HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW AND HAYNE JJ

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS APPELLANT

AND

VARATHARAJAH THIYAGARAJAH RESPONDENT

Minister for Immigration and Multicultural Affairs v Thiyagarajah
[2000] HCA 9
2 March 2000
S200/1998

ORDER

1. *Appeal allowed.*

2. *Set aside Orders 1, 2 and 3 of the orders made by the Full Court of the Federal Court of Australia on 4 March 1998 and in place thereof order that:*

   (a) the appeal to that Court be allowed;

   (b) Orders 1 and 2 of the orders made by Emmett J on 3 March 1997 be set aside; and

   (c) in place thereof the application for review be dismissed.

3. *Appellant to pay the reasonable costs of the respondent in this Court, including costs of senior counsel.*

On appeal from the Federal Court of Australia

Representation:

J Basten QC with N J Williams for the appellant (instructed by Australian Government Solicitor)

D F Jackson QC with E A Wilkins for the respondent (instructed by McDonells Solicitors)

CATCHWORDS

Minister for Immigration and Multicultural Affairs v Thiyagarajah

Administrative law – Judicial review of administrative decision – Error of law – Rejection of application for protection visa – Error must affect decision to affirm the refusal of grant of a protection visa – Refugee Review Tribunal made no error of law – Absence of power in RRT to reconsider its own decision by reason of later changed circumstances – Appeal against decision to affirm RRT's decision to refuse protection visa – Power of Federal Court to review decisions limited by *Migration Act* 1958 (Cth), s 476 – Power of applicant to seek second application for protection visa limited by ss 48A and 48B – Whether Federal Court has power under s 481 to refer matter to RRT for further consideration to take account of changed circumstances.

Words and phrases – "decision".

Migration Act 1958 (Cth), ss 48A, 48B, 476, 481.
Migration Regulations (Cth), Sched 2.
Administrative Decisions (Judicial Review) Act 1977 (Cth), ss 10, 16.

1 GLEESON CJ, McHUGH, GUMMOW AND HAYNE JJ. This is an appeal from orders made by the Full Court of the Federal Court of Australia (von Doussa and Moore JJ; Sackville J dissenting)[1]. One effect of these orders was to dismiss an appeal by the Minister against so much of the orders made by the primary judge (Emmett J)[2] as set aside a decision of the Refugee Review Tribunal ("the Tribunal"). However, the Full Court had decided that the Tribunal had made no error of law, the ground of review relied upon. The Minister contends that, this being so, the Full Court should have allowed the appeal and, in place of the orders of the primary judge, dismissed the application to the Federal Court for review. At the hearing of the appeal in this Court, the respondent did not pursue a proposed notice of contention.

2 The matter had come before the Federal Court on an application for review under Div 2 of Pt 8 (ss 475-486) of the *Migration Act* 1958 (Cth) ("the Act"). The Tribunal had been dealing under Div 2 of Pt 7 of the Act (ss 411-419) with one of the class which s 411(1) defines as "RRT-reviewable decisions". Section 414 obliged the Tribunal to review an RRT-reviewable decision if a valid application were made to it under s 412. The decision in the present case was that of a delegate of the Minister[3] on 11 October 1995 to refuse an application to grant to the respondent a protection visa (s 411(1)(c)). The wife and child of the respondent were included in the application. The Tribunal had upheld the refusal of the protection visa.

3 In addition to setting aside the Tribunal's decision, the primary judge ordered that the matter be remitted to the Tribunal for further consideration and decision according to law. The Full Court set aside that order and instead made an order (order 3) remitting the matter to the Tribunal with a direction that it consider "whether facts exist which … now impose protection obligations on Australia under the Refugees' Convention in relation to the respondent … his wife and child".

4 The ground of review relied upon by the respondent to attract the jurisdiction of the Federal Court had been that specified in par (e) of s 476(1) of the Act. This was:

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1 *Minister for Immigration and Multicultural Affairs v Thiyagarajah*, unreported, 4 March 1998.

2 *Thiyagarajah v Minister for Immigration and Multicultural Affairs* (1997) 73 FCR 176 at 186.

3 Section 496 of the Act provides for delegation of the powers of the Minister under the Act.

"that the decision [of the Tribunal] involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision".

5 In reasons for judgment delivered on 19 December 1997[4], von Doussa J, with whom Moore J and Sackville J agreed, had indicated a disposition to reinstate the decision of the Tribunal by orders allowing the appeal from Emmett J, setting aside his Honour's orders and in place thereof ordering that the application for judicial review be dismissed with costs[5].

6 However, the Full Court granted leave to the parties to make submissions as to the proposed orders and, after receipt of those submissions, the Full Court on 4 March 1998 delivered unreported supplementary reasons for judgment. The Full Court then, by majority, made the orders against which the Minister appeals to this Court.

7 The Minister submits that, in view of the grounds for decision of the Full Court delivered on 19 December 1997, that Court had no power to do other than allow the appeal and, in place of the orders made by the primary judge, to dismiss the application for an order of review.

8 It is necessary now to turn to the relevant facts. The respondent was born in Sri Lanka in 1955 and is of Tamil origin. He arrived in metropolitan France in May 1985 and in November 1988 was granted refugee status. Article 28 of the Convention Relating to the Status of Refugees ("the Convention")[6] obliges Contracting States to issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory. In 1990 the respondent went to India to marry his fiancée. They appear to have returned to France where they lived until December 1994. On 30 November 1994, the respondent obtained a visitor's visa from the Australian authorities in France. The visa was valid until 12 March 1995. The respondent, his wife and child

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4 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543.

5 (1997) 80 FCR 543 at 569.

6 Done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

arrived in Australia on 12 December 1994. The respondent's wife has two brothers in Australia.

9 The respondent disclosed in his application for an Australian protection visa dated 15 February 1995 that he held a French travel document issued on 2 October 1989 and valid until 1 December 1996. At the time of the decision of the Tribunal on 28 March 1996, the respondent also held a Carte de Resident issued by the French authorities. This was valid for 10 years, was automatically renewable and was equivalent to permanent residence. Having lived in France for more than five years, he was eligible to apply for French citizenship.

10 In the course of the hearing before the Tribunal, the respondent's solicitor had raised but not sought to answer by placing material before the Tribunal the question whether, if the travel document expired, his client would be able to obtain a replacement document.

11 The Tribunal found:

> "The [respondent] submitted documents confirming that he and his family members have formal refugee status and the right of residence in France. The [respondent] and his wife travelled to Australia on Convention travel documents issued by the French authorities which remain valid and guarantee the right of re-entry to France.
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> The [respondent] provided further details at interview with the Department in August 1995.
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> The [respondent] confirmed that he and his family had been granted refugee status in France and had been issued with residence permits valid for 10 years (and automatically renewable after 10 years) and that he was eligible to apply for French citizenship.
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> …
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> The [respondent] has a current Carte de Resident with the right to reside in France and a current travel document [a Titre de Voyage] issued by the French authorities and specifically carrying the right of re-entry to France. The [respondent] is also protected against return (*refoulement*) to Sri Lanka in accordance with the provisions of the Convention."

12 Before the Tribunal, the respondent said that he had fled Sri Lanka to escape arrest and harassment by government forces who suspected that he had assisted the Tamil separatist organisation known as the LTTE. He said that he feared persecution in France at the hands of that organisation and was not

prepared to seek protection from the French authorities. The Tribunal rejected the respondent's claims in relation to the position in France and concluded that there was nothing to suggest that the authorities of that country were unable or unwilling to protect him.

13 The Tribunal found that the respondent fell within the exception to the definition of the term "refugee" in Art 1E of the Convention. Article 1E provides:

> "This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

14 Before Emmett J, the respondent was successful with the submission that the rights and obligations which he had in France did not satisfy the requirements of Art 1E. In particular, his Honour held that employment disadvantages suffered by the respondent in France were not insignificant and set him apart from French nationals. The Full Court did not approach the matter as turning upon the application of Art 1E. Rather, it dealt with the matter on the footing that it was unnecessary to determine the scope of Art 1E, if, in any event, Australia did not owe the respondent protection obligations[7]. The Full Court held that on the facts found by the Tribunal and because, in terms of Art 33 of the Convention, Australia was not seeking to expel or to return the respondent to the frontiers of the territory where his life or freedom would be threatened, he was not a person to whom Australia owed protection obligations[8]. Article 33 states:

> "1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
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> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

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7 (1997) 80 FCR 543 at 551.

8 (1997) 80 FCR 543 at 557.

15 This conclusion made it "not strictly necessary"[9] to deal with the construction of Art 1E. However, the Full Court said that the decision of Hill J in *Barzideh v Minister for Immigration and Ethnic Affairs*[10] should be followed. Emmett J had generally agreed with that decision. The Full Court did not go on to hold, as would appear to follow, that in this respect the Tribunal had erred in law. This course was not taken because of the view of the Full Court that, by reason of the operation of Art 33, Australia did not owe the respondent protection obligations. Thus, the ultimate decision which the Act (ss 411(1)(c), 414, 415) had placed in the hands of the Tribunal, that to affirm the delegate's decision to refuse to grant a protection visa, did not involve an error of law.

16 In the Full Court, von Doussa J correctly emphasised two aspects of the case. The first was that the effect of ss 36 and 65 of the Act and subclass 866 of Sched 2 of the Migration Regulations was that the case turned upon the question whether an error of law was involved in the decision of the Tribunal that the respondent, his wife and child were not "persons to whom Australia has protection obligations under the [Convention]". In its applicable form, the legislation obliged the Minister to grant a protection visa if this criterion were met and to refuse the visa if it were not met. The second aspect was that, under the legislation, the inquiry was not confined (as it had been under earlier legislation[11]) to the question whether the asylum seeker had the "status" of a "refugee". Even were the respondent a refugee, he was not a person to whom Australia had protection obligations if Art 33 applied.

17 The Tribunal had not dealt with the matter by reference to Art 33. However, the Full Court held that the findings made by the Tribunal constituted an answer to the question correctly formulated[12]. Von Doussa J concluded[13]:

> "The [Tribunal] has found as a fact that effective protection is available to the respondent in France, and that there is no real chance that the French authorities are unable or unwilling to provide such protection. This finding

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9 (1997) 80 FCR 543 at 565.

10 (1996) 69 FCR 417.

11 See *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 273-275; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 563.

12 (1997) 80 FCR 543 at 568.

13 (1997) 80 FCR 543 at 568.

involves no error of law. It determines adversely to the respondent the question whether there was any potential for Art 33 to have application to the respondent, if he were a refugee. Accordingly, Australia did not owe the respondent protection obligations, and the criterion laid down in s 36(2) of the Act for a protection visa was not fulfilled.

…

As there was no real chance that the respondent would suffer persecution in France, Australia was entitled as a Contracting State to deport the respondent to France without considering the substantive merits of his claim to be a refugee."

It should be noted that the phrase in s 476(1)(e), "the decision involved an error of law", in the present case applied to the decision of the Tribunal under s 415(2)(a) to "affirm" the decision of the delegate to refuse to grant a protection visa. In s 476(1)(e), the term "the decision" thus identifies "a determination effectively resolving an actual substantive issue" by "effectively [disposing] of the matter in hand"[14]. The error of law which will attract review must be more than one found in a step taken at some stage in the decision-making process. The involvement of which s 476(1)(e) speaks postulates an error which finds a necessary consequence in the ultimate decision to affirm the refusal of the grant of a protection visa[15]. The reasoning of von Doussa J correctly proceeded on that footing.

18 The Full Court did not forthwith make the orders indicated in its judgment of 19 December 1997 because of its concern that the travel document issued by the French authorities to the respondent might have expired since the decision of the Tribunal on 28 March 1996. There was an apprehension that this would cause an impediment to the entitlement of the respondent to return to France. Von Doussa J expressed the matter as follows[16]:

"The [Tribunal] made no finding as to when the travel documents expired and what rights, if any, the respondent had to return to France if the travel documents expired. However, the documents in the Appeal Book

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14 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 335.

15 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353.

16 (1997) 80 FCR 543 at 569.

> indicate that the travel document held by the respondent was valid until 1 December 1996. The document contains provision for the recording of further extensions of time, but it does not specify whether the respondent is entitled to obtain an extension and, if so, on what conditions."

His Honour considered that, in those circumstances, there was "perhaps a possibility", albeit "highly unlikely", that, if Australia attempted to return the respondent to France, he would face a danger of refoulement to Sri Lanka[17].

19 In the supplementary reasons for judgment delivered on 4 March 1998, the majority of the Full Court (von Doussa and Moore JJ) referred to the concerns previously expressed and said:

> "This Court is in no better position now than it was when the Reasons for Judgment were delivered to form a view on these matters. It is not appropriate for this Court to instigate further investigations about these factual questions, although they remain questions that need to be explored. It is therefore necessary that the appeal to this Court be disposed of by an order framed to enable the outstanding factual questions to be considered and determined."

Von Doussa and Moore JJ then held that it was essential for the determination of the claim of the respondent that the factual issue be resolved and for that purpose the matter should be remitted to the Tribunal. No question arises in this instance with respect to the power of the Federal Court in a proceeding for judicial review itself to admit material not before the decision-maker or to admit evidence of events occurring after the making of the decision under review[18]. Their Honours continued:

> "The power of the Full Court on an appeal from a single Judge who has heard and determined an application for review under s 476 of the [Act] arises under s 481 of that Act, and s 28 of the *Federal Court of Australia Act* 1976 (Cth) [('the Federal Court Act')]. The power of the Federal Court under s 481(1) includes power to make the following orders:

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17 (1997) 80 FCR 543 at 569-570.

18 The Federal Court authorities on these points, which are inconclusive, are discussed in *Ragogo v Minister for Immigration and Ethnic Affairs* (1995) 59 FCR 489.

(a) an order affirming, quashing or setting aside the decision, or part of the decision, with effect from the date of the order or such earlier date as the Court specifies;

(b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit.

On appeal from a single Judge, the Full Court is empowered by s 28(1)(b) of the [Federal Court Act] to 'give such judgment, or make such order, as, in all the circumstances, it thinks fit …'. This power is expressed in wide terms, and enables the Full Court to make any order that could have been made at first instance[19]. This Court therefore has the power to refer 'the matter to which the decision relates' back to the [Tribunal] for further consideration. The matter to which the decision relates is the claim by the respondent and his family for protection visas. Essential to the determination of that claim is the question whether the respondent and his family are non-citizens in Australia to whom Australia has protection obligations under the [Convention]: s 36(2) of the [Act]. If the matter is remitted to the [Tribunal] for further consideration, of necessity the earlier decision of the [Tribunal] must be set aside so that, on further consideration, the [Tribunal] (in accordance with such directions as are contained in the order for remittal) can make a decision which gives effect to its further consideration.

The remittal of the matter to the [Tribunal] therefore requires that the substantive appeal to this Court be dismissed, although [the] incidental orders made by Emmett J will need to be varied. On the main issue raised and considered on the appeal, the appellant was nevertheless successful, although the argument which succeeded had not been raised before Emmett J. In these circumstances we think that there should be no order for costs either in relation to the proceedings below or in this Court."

20 Sackville J dissented. His Honour rejected the submission that the orders previously proposed should be varied so as to re-open the matter before the Tribunal, thereby allowing it to take account of developments after its decision, in particular the apparent expiry of the respondent's travel documents. His Honour said:

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19 See *Watkins Ltd v Renata* (1985) 8 FCR 65 at 73-74.

> "In considering this submission it must be remembered that there is no basis in the [Act] (or under any other legislation or under the common law) for setting aside the [Tribunal's] decision. In my view, whatever the scope of s 481 of the [Act], it is not an appropriate exercise of the Court's powers under that section to set aside a decision of the [Tribunal], otherwise unchallengeable, *solely for the purpose of allowing the [Tribunal] to take into account developments that have occurred since the date of the [Tribunal's] decision*. The powers conferred by s 481 arise on 'an application for review of a judicially-reviewable decision'. In exercising those discretionary powers, the Court must take account of the outcome of the very application which enlivens the discretion in the first place. I do not think that, in exercising the powers conferred by s 481(1), the Court is entitled to take account of circumstances quite extraneous to the application for review. Nor do I think that s 28(1)(b) of the [Federal Court Act] changes the position.
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> If there is any potential injustice in this case (a question on which there is insufficient information to make any judgment), it arises from s 48A of the [Act], which prevents [the respondent] from making a further application for a protection visa, unless the Minister thinks it is in the public interest to exercise the power conferred by s 48B. I do not think it appropriate to attempt to ameliorate possible injustice flowing from s 48A by remitting a matter to the [Tribunal] under s 48(1) for reasons unconnected with the grounds of the application to review the [Tribunal's] decision." (original emphasis)

The effect of s 48A is that, whilst in Australia, the respondent, having made an application for a protection visa which has been refused, may not make a further application for a protection visa. This provision is subject to s 48B. This confers upon the Minister a power, not a duty (s 48B(6)), and the power is exercisable only by the Minister personally (s 48B(2)). The power is exercisable if the Minister "thinks that it is in the public interest" to determine that s 48A does not apply to prevent an application for a protection visa made by a non-citizen in the period starting when notice is given by the Minister and ending at the end of the seventh working day after the day of the giving of notice (s 48B(1)).

21 The views of Sackville J as to the orders which were appropriate in this case should be accepted.

22 The orders of Emmett J were as follows:

> "1. The decision of the [Tribunal] of 28 March 1996 be set aside.

2. The matter be remitted to the [Tribunal] for further consideration and decision according to law.

3. The [Minister] pay the [respondent's] costs."

The orders made by the Full Court were:

"1. The appeal against paragraph 1 of the orders of Emmett J made on 3 March 1997 which set aside the decision of the [Tribunal] made on 28 March 1996 be dismissed.

2. The orders in paragraph 2 and 3 of the said orders of Emmett J be set aside.

3. The matter be remitted to the [Tribunal] with a direction that the Tribunal consider whether facts exist which, in accordance with the principles referred to in the Reasons for Judgment of this Court published on 19 December 1997, now impose protection obligations on Australia under the [Convention] in relation to the respondent … his wife and child.

4. There be no order for costs either in the proceedings at first instance before Emmett J or in the Full Court of the Federal Court."

23 The effect of the orders in the Full Court supported by the majority, particularly order 3, was to oblige the Tribunal to enter upon and determine the factual inquiry as to whether protection obligations were "now" imposed upon Australia. The use of "now" leaves uncertain the identification of the time to which the facts were to speak, but it may be read as identifying the date on which the determination was to be made by the Tribunal. However, a bare determination that such obligations existed would not be an exercise of the powers conferred upon the Tribunal by the Act.

24 The "RRT-reviewable decision" in question was "a decision to refuse to grant a protection visa" (s 411(1)(c)). The Tribunal was empowered to exercise all the powers and discretions conferred by the Act upon the decision-maker (s 415(1)). Section 415(2) gave the Tribunal authority to deal in various ways with the decision of the Minister's delegate. The Tribunal might affirm or vary that decision, or set it aside and substitute a new decision. The decision as varied or substituted would be taken, except for the purpose of appeals from decisions of the Tribunal, to be a decision of the Minister (s 415(3)). Further, the Minister was empowered by s 417, in certain circumstances, to substitute for a decision of

the Tribunal under s 415 another decision, more favourable to the applicant, whether the Tribunal had the power to make that other decision.

25 The Tribunal was enjoined not to purport to make decisions which were not authorised by the Act or the Regulations (s 415(4)). It was not empowered by the Act to deal with RRT-reviewable decisions solely by making findings as to matters upon which the decision depended and then go no further.

26 For order 3 made by the Full Court to be supported as a direction with which the Tribunal might properly comply, it must be understood as directing the Tribunal to act upon a finding to be made at the later date by either affirming, varying or setting aside the decision made by the delegate of the Minister on 11 October 1995. However, on 28 March 1996, the Tribunal had already affirmed that decision and the Full Court had held that the ground of review in the Federal Court, error of law, had not been made out. Order 2 of the orders of Emmett J remitting the matter to the Tribunal for further decision according to law was set aside by the Full Court.

27 Yet the Full Court dismissed the Minister's appeal against order 1 made by Emmett J. This order had set aside the decision of the Tribunal. The incongruous effect of the Full Court's order thus was to keep the Tribunal's decision on foot so as to provide subject-matter for further action for the Tribunal, where the Full Court had found no reviewable error by the Tribunal in respect of that decision.

28 Before the Tribunal the question whether protection obligations were owed by Australia had been determined by reference to facts found on 28 March 1996, when the Tribunal made its decision. This selection of the determinative date for fact-finding was in accordance with authority in the Full Court[20]. That authority fixed upon that date, not the earlier date of the application for a protection visa.

29 In the present case, von Doussa J correctly pointed out[21], with reference to the judgment in *Chan v Minister for Immigration and Ethnic Affairs*[22], the fallacy in the notion of "once a refugee always a refugee", because the circumstances

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20 *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288 at 291-292; *Minister for Immigration and Ethnic Affairs v Singh* (1997) 74 FCR 553 at 556-557.

21 (1997) 80 FCR 543 at 556.

22 (1989) 169 CLR 379 at 405-406, 414, 431-433.

giving rise to the obligation of protection may change. However, the Act posits the determination of a particular application at a particular time. The Act contemplates changed circumstances which might found a fresh application, but imposes the limitations found in ss 48A and 48B.

30 It would be inconsistent with that scheme and contrary to the ordinary reading of Div 2 of Pt 7 of the Act to treat the decision of the Tribunal as provisional in nature. In the situation where the Tribunal had, without reviewable error, disposed of an application for review of the decision of the delegate made on 11 October 1995, the Act did not confer upon the Tribunal any authority subsequently to reconsider the decision of the delegate by reason of later changed circumstances.

31 The powers of the Federal Court under Div 2 of Pt 8 were exercisable in respect of applications made for review upon grounds limited to those spelled out in s 476. Upon the consequences of this state of affairs for the validity of Div 2 of Pt 8, this Court divided in *Abebe v The Commonwealth*[23]. The decision in that case establishes that, when an application fails and is dismissed, the Federal Court may exercise the power conferred by s 481(1) to make an order affirming the decision although the grounds upon which the application for review has been prosecuted are narrower than those in this Court under s 75(v) of the Constitution. The consequence is to deny any general proposition that proceedings for judicial review, at least under a structure provided by a law of the Commonwealth to which s 76(ii) of the Constitution applies to provide federal jurisdiction for that review, necessarily involve the giving of effect to the whole of the legal rights and duties of the parties. In any event, the Minister seeks no such order in the present case. The Minister seeks, in place of the orders made by the Full Court, no more than an order that the appeal to that Court be allowed and the application for review be dismissed.

32 Section 481 deals first with the orders which may be made by the Federal Court on an application for review of a judicially reviewable decision (s 481(1)) and then with the orders which may be made on an application for review in respect of a failure to make such a decision (s 481(2)) and, finally, empowers the Federal Court to revoke, vary or suspend the operation of any order made by it under the earlier sub-sections (s 481(3)). These provisions reflect the terms of sub-ss (1), (3) and (4) of s 16 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"). However, the rights conferred by the ADJR Act were stated by s 10 thereof to be additional to other rights. The ADJR Act

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23 (1999) 73 ALJR 584; 162 ALR 1.

plainly was designed to provide a more streamlined procedure for the obtaining of relief which was formerly available only by way of prerogative writ, injunction or declaration of right. The terms of s 16 should not be the subject of any narrow or restrictive construction[24]. On the other hand, with respect to Div 2 of Pt 8 of the Act, s 485 limits the jurisdiction of the Federal Court.

33 Section 481 of the Act must be read with the limitation upon the grounds of review imposed by s 476. In the present case, the sole ground of review put forward before Emmett J was that the decision of the Tribunal affirming the decision of the delegate to refuse the grant to the respondent, his wife and child of protection visas involved an error of law, being an error involving an incorrect interpretation of the Act or an incorrect application of it to the facts as found by the Tribunal (s 476(1)(e)). The situation before the Federal Court in this case thus has some affinity with that of appeals to the Federal Court on questions of law under s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act").

34 In *Minister for Immigration and Ethnic Affairs v Gungor*[25], the Full Court of the Federal Court considered s 44 of the AAT Act. The provisions thereof empowered the Federal Court to make such order as it thought appropriate by reason of its decision and to make an order remitting the case to be heard and decided again by the AAT, either with or without the hearing of further evidence and "in accordance with the directions of the Court". In *Gungor*, Sheppard J said of these provisions[26]:

> "It is, in my opinion, not correct to say that this court is by these provisions given wide powers to make such order as it thinks fit. Implicit in its powers are a number of restrictions. The appeal is expressly limited to error of law, which alleged error is the sole matter before this court and is the only subject matter of any order made consequent on the appeal. The order which this court can make after hearing the appeal is also similarly restricted to an order which is appropriate by reason of its decision. It follows that the only order which can be properly made is one the propriety

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24 *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 11 FCR 528 at 537; *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637 at 644; cf *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 433-434.

25 (1982) 42 ALR 209.

26 (1982) 42 ALR 209 at 220.

of which is circumscribed by and necessary to reflect this court's view on the alleged or found error of law."

Section 481(1) of the Act is in broader terms than s 44 of the AAT Act. It states:

"On an application for review of a judicially-reviewable decision, the Federal Court may, in its discretion, make all or any of the following orders:

(a) an order affirming, quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or such earlier date as the Court specifies;

(b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit;

(c) an order declaring the rights of the parties in respect of any matter to which the decision relates;

(d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Federal Court considers necessary to do justice between the parties."

While limited, the grounds of review in s 476(1) go beyond error of law. However, where, as in the present litigation, the ground of review relied upon is error of law, *Gungor* provides guidance as to the appropriate exercise of discretion to make one or more of the orders identified in s 481(1). Further, as Brennan J pointed out in *Johns v Australian Securities Commission*, with reference to s 16(1) of the ADJR Act[27], the question of relief is not at large and the doing of justice between the parties means justice according to law. The law involved here includes the regime established by Div 2 of Pt 7 of the Act for review by the Tribunal of RRT-reviewable decisions and the limitations imposed by ss 48A and 48B upon further applications for protection visas. Here the substance of what occurred in the Full Court was the exercise of the powers in s 481(1) to require a re-opening of the application in a fashion which avoided the operation of ss 48A and 48B.

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27 (1993) 178 CLR 408 at 433-434.

35 In making order 3, the Full Court appears to have relied upon par (b) of s 481(1). This conferred a discretion upon the Full Court to make an order referring the matter to which the decision relates to the decision-maker for further consideration "subject to such directions as the Court thinks fit". Where the Federal Court has affirmed part of the decision and set aside another part of the decision, by orders supported by par (a) of s 481(1), the occasion may arise for an order of the nature spelled out in par (b). The more obvious case would arise where a decision is wholly quashed or set aside. But here the application for review should have been dismissed because the alleged error of law by the Tribunal in reaching its decision had not been made out. The decision of the Tribunal had not been one to be reached upon provisional or prospective findings of fact. The scheme of the Act was to the contrary. In those circumstances, there could be no case for the exercise of the discretion conferred by s 481(1) to make an order under par (b) of the nature made here by the Full Court.

36 No doubt the powers listed in s 481(1) fall to be exercised in a variety of circumstances but the relevant significance of this is that those circumstances, including the particular legislative framework in which the application for review is placed, will indicate the limits upon the exercise of those powers in the case in question. For example, where there exists a duty "which is unqualified by any discretionary judgment still remaining to be exercised"[28], an order under s 481(1)(d) might properly be made directing that that duty be performed. On the other hand, as is illustrated by *Minister for Immigration and Ethnic Affairs v Guo*[29], a declaration under s 481(1)(c) as to the present rights of the parties would not be appropriate where those rights would only arise upon the satisfaction of statutory conditions, including a determination by the Minister.

37 Here, for the reasons given by Sackville J and further outlined above, the Full Court fell into error in making the orders in question. The orders which on the findings of the Full Court should have been made were orders allowing the appeal, setting aside orders 1 and 2 of the orders of Emmett J and in place thereof dismissing the application for review. This Court should allow the appeal, set aside orders 1, 2 and 3 of the orders made by the Full Court and in place thereof substitute the above orders.

38 The Full Court ordered that there be no costs in the proceedings either at first instance before Emmett J or in the Full Court. Order 4 so provided. It was a term of the grant of special leave in this Court that in any event the Minister pay

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28 *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 188.

29 (1997) 191 CLR 559 at 563, 579.

the reasonable costs of the respondent in this Court. Such a condition was not opposed by the Minister. In the circumstances, we would make the order foreshadowed by the special leave condition to allow the reasonable costs of the respondent in this Court, including costs of senior counsel. We would not disturb the position respecting costs established in the Full Court.

39 GAUDRON J. The respondent, Mr Thiyagarajah, applied for a protection visa under ss 36 and 45 of the *Migration Act* 1958 (Cth) ("the Act"). His application was considered by a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister") and refused. He thereupon applied to the Refugee Review Tribunal ("the Tribunal") for review of the delegate's decision under s 412 of the Act. The Tribunal affirmed the delegate's decision. Pursuant to s 476, application was then made to the Federal Court of Australia for review of the Tribunal's decision. The application was allowed by Emmett J[30] and, so far as is presently relevant, his Honour made orders as follows:

> "1. The decision of the Refugee Review Tribunal of 28 March 1996 be set aside.
>
> 2. The matter be remitted to the Refugee Review Tribunal for further consideration and decision according to law."

40 The Minister appealed from the decision and orders of Emmett J. The Full Court of the Federal Court held that the decision of the Tribunal was correct, although arrived at for different reasons from those of the Full Court[31]. The Full Court also held that, but for a possible change in the respondent's circumstances after the Tribunal gave its decision, orders should be made allowing the appeal and dismissing the application for judicial review[32]. In the result, the Full Court, by majority (von Doussa and Moore JJ, Sackville J dissenting), declined to make those orders. Instead and so far as is presently relevant, it made orders that:

> "1. The appeal against paragraph 1 of the orders of Emmett J made on 3 March 1997 which set aside the decision of the Refugee Review Tribunal made on 28 March 1996 be dismissed.
>
> 2. The orders in paragraph 2 ... of the said orders of Emmett J be set aside.
>
> 3. The matter be remitted to the Refugee Review Tribunal with a direction that the Tribunal consider whether facts exist which, in accordance with the principles referred to in the Reasons for Judgment of this Court ... now impose protection obligations on Australia under the Refugees'

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30 *Thiyagarajah v Minister for Immigration and Multicultural Affairs* (1997) 73 FCR 176.

31 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 568 per von Doussa J (with whom Moore and Sackville JJ agreed).

32 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 568-569 per von Doussa J.

> Convention in relation to the respondent, Varatharajah Thiyagarajah, his wife and child."

41 The question in this appeal is whether the Full Court had power to do anything other than allow the appeal from the orders of Emmett J.

Facts

42 The respondent, who is a citizen of Sri Lanka, fled from that country to France. In France he was granted refugee status, issued with a Carte de Resident and a Titre de Voyage (together referred to as "French papers") which allowed him to travel in and out of France[33]. He and his family left France and came to Australia using the Titre de Voyage. He applied for a protection visa after his arrival in this country[34].

43 It is not in issue that, when the Tribunal considered Mr Thiyagarajah's application, his French papers were then current. He was able to return to France and again take up residence in that country, although, at some stage, he would need to apply for a renewal of his French papers. It seems that, had he returned to France at that stage, he would have been entitled to have them renewed automatically[35]. However, they appear to have expired before his application for review was determined by Emmett J. His Honour was unable to determine whether they could then be renewed[36]. Similarly, the Full Court was unable to determine that question[37] and, for that reason, refused to allow the Minister's appeal and made the orders to which reference has been made.

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33 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 546 per von Doussa J.

34 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 545 per von Doussa J.

35 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 569 per von Doussa J.

36 *Thiyagarajah v Minister for Immigration and Multicultural Affairs* (1997) 73 FCR 176 at 186 per Emmett J.

37 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 569-570 per von Doussa J.

Powers of the Federal Court

44 Section 28(1) of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") relevantly allows that, in the exercise of its appellate jurisdiction, that Court may:

> "(a) affirm, reverse or vary the judgment appealed from;
>
> (b) give such judgment, or make such order, as, in all the circumstances, it thinks fit, or refuse to make an order".

45 The power conferred by s 28(1)(b) of the Act is not at large. It is confined by the subject-matter of the proceedings and the issues joined between the parties. Ordinarily, that has the consequence that, on appeal, the Federal Court can and should make those orders which, in its view, could and should have been made at first instance. At least that is so in the case of an appeal in the strict sense where the issue is simply whether the decision appealed from was or was not correct when given.

46 It is not necessary to determine the precise nature of an appeal to the Full Court from a decision reviewing a decision of the Tribunal[38]. It is sufficient to

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38 As to the different types of proceedings encompassed by the term "appeal", see *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-298 per Glass JA; *Wigg v Architects Board of South Australia* (1984) 36 SASR 111 at 112-114 per Cox J; *Clarke & Walker Pty Ltd v Secretary, Department of Industrial Relations* (1985) 3 NSWLR 685 at 690-691 per Kirby P; *Strange-Muir v Corrective Services Commission of New South Wales* (1986) 5 NSWLR 234 at 249-250 per McHugh JA; *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 273-274 per Deane, Gaudron and McHugh JJ; *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1998) 84 IR 314 at 339-343. Note that s 27 of the Federal Court Act provides:

> " In an appeal, the Court shall have regard to the evidence given in the proceedings out of which the appeal arose, and has power to draw inferences of fact and, in its discretion, to receive further evidence, which evidence may be taken:
>
> (a) on affidavit; or
>
> (b) by video link, telephone or other appropriate means in accordance with another provision of this Act or another law of the Commonwealth; or
>
> (c) by oral examination before the Court or a Judge; or
>
> (d) otherwise in accordance with section 46."

(Footnote continues on next page)

proceed on the basis that it is an appeal in the strict sense. And on that basis, the critical issue is what order or orders could and should have been made at first instance. So far as that question is concerned, s 481(1) of the Act provides:

> " On an application for review of a judicially-reviewable decision, the Federal Court may, in its discretion, make all or any of the following orders:
>
> (a) an order affirming, quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or such earlier date as the Court specifies;
>
> (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit;
>
> (c) an order declaring the rights of the parties in respect of any matter to which the decision relates;
>
> (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Federal Court considers necessary to do justice between the parties."

47 Although the terms of s 481(1) are wide enough to permit of the orders made in this case by the Full Court, the orders that may be made pursuant to that sub-section are not unconfined. They are limited by reason that they are to be made in the exercise of judicial power. Necessarily, that means that they are confined by the grounds on which review is permitted[39] and the nature of the decision in question. And in this context, it is important to bear in mind the nature of the jurisdiction which is exercised in judicial review proceedings.

48 When reviewing an administrative decision, a court is not simply exercising a supervisory function directed to determining whether, by reference to one or more of the permissible grounds of review, the decision was right or wrong. Rather, review proceedings are the mechanism by which the court gives effect to the underlying rights and duties of the parties, whether those rights and duties be procedural or substantial. So much appears from the terms of ss 481(1)(b) and (c) which, respectively, permit of orders "referring the matter to which the

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The terms of that provision would suggest that appeals to the Full Federal Court are not confined to appeals in the strict sense.

39 See s 476 of the Act.

decision relates ... for further consideration" and "declaring the rights of the parties in respect of any matter to which the decision relates". Thus, when considering the orders that can and should be made under s 481(1) of the Act, it is necessary to identify the precise rights and duties which underlie the decision in question.

The nature of the Tribunal's decision: underlying rights and duties

49 It is not in issue that, in reviewing a decision under Pt 7 Div 2 of the Act, the Tribunal proceeds as though it were the original decision maker and, itself, determines those matters which are necessary for the decision[40]. Thus, in this case it was for the Tribunal to proceed in the manner required of the Minister, or, by s 496[41] of the Act, his delegate, when deciding whether or not to grant a protection visa.

50 By s 47(1) of the Act, the Minister is required "to consider a valid application for a visa." It is common ground that, in this case, the application was valid. Section 65(1)(a) provides that, after considering an application for a visa, the Minister if satisfied of various criteria, including the "criteria ... prescribed by [the] Act or the regulations ... is to grant the visa". By s 65(1)(b), the Minister, "if not so satisfied, is to refuse to grant the visa".

51 The first matter which emerges from the combined operation of ss 47(1) and 65(1) of the Act is that the decision maker – relevantly, in this case, the Tribunal – had a duty to consider the application[42]. Correspondingly, Mr Thiyagarajah had a right to have it considered by the Tribunal. The second is that he had a right to have his application determined by reference to the Tribunal's and only the Tribunal's satisfaction or non-satisfaction with respect to the criteria specified in s 65(1)(a) of the Act. The third is that if the Tribunal was satisfied as to those matters, he had a right to obtain a protection visa; if it was not, the Tribunal had a duty to refuse it.

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40 Section 415.

41 Section 496 relevantly provides:

> "(1) The Minister may, by writing signed by him or her, delegate to a person any of the Minister's powers under this Act.
>
> (1A) The delegate is, in the exercise of a power delegated under subsection (1), subject to the directions of the Minister."

42 See s 414.

52 It is common ground that the Tribunal was satisfied as to all criteria specified in s 65(1)(a) of the Act, except that "prescribed by [the] Act". In that regard, it was necessary for the Tribunal to consider and determine whether, in terms of s 36(2) of the Act, it was or was not satisfied that "the applicant ... [was] a non-citizen in Australia to whom Australia ha[d] protection obligations under the Refugees Convention as amended by the Refugees Protocol."[43] It is convenient to refer to that Convention and the Protocol together as "the Convention".

The Convention and the Tribunal's consideration of the application

53 So far as is relevant to the Tribunal's decision, the Convention defines a refugee to include a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country"[44]. By Art 1E, the Convention does "not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

54 The Tribunal approached the question whether "Australia ha[d] protection obligations" to Mr Thiyagarajah by asking whether, by force of Art 1E, the Convention did not apply to him. The Tribunal considered that that Article did not require that the rights and obligations accorded by a country in which a refugee has taken up residence correspond precisely with those of its nationals. In particular, it was of the view that it did not require that the refugee have the same rights to work in the public service, enter certain professions or engage in certain business activities. However, the Tribunal considered that it did require that the refugee "have recourse to the authorities for protection against persecution". In this last regard, it found that "there [was] no real chance that the French authorities [were] unable or unwilling to provide such protection."

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43 Section 36(2) states that this is "[a] criterion for a protection visa", and subclass 866.22 of Sched 2 of the Migration Regulations (Cth) adds the further criteria that the applicant has undergone a medical examination; has undergone a chest x-ray examination (unless under 16 years of age); satisfies public interest criteria 4001 to 4003; and that the Minister is satisfied that to grant a protection visa is in the national interest.

44 Article 1A(2).

The Convention and the Full Court's decision

55 The Full Court differed from the view taken by the Tribunal with respect to Art 1E of the Convention. It held[45] that that Article was to be construed in accordance with the decision in *Barzideh v Minister for Immigration and Ethnic Affairs*[46]. In that case Hill J held that Art 1E is not "rendered inapplicable merely because the person who has de facto national status does not have the political rights of a national ... [b]ut short of matters of a political kind ... the rights and obligations of which the Article speaks must mean all of those rights and obligations and not merely some of them."[47]

56 Although it did not say so expressly, it is implicit in the decision of the Full Court that, in terms of s 476(1)(e) of the Act, the Tribunal's decision involved an error of law, "being an error involving an incorrect interpretation of the applicable law". This notwithstanding, the Full Court held that the decision was correct. It did so because, in its view, the decision could be sustained on another basis[48].

57 The Full Court was of the view that the decision of the Tribunal could be sustained on the basis that, independently of Art 1E, protection obligations under the Convention do not extend to a person who has established residence and acquired effective protection as a refugee in another country[49]. It reached this conclusion by reference to Art 33 of the Convention which provides:

> "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

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45 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 566 per von Doussa J.

46 (1996) 69 FCR 417.

47 (1996) 69 FCR 417 at 429.

48 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 568 per von Doussa J.

49 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 564-565 per von Doussa J.

58 The Full Court noted that "the possible application of Art 33 was not in terms referred to by the [Tribunal]"[50]. In the view of the Full Court that was of no consequence because, in the context of Art 1E, the Tribunal had found that "there [was] no real chance that the French authorities [were] unable or unwilling to provide such protection"[51]. In essence, the Full Court was of the view that the appeal should be dismissed because, had the Tribunal considered Art 33, it would necessarily have concluded that Australia did not owe protection obligations to Mr Thiyagarajah.

59 Where an administrative decision maker has considered all relevant issues and made findings which permit of only one outcome but has failed to reach that decision, a court may, in an appropriate case, make orders giving effect to the decision that should have been made. Similarly, in an appropriate case, if fresh consideration would permit of only one decision, orders can be made giving effect to that decision[52]. It will be necessary later in these reasons to consider whether orders of that nature can be made where the decision in question depends on the satisfaction or non-satisfaction of the primary decision maker as to some particular matter or state of affairs.

60 Leaving aside any question that might arise when a decision depends on the satisfaction or non-satisfaction of the primary decision maker, it cannot be said, in this case, that fresh consideration of the visa application by the Tribunal by reference to the terms of Art 33 would permit of only one conclusion. That is because it is not now certain that Mr Thiyagarajah can return to France. The more difficult question is whether it can be said that the Tribunal considered all relevant issues – more precisely, in terms of s 47 of the Act, whether the Tribunal considered the visa application – and made findings which permitted of only one conclusion. In this regard, the Tribunal considered the factual question raised by Art 33, but did not consider the application of that Article.

61 As already indicated, the Full Court found that the Tribunal's decision involved an error of law. It was an error of law which, in the view of the Full Court, resulted in the Tribunal posing the wrong question with respect to Art 1E

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50 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 565 per von Doussa J.

51 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 565 per von Doussa J.

52 See *Steele v Deputy Commissioner of Taxation* (1999) 73 ALJR 437 at 446 per Gleeson CJ, Gaudron and Gummow JJ; 161 ALR 201 at 213. See also *Fletcher v Federal Commissioner of Taxation* (1991) 173 CLR 1 at 24-25.

of the Convention. In proceedings for review under s 75(v) of the Constitution[53], an error of that kind would constitute a constructive failure to exercise jurisdiction[54]. Given that and given also that the Tribunal did not consider the application of Art 33, the better view, it appears to me, is that the Tribunal did not consider the visa application, as required by s 47 of the Act. Rather, it considered only part of that application.

62 Moreover and as already indicated, Mr Thiyagarajah had a right to have his application determined by reference to the satisfaction or non-satisfaction of the Tribunal with respect to the criteria for the grant of a protection visa. That raises a question as to the orders that may be made in review proceedings with respect to a decision which depends on the satisfaction or non-satisfaction of the primary decision maker. In this regard two distinct questions may emerge. The first is whether, although it is not so stated, the decision maker was, in fact, satisfied; the second is the hypothetical question whether he or she would have been or would be satisfied if the matter had been or were to be considered. Both questions were considered in *Kolotex Hosiery (Australia) Pty Ltd v Federal Commissioner of Taxation*[55].

63 In *Kolotex*, a taxpayer's entitlement to deductions depended on the satisfaction of the Commissioner of Taxation as to certain matters. As to the question whether the Commissioner was, in fact, satisfied, Barwick CJ said[56]:

> "[T]he court may treat the Commissioner as having been satisfied if the assessment in question is consistent with his having been so satisfied. On the other hand ... if ... he could not properly have been satisfied it may be that the court may treat the Commissioner as not having been satisfied. But if ... the Commissioner could not properly have failed to have been satisfied, the court will treat him as having been satisfied."

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53 Section 75(v) provides that the High Court shall have original jurisdiction in all matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth".

54 See, for example, *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243 per Rich, Dixon and McTiernan JJ; *Wade v Burns* (1966) 115 CLR 537 at 555 per Barwick CJ, 562 per Menzies J, 568-569 per Owen J; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 268-269 per Aickin J, 287 per Wilson J; *R v Bowen; Ex parte Federated Clerks Union* (1984) 154 CLR 207 at 209-210; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 349 per Wilson, Deane and Gaudron JJ.

55 (1975) 132 CLR 535 at 541 per Barwick CJ.

56 (1975) 132 CLR 535 at 542.

His Honour prefaced those remarks by saying that "[q]uite clearly the court cannot in any event substitute its view of any of the matters as to which ... the Commissioner is to be satisfied."[57]

64 On the question whether a court may substitute its view of matters upon which the primary decision maker is to be satisfied, Gibbs J and Stephen J took a slightly different view in *Kolotex*. Gibbs J said:

> "[I]t would appear to me that once it is decided that the conclusion of the Commissioner should be disturbed, for example, on the ground that it was based on error, it is right for the court to reach its final conclusion as to whether or not the Commissioner ought to be satisfied"[58].

His Honour then noted that the parties had conducted the case on the footing that if the Commissioner had been in error, the appeal should be decided on the material before the Court. His Honour concluded that the Commissioner was not satisfied and could not properly have been satisfied as to the matters upon which the taxpayer's entitlement to a deduction depended[59].

65 Stephen J saw the matter a little differently. His Honour was of the view that:

> "[I]f ... but for those errors, the Commissioner should have been satisfied ... the court would allow the taxpayer's appeal and remit the assessment to the Commissioner so that effect might be given to the taxpayer's right to a deduction"[60].

In the result, his Honour held that "the Commissioner's failure to be satisfied ... was correct"[61].

66 It is clear that the decision in *Kolotex* was based on what was, in fact, the Commissioner's lack of satisfaction, and not on whether he should or should not have been satisfied. Even so, it is apparent that Gibbs and Stephen JJ each thought that a court could make orders giving effect to the rights and obligations that would or would not arise if the primary decision maker could not properly be

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57 (1975) 132 CLR 535 at 542.

58 (1975) 132 CLR 535 at 568.

59 (1975) 132 CLR 535 at 574-575.

60 (1975) 132 CLR 535 at 576.

61 (1975) 132 CLR 535 at 581.

satisfied as to the matters on which they depended. And Gibbs J was also of the view that that could be done if the primary decision maker ought to have been satisfied as to those matters. However, their Honours were not of the view that orders had to be made. And neither was contemplating a situation in which there was or might have been a material change in circumstances subsequent to the erroneous decision of the primary decision maker.

67 More recently, in *Minister for Immigration and Ethnic Affairs v Guo*[62], this Court considered the power of the Federal Court to grant declaratory relief in circumstances where the decision depended on the satisfaction of the primary decision maker. In that case, the Federal Court declared that applicants for judicial review "[were] refugees and [were] entitled to the appropriate entry visas"[63]. It was held that that declaration should not have been made, it being said that:

> "The Act provided (s 22AA) for determination by the Minister that a person was a refugee, but this power was exercisable upon the Minister being satisfied that a person had that status or character. The rights of the appellants to the issue of visas, which the Full Court purported to declare with present effect, would only arise upon satisfaction of statutory conditions including the determination by the Minister under s 22AA or by the Tribunal under s 166BC.
>
> In those circumstances, the appropriate course would have been for the Full Court to set aside the orders [the subject of the appeal] and to return the matter to the Tribunal for determination in accordance with law."[64] (footnote omitted)

68 It must be taken, following *Guo*, that, in review proceedings, a court cannot make orders giving effect to rights which depend on the satisfaction of the primary decision maker even if he or she should be or should have been satisfied as to the matters upon which those rights depend. However, the present case is the obverse of *Guo*.

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62 (1997) 191 CLR 559.

63 (1997) 191 CLR 559 at 579 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

64 (1997) 191 CLR 559 at 579 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ. See also at 599-600 per Kirby J. See also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41 per Mason J.

69 It seems to me that, where the primary decision maker was not, in fact, satisfied and could not properly be satisfied as to matters upon which rights depend and it is clear that there has been no material change with respect to those matters, a court may properly make orders giving effect to the decision under review. However, that is not to say that a court must make orders of that kind. Certainly, s 481(1) does not require that course for it is expressed in terms of what the Court "may, in its discretion", do.

70 What has been said above is premised on there being no material change with respect to the matters as to which the primary decision maker must be satisfied. If there were a material change of that kind, it would not, in my view, be open to a court to make orders giving effect to its view as to whether the primary decision maker would or would not be satisfied. That would be to proceed beyond judicial review and to exercise the powers conferred, not on the court, but on the primary decision maker.

71 Once it is accepted, as in my view it must be, that Mr Thiyagarajah was entitled to have his application considered by the Tribunal and determined by reference to its satisfaction or non-satisfaction with respect to the criteria specified in s 65 of the Act, it follows that the Full Court's finding that the Tribunal's decision involved reviewable error permitted it to return the matter to it for determination in accordance with law. Moreover, there was another factor in this case. There may have been a material change with respect to matters relevant to the Tribunal's satisfaction or non-satisfaction of the criteria specified in s 65. The Full Court was unable to determine whether or not that was so. In circumstances where the application had not been fully considered by the Tribunal and it could not be said that, on further consideration, the Tribunal could not properly be satisfied as to the matters it had to consider, it was not appropriate for the Full Court to make orders allowing the appeal and dismissing the application for judicial review. It follows that the Full Court's order was correct.

72 The correctness of the Full Court's order depends on its finding of reviewable error on the part of the Tribunal. Had there been no such finding, in my view, the Full Court would have been obliged to allow the appeal and dismiss the application. This follows from what was described by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* as the "limited role of a court reviewing the exercise of an administrative discretion"[65]. In that case his Honour said[66], in relation to a discretionary decision:

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65 (1986) 162 CLR 24 at 40.

66 (1986) 162 CLR 24 at 40-41.

> "It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned."

73 Similarly, where a court is given power to review a decision on specified grounds, as in the present case, its role is to determine whether or not the decision involves an error of the kind specified in those grounds and a decision which does not involve an error of that kind must be given full force and effect.

74 The appeal should be dismissed.