion of the Supreme Court, "[t]he power to issue them is discretionary and it is sparingly exercised": *Parr v United States* 351 US 513 at 520 (1956).

admiralty courts[73]. Be that as it may, this view, one contrary to that of Jessel MR and Willes J, held sway well into the nineteenth century in the Court of Common Pleas and had Brett J as its particular champion. In *Worthington v Jeffries*[74], his Lordship declared that, in all cases, the writ issued upon the same ground. This was[75]:

> "not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed. If this were not so, it seems difficult to understand why a stranger may interfere at all."

Later, in *Ellis v Fleming*[76], Brett J discountenanced the judgment of Jessel MR in *Chambers v Green*[77]. Moreover, in *Mayor, &c, of London v Cox*[78], Willes J himself had stated[79]:

> "All lawful jurisdiction is derived from and must be traced to the royal authority. Any exercise, however fitting it may appear, of jurisdiction not so authorized, is an usurpation of the prerogative, and a resort to force unwarranted by law."

Plainly that mode of reasoning was inapplicable in the United States, given the nature of government adopted in that country and the conclusion, expressed before the adoption of the Australian Constitution, that, in the United States, the writs had necessarily been stripped of their prerogative features[80].

---

73 *The People ex rel Adams v Westbrook* 89 NY 152 at 155-156 (1882).

74 (1875) LR 10 CP 379.

75 (1875) LR 10 CP 379 at 382.

76 (1876) 1 CPD 237 at 240.

77 (1875) LR 20 Eq 552.

78 (1867) LR 2 HL 239.

79 (1867) LR 2 HL 239 at 254.

80 See High, "A Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto, and Prohibition", (1874), Arts 3-5.

45 The nature and structure of the Constitution indicates that the same must be true of the remedies of "prohibition" and "Mandamus" identified in s 75(v). The legislative power of the Commonwealth is "vested" in the Parliament consisting of the Crown, the Senate and the House of Representatives (s 1). The executive power of the Commonwealth is "vested" in the Crown and is exercisable by the Governor-General as the Crown's representative (s 61)[81]. On the other hand, the judicial power of the Commonwealth is "vested" by s 71 in this Court and in such other federal courts as the Parliament creates and in such other courts as the Parliament invests with federal jurisdiction. There is no vesting in the Crown of any element of the judicial power of the Commonwealth. Indeed, an important exercise of the judicial power of the Commonwealth is its utility in controlling actions by the executive branch of government beyond the exercise of the executive power vested by s 61. Thus, to adapt to this country the statement by Willes J in *Mayor, &c, of London v Cox*[82], all lawful jurisdiction is derived from and must be traced to Ch III of the Constitution. The remedies specified in s 75(v) are directed to observance by officers of the Commonwealth of the Constitution and the laws in force thereunder.

46 Nevertheless, in *The Tramways Case [No 1]*[83], Griffith CJ set out a passage from the judgment of Brett J in *Worthington v Jeffries*[84] in which his Lordship had founded the issue of prohibition as of right upon an encroachment upon the law of prerogative. The context in which Griffith CJ did so is important. One question in *The Tramways Case [No 1]* was whether jurisdiction of this Court to issue prohibition to a tribunal comprising Commonwealth officers which acted in excess of jurisdiction was in its nature appellate or (as the Court held) original jurisdiction. If the former, then it would have been subject to the power of the Parliament in s 73 of the Constitution to prescribe exceptions and regulations. *Worthington v Jeffries* was referred to in support of the unexceptionable proposition that the jurisdiction of the superior courts in England to grant a common law writ of prohibition was original and not appellate jurisdiction.

47 Later, in *R v Federal Court of Australia; Ex parte WA National Football League*[85], Barwick CJ also referred to the same passage in the judgment of Brett J

---

81 See *Sue v Hill* (1999) 73 ALJR 1016 at 1030-1032 [67]-[82]; 163 ALR 648 at 667-671.

82 (1867) LR 2 HL 239 at 254.

83 (1914) 18 CLR 54 at 60.

84 (1875) LR 10 CP 379 at 382.

85 (1979) 143 CLR 190 at 201.

in *Worthington v Jeffries*. Barwick CJ, as indicated earlier in these reasons, treated what his Lordship had said as a "presently relevant" aspect of the law appertaining to the grant of prohibition by the King's Bench which was imported into the jurisdiction of this Court by the use of the word "prohibition" in s 75(v). In our view, that starting point should not be accepted. However, in *WA National Football League*, Barwick CJ also advanced the proposition that the grant of prohibition under s 75(v) is discretionary if sought by a stranger or if the jurisdiction does not appear on the face of the proceedings but semble that otherwise the writ is as of right. In his discussion of this point, his Honour quoted[86] with approval the judgment of Willes J in *Mayor, &c, of London v Cox*[87].

48 To treat what Willes J said as applicable to s 75(v) is not to challenge the line of authority which indicates, in some circumstances, that a stranger, without a relevant legal interest, may have standing as a prosecutor in a matter in which prohibition is sought under s 75(v)[88]. The point in issue here concerns the existence of a discretion in a case such as the present (where the prosecutor is not a stranger) to decline the issue of prohibition.

49 Where the prosecutor is a stranger, the existence of a discretion should be regarded as settled by what was said in *Re Grimshaw; Ex parte Australian Telephone and Phonogram Officers' Association*[89] by Mason, Brennan and Dawson JJ, who comprised the Court in that case. There, the prosecutor was a stranger to any demarcation dispute between the relevant union parties in an application for variation of an award by the Conciliation and Arbitration Commission. In those circumstances their Honours held that it would be "inappropriate" to grant prohibition. They prefaced that conclusion by saying[90]:

> "At common law there has been some controversy as to the existence and extent of the Court's discretion to refuse prohibition when the writ is sought by a stranger to the proceedings before the inferior court, but the

---

86 (1979) 143 CLR 190 at 201-202.

87 (1867) LR 2 HL 239 at 283.

88 See *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263 [40]; and see, generally, *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 74 ALJR 604; 169 ALR 616.

89 (1986) 60 ALJR 588.

90 (1986) 60 ALJR 588 at 594.

> resolution of the controversy has not been thought to determine the existence of this Court's discretion in exercising its jurisdiction under s 75(v) to grant or refuse prohibition to the Commission. The tendency of the Court has been to assume the existence of a discretion to refuse the remedy when sought by a stranger though a case in which it would have been right to refuse the remedy has not arisen hitherto".

There remains the class of case in which the applicant for prohibition is not a stranger in the relevant sense. Here, it should be observed that the proposition that in respect of activity in excess of jurisdiction prohibition goes as of right cannot be accepted at its face value. For example, it is well settled that a court may discharge an order nisi and refuse to proceed further with an examination of the merits where the prosecutor obtains the order nisi upon material which misled and deceived the court[91].

50 Particular considerations arise where the officers of the Commonwealth against whom prohibition is sought are members of a federal court. In *R v Gray; Ex parte Marsh*, Mason J said[92]:

> "It has been said that, although prohibition is not a writ of course, it is a writ which goes as of right when the prosecutor is directly affected by the course pursued by a tribunal to which the writ lies and the prosecutor shows satisfactorily that the tribunal is about to act to his detriment in excess of its authority: *Australian Stevedoring Industry Board*[93]. However, recent judgments in this Court support the proposition that the court has a discretion to refuse prohibition where it is sought against a superior court at least when: (a) the prosecutor has a right of appeal; and (b) there is no constitutional question involved".

Further, prohibition may be refused by this Court where the administrative structure incorporates provision for an internal "appeal" and, whilst there was a denial of procedural fairness at the first stage, an appeal was taken and there was a full and fair hearing on that appeal. The judgment of Mason J in *R v Marks; Ex parte Australian Building Construction Employees Builders Labourers' Federation*[94] is authority that, in such a case, prohibition to the first decision-

---

91 *R v Kensington Income Tax Commissioners. Ex parte Princess Edmond de Polignac* [1917] 1 KB 486.

92 (1985) 157 CLR 351 at 375.

93 (1953) 88 CLR 100 at 118-119.

94 (1981) 147 CLR 471 at 484-485. Murphy J (at 489), Aickin J (at 493) and Wilson J (at 494) agreed with the judgment of Mason J in this respect.

maker may be refused on the footing that any denial of natural justice at that level has become irrelevant. For that conclusion, Mason J cited in support the decision of the Privy Council in *Calvin v Carr*[95].

51 The position respecting refusal of prohibition was expressed in more general terms by Gibbs CJ in *R v Ross-Jones; Ex parte Green*[96]. After referring to various authorities, including *Australian Stevedoring Industry Board*[97] (in which the expression "in excess of its authority" was used with reference to the activities of tribunals), Gibbs CJ said[98]:

> "If, therefore, a clear case of want or excess of jurisdiction has been made out, and the prosecutor is a party aggrieved, the writ will issue almost as of right, although the court retains its discretion to refuse relief if in all the circumstances that seems the proper course."

52 That statement should be accepted as the correct approach to the exercise of the original jurisdiction in matters in which a writ of prohibition is sought against an officer of the Commonwealth under s 75(v) of the Constitution. The expression "want or excess of jurisdiction" in that passage includes, in the sense explained earlier in these reasons, the consequence of failure to observe the rules of natural justice in the exercise of statutory authority.

53 The recognition of an element of discretion attending the exercise of the jurisdiction conferred by s 75(v) with respect to prohibition involves "two separate questions"[99]. The first is whether the officers of the Commonwealth in question acted in want of or in excess of jurisdiction. The second is whether prohibition should not issue, having regard to the delay, waiver, acquiescence or other conduct of the prosecutor, in the course of the administrative proceeding or in other relevant circumstances. The denial of prohibition by reason of an adverse answer to the second question does not necessarily deny to the prosecutor the opportunity to vindicate any private law rights in appropriate proceedings. For example, damages or equitable relief may be sought for

---

95 [1980] AC 574 at 593.

96 (1984) 156 CLR 185.

97 (1953) 88 CLR 100 at 118-119.

98 (1984) 156 CLR 185 at 194.

99 *De Smith's Judicial Review of Administrative Action*, 4th ed (1980) at 422.

tortious injury to private or individual rights[100]. In such actions, the parties are likely to be different and, in any event, the doctrine of *res judicata* may not be applicable[101].

54 The text and structure of Ch III do not suggest that prohibition should occupy any special position among the constitutional remedies provided in s 75(v). The other two remedies specified there are attended by discretion. This is "well settled" with respect to mandamus[102]. It is a remedy which does not go either as of right or as of course. The same certainly is true of the injunction where, as here, it is a public law remedy[103]. In *Annetts v McCann*[104], Brennan J pointed out that a writ of prohibition or an injunction may be sought to restrain the exercise of a power where natural justice has not been accorded, this being "a failure to satisfy some condition governing the proposed exercise of the power". In other cases, upon analysis, an injunction with the same effect as prohibition *quousque* may be the appropriate remedy that is sought[105].

55 No doubt the discretion with respect to all remedies in s 75(v) is not to be exercised lightly against the grant of a final remedy, particularly where the officers of the Commonwealth in question do not constitute a federal court and there is no avenue of appeal to this Court under s 73 of the Constitution[106]. The discretion is to be exercised against the background of the animating principle

---

100 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558. See Craig, *Administrative Law*, 3rd ed (1994) at 613-642.

101 Wade and Forsyth, *Administrative Law*, 7th ed (1994) at 282-283; cf *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 452-453; Craig, *Administrative Law*, 3rd ed (1994) at 676-677.

102 *R v Ross-Jones; Ex parte Beaumont* (1979) 141 CLR 504 at 522. See also *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400, 407-409.

103 See *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157-158 [57]-[58].

104 (1990) 170 CLR 596 at 604-605.

105 *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461 at 474-475.

106 See, for example, *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 639, 651-655.

described by Gaudron J in *Enfield City Corporation v Development Assessment Commission*. Her Honour said[107]:

> "Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less." (footnote omitted)

56 Some guidance, though it cannot be exhaustive, as to the circumstances which may attract an exercise of discretion adverse to an applicant is indicated in the following passage from the judgment of Latham CJ, Rich, Dixon, McTiernan and Webb JJ in a mandamus case, *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd*. Their Honours said[108]:

> "For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld."

57 When dealing apparently with certiorari and declarations, Lord Denning MR in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* said[109]:

> "He may be debarred from relief if he has acquiesced in the invalidity or has waived it. If he does not come with due diligence and ask for it to be set aside, he may be sent away with nothing[110]. If his conduct has been

---

107 (2000) 199 CLR 135 at 157 [56].

108 (1949) 78 CLR 389 at 400.

109 [1975] AC 295 at 320 (CA); affd [1975] AC 329.

110 See *R v Aston University Senate, Ex parte Roffey* [1969] 2 QB 538.

> disgraceful and he has in fact suffered no injustice, he may be refused relief[111]."

The reference by the Master of the Rolls to the refusal of relief because the applicant in fact suffered no injustice requires further attention. There are authorities which suggest that, where the complaint is one of denial of procedural fairness, the nature of the alleged irregularity may be a matter going to discretion to deny a remedy on the footing that, in any event, no different result would have been reached[112].

58 It is one thing to refuse relief on the ground of utility because, as Lord Wilberforce put it, "[t]he court does not act in vain"[113]. For example, the application for an administrative determination may be one which, irrespective of any question of procedural fairness or individual merits, the decision-maker was bound by the governing statute to refuse[114]. Or the prosecutor's complaint may be the refusal by the decision-maker of an opportunity to make submissions on a point of law which must clearly have been answered unfavourably to the prosecutor[115]. Again, the decision under review may have no legal effect and no continuing legal consequences may flow from it. In such a situation, the reasoning in *Ainsworth v Criminal Justice Commission*[116], where the remedy refused was certiorari, indicates that prohibition will not lie[117].

59 However, the conditioning of a statutory power so as to require the provision of procedural fairness has, as its basis, a rationale which differs from that which generally underpins the doctrine of excess of power or jurisdiction.

---

111 See *Glynn v Keele University* [1971] 1 WLR 487; [1971] 2 All ER 89 and *Ward v Bradford Corporation* (1971) 70 LGR 27.

112 *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29 at 42; *Cinnamond v British Airports Authority* [1980] 1 WLR 582 at 593; [1980] 2 All ER 368 at 376-377.

113 *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 at 1595; [1971] 2 All ER 1278 at 1294.

114 *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board* [1994] 1 SCR 202 at 228; Wade and Forsyth, *Administrative Law*, 7th ed (1994) at 528.

115 See *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

116 (1992) 175 CLR 564 at 580-581.

117 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 553-554 [113].

The concern is with observance of fair decision-making procedures rather than with the character of the decision which emerges from the observance of those procedures. Unless the limitation ordinarily implied on the statutory power is to be rewritten as denying jurisdictional error for "trivial" breaches of the requirements of procedural fairness, the bearing of the breach upon the ultimate decision should not itself determine whether prohibition under s 75(v) should go. The issue always is whether or not there has been a breach of the obligation to accord procedural fairness and, if so, there will have been jurisdictional error for the purposes of s 75(v).

60 Cases said to turn upon "trivial" breaches are often better understood on other grounds. In particular, it is trite that, where the obligation to afford procedural fairness exists, its precise or practical content is controlled by any relevant statutory provisions and, within the relevant legislative framework, this will vary according to the circumstances of the particular case. The point is developed in particular in the judgments of Deane J in *Kioa v West*[118] and *Haoucher v Minister for Immigration and Ethnic Affairs*[119].

61 In the present case, the Act laid down a particular framework for the particular conduct by the Tribunal of its review of the decision of the delegate of the Minister. The Tribunal was bound by par (a) of s 425(1) to give the prosecutor an opportunity to appear before it to give evidence. The Tribunal was empowered to require the prosecutor to give evidence on oath or affirmation (s 427(3)(c)) and he gave sworn testimony on two occasions. However, he had not been entitled to be represented by any other person (s 427(6)). The cogency of the prosecutor's evidence was of greatest importance for the evaluation of his claims respecting a well-founded fear of persecution.

62 The content of the requirement for procedural fairness may fluctuate during the course of particular administrative decision-making[120]. It is in this fashion that the complaints made by the prosecutor in the present case are appropriately evaluated. Before doing so, it is necessary to return briefly to the history of the matter.

---

118 (1985) 159 CLR 550 at 632-633.

119 (1990) 169 CLR 648 at 652-653.

120 See the discussion by Brennan J in *R v Marks; Ex parte Australian Building Construction Employees Builders Labourers' Federation* (1981) 147 CLR 471 at 499-501.

The proceedings before the Tribunal and the Federal Court

63 The jurisdiction of the Tribunal had been attracted in the first instance by an application made on 4 October 1996 to review the decision of a delegate of the Minister dated 2 October 1996 that the prosecutor did not meet a prescribed criterion for the grant of a protection visa. The decision of the delegate was conveyed in a document of 16 pages which contained detailed findings. The jurisdiction of the Federal Court was attracted by the filing by the prosecutor on 15 January 1997 of an application for an order of review under Pt 8 of the Act of the first decision of the Tribunal. On the top of the first page of the application there appeared in the handwriting of the prosecutor the statement:

"Total 21 PAGES INCLUDING THIS PAGE

PAGES 1-5 COVER + 16 pages submission".

These 21 pages are included in the materials before the Court on this present application.

64 On 18 December 1997, the Full Court of the Federal Court ("the first Full Court") allowed an appeal from orders of Beaumont J. His Honour had dismissed the application. The effect of the orders of the first Full Court was to allow the application for review, to set aside the first decision of the Tribunal, and to remit the matter to the Tribunal to be determined in accordance with law, with or without the hearing of fresh evidence as the second Tribunal should determine.

65 Power to make such orders was given to the Federal Court by pars (a) and (b) of s 481(1) of the Act. The authority of the Tribunal derived primarily from that section. The provisions thereof to which we have referred impliedly conferred upon the Tribunal at the second hearing the authority[121] to redetermine the application which the prosecutor had made on 4 October 1996, and to do so with or without the hearing of fresh evidence, and otherwise in accordance with the procedures set out in Div 3 (ss 420-422), Div 4 (ss 423-429) and Div 5 (ss 430-431) of Pt 7 of the Act.

66 At the second Tribunal hearing on 20 March 1998, the prosecutor again gave sworn evidence. The Tribunal was differently constituted for the second hearing. A new file was opened and given the number N98/21291. The file at the first Tribunal hearing was number N96/12272. Section 418 of the Act provided for the Secretary to the Minister's Department to give to the Registrar of

---

121 *Attorney-General (Cth) v Oates* (1999) 198 CLR 162 at 171-172 [16].

the Tribunal certain documents relevant to the review. There is no such statutory provision respecting the Federal Court file. However, appeal papers had been prepared for the first Full Court and an appeal book assembled. The index to that appeal book is in evidence on the present application. This shows that the application for review filed on 15 January 1997, and thus the written submissions of 16 pages, was reproduced. So also was an amended application filed on 3 March 1997, including an attachment of 16 pages.

67 After the prosecutor had been sworn on 20 March 1998, the member constituting the Tribunal at the second hearing told the prosecutor that she had read everything in "all of those files", being identified in the sentence:

> "I've got [your] Department of Immigration file and your old Refugee Tribunal file and your new Refugee Tribunal file plus all of the Federal Court papers."

At the second hearing, the prosecutor gave oral evidence concerning his association with his former colleague, Ali Tehrani. The Tribunal on 3 April 1998 affirmed the decision not to grant to the prosecutor a protection visa. The position respecting Ali Tehrani then assumed considerable importance on the consequent application for review to the Federal Court. This was heard by Branson J and, on 17 December 1998, her Honour affirmed the decision of the second Tribunal. On 3 June 1999, the Full Court ("the second Full Court") dismissed an appeal against her Honour's orders. The Full Court gave judgment after this Court's decision in *Minister for Immigration and Multicultural Affairs v Eshetu*[122]. The Full Court noted that the effect of the decision in *Eshetu* was that par (a) of s 476(1) did not empower the Federal Court to review a decision of the Tribunal on the basis that it had failed to comply with procedures mandated by the Act. This was because that obligation to afford natural justice was not part of the statutory requirement in par (b) of s 420(2) that the Tribunal, in reviewing a decision, "must act according to substantial justice".

68 However, at the time the matter was before Branson J, it was accepted that it was open to the Federal Court to deal with matters of natural justice. Her Honour did so, with particular reference to the matter concerning Ali Tehrani. Branson J's findings appear in the following passage:

> "The [prosecutor] gave evidence at the second [Tribunal] hearing that he and a former colleague of his, Ali Tehrani, had an agreement that if … Mr Tehrani experienced any problems with the Komiteh, Mr Tehrani should try to save himself by disclosing all the information in his

---

122 (1999) 197 CLR 611.

> possession about the [prosecutor], as the [prosecutor] would be safely overseas. The [prosecutor] had not given this evidence either to the Department or at the [first Tribunal hearing]. However, he had made a written statement to this effect in a document dated 14 January 1997 which he apparently provided by facsimile transmission to the Federal Court following his appeal to this Court from the [first Tribunal decision]. The [prosecutor] also sent three further documents to the Federal Court. *All four of the documents sent by the [prosecutor] to the Court were reproduced in the Appeal Book produced for the purpose of the hearing by the Full Court of the appeal against the decision of Beaumont J.* There is nothing before me to suggest that documents provided to the Federal Court in this way would ordinarily be expected to come to the attention of the [second Tribunal]. There is nothing before me to suggest that these documents did come to the attention of the [second Tribunal]. Nor has the [prosecutor] placed any evidence before the Court on the issues of whether he was in fact misled by the assurance of the member who constituted the [second Tribunal] that she had read all of his statements and, assuming that he was misled, what he would have done had he been aware that certain documents prepared by him were not available to the [second Tribunal]. It seems likely that the [second Tribunal] was unaware that the [prosecutor] had first made a statement in January 1997 which asserted the existence of the agreement between him and Mr Tehrani. However, the reasons of the [second Tribunal] indicate that the [second Tribunal] placed importance on the fact that no evidence of such an agreement was given at [the hearing by the first Tribunal] (see the reasons of the [second Tribunal] at p 10). Nothing in the documents sent by the [prosecutor] to the Federal Court altered this situation." (emphasis added)

The relevant passage in the reasons of the second Tribunal is as follows:

> "The [prosecutor] claims that before he left Iran he told Ali that if ever he experiences any problems with the Komiteh he should try to save himself by disclosing all of the information he knows about the [prosecutor]. The [prosecutor] told him that he would be safe overseas and so it would be alright to pass this information on. *The Tribunal notes that, prior to the second Tribunal hearing, the [prosecutor] had never raised the claim that he and Ali had an agreement that Ali would try to save himself by passing on information about the [prosecutor] if it became necessary.*" (emphasis added)

69 In a later passage in the reasons of the second Tribunal, the following appears:

> "The [prosecutor] told the Tribunal about a real estate transaction in which his colleague Ali Tehrani had been involved after the [prosecutor's]

departure for Australia which he claims led to Ali's arrest and execution. *The [prosecutor] had never raised this claim prior to the second Tribunal hearing. He claims that the information was given to him by other real estate colleagues, although he did not claim this in prior submissions or hearings. The Tribunal finds that the [prosecutor] concocted this evidence and places no weight on it.*

The [prosecutor] gave evidence that he felt that Ali Tehrani would have passed on information about the [prosecutor's] activities to the authorities. He claims that he and Ali had an 'agreement' that, if Ali were to be detained, he would tell the authorities about the [prosecutor's] past activities in order to save himself. *The Tribunal does not accept this evidence. Prior to the second Tribunal hearing, the [prosecutor] had never claimed that he and Ali had any sort of agreement.* This claim is purely self-serving.

…

The Tribunal finds that there is no connection between the [prosecutor] and the alleged execution of Ali Tehrani, nor any consequences which may flow to the [prosecutor]. However, even if the Tribunal accepts that Ali Tehrani did inform the authorities about the [prosecutor's] involvement in the sale of properties for the Shah and his associates, the Tribunal has already found … that the [prosecutor] does not have a well-founded fear of persecution for reasons of this or any of his past activities. Consequently, the Tribunal finds that the [prosecutor] does not have a well-founded fear of persecution for reasons of his association with Ali Tehrani." (emphasis added)

The prosecutor's case

70 The substance of the prosecutor's complaint is that (i) the references by the second Tribunal to the absence of prior claims by the prosecutor respecting the agreement with Ali Tehrani is factually wrong; (ii) this is because reference was made respecting this matter by the prosecutor in one or more of the documents sent by the prosecutor to the Federal Court and which were reproduced in the appeal book for use by the first Full Court; (iii) the prosecutor was diverted from setting matters straight at his hearing before the second Tribunal because he understood the opening statement by the second Tribunal, which we have set out above, as an assertion by the second Tribunal member that she had read those materials as part of the Federal Court materials; (iv) in particular, his evidence in this Court, which was unchallenged, is that he did not elaborate at the hearing before the second Tribunal on these materials because he believed the member had read them and taken them into account; (v) had the second Tribunal been apprised of the true situation respecting the content of the material and its chronology, the second Tribunal would have had to take it into

account before making the adverse finding as to the prosecutor's credit, respecting recent invention; and (vi) further, the second Tribunal denied the prosecutor procedural fairness by not putting to him its concern with recent invention before making an adverse finding based upon it.

71 The written submissions to this Court by the second respondent included the following:

> "1.4 The Prosecutor made no mention to the [first] Tribunal of an agreement with Ali that Ali would incriminate the Prosecutor if Ali was caught in an effort to save his (Ali's) life (the agreement claim). This new claim appears to have first been made in material dated 14 January 1997 submitted to the Federal Court after the [first] Tribunal decision and in support of the application for review. It was repeated thereafter in other material sent by facsimile to the Federal Court by the Prosecutor at different times.
>
> 1.5 The [second] Tribunal held an oral hearing on 20 March 1998. The member told the Prosecutor she had read all of the Federal Court papers. It was conceded before the Federal Court by the Second Respondent, and is again conceded, that the [second] Tribunal did not have before it the materials referred to in para 1.4 above."

72 There was discussion in the course of the oral submissions for the Minister of what was involved in this concession. It was not clear, for example, whether what was meant was that there had been some breakdown in established administrative procedures between the Federal Court and the second Tribunal. It was said by counsel for the second respondent that the concession meant that the Federal Court's file "is not ordinarily before the [Tribunal]" so that, in the present case, there has been "no particular glitch". That left for speculation what was meant by the member constituting the Tribunal at the second hearing when she asserted that she had read "all of the Federal Court papers". It was suggested by counsel, again without evidence, that this meant the member had before her the judgments delivered in the Federal Court and that she may or may not have had the application for review filed in the Federal Court on 15 January 1997. Then it was said that, in any event, the 16 page submission referred to on the front page of that application had not been before the second Tribunal.

73 It may be that what was meant by the member in her opening remarks was that she had before her a copy of the appeal book prepared for the first Full Court and that it was this that she had read, not any unassembled court file from the Federal Court. The appeal book, as Branson J pointed out, reproduced all four of the documents now relied upon by the prosecutor as his communications to the Federal Court.

74 Nevertheless, on this application in the original jurisdiction of the Court, it was for the parties to provide it with evidence in proper form to establish what in fact was the material before the Tribunal at the second hearing. Rather than doing so, the Minister relies upon the awkwardly expressed concession set out above. We therefore proceed on the footing that the four documents were not among material which constituted the record before the second Tribunal upon which it made its decision.

75 However, when read as a whole and in context, the remarks made by the second Tribunal respecting recent invention are directed not to the intervening litigation in the Federal Court, but to a comparison between the record before the first Tribunal and the second Tribunal. After all, the proceedings in the Federal Court had been for administrative review upon a record constituted by that which had been before the first Tribunal. The relevant evidence was that tendered to the first Tribunal, in particular the prosecutor's oral evidence.

76 It is here, nevertheless, that the real difficulty for the Minister's case arises. The assessment by the second Tribunal of the credit of the prosecutor was an important matter. There is no universal proposition that before the Tribunal ever makes a finding adverse to an applicant, it is necessary for the Tribunal to put to the applicant the concerns which are inclining the Tribunal towards such an adverse finding. The procedure is inquisitorial and not adversarial. The requirement of procedural fairness did not require the Tribunal when, pursuant to par (a) of s 425(1), it gave the prosecutor the opportunity to appear before it to give evidence, to treat what transpired "as though it were a trial in a court of law"[123].

77 However, the practical content in the present case of the requirement for procedural fairness is to be determined bearing in mind the relationship between the hearings before the first Tribunal and the second Tribunal, the giving by the prosecutor of sworn evidence on both occasions, and the critical and obvious importance of any adverse finding as to his credit.

78 The central issue to which the prosecutor's oral evidence was directed on both occasions was his claim to refugee status involving his well-founded fear of persecution for a Convention reason. The circumstances here were such as to

---

123 *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 315.

make applicable what, in *Mahon v Air New Zealand Ltd*[124], Lord Diplock identified as one of the rules of natural justice. His Lordship said[125]:

> "The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result." (original emphasis)

79 It is true that, in the present case, the second Tribunal said that, even if it had accepted that Ali Tehrani had informed the authorities about the involvement of the prosecutor in the sale of properties for the Shah and his associates, the second Tribunal already in its reasons had found that the prosecutor did not have a well-founded fear of persecution for reasons of any of his past activities. That finding had been expressed as follows:

> "The Tribunal finds that because it is so clear that the [prosecutor] was driven by financial considerations and not by political motivations there is no possibility that his actions in facilitating the sale of properties owned by the Shah and his associates would be seen as political. The [prosecutor] has shown himself to be an opportunistic businessman who will do almost anything to earn large profits. There is no evidence before the Tribunal, *apart from the [prosecutor's] own claims*, to suggest that real estate agents, or any person, caught facilitating sales of property for the Shah or his associates for profit are imputed with a political opinion in Iran. The Tribunal finds, therefore that there is only a very remote chance that the [prosecutor] would be imputed with a political opinion in support of the Shah." (emphasis added)

80 Thus, the second Tribunal's estimate of the cogency of the prosecutor's claim permeated its reasoning. The evidence before the first Tribunal was given on 4 December 1996. The 16 page statement which accompanied the application for an order for review by the Federal Court was dated shortly thereafter, on 14 January 1997. It cannot be predicted that, had this been pointed out to the second Tribunal, it would inevitably have had a result which did not involve an adverse finding with respect to the prosecutor's credit. However, it can at least be said that this might have deterred the second Tribunal from concluding as it

---

124 [1984] AC 808.

125 [1984] AC 808 at 821.

did. It is sufficient that "the denial of natural justice deprived [the prosecutor] of the possibility of a successful outcome"[126].

81 In *John v Rees*, Megarry J said in such a context as the present that[127]:

> "[a]s everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change".

Delay

82 The Minister urges the refusal of relief by reason of delay. The order of the second Full Court was made on 3 June 1999 and the application to this Court, which led to the making of the order nisi on 21 December 1999, was instituted on 21 October 1999. The decision of this Court in *Eshetu* had been delivered on 13 May 1999, while the second Full Court had the matter reserved for its consideration. The relevance of *Eshetu* for the prosecutor's arguments respecting natural justice has been indicated earlier in these reasons. The Full Court had given the prosecutor some encouragement, saying:

> "[T]he Court has no jurisdiction to set aside the decision of the [second] Tribunal on the ground that it denied to the [prosecutor] natural justice. It may be noted that the submission was not without some substance. If the [prosecutor] wishes to pursue it, however, he must commence proceedings in the High Court."

83 In all the circumstances, the delay which then ensued between June and October 1999 was not such as to merit the disqualification of the prosecutor from relief to which he otherwise would be entitled in this Court.

Conclusion

84 At the hearing before the Full Court, the prosecutor did not press for an order absolute for prohibition directed to the first respondent, the Tribunal. The prosecutor should have orders absolute for prohibition against the second

---

126 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147.

127 [1970] Ch 345 at 402. See also the observations by Barwick CJ in *Wade v Burns* (1966) 115 CLR 537 at 555 and by Sir Thomas Bingham, "Should Public Law Remedies be Discretionary?", [1991] *Public Law* 64 at 72-73.

respondent, the Minister, to prevent action by him on the decision of the second Tribunal. In aid of that prohibition, the prosecutor should have certiorari to quash the decision of the second Tribunal. To that end, an extension of time within which to apply for certiorari should be granted. That leaves standing the undetermined application to the Tribunal of 4 October 1996. In respect of that application, there should be an order absolute for mandamus to the Tribunal requiring consideration and determination of that application according to law. The Minister should pay the costs of the prosecutor, both in respect of the order nisi and the hearing before the Full Court.

85 McHUGH J. This case shows how the failure to define terms can sometimes lead to breaches of the rules of natural justice. The Refugee Review Tribunal told an applicant for a visa ("the prosecutor") that it had "all of the Federal Court papers". Perhaps the Tribunal meant the orders and the reasons for judgment given in the Federal Court in earlier proceedings brought by the prosecutor. But among the documents used in that Court was an appeal book which contained four statements made by the prosecutor. Those statements were not before the Tribunal. Their contents were consistent with evidence which the prosecutor later gave in the Tribunal but which the Tribunal thought was "concocted". That being so, the prosecutor contends that the Tribunal denied him natural justice.

86 The present proceedings are brought in the original jurisdiction of the Court to make absolute orders nisi for writs of mandamus, prohibition and certiorari. Three issues arise in the proceedings. First, whether the Refugee Review Tribunal breached the rules of natural justice. The rule alleged to have been breached is the fair hearing (or *audi alteram partem*) rule. In substance, the prosecutor claims that the Tribunal did not take into account the four statements and had misled him into believing that it would consider those statements. If a breach of the fair hearing rule has occurred, the second issue is whether, but for the breach, the prosecutor would have obtained a visa. If the answer to both these issues is yes, the third issue is whether a breach of the rules of natural justice by the Tribunal member as an "officer of the Commonwealth" attracts the constitutional writs of mandamus and prohibition in s 75(v) of the Constitution.

87 In my opinion, the Tribunal breached the fair hearing rule because it prevented the prosecutor from fully putting his case in support of his application. But, unfortunate though that breach was, it did not affect the decision of the Tribunal[128]. That being so, the prosecutor fails on the second issue and is not entitled to relief under s 75(v) of the Constitution.

The factual and procedural background

88 The proceedings are prosecuted by Mansour Aala who was born in Iran. In 1991 he left Iran and arrived in Australia. Shortly after arrival he married an Australian citizen. He applied for, but was refused, a spouse visa. In August 1996, he applied for a protection visa claiming that he was a refugee because he had a well-founded fear that, if returned to Iran, he would be persecuted on the ground of political opinions that would be imputed to him. In October 1996, a delegate of the Minister for Immigration and Multicultural Affairs refused his application. Subsequently, the prosecutor asked the Refugee Review Tribunal to review the Minister's decision. In December 1996, the Tribunal ("the first Tribunal") affirmed the Minister's decision. In judicial review proceedings in the

---

128 cf *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147.

Federal Court, Beaumont J dismissed the prosecutor's application to set aside the first Tribunal's decision. But a Full Court of the Federal Court allowed the prosecutor's appeal and remitted the matter to the Refugee Review Tribunal to be determined according to law.

89 Before the first Tribunal, the prosecutor claimed that, if he was returned to Iran, he would be persecuted for political opinions imputed to him because of activities in which he had been involved in that country before arriving in Australia in 1991. Those activities fell into three categories:

(1) working for the *Savak* organisation (the deposed-Shah-of-Iran's secret police);

(2) supporting the *Mujahadeen* who opposed the Iranian government; and

(3) illegally selling real estate owned by the Shah and his supporters.

90 In this Court, attention has focused on the third category, the findings against the prosecutor concerning the first and second categories being unchallengeable. The prosecutor told the first Tribunal that he and a business associate, Ali Tehrani, had illegally sold real estate for the Shah and his supporters. As a result of visits to his office in 1990 by the *Komiteh* (a State-controlled enforcement agency), the prosecutor and Tehrani discussed leaving Iran. In 1991, the prosecutor obtained a passport and left for Australia. He accepted that the *Komiteh* must not have been able to prove anything against him before he left Iran in 1991; otherwise, he would not have been able to obtain a passport.

91 The first Tribunal was not satisfied that there was a real chance that Tehrani had told the authorities in Iran about the prosecutor's illegal sales dealings. Nor was it satisfied that Tehrani's premises contained anything that might have implicated the prosecutor in activities "warranting serious punishment". It concluded that, if the prosecutor was deported to Iran, he would not face a real chance of persecution because of his real estate dealings.

92 After the first Tribunal's decision, the prosecutor sent four hand-written statements to the Federal Court. They were dated 14 January 1997 ("the first statement"), 30 January 1997, 11 August 1997 and 30 September 1997 respectively. The first statement was attached to the application for review filed with the Federal Court on 15 January 1997. The other three statements were received by the Federal Court, but in what circumstances is unclear. The evidentiary status of all four statements is also unclear.

93 In the first statement, the prosecutor claimed for the first time that he had agreed with Tehrani that, if Tehrani was investigated after the prosecutor had left

Iran, Tehrani should disclose incriminating information about the prosecutor to try to help himself. In that statement, the prosecutor also claimed for the first time that Iranian friends had told him of the circumstances of Tehrani's arrest, namely that Tehrani had been arrested after he had illegally attempted to sell property to a member of a government organisation. The prosecutor claimed that the *Komiteh* would have searched Tehrani's office after his arrest and would have found copies of contracts for illegal sales organised by the prosecutor. He also claimed for the first time that his name appeared on those contracts. It is convenient to refer to these matters as the "new explanations". The statements of 30 January, 11 August and 30 September 1997 repeated these new explanations but they did not significantly add to them.

94 The reasons of Beaumont J indicate that his Honour probably read the first two statements before he dismissed the prosecutor's application for judicial review. Whether or not that is so, all four statements were included in the appeal book used in the appeal to the Full Court of the Federal Court, and the prosecutor was entitled to believe that that Court had considered the new explanations.

95 After the matter was remitted to the Refugee Review Tribunal by the Full Court, the prosecutor again gave evidence before the Tribunal ("the second Tribunal"). During that hearing, the member who constituted the second Tribunal said to him that she had the "Department of Immigration file and your old Refugee Tribunal file and your new Refugee Tribunal file plus all of the Federal Court papers." She told the prosecutor that she had "read everything that's in all of those files." Just before concluding the hearing, the Tribunal member told the prosecutor that she would "consider everything that you've told me and everything in all of your other statements and the evidence which you gave in your other interviews".

96 In April 1998, the second Tribunal affirmed the Minister's decision to refuse the protection visa after examining all three categories of activities – working with the *Savak*, supporting the *Mujahadeen*, and illegally selling properties – which the prosecutor claimed made his fear of persecution well-founded.

97 In its reasons, the second Tribunal said that, *prior to the second Tribunal hearing*, the prosecutor had never claimed that he and Tehrani had agreed that Tehrani would pass on information about the prosecutor to save himself, nor had he claimed that he knew of the circumstances and the real estate transaction that led to Tehrani's arrest, nor had he claimed that a search of Tehrani's premises would have revealed that the prosecutor had illegally sold properties.

98 These claims had been included in the new explanations contained in the four statements. In subsequent proceedings in the Federal Court, the Minister conceded that none of those statements were before the Tribunal. That being so, the prosecutor asserts that he has been denied a fair hearing of his case because

the Tribunal represented to him that it would take the new explanations into account and it did not. Furthermore, in this Court the prosecutor gave uncontested affidavit evidence as to what he would have done if he had known that the Tribunal did not have the four statements. He said that, if the Tribunal had put to him that he had not given the relevant evidence before the second Tribunal hearing, he would have replied that he had done so "on more than one occasion, that it was in writing and available for consideration by the Tribunal." He also asserted that he had not elaborated on the material at the Tribunal's hearing because he "believed that the Tribunal had read the material and accordingly taken it into account."

99 If the Tribunal had taken the new explanations into account, it might not have concluded that the prosecutor had "concocted this evidence" and might not have refused to accept the prosecutor's evidence concerning the agreement with Tehrani. But assuming that that is so, was this denial of a fair hearing? And, if it was, did it affect the outcome of the case?

Breach of the fair hearing rule

100 If the second Tribunal had simply failed to take into account the "Federal Court papers", it would not have breached the fair hearing rule. Its function was to consider the case put to it by the prosecutor. He had the responsibility of putting the contents of the four statements to the second Tribunal. If he failed to do so, no blame could be attached to the Tribunal for not taking them into account. But the Tribunal did more than fail to take account of evidence which the prosecutor should have put before it. It found that he had concocted evidence without informing him that it might do so and without indicating to him that that finding might be made.

101 One of the fundamental rules of the fair hearing doctrine is that a decision-maker should not make an adverse finding relevant to a person's rights, interests or legitimate expectations unless the decision-maker has warned that person of the risk of that finding being made or unless the risk necessarily inheres in the issues to be decided. It is a corollary of the warning rule that a person who might be affected by the finding should also be given the opportunity to adduce evidence or make submissions rebutting the potential adverse finding[129].

102 In the present case, the prosecutor was given no warning that the second Tribunal might find that he had concocted his evidence. But the risk of that finding inhered in the issues and in his various accounts of the real estate transactions. Given the issues and the inconsistency between what the prosecutor told the delegate and the first Tribunal and what he told the second Tribunal, he

---

129 *Mahon v Air New Zealand Ltd* [1984] AC 808 at 820-821.

could not complain that the Tribunal did not warn him that it might reject his evidence concerning the incriminating contracts and the Tehrani agreement. Nor did the more serious finding of concoction require a warning that it might be made. The prosecutor had given inconsistent accounts. The second account was much more favourable to his case. It was given after his first account had failed to persuade the first Tribunal that he had a well-founded fear of persecution. Because that is so, it was a distinct possibility that the second Tribunal might find that his later account was concocted.

103 But the fair hearing doctrine also requires that the Tribunal should not mislead an applicant concerning the evidence that should be led or that will be taken into account. Here the second Tribunal effectively told the prosecutor that it would take into account the material in the four statements. It did not do so. And the prosecutor has sworn that, but for being misled, he would have elaborated on the material at the hearing. He was therefore denied the opportunity to put his whole case to the Tribunal. In that respect, he was denied a fair hearing.

The breach of the fair hearing rule did not affect the Tribunal's decision

104 Not every breach of the rules of natural justice affects the making of a decision. The decision-maker may have entirely upheld the case for the party adversely affected by the breach; or the decision may have turned on an issue different from that which gave rise to the breach of natural justice. Breach of the rules of natural justice, therefore, does not automatically invalidate a decision adverse to the party affected by the breach. This principle was acknowledged by this Court in *Stead v State Government Insurance Commission*[130] when it said that "not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial." Nevertheless, once a breach of natural justice is proved, a court should refuse relief only when it is confident that the breach could not have affected the outcome because "[i]t is no easy task for a court ... to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome"[131]. In this case, however, the denial of natural justice did not affect the outcome. After analysing the reasons of the second Tribunal and the history of the proceedings, the best conclusion is that the Tribunal would have found that the prosecutor did not have a well-founded fear of persecution even if it had had the four statements before it.

---

130 (1986) 161 CLR 141 at 145.

131 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

The second Tribunal's reasons

105 Although the second Tribunal concluded that the prosecutor had concocted part of his evidence and did not accept his evidence concerning an agreement with Tehrani, it considered what the Iranian authorities might do if they became aware of the prosecutor's illegal dealings in property. And it did so before it made the adverse findings concerning the prosecutor's credibility. It asked itself whether the illegal activities of the prosecutor – which it assumed had occurred – "would be likely to cause the authorities to impute a political opinion in the [prosecutor] which may bring him within the Convention." It held that the authorities would not impute those opinions to him even if they knew of his dealings. The Tribunal thought that the prosecutor was motivated by financial gain and not political sympathy in selling the properties, saying that he "was involved in the sale of properties for the Shah purely because of the large commissions he was able to earn." The Tribunal found that it was so clear that the prosecutor had not been driven by political motivations that there was no possibility that his actions in facilitating the sale of properties owned by the Shah and his associates would be seen as political.

106 The Tribunal thought that assisting in the sale of properties of the Shah and his supporters was not itself sufficient to be regarded as a political risk to the authorities. It said that there was no evidence, apart from that of the prosecutor, that suggested that persons facilitating sales of property for the Shah or his associates were imputed with a political opinion in Iran. Accordingly, the Tribunal found that there was "only a very remote chance that the [prosecutor] would be imputed with a political opinion in support of the Shah."

107 Furthermore, the Tribunal noted information from independent sources that suggested that former supporters of the Shah had started to return to Iran. Other information provided by the Department of Foreign Affairs and Trade suggested that even those Iranians who still had monarchist leanings were not taken seriously and did not experience any significant difficulties unless they were politically active. The Tribunal thought that, because the prosecutor did not claim to have been, or to have been seen as, a supporter of the Shah, his past activities would not occasion any difficulties.

108 Only after concluding that the Iranian authorities would not impute political opinions to the prosecutor did the second Tribunal deal with the alleged agreement between the prosecutor and Tehrani and with the claim that an investigation after a search of Tehrani's premises would have incriminated the prosecutor. The Tribunal refused to accept that there was any agreement that Tehrani would tell the authorities about the prosecutor. That was because the prosecutor had never asserted any agreement of that sort until the second Tribunal hearing. The Tribunal also held that the claim that an investigation would incriminate the prosecutor was "pure speculation and largely concocted." Although he had told the second Tribunal that his name appeared on contracts

which the authorities would have found in Tehrani's office, he had "told the first Tribunal that his name never appeared on sales contracts." Moreover, the Tribunal said:

> "[E]ven if the Tribunal accepts that Ali Tehrani did inform the authorities about the [prosecutor's] involvement in the sale of properties for the Shah and his associates, the Tribunal has already found above that the [prosecutor] does not have a well-founded fear of persecution for reasons of this or any of his past activities. Consequently, the Tribunal finds that the [prosecutor] does not have a well-founded fear of persecution for reasons of his association with Ali Tehrani."

109 The second Tribunal drew together its findings on all three categories of activities – working with the *Savak*, supporting the *Mujahadeen*, and illegally selling properties – and concluded:

> "In sum, the Tribunal is not satisfied that there is a real chance that any of the [prosecutor's] past activities, considered individually or cumulatively, would bring him to the adverse attention of the authorities for any Convention reason. The Tribunal is not satisfied that the [prosecutor] has a well-founded fear of persecution in Iran for a Convention reason."

110 Given the reasons of the second Tribunal, the question whether the breach of the fair hearing rule might have affected the decision of that Tribunal turns on two questions. First, would the adverse findings concerning the prosecutor's credibility have been made if the Tribunal had known that the prosecutor had raised the new explanations before the second hearing? Second, if so, would the second Tribunal still have found against the prosecutor on the issue of imputed political opinion if it had known that the prosecutor had given the new explanations more than twelve months before the second Tribunal hearing?

The prosecutor's credit was not affected by the Tribunal's mistake concerning the time when the new explanations were first given

111 The second Tribunal's views as to the prosecutor's credit were influenced by the delay in giving evidence about the Tehrani agreement and about the existence of documents (contracts with his name appearing on them) implicating him in illegal sales. On several occasions, it mentioned that the prosecutor had not given this evidence "prior to the second Tribunal hearing". But would it have made any difference if the Tribunal had known that he had given this evidence prior to the second hearing? What was significant was not the precise date of the new explanations, but that the prosecutor had not given them until after the first hearing and that his new explanations were not reconcilable with the account that he had given at the first hearing or to the delegate. Moreover, in so far as the prosecutor claimed that he would be incriminated because his name was on the

sales contracts, the second Tribunal pointed out that he had said the opposite to the first Tribunal.

112 The basis for fearing persecution that he gave to the second Tribunal differed significantly from that which he gave to the delegate. In the delegate's reasons for decision in October 1996, the delegate said:

> "In his initial statement, the [prosecutor] stated that after his arrival in Australia, one of his sisters in Iran has informed him that the *Komiteh* have been looking for him. The *Komiteh* has also arrested some of his colleagues and that, Ali Tehrani being one of those arrested, has been executed for his involvement in the sale of real estate belonging to dignitaries under the Shah and the transfer of the proceeds of these sales outside Iran.
>
> At interview, the [prosecutor] explained that [about two years before the interview took place] he had spoken to one of his real estate agents friends in Tehran, who had told him then that Ali Tehrani was executed a few months earlier that year. He explained that Ali Tehrani was another real estate agent with a large company in Tehran, who had sold illegal properties. He said that ... he had tried to contact some of his real estate friends but there was no answer to his calls and he suspects that they may have been arrested. He fears that they may have revealed his identity under interrogation."

113 The first Tribunal also had a statutory declaration of the prosecutor which was not reconcilable with the account that he gave to the second Tribunal. The prosecutor stated in that declaration:

> "However, as far as I already stated Ali Tehrani was executed for his involvement in the sale of real estate to Shah dignitaries. I am sure the Iranian authorities have investigated my activities in relation to the sale of illegal properties through him.
>
> ...
>
> However, when Ali Tehrani had been arrested and executed by the Iranian authorities in relation to his past work, after having the real chance to face persecution, all information of my past works and himself must had been released to the Iranian authorities through Ali Tehrani. That is why the *Komiteh* is looking for me".

114 In December 1996, the prosecutor told the first Tribunal:

> "And then I called some other friends. They told me ... Ali Tehrani has been faced persecution and he was executed by the Iranian authorities. I know why: because he was doing the illegal selling of the confiscation

> properties. So by – so at this stage I am sure the Iranian authorities should – they took a lot of information from Ali from his business. And also my business, perhaps, because I was working with – we were working together. So that's why – that's why I am sure the Iranian authorities have information about my past illegal activities of the selling ... So that's why I am sure if I return to Iran I will face persecution. And they will take lot of information off me as they have taken from Ali Tehrani and then they will execute me."

115 None of these statements mentioned the agreement with Tehrani. Nor did they mention the transaction which he later claimed led to Tehrani's arrest and execution. None of the statements is reconcilable with the new explanations. I do not think that it would have affected the Tribunal's comments concerning the prosecutor's credibility if it had known that he had first proffered the new explanations to the Federal Court in January 1997 and not to the second Tribunal in March 1998. What was destructive of the prosecutor's credibility was the contrast between his accounts to the delegate and the first Tribunal and his new explanations given for the first time after the delegate and the first Tribunal had rejected his claim for a protection visa. Of particular significance was his claim at the second Tribunal hearing that his name was on the contracts which he alleged would have been found at Tehrani's premises and his statement to the first Tribunal that his name did not appear on the contracts. I do not think that it would have made the slightest difference to the Tribunal's findings if it had known that he had proffered these new explanations to the Federal Court. That showed only that he had raised his new explanations in January 1997 and not in March 1998. It did not restore the destruction of his credit that resulted from his inconsistent and irreconcilable accounts.

<u>The finding as to the prosecutor's credit did not affect the Tribunal's decision that there was no well-founded fear of persecution</u>

116 But even if, contrary to my view, the second Tribunal would not have made adverse findings concerning the prosecutor's credibility, I am satisfied that the Tribunal would still have found that he did not have a well-founded fear of persecution for imputed political opinions. Despite its findings concerning the Tehrani agreement and the incriminating documents, the Tribunal examined whether the prosecutor would face persecution if the authorities had become aware of his illegal real estate dealings. It held that he would not. It said:

> "There is no evidence before the Tribunal, apart from the [prosecutor's] own claims, to suggest that real estate agents, or any person, caught facilitating sales of property for the Shah or his associates for profit are imputed with a political opinion in Iran."

Moreover, the Tribunal had cogent evidence before it from which it could conclude that the authorities would not persecute the prosecutor for his real estate dealings.

117 But might the Tribunal have acted on the prosecutor's "claims", despite the other evidence, if it had not made adverse findings concerning his credibility? I do not think so. The countervailing evidence was too strong. In its reasons for decision, the Tribunal noted independent evidence that many people with royalist sympathies did not now, years after the deposing of the Shah, experience difficulties if they did not express those views "too publicly". Further, the Tribunal noted independent evidence that in recent years the authorities had adopted a far more relaxed attitude and that many former senior figures in the Shah's government and/or family members had returned to Iran with impunity. In fact, self-declared monarchists did not appear to be taken very seriously as long as they desisted from political activism.

118 The Tribunal took account of an article which stated that many former supporters of the Shah and former *Mujahadeen* supporters were beginning to return to Iran with impunity. The article noted that people who ran the country under the Shah had been cautious about coming back. But the regime now appeared to be making it easier for them to return. The article said that, to general amazement, "the all-powerful Bonyad" had admitted in March 1992 that many convictions, made in the absence, of those running Iran for the Shah were unsound and that the confiscation of their property had been unlawful.

119 The Tribunal also had a report of the Department of Foreign Affairs and Trade which described the classes of persons who might be persecuted by reason of imputed political opinions. Significantly, the report said:

> "Those individuals who had in the past simply been briefly and in a relatively minor capacity, associated with anti-regime activities or demonstrations, had been briefly detained and imprisoned and were now living freely in society could not be considered as having an imputed political profile."

120 The prosecutor did not fall within any of the categories of persons who were likely to have "an imputed political profile". Even if he could be categorised as having been "associated with anti-regime activities", the Tribunal found for good reasons that he was "clearly driven by financial motives and not by political motives." Given the Tribunal's acceptance of the change of attitude to supporters of the former Shah, I do not think that it is remotely possible that, if the Tribunal had known of the existence of the four statements, it would have found that the prosecutor had a well-founded fear of persecution for political opinion if he were returned to Iran.

121 The second Tribunal assumed in favour of the prosecutor that Tehrani had been executed for illegally selling the Shah's real estate and that he would have told the authorities that the prosecutor was involved in those sales. Yet it still concluded that the prosecutor did not have a well-founded fear of persecution for political opinion. It took the view that his activities before August 1991 no longer gave rise to a well-founded fear of persecution, if they ever had. I do not think that it would have changed its conclusion if it had known that the prosecutor had first made the new explanations in January 1997 and not in March 1998. On any view of the case, the credibility of the prosecutor was compromised by the inconsistency between the accounts given to the delegate and the first Tribunal and the account given in the four statements and in evidence to the second Tribunal. Although the Tribunal said that there were only the prosecutor's claims to suggest that those facilitating sales of property for the Shah or his associates for profit were imputed with a political opinion in Iran, there is no reason to think that the Tribunal would have changed its conclusion on this issue if it had known of the four statements. There is no realistic possibility that knowledge of the statements would have so altered the Tribunal's view about the prosecutor's credibility that it would have acted on his claim about those involved in illegal real estate transactions despite the conclusions which it drew from other evidence concerning the changes in Iran.

Conclusion

122 Accordingly, breach of the fair hearing rule did not deprive the prosecutor of the possibility of a successful outcome[132]. Even if the second Tribunal had read the prosecutor's accounts in the four statements, it would still have found that he did not have a well-founded fear of persecution by reason of his assumed connection with Tehrani. The contrary and unsupported assertion of the prosecutor – who had been away from Iran for nearly seven years – was overwhelmed by the weight of evidence from independent sources. Because the breach did not affect the outcome, the rules of natural justice do not require the setting aside of the second Tribunal's decision. To hold that they did would mean that, whenever a breach is proven, the impugned decision should always be set aside. But this is contrary to principle and to what this Court expressly said in *Stead*[133].

Order

123 I would grant the extension of time in which to make the application seeking a writ of certiorari. But I would refuse the application to make absolute

---

132 cf *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147.

133 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

the orders nisi for prohibition, mandamus and certiorari which I granted on 21 December 1999. I would dismiss the application with costs.

124 KIRBY J. This is another case in which, in the absence of effective access to the Federal Court of Australia[134], an application has been made in the original jurisdiction of this Court for relief. In substance, the application seeks the remedies provided by the Constitution[135].

The facts

125 Mr Mansour Aala ("the prosecutor") asks the Court to make absolute orders nisi granted by McHugh J for constitutional writs of mandamus and prohibition, and ancillary relief in the form of a writ of certiorari, a declaration and orders extending time within which to obtain the foregoing relief. The terms of the orders nisi are set out in the reasons of Callinan J[136].

126 The facts are sufficiently stated by the other members of the Court[137]. They also recount the history of the matter, amounting to the prosecutor's two proceedings before the Refugee Review Tribunal ("the Tribunal") and his proceedings before the Federal Court[138]. I am therefore relieved of the necessity to outline how the application now comes before this Court. Essentially it does so because the *Migration Act* 1958 (Cth) ("the Act") excludes from the jurisdiction of the Federal Court the provision of relief based on the ground that "a breach of the rules of natural justice occurred in connection with the making of the decision"[139]. As that is the essential contention of the prosecutor, his only avenue for redress is that afforded by the Constitution, and the ancillary relief necessary to make the constitutional remedies efficacious.

---

134 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 407-408 [7]-[15]; 168 ALR 407 at 409-411 per McHugh J explaining the effect of the amendments to the *Migration Act* 1958 (Cth) ("the Act"); cf Crock, "Of Fortress Australia and Castles in the Air: The High Court and the Judicial Review of Migration Decisions", (2000) 24 *Melbourne University Law Review* 190 at 215.

135 Ch III, esp s 75(v).

136 Reasons of Callinan J at [198].

137 Reasons of Gaudron and Gummow JJ at [8], [63]-[67], reasons of McHugh J at [88]-[90] and reasons of Callinan J at [174]-[187].

138 Reasons of Gaudron and Gummow JJ at [63]-[69], reasons of McHugh J at [91]-[99], reasons of Callinan J at [188]-[197].

139 The Act, s 476(2).

The issues

127 In the way the proceedings developed, five issues are presented for decision. They are:

1. Whether the Tribunal, in the circumstances disclosed, breached the rules of procedural fairness ("natural justice")[140];

2. Whether, if it did, relief should be denied because of a conclusion that, had there been compliance with the rules of procedural fairness, it could have made no difference to the result reached by the Tribunal[141];

3. If the answer to (1) is yes, and to (2) is no, whether one or both of the constitutional writs sought by the prosecutor (mandamus and prohibition) is attracted to afford relief, or whether they are not available on the footing that any breach on the part of the Tribunal was an error within jurisdiction which does not attract mandamus or prohibition[142];

4. Whether there is a general discretion to refuse relief in the form of prohibition and, if so, whether that discretion should be exercised to deny the prosecutor that remedy in this case; and

---

140 The concepts of "natural justice" and "procedural fairness" appear to have become fused in the reasons of this Court: *Kioa v West* (1985) 159 CLR 550 at 583-584; cf *R v Gaming Board for Great Britain; Ex parte Benaim and Khaida* [1970] 2 QB 417; *Chandra v Minister of Immigration* [1978] 2 NZLR 559 at 564-565; Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 310. To the extent that there is a difference, "natural justice" may refer to a wider concept, not restricted to matters of procedure; see Mullan, "Fairness: The New Natural Justice?", (1975) 25 *University of Toronto Law Journal* 281 at 315; Woolf, Jowell and Le Sueur, *De Smith, Woolf and Jowell's Principles of Judicial Review* (1999) at 246-247. The defect alleged in the present matter was a departure from the requirements of procedural fairness. The statutory exclusion from the jurisdiction of the Federal Court is expressed in terms of "natural justice". Nothing turns on this distinction in this case.

141 cf *Stead v State Government Insurance Commission* (1986) 161 CLR 141 ("*Stead*").

142 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1366-1369 [78]-[89]; 174 ALR 585 at 608-612.

5. Whether the writ of certiorari is available in the circumstances and, if it is, whether it should issue to quash the decision of the Tribunal which is affected by a breach of the requirements of procedural fairness.

There was a breach of procedural fairness

128 In my opinion, for the reasons given by McHugh J[143], the prosecutor was misled by the statement made by the member of the Tribunal, at the second relevant hearing, to the effect that she had taken into account the "Federal Court papers". Because the prosecutor has sworn that, but for being misled, he would have elaborated the materials contained in the "Federal Court papers", by evidence and argument, he was thereby denied a fair hearing. He has therefore made out a breach of the rules of procedural fairness.

129 I should record that the Minister did not argue that breach of the rules of natural justice or procedural fairness was irrelevant on the footing that the Act had effectively abolished the application of such rules and substituted a statutory code in their place. Nor did the Minister argue that the statutory limitations upon access to the Federal Court to complain about breach of the rules of natural justice affected the jurisdiction of this Court. I can therefore put those questions to one side.

The breach was effective

130 In his reasons, McHugh J has concluded that this breach did not affect the outcome and that the law of procedural fairness does not therefore require the setting aside of the second Tribunal's[144] decision, adverse to the prosecutor[145]. I acknowledge the force of McHugh J's analysis of the facts. However, for two reasons, I have come to the opposite conclusion.

131 My first reason concerns the governing law. It is contained in the statement of principle in *Stead*[146]. Once the applicable breach is proved, the victim of the breach is ordinarily entitled to relief. It is only where an affirmative conclusion is reached, that compliance with the requirements of procedural fairness "could have made no difference"[147] to the result, that relief will be

---

143 Reasons of McHugh J at [100]-[103].

144 Refugee Review Tribunal, N98/21291, 3 April 1998 ("the second Tribunal").

145 Reasons of McHugh J at [122].

146 (1986) 161 CLR 141 at 145-146, set out in the reasons of Callinan J at [211].

147 *Stead* (1986) 161 CLR 141 at 145.

withheld. This Court has emphasised that such an outcome will be a rarity. It will be "no easy task" to convince a court to adopt it[148]. This will especially be so where, as here, "the issue concerns the acceptance or rejection of the testimony of a witness at the trial"[149]. In this case, what was at stake could hardly have been more important, being the credibility of the prosecutor and whether his statements to the second Tribunal were, as it concluded, in a critical respect, a "concoction" and so should be rejected[150]. Many, if not most, cases of this kind turn on the assessment of the credibility of the applicant for refugee status. There are already enough obstacles to be overcome[151]. Adding to these a mistake affecting the credibility of the applicant is not tolerable.

132 The reason for the stringent principle of the common law is plain enough. Departure from the fair hearing rule involves a derogation from the assumptions inherent in the grant to the Tribunal by the Parliament of the decision-making power. Those who enjoy such power must conform to the conditions of the grant. If they do not, they have not exercised the power in accordance with law but, instead, in accordance with some personal predilection. Correction by the issue of the constitutional writ simply upholds the rule of law. It does not assure the victim of the breach of ultimate success. But it does assure that person of the privilege belonging to all those affected by the deployment of power by officers of the Commonwealth. This is that such officers will only act in accordance with their lawful mandate. The exception, accepted by *Stead*, is held in reserve to guard against insignificant, purely formal and immaterial mistakes. Unless the breach can be so classified, the person affected who claims the writ is normally entitled to relief.

133 The second reason, reinforcing this conclusion, is one of fact. It relates to the impact which the opportunity to give evidence and present argument might have had, in this case, on the second Tribunal's decision. McHugh J has concluded that the contrast between the accounts given by the prosecutor to the

---

148 *Stead* (1986) 161 CLR 141 at 145.

149 *Stead* (1986) 161 CLR 141 at 146.

150 See the reasons of Gleeson CJ at [4].

151 cf Crock, "Of Fortress Australia and Castles in the Air: The High Court and the Judicial Review of Migration Decisions", (2000) 24 *Melbourne University Law Review* 190 at 214-216. In fn 130, the author points out that the "set aside" rates for refugee appeals before the Tribunal in the first half of 1997 fell from 14-19% in the previous year to less than 3%. This fall coincided with political and public commentary about refugees. According to the author, in September 1999 no member of the Tribunal held appointment for more than 16 months, a situation which, if correct, is unconducive to independent decision-making.

delegate of the Minister and to the first Tribunal[152], and the explanations given to the second Tribunal, is so vivid as to deny the possibility of alteration of the Tribunal's decision following an opportunity to afford evidence and persuasion[153]. For the reasons given by Gleeson CJ[154] and by Callinan J[155], it cannot be said, affirmatively, that a different result would not have been reached if the prosecutor had not been misled. The point was clearly important to the Tribunal's decision, which rested heavily on the conclusion that the prosecutor had "concocted" a second story. That being so, the prosecutor must be afforded the forensic opportunity to address the issue which the breach of the rules of procedural fairness denied him.

134 I cannot forbear to mention that the debate reflected in the different opinions in this Court on this question illustrates once again the great inconvenience occasioned by the exclusion from the jurisdiction of the Federal Court of consideration of the legal requirements of natural justice[156]. In this matter, this Court has been involved, not in the elucidation of some important question of constitutional, statutory or other legal significance. The applicable principles are clear. This Court has been engaged in nothing more than the elucidation of the facts and the application to them of settled rules of law. In the event that the Parliament was of the opinion that consideration of arguments of procedural fairness (and administrative unreasonableness) was consuming too much time and cost in migration matters, both in the Tribunal and before the Federal Court, there must surely have been a better way of reducing those burdens than by heaping them upon this Court.

The constitutional writs are available

135 Having regard to the foregoing conclusions, the question is presented as to whether the constitutional writs of mandamus and prohibition, claimed by the prosecutor, are available to him in law. That question requires an understanding of the meaning and effect of s 75(v) of the Constitution. The Minister contended, as explained in the reasons of Hayne J[157], that the circumstances in which those

---

152 Refugee Review Tribunal, N96/12272, 20 December 1996.

153 Reasons of McHugh J at [111].

154 Reasons of Gleeson CJ at [4].

155 Reasons of Callinan J at [211].

156 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 534 [50]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 407-408 [7]-[15]; 168 ALR 407 at 409-411.

157 Reasons of Hayne J at [158].

writs might be issued were fixed for all time according to the law and practices prevailing when the Constitution came into force.

136 The Minister's submission took the Court to a tedious and largely unilluminating examination of nineteenth century case books. Some of the product of that search may be found in the reasons of Gaudron and Gummow JJ[158]. The Minister's submission represented an appeal to an approach to the construction of the Constitution, by reference to the original intention and purposes of its framers, which I reject[159]. The framers did not intend, and had no power to require, that the words they used in the constitutional text would forever chain successive generations of Australians to the understanding of those words in 1900. Once the Constitution was adopted, its text was set free from the constraints of nineteenth century appreciation. Instead, the text has to be construed in a way appropriate to a constitutional charter for the government of a nation and as its words are understood by succeeding generations of Australians for whose governance it provides.

137 This approach does not imply that the language of the Constitution is devoid of any settled meaning or that its words may be given whatever content is desired by the judges of this Court. Especially where, as here, the words used in the text ("writ of Mandamus or prohibition or an injunction") are words describing legal procedures of some antiquity, it must be accepted that some examination of the history of such procedures will be appropriate to identify the broad contours of the remedies for which the Constitution has provided. But the fundamental difference between the approach to construction that I favour, and that reflected in a search for the meaning of words in 1900, is this: where the Constitution uses words (including "Mandamus or prohibition or an injunction") those words take on a special significance by reason of their constitutional use and context. It is only the essential characteristics of the words used that need to be ascertained. Furthermore, those essential characteristics will be derived having regard to the constitutional purposes for which they appear in the text.

---

158 Reasons of Gaudron and Gummow JJ at [26]-[35].

159 cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 599-600 [186]-[187]; *Re Colina; Ex parte Torney* (1999) 73 ALJR 1576 at 1597-1598 [96]-[99]; 166 ALR 545 at 574-576; *Grain Pool of Western Australia v The Commonwealth* (2000) 74 ALJR 648 at 665 [90]; 170 ALR 111 at 133-134; *Cheng v The Queen* (2000) 74 ALJR 1482 at 1521-1522 [218]; Kirby, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?", (2000) 24 *Melbourne University Law Review* 1; Hill, "'Originalist' vs 'Progressive' Interpretations of the Constitution – Does it Matter?", (2000) 11 *Public Law Review* 159.

138 In my respectful view, it is also an error to describe the writs appearing in s 75(v) of the Constitution as "prerogative"[160]. It is an error that has persisted for a century, which is quite enough time for lawyers to correct it. There is nothing "prerogative" about the constitutional writs created by, and deriving their force from, the terms of s 75(v) of the Constitution. Conceiving of the constitutional writs as "prerogative writs" is liable to lead those who make that error to the mistake of burdening an important Australian constitutional remedy, needlessly, with all the limitations, restrictions and procedural convolutions found in the history of English prerogative writs.

139 As Gaudron and Gummow JJ point out[161], the writs to which s 75(v) of the Constitution refers assumed, from the start, functions in Australia that had never been either necessary or appropriate to the English prerogative writs. It was never a function of the prerogative writs in England to provide relief directed to a judge of a superior court. Yet that was inherent in the writs contemplated by s 75(v) of the Australian Constitution once it was determined that such judges were "officers of the Commonwealth"[162]. Moreover, in the English constitutional context, prerogative relief would not be attracted on the ground that action of a Crown servant was beyond power because of invalidity of legislation enacted by the Parliament. Yet that was precisely the kind of circumstance for which the remedy in s 75(v) was afforded.

140 Whilst it is true that s 75(v) of the Constitution is a provision conferring original jurisdiction on this Court and not, as such, one conferring power on this Court to issue the writ of mandamus or prohibition or grant an injunction, this is a distinction of no present significance. Undoubtedly, power to issue the constitutional writs has been conferred by federal legislation[163]. And even if it had not been, the constitutional conferral of jurisdiction on this Court, together with the Court's inherent or implied powers deriving from its status, character and function, would, in my view, have ensured that the Court had the *power* as well as the *jurisdiction* which the paragraph contemplates. Thus, s 75(v) of the Constitution is a provision of "cardinal significance [for by it] all officers of the

---

160 Before enlightenment, I had myself been guilty of this error: *Attorney-General (Q) v Riordan* (1997) 192 CLR 1 at 60 (heading); cf *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1357 [34] fn 60; 174 ALR 585 at 595.

161 Reasons of Gaudron and Gummow JJ at [18]-[25]. See also reasons of Hayne J at [161]-[162].

162 See eg *The Tramways Case [No 1]* (1914) 18 CLR 54 at 62, 66-67, 79-80; *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437 at 452-453.

163 *Judiciary Act* 1903 (Cth), s 33(1).

Commonwealth (including federal judges) are rendered accountable in this Court to the Constitution and the laws of the Commonwealth. Being the means by which the rule of law is upheld throughout the Commonwealth, the provision is not to be narrowly construed or the relief grudgingly provided."[164]

141 Upon this view, the response to the objection of the Minister to the availability of the constitutional writs of prohibition and mandamus is, in my opinion, not to be found in a search of the case books of English or colonial law prior to 1900. Still less is it to be ascertained on the hypothesis that these crucial remedies, performing such vital constitutional functions in Australian law, are to be shackled to the supposed limitations on their availability in England or in the Australian colonies, in or before 1900. It was conceded that mandamus, even at that time, was available to afford relief for breach of the rules of natural justice[165]. A diligent search suggests that this might also have been the case in respect of the prerogative writ of prohibition[166]. But in my view these facts (although undoubtedly of historical interest) are constitutionally irrelevant in Australia. The writs in question have assumed their special and unique functions in the Australian constitutional context; the most that history does is to explain their broad character.

142 Our search is thus for the essential characteristics of the constitutional remedies afforded by s 75(v). Those essential characteristics are sufficiently described in the reasons of Hayne J[167]. So far as prohibition is concerned, it is "a judicial proceeding in which one party seeks to restrain another from usurping or exceeding jurisdiction"[168]. Mandamus commands "the fulfilment of some duty of a public nature which remains unperformed"[169]. With today's eyes, we see clearly that a performance by a repository of statutory power (including a federal tribunal) of its functions in breach of the rules of procedural fairness is (at least where the breach is substantial) no true exercise of jurisdiction and power in

---

164 *Re Carmody; Ex parte Glennan* (2000) 74 ALJR 1148 at 1149-1150 [3]; 173 ALR 145 at 147 (footnote omitted).

165 A point made by Callinan J in his reasons at [210].

166 Reasons of Gaudron and Gummow JJ at [26]-[27], [34]-[35].

167 Reasons of Hayne J at [159].

168 *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437 at 446; see also *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1920) 28 CLR 456 at 492.

169 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242.

accordance with law. Such a purported exercise therefore amounts to an excess of jurisdiction. The constitutional writ of prohibition is thus available to restrain it. Mandamus is also available to command the performance of the power and jurisdiction in accordance with law. A constitutional injunction and the ancillary writ of certiorari are available, where necessary, to ensure the effectiveness of the foregoing remedies.

143 It is on this footing, and not on the basis of historical understandings of the position in 1900, or any other time, that I would rest my conclusion that the constitutional writs sought by the prosecutor are available in this case.

144 The time has come to rid the Australian constitutional lexicon of references to "prerogative writs"[170]. The prerogative writs belonged to the Crown on the theory that the courts of England (and England's colonies) were the King's courts and the judicial power exercised was that of the King's judges, performing the King's work[171]. This is not, and has never been, the legal character of the courts or of the judicial power of the Commonwealth under the Australian Constitution. The only appearance of the monarch in Ch III of the Constitution is found in the residual references to the Privy Council[172], now of no continuing efficacy[173]. The description of our constitutional writs as "prerogative writs" should, in my view, cease.

The constitutional writs are discretionary

145 For like reasons, I am of the opinion that the character of the constitutional writs, and whether they are differentially available as of right, or only in the discretion of the Court, is to be determined by reference to the place of those writs, and of the remedy of injunction, in the Australian Constitution. It is not

---

170 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1357 [34] fn 60; 174 ALR 585 at 595.

171 A similar theory prevailed in France before the Revolution of 1789. See "Résponse de Louis XV aux remontrances du Parlement de Paris lors de la 'séance de la flagellation' du 3 mars 1766", in West et al, *The French Legal System*, 2nd ed (1998) at 31 (trans "Judges are my officers, appointed to perform on my account the truly royal duty of dispensing justice to my subjects").

172 ss 73, 74.

173 Following *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975 (Cth); *Australia Act* 1986 (Cth and UK), s 11; cf *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461 at 464-465.

resolved by a study of the character of the pre-constitutional "prerogative writs" of like name but different purpose and function[174].

146 Historically, it was not doubted that the prerogative writ of mandamus was a discretionary remedy. However, it was asserted that, in some circumstances, the prerogative writ of prohibition issued as of right[175]. Lying behind the judicial elaborations of why this should be so was the notion that courts, alerted to a usurpation or infringement of the law, should restrain the same if properly asked to do so by a person affected. This was so because compliance with the law by public officers was not merely an interest which individuals affected may claim but one of great concern to the community generally.

147 Once the prerogative writs were converted in Australia into their constitutional form, by inclusion of the writs named in s 75(v), it was no longer necessary or appropriate to retain the distinctions between the availability of the various remedies provided, which had grown up in the long course of the development of such writs in English legal history. In the Australian constitutional context, there was no reason for differentiation in this respect among the three constitutional remedies provided. Artificial distinctions, of no relevance to their essential constitutional function, should be excised.

148 The public character of the legal duties which the constitutional writs were designed to uphold means that, ordinarily, they will issue where the preconditions are made out. But circumstances will occasionally arise where it is appropriate to withhold the writ because a party has been slow to assert its rights, has been shown to have waived those rights, or seeks relief in trivial circumstances or for collateral motives, and where the issue of the writs would involve disproportionate inconvenience and injustice.

149 So far as the constitutional writ of prohibition is concerned, I accept the principle expressed by Gibbs CJ in *R v Ross-Jones; Ex parte Green*[176]. Where a party aggrieved establishes a want or excess of jurisdiction, the writ will issue "almost as of right"[177]. But the court asked to provide it retains a discretion to refuse relief "if in all the circumstances that seems the proper course"[178]. In

---

174 cf reasons of Gaudron and Gummow JJ at [45]-[62].

175 *Mayor, &c, of London v Cox* (1867) LR 2 HL 239 at 279-280; Bingham, "Should Public Law Remedies be Discretionary?", [1991] *Public Law* 64 at 66.

176 (1984) 156 CLR 185 at 194.

177 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194.

178 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194.

considering whether it is the proper course, this Court will keep in mind the high purposes of vindicating the public law of the Commonwealth, of upholding lawful conduct on the part of officers of the Commonwealth, of defending the rights of third parties under that law, and of maintaining the provisions of the Constitution.

150 In the present case there is no reason to exercise a discretion against the provision of relief to the prosecutor. The only suggested bases for doing so were that the result would have been the same had the prosecutor been accorded procedural fairness and that the prosecutor delayed bringing these proceedings. I have already answered the first of these objections. As to the second, I agree with Gaudron and Gummow JJ[179].

Certiorari should issue

151 In his reasons, Callinan J concludes that the writ of certiorari should be withheld because the Parliament has, in s 476(2) of the Act, excluded review of the decision of the Tribunal on the ground of breach of the rules of natural justice. In his Honour's opinion, this fact makes it inappropriate to grant the remedy of certiorari on the basis of a ground so excluded[180]. It is true that the writ of certiorari is not mentioned in the Constitution. But the jurisdiction and power which this Court is here exercising is undoubtedly constitutional. It is thus outside a limitation by the Parliament of the kind found in s 476(2) of the Act. The Parliament could not, by such a provision, limit or deny the exercise by the Court of its jurisdiction under s 75(v), or of the Court's other powers, to make the exercise of such jurisdiction good. Moreover, in my opinion, s 476(2) of the Act does not purport to have that effect[181].

152 Once this is accepted, if certiorari is necessary and appropriate for the effective exercise of the constitutional jurisdiction and power of this Court[182], it

---

179 Reasons of Gaudron and Gummow JJ at [82]-[83].

180 Reasons of Callinan J at [218].

181 cf *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 632 [64].

182 *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 25, 32-33; *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 604; *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 411 [29]-[31]; 168 ALR 407 at 415-416.

is available to the Court[183]. The Court could, I suppose, simply declare that the purported order of the second Tribunal was void and of no effect because made beyond jurisdiction. It could prohibit or enjoin any attempt to give effect to the Tribunal's decision. But the more conventional and appropriate course, to ensure the effectiveness of the constitutional writs of prohibition and mandamus, is to remove from the record the purported, but invalid, order of the second Tribunal. This can most effectively be done by quashing that order. The writ of certiorari is the ordinary remedy for giving effect to that objective. It is available and appropriate in the present case to ensure that the issue by this Court of the constitutional writs is efficacious.

Orders

153 It follows that I agree in the orders proposed by Gaudron and Gummow JJ.

---

183 *R v The District Court of the Queensland Northern District; Ex parte Thompson* (1968) 118 CLR 488 at 494-495; cf Aitken, "The High Court's Power to Grant Certiorari – The Unresolved Question", (1986) 16 *Federal Law Review* 370.

154 HAYNE J. The prosecutor seeks prohibition, certiorari and mandamus. He contends that the decision of the Refugee Review Tribunal ("the Tribunal") made on 3 April 1998, affirming the decision not to grant him a protection visa, was "beyond [the Tribunal's] jurisdiction" and "made in breach of the rules of natural justice". He seeks prohibition directed to the Tribunal and to the Minister for Immigration and Multicultural Affairs (who is the Minister responsible for administering the *Migration Act* 1958 (Cth)). The prosecutor seeks certiorari to quash the decision of the Tribunal made on 3 April 1998 and mandamus directing it to consider according to law his application for review of the decision not to grant him a protection visa.

155 Section 75(v) of the Constitution gives this Court original jurisdiction in matters in which mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. As was pointed out in *Bank of NSW v The Commonwealth*[184], the purpose of including s 75(v) in the Constitution was "to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power". The need for certainty was suggested by the course of American constitutional decisions[185] from which it might have been argued that the jurisdiction conferred by s 75(iii), with its reference to "a person … being sued on behalf of the Commonwealth", could be invoked only where the Commonwealth itself was the real party[186].

156 It is important to notice that s 75(v) is not a source of substantive rights[187]. It is a grant of jurisdiction in cases where certain remedies are sought against officers of the Commonwealth. It does not confer the power to issue those remedies. If s 75(v) had not been inserted into the Constitution, the High Court

---

184 (1948) 76 CLR 1 at 363 per Dixon J. See also *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 178-179 per Mason CJ, 204-205 per Deane and Gaudron JJ, 221 per Dawson J.

185 Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, (1901) at 778-779; *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898 at 1875-1885; *Marbury v Madison* 5 US 87 (1803).

186 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 608-609; *The Tramways Case [No 1]* (1914) 18 CLR 54 at 82; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 178-179 per Mason CJ, 204-205 per Deane and Gaudron JJ, 221 per Dawson J.

187 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 178 per Mason CJ; cf *Werrin v The Commonwealth* (1938) 59 CLR 150 at 167-168 per Dixon J; *Maguire v Simpson* (1977) 139 CLR 362 at 404 per Jacobs J.

would nevertheless have possessed the power to grant the writs mentioned in s 75(v) in cases where it had jurisdiction. This follows as a consequence of the Court's status as the "Federal Supreme Court"[188]. Moreover, the Court's power extends to all forms of prerogative relief, not just those writs identified in s 75(v) (a constitutional conclusion that now finds statutory reflection in Pt 4 of the *Judiciary Act* 1903 (Cth)).

157 Section 75(v) is concerned not with the power of this Court to issue prerogative writs in cases that are properly before it, but with its jurisdiction to hear matters in which such writs are sought. The omission of certain remedies (such as certiorari) from s 75(v) does not mean that the Court does not have power to grant those remedies, but it does mean that a basis for jurisdiction, when those other remedies are sought, must be found elsewhere than in s 75(v).

158 Section 75(v) only indirectly identifies the kinds of right which may be enforced in exercising the jurisdiction which it confers – by reference to the grounds that may support the grant of the remedies it identifies (grounds which are not stated in the Constitution) and by reference to the evident constitutional purpose of the provision. In the present matter the Minister submitted, in effect, that because the Constitution was silent about the grounds in which a writ of mandamus or prohibition can be issued, those circumstances were fixed immutably according to the practices prevailing at the time the Constitution came into force. It was said to follow that prohibition would not go to prevent a breach of rules of procedural fairness. It was contended that if, by a process of development of the common law, the circumstances in which mandamus or prohibition will issue can be expanded, it follows that the legislature can confine, perhaps even extinguish, the circumstances in which the relief will go, thus stripping s 75(v) of its content. These submissions should be rejected.

159 At the time the Constitution was adopted, writs of prohibition and mandamus were well-recognised forms of relief. They were processes by which a superior court, in the exercise of original (not appellate) jurisdiction, supervised the acts of inferior courts or tribunals and compelled the performance of public duties. "Ever since the time of Edward I the word 'prohibition' has been used in English jurisprudence to denote a judicial proceeding in which one party seeks to restrain another from usurping or exceeding jurisdiction."[189] Mandamus issued to

---

188 Constitution, s 71.

189 *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437 at 445-446 per Griffith CJ. See also, for example, *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1920) 28 CLR 456 at 492.

command the fulfilment of some duty of a public nature which remained unperformed[190].

160 In the case of each writ the focus of inquiry is upon the authority, or "jurisdiction", that is given to the person or body to whom it is sought to have the writ issue. In the case of prohibition, what are the limits of that person's authority to decide a question or exercise a power? In the case of mandamus, has the person failed to exercise a power which he or she was bound to exercise? The inquiry is *not* about whether a decision which was made in exercise of the authority was right or wrong on its merits. It is an inquiry about the boundaries of the power conferred.

161 The conferral of jurisdiction in s 75(v) ensures that the Court can restrain officers of the Commonwealth from exceeding federal power. The breadth of the expression "an officer of the Commonwealth" has been explained in the decisions of this Court[191]. It is a very broad expression. It includes judges of federal courts, but it is by no means limited to them. Unlike prohibition, mandamus and injunction have never been confined to duties or decisions of a judicial character. This suggests very strongly that the authority to decide conferred by s 75(v) is not confined to cases in which the identified remedies are sought against those who exercise the judicial power of the Commonwealth. The conclusion that the jurisdiction is not concerned only with judicial decisions is reinforced when it is recalled that s 73 gives the Court appellate jurisdiction from all judgments, decrees, orders and sentences from federal courts and courts exercising federal jurisdiction.

162 References to prohibition going to restrain excess of "jurisdiction" must be understood against this background. The terms "jurisdiction" and "jurisdictional error" are to be understood as having wider application than they may have in a purely curial context. Questions of constitutional validity, which are wholly unknown to English law, may lead to the issue of prohibition to judicial or executive officers of the Commonwealth because the power they seek to exercise has not been validly conferred[192]. There can, therefore, be no automatic transposition to the Australian constitutional context of principles developed in

---

190 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242 per Rich, Dixon and McTiernan JJ.

191 See, for example, *The Tramways Case [No 1]* (1914) 18 CLR 54 at 62 per Griffith CJ, 66-67 per Barton J, 79-80 per Isaacs J, 82-83 per Gavan Duffy and Rich JJ; *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437 at 452-453 per Isaacs J.

192 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 217-218 per Brennan J.

England about the availability of the writs mentioned in s 75(v). Any automatic transposition of such principles runs the risk of denying the evident constitutional purpose that relief should be available to restrain excess of federal power and to enforce performance of federal public duties.

163 In deciding whether writs of prohibition and certiorari (and analogous forms of relief) should be granted, a distinction is drawn between jurisdictional error and error within jurisdiction. This Court has not accepted that this distinction should be discarded[193]. As was noted in *Craig v South Australia*[194], that distinction may be difficult to draw. The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.

164 The grounds for issue of mandamus or prohibition are not frozen according to practices prevailing at 1900. Even if the practices that then prevailed could be identified with some certainty, a step which would require the identification of the court (or courts) whose practices were relevant, there is no warrant for reading s 75(v) as suggesting such a limitation. Indeed, the differences between the constitutional setting in which s 75(v) appears and that in which any supposedly comparable court operated would make the asserted comparison and transposition of practice difficult if not impossible.

165 The common law rules describing the kinds of departure from the lawful manner of exercise of power that will attract a grant of prohibition have changed over time. That development has occurred both before and after 1900 and it is reflected in the cases to which reference is made in the joint reasons of Gaudron and Gummow JJ. It has occurred in cases in which relief is sought against an officer of the Commonwealth as, for example, in *Deputy Commissioner of*

---

193 *Craig v South Australia* (1995) 184 CLR 163 at 179; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 141, 149, 165; cf *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R v Hull University Visitor; Ex parte Page* [1993] AC 682; *Boddington v British Transport Police* [1999] 2 AC 143.

194 (1995) 184 CLR 163 at 177-178.

Taxation v Richard Walter Pty Ltd[195], and in cases outside federal jurisdiction, such as *Craig v South Australia*[196]. Of course, in cases concerning s 75(v) jurisdiction, the development must take account of the purpose served by the jurisdiction. No doubt it is for this reason that the writs are sometimes referred to as "constitutional writs" rather than by their historical title of "prerogative writs".

166 The use of the expression "constitutional writs" should not distract attention from the fact that the Constitution is silent about the circumstances in which the writs may issue. What is constitutionally entrenched is the jurisdiction of this Court when the writs are sought, rather than any particular ground for the issue of the writs. The tension to which this may give rise (and the resolution of that tension) is examined in the privative clause cases[197], particularly the judgment of Dixon J in *R v Hickman; Ex parte Fox and Clinton*[198]. As those cases demonstrate, the Parliament may lawfully prescribe the kind of duty to which an officer of the Commonwealth is subject and may lawfully prescribe the way in which that duty shall be performed[199]. Parliament may not, however, consistently with s 75(v) and Ch III generally, withdraw from this Court the jurisdiction which it has to ensure that power given to an officer of the Commonwealth is not exceeded.

167 With this background it is convenient to turn to the question whether prohibition will issue where there has been a want of procedural fairness. Jurisdictional error and denial of procedural fairness are sometimes spoken of as distinct grounds for the issue of the writs mentioned in s 75(v)[200].

168 In *Kioa v West*, different views were expressed about whether the requirements of procedural fairness arise from the common law[201] or depend upon an implication to be drawn from the legislation conferring authority to

---

195 (1995) 183 CLR 168.

196 (1995) 184 CLR 163.

197 For example, *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1920) 28 CLR 456; *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407.

198 (1945) 70 CLR 598 at 614-617.

199 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 179 per Mason CJ, 205-207 per Deane and Gaudron JJ, 220 per Dawson J.

200 For example, *Craig v South Australia* (1995) 184 CLR 163 at 175-176.

201 (1985) 159 CLR 550 at 584 per Mason J.

make a decision[202]. In *Annetts v McCann*[203], the majority of the Court proceeded from the premise that the duty to accord procedural fairness is a common law duty which may be excluded by statute, rather than from the competing premise that the question is whether the obligation should be implied in the statute empowering the decision maker. Even if the source of the obligation to accord procedural fairness is to be regarded as an open question[204], it is not one which must be resolved now. Indeed, it may be that for many purposes the competing views lead to no different result, the ultimate question being whether the obligation asserted is compatible with the terms of the relevant legislation. On either view, the obligation to accord procedural fairness is an obligation affecting how the decision maker is to go about the task of decision making. It is a limitation on the power to decide.

169 Casting the question as whether a want of procedural fairness is an error within or without jurisdiction may appear to invite attention only to the content of the word "jurisdiction" or the content of the phrase "jurisdictional error". An inquiry confined in that way would be too narrow. Once it is accepted that the Constitution did not intend to freeze at 1900 the development of the common law regulating the issue of any of the prerogative writs, the question whether a departure from the requirements of procedural fairness will ground the issue of prohibition depends upon the closeness of the analogy between that departure and other errors that will ground the writ. In that regard, it is important to recognise that the duty to accord procedural fairness (no matter whether founded in the common law or in implication from statute) is a fetter upon the lawful exercise of power. The decision maker may affect the rights of the party who seeks the issue of a writ if and only if that party is accorded procedural fairness. That is, putting the matter in terms of jurisdiction, the authority to decide is an authority which may be exercised only if procedural fairness is extended.

170 In these circumstances it should be accepted that prohibition may issue to an officer of the Commonwealth if there has been, or will be, a denial of procedural fairness. If so to hold requires the development of the common law then that should be done. Not only would this be entirely consistent with the text and the structure of the Constitution, it would further the evident constitutional purpose behind s 75(v).

171 The better view may be that the conclusion I have expressed represents no development of common law principles. The power to grant prohibition for

---

202 (1985) 159 CLR 550 at 615 per Brennan J.

203 (1990) 170 CLR 596 at 598-600 per Mason CJ, Deane and McHugh JJ.

204 cf *May v Commissioner of Taxation* (1999) 92 FCR 152.

denial of procedural fairness, in cases within s 75(v) jurisdiction, has often been assumed[205]. As Gaudron and Gummow JJ point out in their joint reasons, there are several statements to be found in both 19th and 20th century decisions in England and Australia suggesting that prohibition will go in at least some cases of denial of procedural fairness. In stating the opinion of the judges in answer to the questions posed by the House of Lords in the well-known case of *Dimes v Grand Junction Canal*[206], Parke B entertained no doubt about the matter, saying that had the proceeding then in question been a proceeding in an inferior court, "prohibition would be granted … upon an allegation that the presiding Judge of the court was interested in the suit"[207].

172 I agree with Gaudron and Gummow JJ, for the reasons they give, that prohibition does not lie as of right but is discretionary. I agree that, for the reasons their Honours give, the prosecutor was denied procedural fairness and that, again for the reasons they give, the prosecutor should not be refused relief on account of delay. Orders should be made in the form proposed by Gaudron and Gummow JJ.

---

205 See, for example, *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 116-119; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552; *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 263, 267; *Re Grimshaw; Ex parte Australian Telephone and Phonogram Officers' Association* (1986) 60 ALJR 588 at 592.

206 (1852) 3 HLC 759 [10 ER 301].

207 (1852) 3 HLC 759 at 785 [10 ER 301 at 312].

173 CALLINAN J. The issue in this case is whether this Court should grant prerogative relief to the prosecutor, by reason of his reliance upon an inadvertently made, erroneous statement by a Tribunal, at the inception of a hearing, that the Tribunal had read some relevant materials which in fact the Tribunal did not have and had not seen.

The Facts

174 A Refugee Review Tribunal ("the first Tribunal") which received his application for a protection visa summarized the prosecutor's evidence to the Tribunal in this way. The prosecutor was born on 16 March 1942 in Iran. Between 1969 and 1978 he studied in London, Munich and Paris. He returned to Iran in 1973. He claimed that he had worked for the Savak (the secret police of the Shah of Iran) for six months. Subsequently he commenced a real estate business in that country. The Shah was deposed in February 1979. A high ranking military officer who was a cousin of the prosecutor's father and a member of the Shah's cabinet was executed by the new regime.

175 The prosecutor was thereafter involved in the illegal sale of property owned by the Shah and some of his supporters.

176 In about 1981 or 1982 he made substantial donations to an underground counter-revolutionary organisation, the Mujahideen-e-Khalq and helped to spread the views that it propounded.

177 Members of the Komiteh, an enforcement organ of the new regime, visited the prosecutor's premises on three occasions between 1990 and his departure from Iran, in search, seemingly, of documents that might disclose his involvement in the sale of properties of the Shah and his followers. After the first visit the prosecutor concealed relevant documents in a safe place. Following the second visit the Komiteh questioned him at the Komiteh station.

178 The prosecutor told the Tribunal that he had worked in cooperation with a school friend, Ali Tehrani, in selling property belonging to the Shah and his supporters. He described this man as his best friend although they were in competition as real estate agents. He said that they frequently pooled their resources to conduct their businesses and that they both became concerned when the Komiteh began to display interest in them in late 1990. His evidence was that they discussed leaving Iran. He told his friend that he too should leave the country.

179 The prosecutor said that he contacted his sister in about 1993 and that she told him that the Komiteh was looking for him. He said that his sister informed him that she had been unable to find Ali Tehrani or make any contact with him. The prosecutor said that he had learned that this man had been arrested for selling confiscated Royalist properties and had been executed by the Iranian authorities.

The prosecutor contended that he believes that the Komiteh would have found out about his involvement in the sales from questioning his friend.

180 In response to a comment by the first Tribunal, to the prosecutor, that the Tribunal did not think any of the evidence pointed to a conclusion that the applicant's friend would have given his name to the Komiteh, or disclosed information about him, the prosecutor responded that he was sure his friend would have given information to the Komiteh about him as a means of trying to save himself: that his friend would have done so because he would have thought the prosecutor to be safe having fled the country. Accordingly Ali Tehrani would have been able to provide such information in order to protect himself.

181 It was common ground before the Tribunal that supporters of the Mujahideen-e-Khalq and the Shah when apprehended were imprisoned, and often tortured and executed.

182 No evidence was presented to the first Tribunal of any explicit agreement between the prosecutor and Ali Tehrani as to the latter's freedom to disclose the prosecutor's activities before he left Iran, to save his own skin, if he were apprehended by the Komiteh. The prosecutor accepted that he would not have been given a passport to leave Iran in 1991 if he had been suspected of any illegal, covert activities.

183 The first Tribunal was not satisfied that there was a real chance that the authorities would have learned of any of the prosecutor's activities that might, from their perspective, justify persecuting the prosecutor, from an interrogation of his friend in 1992 or 1993. The Tribunal concluded that the prosecutor did not have a well-founded fear of persecution and was not therefore entitled to a Protection Visa.

184 There are some further factual matters to which reference is required. On 15 September 1991 the prosecutor married Mary Razi, an Australian citizen of Afghan ethnic origin. An Islamic marriage celebration followed on 21 September 1991. On 9 October 1991 the prosecutor made application for a Class BC Subclass 100 (Spouse) Visa. On 13 August 1992 the prosecutor and his wife separated, and on 25 February 1993 a Spouse Visa was refused. On 7 March 1994 a decree nisi for divorce was pronounced.

185 The prosecutor perpetrated a violent crime against his former wife. He was tried before Finlay J and a jury and convicted of malicious wounding, and sentenced to 34 months on 16 August 1995[208]. His application for a Protection

---

208 *R v Mansour Aala* unreported, Supreme Court of New South Wales, 16 August 1995 per Finlay J.

Visa was made on 20 August 1996 and on his release from Long Bay Jail he was immediately transferred to Villawood Immigration Detention Centre.

186 The prosecutor then made an application to the Federal Court of Australia for an order of review of the decision of the Refugee Review Tribunal. The prosecutor provided to the Federal Court handwritten documents numbering some 19, 21 and 32 pages respectively, of allegation, repetition of facts stated to the first Tribunal, complaints about the decision of the first Tribunal, and some facts not previously stated. These documents were prepared without the benefit of any legal assistance. That material contained these statements:

> "I advised Ali, try to get out of the country like me, before anything happened to you, but if something happen to you, try to disclosed information about me to the authorities, and protect yourself from any serious harm, because I will be out of the country and safe of any harm and I will not come back to Iran in future. It was accepted by Ali and he told me he will do it as I advise him."

187 It is necessary to say something about these documents. They were not in the form of affidavits. They were unsworn. They contained some material that was objectionable in form and irrelevant to the issues. It is not clear whether the second respondent was content to treat them as evidentiary, or indeed whether any reference was made to them at all in the hearing of the prosecutor's application to the Federal Court which was heard by Beaumont J. These circumstances are unfortunate. It would have been better if the status of these documents had been in some way defined or it was made clear that they should be rejected. However, for reasons that will appear, this Court should regard the documents as documents which were relevantly before the Federal Court.

188 Beaumont J, in short reasons which need no further reference, rejected the prosecutor's application.

189 From this decision the prosecutor appealed to the Full Federal Court (Davies, Hill and Lehane JJ). The Court upheld the prosecutor's appeal, by, in effect, conducting a review of the facts and holding that the first Tribunal had misdirected itself as to the legal test to be applied in assessing the prosecutor's assertions. The decision of the Full Federal Court was given before the decisions of this Court in *Abebe*[209] and *Eshetu*[210].

---

209 *Abebe v The Commonwealth* (1999) 197 CLR 510.

210 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

190 The consequence of the decision of the Full Federal Court was another review before a differently constituted Refugee Review Tribunal ("the second Tribunal"). At the beginning of the hearing the Tribunal said this:

> "Now, I've got both of your – I've got Department of Immigration file and your old Refugee Tribunal file and your new Refugee Tribunal file plus all of the Federal Court papers. So I've read everything that's in all of those files. There's quite a lot there but I've read it all and I'm going to have a number of questions for you and you'll have a lot of things that you'll want to tell me."

191 Later the Tribunal added this:

> "Okay, I mean I – as I've said I've read everything that's in your file, I've got all your other statements and I've got the tapes from your other hearing and your departmental interview so I – you know, if there's anything in there that you've missed today then you know I've got it?"

To which the prosecutor responded:

> "I think it is that missed that there are plenty of information to take place but I'm afraid I don't know which one it is necessary I'd say, that's why I'm asking if there is any question you have, you can ask me I would like to answer anxiously."

The Tribunal then said:

> "Well, I think I've asked you everything that I need to know".

192 Until this point and save for what appeared in the documents sent to the Federal Court, the prosecutor had given no evidence of any agreement with Ali Tehrani that the latter was at liberty to inculpate him in proscribed activities in Iran.

193 The second Tribunal also rejected the prosecutor's application for a Protection Visa. In doing so the Tribunal made some adverse findings against the prosecutor.

> "The Tribunal notes that, prior to the second Tribunal hearing, the applicant had never raised the claim that he and Ali had an agreement that Ali would try to save himself by passing on information about the applicant if it became necessary."

194 Later the Tribunal dealt with the prosecutor's relationship in more detail.

> "The applicant told the Tribunal about a real estate transaction in which his colleague Ali Tehrani had been involved after the applicant's departure

> for Australia which he claims led to Ali's arrest and execution. The applicant had never raised this claim prior to the second Tribunal hearing. He claims that the information was given to him by other real estate colleagues, although he did not claim this in prior submissions or hearings. The Tribunal finds that the applicant concocted this evidence and places no weight on it.
>
> The applicant gave evidence that he felt that Ali Tehrani would have passed on information about the applicant's activities to the authorities. He claims that he and Ali had an 'agreement' that, if Ali were to be detained, he would tell the authorities about the applicant's past activities in order to save himself. The Tribunal does not accept this evidence. Prior to the second Tribunal hearing, the applicant had never claimed that he and Ali had any sort of agreement. This claim is purely self-serving."

195 Once again, the prosecutor sought a review, in the Federal Court, of the Refugee Review Tribunal's rejection of his application to it.

196 Branson J, who heard the application in the Federal Court, said this of the prosecutor's relationship with Ali Tehrani and the way in which the second Tribunal had dealt with the prosecutor's evidence concerning it.

> "The applicant gave evidence at the second RRT hearing that he and a former colleague of his, Ali Tehrani, had an agreement that if … Mr Tehrani experienced any problems with the Komiteh, Mr Tehrani should try to save himself by disclosing all the information in his possession about the applicant, as the applicant would be safely overseas. The applicant had not given this evidence either to the Department or at the [Refugee Review Tribunal ('the RRT')] as initially constituted. …
>
> Not every failure by the RRT to afford an applicant an opportunity to be heard before drawing adverse inference from his or her failure to raise allegedly important evidence at an early stage will found a ground of review under s 476(1)(a). It is significant in this case that nothing has been placed before this Court which suggests that had the applicant been given the opportunity which he claims was denied to him, he would have been in a position to provide to the RRT an explanation which would have been supportive of his credit. As Tamberlin J pointed out in *Singh v Minister for Immigration and Multicultural Affairs*[211] there is no universal obligation on a Tribunal member to disclose to an applicant its proposed line of reasoning and to seek the comments of the applicant. Nor is there an obligation on a Tribunal member to inform an applicant of every piece of evidence or every consideration or line of reasoning which the RRT

---

211 (1997) 49 ALD 640 at 645-646.

might adopt in assessing his or her credibility. This was not a case where the RRT obtained information of which the applicant was unaware which tended to reflect adversely on the applicant's credibility (cf *Kioa v West*[212]). No ground of review based upon any failure of the RRT to comply with procedures with which the Act required it to comply has, in my view, been made out."

197 From this decision the prosecutor appealed to the Full Federal Court (Hill, Whitlam and Kiefel JJ). By the time that the Full Federal Court came to consider the appeal this Court had handed down its decision in *Eshetu*[213]. The Full Federal Court in accordance with that decision accepted that the Federal Court had no jurisdiction "to set aside the decision of the Tribunal on the ground that it denied to the Appellant natural justice" noting that the submission was not without some substance. The Full Federal Court also held that no other grounds were made out and dismissed the appeal.

198 The prosecutor's next step was to seek relief in this Court by way of prerogative writs under s 75(v)[214] of the Constitution. On 21 December 1999 McHugh J made orders nisi requiring the respondents to show cause:

> "1. **WHY** a writ of prohibition should not be issued out of this Court directed to the first and second respondents prohibiting them from proceeding further with matter No 98/21291 in the Refugee Review Tribunal and why a writ of certiorari should not be issued out of this Court directed to the respondents, removing into this Court, to be quashed the decision made by them on 3 April 1998 in the said matter.

---

212 (1985) 159 CLR 550 at 587.

213 (1999) 197 CLR 611.

214 "**Original jurisdiction of High Court**

> **75** In all matters:
>
> …
>
> (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
>
> the High Court shall have original jurisdiction."

2. **WHY** a writ of certiorari should not be issued out of this Court quashing the decision of the Refugee Review Tribunal made on 3 April 1998.

3. **WHY** a writ of mandamus should not be issued out of this Court directed to the Refugee Review Tribunal to grant a protection visa to the Prosecutor.

4. **ALTERNATIVELY WHY** a writ of mandamus should not be issued out of this Court directed to the Refugee Review Tribunal to consider the application for a protection visa according to law.

5. **WHY** a declaration should not be issued from this court declaring that the decision of the Refugee Review Tribunal made on 3 April 1998 is invalid.

6. **WHY** the prosecutor should not be granted an extension of time to seek orders 1, 2, and 3 in this writ.

7. **AND WHY** such further orders as the Court deems fit should not be made."

199 The grounds for these orders were:

"1. The said decision of the Refugee Review Tribunal on 3 April 1998 was beyond its jurisdiction.

2. The decision of the Refugee Review Tribunal was made in breach of the rules of natural justice."

200 The prosecutor's application was supported by an uncontradicted and otherwise unchallenged affidavit, in which he deposes that the statements made by the second Tribunal that I have set out misled him; that the Tribunal could not, on any view of its findings have read all of the material (the handwritten documents) that he had submitted to the Federal Court. Had he known this he would have made sure that the material, supporting his assertions in relation to Ali Tehrani, was brought to the attention of the second Tribunal who would then have had no proper basis for findings of dishonesty in relation to this matter.

201 In essence, it is the prosecutor's case in this Court that the second Tribunal, as an officer of the Commonwealth, acted in breach of the rules of natural justice in informing the prosecutor that the Tribunal had, and had read all of the materials, relevantly the handwritten material submitted to the Federal Court when in fact the second Tribunal had not done so. It is not the prosecutor's case that the second Tribunal did this other than honestly. Indeed, the probability is that the Tribunal would only have received formal documents such as the application to the Federal Court, the Court's decisions and perhaps affidavits duly

filed and read in that Court. But the prosecutor says that he was misled and deprived of the opportunity of bringing material prepared for the purpose of, and, drawing the agreement to the attention of the second Tribunal. Furthermore, because of the unqualified way in which the second Tribunal stated that "everything that's in all of those files" had been read, and the non-exclusion of the handwritten materials in the Federal Court, the prosecutor was entitled to take that view. Such a breach, the prosecutor contends entitled him to relief under s 75(v) of the Constitution.

202 An alternative submission was made that there had been a breach of s 425 of the *Migration Act* 1958 (Cth), that the word "opportunity" as used in that section would be read as meaning a full and fair opportunity:

> "**Where review 'on the papers' is not available**
>
> **425 (1)** Where section 424 does not apply, the Tribunal:
>
> (a) must give the applicant an opportunity to appear before it to give evidence; and
>
> (b) may obtain such other evidence as it considers necessary.
>
> **(2)** Subject to paragraph (1)(a), the Tribunal is not required to allow any person to address it orally about the issues arising in relation to the decision under review."

203 The second respondent submits that there is no doubt that the prosecutor had referred to the arrest and execution of Ali Tehrani in extensive evidence given before the first Tribunal on 4 December 1996 and that he then could and should have referred to any agreement with Ali Tehrani:

> "They told me ... Ali Tehrani has been faced persecution and he was executed by the Iranian authorities. I know why: because he was doing the illegal selling of the confiscation properties. So ... they took a lot of information from Ali from his business. And also my business, perhaps, because ... we were working together. So that's why – that's why I am sure the Iranian authorities have information about my past illegal activities of the selling ... and also my activity with ... and my passport at Savak. So that's why I am sure if I return to Iran I will face persecution. And they will take lot of information off me as they have taken from Ali Tehrani and then they will execute me."

It is also indisputable that the prosecutor's claims of an agreement were first made after the adverse finding by the first Tribunal. Whether the new story was formulated immediately after the first Tribunal's decision, or, at some later stage, as suggested by the finding of the second Tribunal hearing that he had "never

raised this claim prior to the second Tribunal hearing" is of little, if any materiality in the circumstances of the prosecutor's having been misled.

204 The second respondent relied upon what was said at first instance by Branson J with respect to the way in which the second Tribunal dealt with the alleged agreement:

> "However, he had made a written statement to this effect in a document dated 14 January 1997 which he apparently provided by facsimile transmission to the Federal Court following his appeal to this Court from the first decision of the RRT. The applicant also sent three further documents to the Federal Court. All four of the documents sent by the applicant to the Court were reproduced in the Appeal Book produced for the purpose of the hearing by the Full Court of the appeal against the decision of Beaumont J. There is nothing before me to suggest that documents provided to the Federal Court in this way would ordinarily be expected to come to the attention of the RRT. There is nothing before me to suggest that these documents did come to the attention of the RRT. Nor has the applicant placed any evidence before the Court on the issues of whether he was in fact misled by the assurance of the member who constituted the RRT that she had read all of his statements and, assuming that he was misled, what he would have done had he been aware that certain documents prepared by him were not available to the RRT. It seems likely that the RRT was unaware that the applicant had first made a statement in January 1997 which asserted the existence of the agreement between him and Mr Tehrani. However, the reasons of the RRT indicate that the RRT placed importance on the fact that no evidence of such an agreement was given at the first RRT hearing (see the reasons of the RRT at p 10). Nothing in the documents sent by the applicant to the Federal Court altered this situation."

205 With respect, her Honour's analysis understates the position. The second Tribunal did not merely place importance on the absence of evidence of an "agreement" at the first hearing, the second Tribunal said that the prosecutor had *never* made a claim of it prior to the second hearing of the Tribunal and used that misapprehension as a basis for the finding of a "concoction", with all the pejorative overtones that that word conveys.

206 This is not a case in which a Tribunal has merely misapprehended a fact and therefore has only made an error of fact within jurisdiction. At the inception of the hearing the second Tribunal mistakenly, but nonetheless prejudicially to the prosecutor, caused him to believe that a state of affairs relating to the manner in which he might choose to conduct his case existed when in fact that state of affairs did not exist.

207 I regard the matter of the alleged agreement and the question whether it had earlier been mentioned or not by the prosecutor, as material. The language in which the second Tribunal addressed this matter and the way in which it must have therefore coloured the Tribunal's mind in relation to the prosecutor's evidence on other matters, and the prosecutor's uncontradicted reliance on what the second Tribunal said make this so.

208 Whilst the Tribunal might not have any obligation enforceable at law to give to an applicant an express warning of the possibility or likelihood of adverse findings against him or her, it is an altogether different matter for a Tribunal to misrepresent, however innocently, an important state of affairs bearing upon the way in which a person in the prosecutor's position might proceed to present his or her case. On the facts deposed to, I think it is not possible to say that what happened did not give rise to an expectation on the prosecutor's part that the second Tribunal had, in fact, read that the prosecutor had already alleged, if somewhat belatedly, the existence of the "agreement" before the hearing of the second Tribunal. This is not a case in which an expectation has to be constructed out of any special relationships between the parties, or any assumption of responsibility by one towards the other, or has to be inferred from any circumstances of those kinds. It is a case in which a party has expressly stated something to be so, and the other has deposed to reliance, without being contradicted, a position which may be contrasted with that which was discussed by McHugh J in *Teoh*[215] and which led his Honour to criticize the application of a doctrine of legitimate expectation there.

209 The second Tribunal therefore made, in my opinion, a decision inconsistent with the expectation that the Tribunal had created in the mind of the prosecutor, an expectation that he might safely conduct his case on the basis that all of the documents which contained an account of the alleged "agreement" had been read by the Tribunal. This was a concrete legitimate expectation in the circumstances. The fact that the expectation may have been created inadvertently by the Tribunal does not affect the matter. Regard has to be had to its consequences and not to the absence of any culpability on the part of the Tribunal in creating it.

210 The second respondent accepted that jurisdictional error, sufficient to support a grant of mandamus could, at the time of Federation, have been founded on a breach of the rules of natural justice. Whilst it is true that the Tribunal had purported to exercise its power of review, the real question is, whether in doing

---

215 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 313-315.

so, it made such an error in failing to afford natural justice, as to amount to an invalid exercise of the power[216]. In my opinion the error is of such a kind.

211 In *Stead v State Government Insurance Commission*[217] this Court (Mason, Wilson, Brennan, Deane and Dawson JJ) had to consider whether a breach of the rules of natural justice required in the circumstances that a party be granted a fresh trial. The particular circumstances were that the trial judge said to counsel who was addressing on a relevant issue, among other things, "You needn't go on as to that" in consequence of which counsel discontinued addressing on the topic. When the judge came to give his decision he made findings to the contrary of the clear intimation he had made to counsel in discouragement of any further address on the topic. This Court had no doubt that a breach of natural justice requiring that there be a new trial had occurred. Their Honours' judgment although they were dealing with an appeal and not an application for prerogative relief, is relevant to the question of what type of conduct will involve a breach of the rules of natural justice sufficient to justify a grant of prerogative relief. They said[218]:

> "The general principle applicable in the present circumstances was well expressed by the English Court of Appeal (Denning, Romer and Parker LJJ) in *Jones v National Coal Board*[219], in these terms:
>
> > 'There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge. ... No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.'
>
> That general principle is, however, subject to an important qualification which Bollen J plainly had in mind in identifying the practical question as being: Would further information possibly have made any difference? That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.

---

216 *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114 at 157 per Isaacs J cited in *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 144-145 [20].

217 (1986) 161 CLR 141.

218 (1986) 161 CLR 141 at 145-146.

219 [1957] 2 QB 55 at 67.

> For this reason not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial. By way of illustration, if all that happened at a trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial.
>
> Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference. True it is that an appeal to the Full Court from a judgment or order of a judge is by way of rehearing and that on hearing such an appeal the Full Court has all the powers and duties of the primary judge, including the power to draw inferences of fact[220]. However, when the Full Court is invited by a respondent to exercise these powers in order to arrive at a conclusion that a new trial, sought to remedy a denial of natural justice relevant to a finding of fact, could make no difference to the result already reached, it should proceed with caution. It is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial."

The existence of an agreement and the time of its disclosure were material matters in this case. What the second Tribunal said at the beginning of the hearing, and after it, regarding the prosecutor's failure to refer earlier to the agreement and the Tribunal's opinion of the prosecutor because of that failure, meant that the prosecutor had been denied an opportunity to make submissions beyond submissions going to credibility, and on an issue of fact, of some materiality. The issue of credibility, as to when the existence of the "agreement" was first raised was, in my opinion, inextricably tied up with ultimate, material issues of fact, as to whether such an agreement had been made, and if it had, its likely consequence for the prosecutor. I cannot say that a different result would not have been reached had the prosecutor not been misled by the second Tribunal.

212 The second respondent submitted that the *audi alteram partem* principle was not applicable here because the prosecutor was accorded a hearing at which he presented his case in full, and that all the Tribunal did was to make a factual

---

220 Supreme Court Rules, O 58, rr 6 and 14.

error in assessing his credibility. But it was precisely because he was misled that the prosecutor did not present his case in full, which included a prior reference to a material fact.

213 In some respects this case is also similar to *R v Muir; Ex parte Joyce*[221] which was decided before the doctrine of legitimate expectation had evolved to the extent that it now has. In *Muir* the respondent Board had, by its actions, led the prosecutor to believe that certain measures might be adopted in relation to his application, which in fact it had no intention of adopting. In the circumstances the prosecutor was unable to present his case in full[222]. In a case of such a kind, of which this is an example, it is probably not even necessary to invoke and apply a principle of legitimate expectations. McHugh J was in dissent in *Teoh*, but his Honour's observations, regarding procedural fairness, are not, I think, affected by that. His Honour said[223]:

> "I think that the rational development of this branch of the law requires acceptance of the view that the rules of procedural fairness are presumptively applicable to administrative and similar decisions made by public tribunals and officials. In the absence of a clear contrary legislative intention, those rules require a decision-maker 'to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it'[224]. If that approach is adopted, there is no need for any doctrine of legitimate expectations. The question becomes, what does fairness require in all the circumstances of the case?"

214 The case may also be contrasted with *Abebe*[225] and *Eshetu*[226]. It is not one in which the Tribunal may have failed to record some factual findings in reaching its conclusions. And, the case is far removed from *Abebe* in which, even though the Tribunal was not bound to do so, it repeatedly stressed matters that might be of importance to the plaintiff in the determination of her entitlement to a visa[227].

---

221 [1980] Qd R 567.

222 [1980] Qd R 567 at 579 per Dunn J.

223 (1995) 183 CLR 273 at 311-312.

224 *Kioa v West* (1985) 159 CLR 550 at 587.

225 (1999) 197 CLR 510.

226 (1999) 197 CLR 611 at 629 [54]-[55] per Gleeson CJ and McHugh J, 656-657 [143]-[145] per Gummow J.

227 (1999) 197 CLR 510 at 607-608 [294]-[296] per Callinan J.

215 I do not take the statements of Rich, Dixon and McTiernan JJ in *Bott*[228] as necessarily constituting a comprehensive and exclusive statement of the obligations of a Tribunal such as the Refugee Review Tribunal in current times[229]:

> "In the case of a tribunal, whether of a judicial or an administrative nature, charged by law with the duty of ascertaining or determining facts upon which rights depend, if it has undertaken the inquiry and announced a conclusion, the prosecutor who seeks a writ of mandamus must show that the ostensible determination is not a real performance of the duty imposed by law upon the tribunal."

216 But even if the principle is as narrow as that, it is possible and right to say here, that a misrepresentation as to the evidentiary material available to, and used by the Tribunal, is incompatible with a real performance of the Tribunal's duty. It was, and would in my opinion have been at the time of Federation such a breach of the rules of natural justice as to justify prerogative relief then, as now.

217 I have already stated my reasons why I think the matter is a material one. The remaining question is whether in the exercise of the Court's discretion all or any prerogative relief should be refused. That the prosecutor has had a number of separate hearings and has arguably dallied in bringing his application to this Court are relevant matters. But on the other hand are the doubts, which the unsettled state of the law prior to *Abebe* and *Eshetu* may have engendered as to the proper construction of the *Migration Act*, and the consequences to the prosecutor of the refusal of a visa if his claims are correct. These latter matters I find compelling. They are equally compelling so far as the prosecutor's application for an extension of time to bring these proceedings is concerned which I would also grant. It is unnecessary for me to consider the prosecutor's alternative argument that he was not given an "opportunity", in the sense of a full and fair opportunity, under s 425 of the *Migration Act*, to give evidence to the Tribunal.

218 But there is still the question whether the prosecutor should have all the prerogative relief he seeks. The prosecutor's application is based upon s 75(v) of the Constitution which makes no mention of certiorari. Whether, notwithstanding the absence of such a reference, certiorari should nonetheless go, when prohibition, mandamus or an injunction is sought pursuant to s 75(v) because the Court is thereby seized of jurisdiction, or because certiorari is an

---

228 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228.

229 (1933) 50 CLR 228 at 242.

alternative remedy, whatever other prerogative relief is sought, is discussed by Dawson J in *R v Gray; Ex parte Marsh*[230] in several passages in which his Honour reviewed some earlier decisions but did not find it necessary to decide whether certiorari was available there or not. Nor is it necessary for me to reach any concluded view on that question here. Although I would grant other relief, I would not grant certiorari, because the legislature in s 476(2)[231] of the *Migration Act* has excluded review of a relevant decision of the Tribunal on the ground of a breach of the rules of natural justice, and, accordingly it would, in my opinion, be inappropriate to grant a remedy on the basis of such a ground so excluded, and which the Constitution does not compel this Court to grant.

219 The relief which I would grant still has efficacy for the prosecutor. I would make absolute the first, fourth and sixth orders nisi (but not for certiorari) made by McHugh J and order that the second respondent pay the prosecutor's costs.

---

230 (1985) 157 CLR 351 at 395-397.

231 "The following are not grounds upon which an application may be made under subsection (1):

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power."