HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, KIRBY AND HAYNE JJ

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS & ANOR — RESPONDENTS

EX PARTE MD ATAUL HAQUE MIAH — PROSECUTOR

Re Minister for Immigration and Multicultural Affairs; Ex parte Miah
[2001] HCA 22
3 May 2001
S199/1999

ORDER

1. *Order absolute for a writ of prohibition directed to the first respondent prohibiting him from acting upon or giving effect to or proceeding further upon the decision of the first respondent by his delegate the second respondent dated 13 May 1997.*

2. *Order absolute for a writ of certiorari directed to the first and second respondents to quash the decision of the first respondent by his delegate the second respondent dated 13 May 1997.*

3. *Order absolute for a writ of mandamus directed to the first respondent requiring him to determine the prosecutor's application for a protection visa under the Migration Act 1958 (Cth) according to law.*

4. *First respondent to pay the costs of the prosecutor.*

Representation:

P Roberts SC with T Reilly for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondent

J Basten QC with D H Godwin for the prosecutor (instructed by Ron Kessels)

CATCHWORDS

Re Minister for Immigration and Multicultural Affairs; Ex parte Miah

Immigration – Refugees – Application for protection visa – Decision rejecting application for protection visa – Failure of decision-maker to give applicant opportunity to comment on change of circumstances – Whether denial of procedural fairness – Whether Pt 2 Div 3 Subdiv AB of *Migration Act* 1958 (Cth) constitutes a code excluding requirements of procedural fairness.

Immigration – Refugees – Application for protection visa – Decision rejecting application for protection visa – Whether decision-maker failed to apply correct test – Whether constructive failure to exercise jurisdiction.

Administrative law – Constitutional writs and orders – Constructive failure to exercise jurisdiction – Procedural fairness – Constitution, s 75(v).

Constitutional law – Writs under Constitution, s 75(v) – Constructive failure to exercise jurisdiction – Jurisdictional error for denial of procedural fairness and natural justice – Availability of constitutional writs under Constitution, s 75(v).

Constitution, s 75(v).
Migration Act 1958 (Cth), Pt 2 Div 3 Subdiv AB, s 69.

1 GLEESON CJ AND HAYNE J. The prosecutor is a citizen of Bangladesh. He entered Australia on 9 March 1996. On 1 April 1996 he applied to the first respondent ("the Minister") for a protection visa under the *Migration Act* 1958 (Cth) ("the Act"). By virtue of s 65 of the Act, he was entitled to such a visa if the Minister was satisfied that the criteria for such a visa had been satisfied. The relevant criterion was whether the prosecutor was a person to whom Australia had protection obligations under the Convention relating to the Status of Refugees as amended by the 1967 Protocol ("the Convention"). That, in turn, depended upon whether he had a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, if he returned to Bangladesh. The task of dealing with the application was delegated to the second respondent ("the delegate"). On 13 May 1997 the delegate refused the application.

2 The Act provided for a merits review of such a decision by the Refugee Review Tribunal ("the Tribunal"). The prosecutor had retained a firm of solicitors, in May 1996, to act for him in relation to his immigration matters. The firm, on 29 May 1996, advised him about a number of matters, including the protection visa application he had already lodged. Between May 1996 and May 1997 the solicitors took various steps on the prosecutor's behalf, including obtaining access to certain folios from his immigration file. On 23 May 1997 the prosecutor instructed his solicitors to apply to the Tribunal for a review of the delegate's decision. The solicitors prepared a form of application for review, but inadvertently misplaced it. It was discovered, in the prosecutor's file in the solicitors' office, on 7 July 1997. By then, the prosecutor was out of time to apply to the Tribunal. An application was made to the Minister, under s 48B of the Act, for permission to make a fresh visa application. That application was refused on 29 March 1998. A further s 48B application was made on 7 July 1998. It was refused on 19 March 1999.

3 In December 1999, an application was made to this Court seeking constitutional writs under s 75(v) of the Constitution in relation to the delegate's decision. On 17 January 2000, McHugh J granted an order nisi for prohibition, certiorari and mandamus.

4 There are two principal grounds upon which relief is sought. The first is that the delegate failed, or constructively failed, to exercise his jurisdiction when he made his decision of 13 May 1997, because he did not address the correct issue which arose for his determination. The second is that he failed to comply with the requirements of procedural fairness.

5 The first respondent joins issue upon both of those contentions and, in addition, argues that relief should be refused on discretionary grounds by reason of delay.

The application for a protection visa

6 In an annexure to his application for a protection visa, the prosecutor set out in detail his claims, which may be summarised as follows. The prosecutor's father was murdered in Bangladesh's war of independence from Pakistan, by a group including Islamic fundamentalists. The prosecutor's father was targeted by this group because of his unorthodox views on cultural matters. The prosecutor was brought up according to those views. As a secondary school student, the prosecutor organised literary and cultural functions at his school, and his group on one occasion clashed with the student wing of the Jamat-i-Islam party. The prosecutor later became further involved in theatrical and artistic presentations that criticised the fundamentalists and those who opposed independence, and protested against the teachings of the Mullahs.

7 The prosecutor claimed that many attempts were made on his life in response to his public opposition to the Islamic fundamentalists. On one occasion the fundamentalists threw a hand-made bomb into his office in Dhaka. The prosecutor fled to Thailand in September 1993 and returned to Bangladesh in December 1995. When he returned to Bangladesh, he married a Hindu woman. The prosecutor and his wife were given 101 lashes in public, and were told to leave their village or they would be killed.

8 In his application, the prosecutor stated that he believed that the government of Bangladesh would never provide effective protection to him, because the government supported the Islamic fundamentalists whom the prosecutor had publicly criticised.

9 The standard form of visa application, which the prosecutor completed, invited him to address the following question:

> "40. Do you think the authorities of [Bangladesh] can and will protect you if you go back? If not, why not?"

10 He answered that question partly by reference to then current political circumstances. He said he believed that the political group in power, the Bangladesh Nationalist Party (BNP), was in league with fundamentalists. He set out some of the history of its relationship with Jamat-i-Islam. He said the BNP would not provide protection to a prejudice-free, progressive-minded, person like him. The fundamentalists regarded him as an atheist who had no right to live in a Muslim country. He said he was definite that the present government (the BNP) could not and would not protect him.

The delegate's reasons for decision

11 Because of the nature of the grounds upon which the prosecutor relies, it is desirable to set out in full the delegate's reasons for refusing the application for a protection visa.

12 After referring to the prosecutor's claim that he feared Convention-based persecution if he returned to Bangladesh, the delegate went on:

> "3.1 To be well founded, there must be a real chance of persecution should the applicant be returned to Bangladesh.
>
> 3.2 Claims
>
> 3.2.1 The applicant's father was a progressive, unorthodox and cultural minded person. His belief did not please the fundamentalists and his family was harassed. During the War of Independence, he was murdered by a group composed of fundamentalists and people opposed to independence.
>
> 3.2.2 The applicant was brought up according to the ideas and beliefs of his late father. In school, he became involved with cultural organisations. When he was in year 9, he became the organiser of the literary and cultural functions of the school. On one occasion, his group clashed with the student wing of the Jamat-i-Islam Party. It was this party who was responsible for his father's death.
>
> 3.2.3 The applicant became involved in cultural presentations and he tried to educate the people through the theatre. Through a theatrical group, he staged dramas critical of the fundamentalists and the anti-independence people who were still influential in the society. He also protested through artistic forms against the teachings of the Mullahs. This invited the ire of the fundamentalists and many attempts were made on the applicant's life.
>
> 3.2.4 The applicant went to Dhaka and took a job in a film making organisation. The fundamentalists traced his presence in Dhaka and a hand made bomb was hurled in his office. The office was damaged and the owner of the company politely asked him to quit his job.
>
> 3.2.5 Because of threats from the fundamentalists and their party, the Jamat-i-Islam, the applicant went to Thailand in September 1993. In December 1995, he returned to Bangladesh but was constantly in clash with the fundamentalists. He soon married a Hindu lady.

The Muslim Mullahs became furious at him and he and his wife were given 101 lashes each. The pair were given seven days to leave the village or else they will [sic] be killed.

3.2.6 The applicant cannot expect protection from the authorities as the fundamentalists were in alliance with the BNP government. It was a BNP leader who established a state religion and who restored the citizenship of a fundamentalist leader.

3.3 Specific evidence

3.3.1 In making my assessment, I considered the following material:

All materials in Part B.

3.4 Reasons

3.4.1 I accept that the applicant may have experienced harassment from the Muslim fundamentalists. I also accept that the BNP government may have some form of an alliance with the fundamentalists. However, during the recent elections, the BNP government was ousted from power and the party which the applicant described as pro-independence, the Awami League, took over. More significantly, the fundamentalist party only managed to retain a few seats in the Parliament and their popular vote dropped in comparison to what they got during the previous elections.

3.4.2 The electoral loss of the fundamentalist political party during the last elections is viewed as an indication that the people in Bangladesh are basically religious moderates who shun the radical brand of Islam (evidence 6). This suggests that Bangladeshis in general are tolerant and that the extremists whom the applicant fears make up a tiny minority of the population.

3.4.3 The Bangladeshi Constitution provides for the right to practice the religion of one's choice. The current government respects this provision in practice (evidence 4). While the government has reportedly failed at times to denounce, investigate or prosecute the Islamic extremist attacks on religious minorities and women, there is no indication that it is totally powerless to stop those violations of other people's rights. The current government can still be said to be capable of offering persons like the applicant effective protection against the religious fundamentalists.

3.5 Findings of fact

3.5.1 I find that Mr Md Ataul Haque Miah does not have a real chance of Convention based persecution if returned to Bangladesh and that his fear of persecution on return is consequently not well founded.

PART D CONCLUSION – PROTECTION OBLIGATIONS NOT IDENTIFIED

4.1 I find that Mr Md Ataul Haque Miah is not a person to whom Australia has protection obligations under the Refugees Convention as there is not a real chance of Convention based persecution if he is returned to Bangladesh and that his fear of persecution on return is consequently not well founded."

13 Part B, which identified the evidence used by the delegate in making his decision, referred to a departmental file relating to the prosecutor, a United Nations handbook on procedures and criteria for determining refugee status, a text book on the law of refugee status, a United States Department of State Report on Bangladesh released in January 1997, a cable from Dhaka dated 31 January 1996, and a Reuters news report dated 1 July 1996.

14 The reference in paragraph 3.4.1 to "the recent elections" and to a change of government, is a reference to events that followed the prosecutor's visa application. The United States Department of State Report, of January 1997, upon which the delegate relied, said:

> "Bangladesh held national elections twice in 1996, in February and June. Since March 1994 … the Parliament had been attended only by BNP Members of Parliament … The February elections, held under the BNP Government, were boycotted and actively resisted by all major opposition parties …
>
> The BNP then dissolved Parliament and … handed over power to a caretaker administration headed by the President. All parties participated in the June elections … The Awami League won a majority of seats (more than 170, including reserved women's seats) and formed a government. The BNP charged the Awami League and government employees with conspiring to rig the vote, but it nevertheless joined Parliament and, with 113 seats, became the largest opposition party in the country's history."

15 The reference in paragraph 3.4.1 to the fundamentalist party, which only managed to retain a few seats in Parliament, was a reference to the Jamat-i-Islam party, (called in the Department of State Report the Jamaat-E-Islami party), which went from 18 seats in Parliament after the 1991 elections to 3 in the June

1996 elections. The total number of seats in the Parliament is 330. The view that the people in Bangladesh are basically religious moderates was said to be related to "evidence 6". That was a reference to the Reuters report of 1 July 1996. The report quoted a "leading commentator" as saying that the Jamat had never enjoyed popular support because the people were basically moderates, who always shunned the radical brand of Islam. The January 1997 Department of State Report said:

> "The Constitution states that 'all citizens are equal before the law and are entitled to equal protection by the law.' In practice, the Government does not strongly enforce laws aimed at eliminating discrimination. In this context, women, children, minority groups, and the disabled often confront social and economic disadvantages …
>
> Hindus, Christians, and Buddhists make up an estimated 10 percent of the population. Although the Government is secular, religion exerts a powerful influence on politics. The Government is sensitive to the Muslim consciousness of the majority of its citizens. However, the Jamaat-E-Islami, the country's largest Islamic political party, went from 18 seats in Parliament after the 1991 elections, to 3 in the June elections. The Awami League Government has not actively sought its political support.
>
> Islamic extremists have occasionally violently attacked women, religious minorities, and development workers. The Government has sometimes failed to denounce, investigate, and prosecute perpetrators of these attacks."

16 The last sentence is obviously what the delegate had in mind in paragraph 3.4.3.

17 The prosecutor makes two substantial complaints about the delegate's reasons. The first is that the delegate attached unwarranted importance to a change in circumstances (the June 1996 elections) which occurred after the visa application had been made, and did so without inviting the prosecutor to comment on the significance of the change. The second is that, if the process of reasoning set out in paragraph 3.4.3 is to be understood as a complete statement of the relevant reasoning, then there is a logical gap between the reasons given in paragraph 3.4.3 and the conclusion expressed in paragraph 3.5.1. The important question, in the circumstances, was not whether the Bangladesh Government was "totally powerless" to stop persecution of the kind feared by the prosecutor, or whether it was "capable of offering … effective protection", but whether it was willing to do so.

18 If the prosecutor, through his solicitors, had lodged an application for review by the Tribunal within time, he would have been entitled to a reconsideration of his application on the merits. He would have argued that the delegate's decision was logically flawed, and wrong in fact. He would have been entitled to have the Tribunal make its own decision about his case. Since, as a result of his solicitors' fault, the prosecutor failed to pursue that avenue of review, he now seeks to bring his claim within a rubric entitling him to a remedy under s 75(v) of the Constitution. Hence the two grounds of claim for relief summarised at the commencement of these reasons.

Was the correct test applied?

19 The prosecutor submits that the delegate failed to apply the correct test in accordance with the terms of the Convention in determining whether the prosecutor had a well-founded fear of persecution at the hands of religious fundamentalists. This, it is said, amounted to a failure, or a constructive failure, to exercise the statutory power reposed in the Minister or the delegate.

20 The application form signed by the prosecutor raised the question whether he thought that the authorities in Bangladesh could and would protect him if he went back. There was no suggestion that the prosecutor feared persecution by the government. He feared persecution by religious fundamentalists. The issue was whether the government would provide effective protection from such persecution. The nature of the persecution feared was illustrated by the past experiences which the prosecutor recounted.

21 In paragraphs 3.1, 3.5.1 and 4.1 of his decision, the delegate formulated the issue for decision as being whether the prosecutor's fear of persecution on return to Bangladesh was well founded, and tested that by asking whether there was a real chance of Convention-based persecution if the prosecutor returned. The delegate concluded that there was "not a real chance of … persecution" and that the prosecutor's fear of persecution on return was not well founded. In paragraphs 3.1, 3.5.1 and 4.1 he addressed the correct questions, and answered them unfavourably to the prosecutor.

22 The argument for the prosecutor is that, notwithstanding the appearance created by paragraphs 3.1, 3.5.1 and 4.1, when the reasoning in section 3.4 of the decision is examined, and especially when paragraph 3.4.3 is considered, it must be concluded that, in reality, the delegate addressed the wrong question. The case the prosecutor was seeking to make was that the authorities in Bangladesh were not providing people like him with effective protection against fundamentalists. He was asserting that they lacked the political will to give such protection. It is contended that the delegate only addressed the question whether the authorities had the power to protect him, and ignored the important question, which was whether they would be willing to do so.

23 A literal reading of paragraph 3.4.3, in the light of paragraphs 3.4.1 and 3.4.2, but ignoring paragraphs 3.1, 3.5.1 and 4.1, gives some support for this contention. However, we are unable to accept that it is a fair reading of the delegate's decision. The reasons of an administrative decision-maker "are not to be construed minutely and finely with an eye keenly attuned to the perception of error"[1]. That proposition remains true even in a case where a person has lost an opportunity of merits review of the decision by reason of a solicitor's error.

24 The distinction between a government's ability or power to protect a citizen against persecution, and the existence of a political will to do so, is not as clear-cut and obvious as the prosecutor's argument would have it. A distinction between the ability to do something and a willingness to do it is sometimes real and important. Here, however, the decision-maker was dealing with a contention about political reality. To ask whether an apprehended failure of the authorities in Bangladesh to control religious fundamentalists would reflect a lack of power, or a lack of political will, would be to make a distinction of little practical significance. To say that a democratically elected government is unable to control a certain group could mean that there are not enough police or soldiers at the government's disposal. But it could also mean that the government cannot take the political risk of alienating the group. When the delegate said, in paragraph 3.4.3, that the government was "capable of offering persons like the applicant effective protection against the religious fundamentalists", it is unlikely that he was intending to refer only to a theoretical capability, or to distinguish between power to protect and willingness to protect. Furthermore, when the terms of paragraphs 3.1, 3.5.1 and 4.1 are considered, it is evident that he was intending to express a conclusion about the practical likelihood of effective protection.

25 This ground of challenge to the decision has not been made out.

Procedural fairness

26 In *Re Refugee Review Tribunal; Ex parte Aala*[2] the relationship between the principles concerning procedural fairness and the provisions of s 75(v) of the Constitution was examined. Applying those principles to the present case, subject to the question of discretion, constitutional writs may issue if the

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1 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ, citing *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287.

2 (2000) 75 ALJR 52; 176 ALR 219.

prosecutor makes good his argument that the decision of the delegate was made in breach of the rules of natural justice, the relevant rule being that requiring procedural fairness. Such a denial of procedural fairness would mean that the delegate was acting in excess of jurisdiction. Prohibition, and certiorari in aid of prohibition, would issue. The prosecutor would also be entitled to mandamus to compel the determination of his application for a protection visa according to law.

27 The substance of the prosecutor's complaint may be stated quite shortly. The application for a protection visa was made in April 1996. It was not determined until May 1997. The application was made at a time when the BNP was the ruling party in Bangladesh. The information it gave concerning the prosecutor's fear of persecution was directed in part to the past record of the BNP, and its relationship with Islamic fundamentalists. The delegate decided against the prosecutor, partly on the basis that there had been a material change in circumstances resulting from the June 1996 elections. The delegate, in paragraph 3.4.1, accepted that there may have been an alliance between the BNP and the fundamentalists. But he considered that circumstances had changed, and that "[t]he current government" would protect the prosecutor. The contention is that fairness required that, before the delegate decided against the prosecutor on the basis of a material change in circumstances since the lodging of the application, he should have warned the prosecutor of the possibility, and given him an opportunity to comment. It may have been sufficient to say: "Do you wish to put anything to me about the change of government in Bangladesh?" But the delegate said nothing to the prosecutor. He considered the material referred to in his decision, noted the change of circumstances, which he regarded as important, and found against the prosecutor.

28 The first respondent submits that, in order to put that recital of events into its true perspective, the following additional matters need to be taken into account. First, an application for a visa, whether dealt with by the Minister or a delegate, is not an adversarial proceeding. It is dealt with administratively, usually on the papers, without what in adversary litigation would be described as a hearing. There was nothing to prevent the prosecutor, who had retained solicitors about a year before the delegate's decision was made, from adding to the material provided to the delegate at any time before the delegate made his decision. Section 55 of the Act permitted that. The prosecutor was no doubt aware of the change of government in June 1996. He was also aware that his application had described the situation in Bangladesh on the basis that the BNP was in power. He must have known that, at least in some respects, the information he had given was out of date. There was nothing to prevent him from adding to, or amending, that information during the period of about 11 months that elapsed between the June 1996 elections and the delegate's decision. Secondly, an application for a visa may be made in a variety of circumstances, by people within or outside Australia. Many, perhaps most, visa

applications are decided without any further communication between the applicant and the decision-maker. Thirdly, the people who deal with such applications ordinarily have available to them background knowledge and information, including information concerning conditions in an applicant's country, not provided by the applicant. Fourthly, the Act, in Pt 2, Div 3, subdiv AB, laid down what it described as a "[c]ode of procedure for dealing fairly, efficiently and quickly with visa applications". The delegate, it is said, complied with that code. Fifthly, the dictates of fairness are to be considered in light of the fact that the Act provided for a merits review of the delegate's decision by the Tribunal. It was only because of an error made by his solicitors that such a review did not take place.

29 Section 29 of the Act empowered the Minister to grant a non-citizen permission, known as a visa, to travel to or enter Australia and/or remain in Australia. Subdivision AA of Div 3 dealt with applications for visas. Subdivision AB dealt with the procedure for dealing with visa applications. Subdivision AC dealt with the grant of visas. It included s 65, which provided that, after considering a visa application, if the Minister is satisfied that the criteria for the visa are satisfied, the Minister is to grant the visa, and if not so satisfied, the Minister is to refuse the visa. To adopt the language of Brennan J in *Kioa v West*[3], two closely related questions arise: the first is whether the exercise of the Minister's power is conditioned upon the observance of the rules of natural justice; the second is what the principles of natural justice require in the circumstances. The aspect of natural justice of present relevance is procedural fairness.

30 In *Kioa v West*[4] Brennan J said:

> "To ascertain what must be done to comply with the principles of natural justice in a particular case, the starting point is the statute creating the power. By construing the statute, one ascertains not only whether the power is conditioned on observance of the principles of natural justice but also whether there are any special procedural steps which, being prescribed by statute, extend or restrict what the principles of natural justice would otherwise require."

31 In considering the scheme of legislation relating to the exercise of a particular kind of power, it is necessary to pay regard to the practical context in which the decision-maker must consider whether to exercise the power. This

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3 (1985) 159 CLR 550 at 612.

4 (1985) 159 CLR 550 at 614.

may be of particular importance where, as here, the complaint is of a failure by the decision-maker to communicate something to an affected person before a decision is made. It is the potential for a decision to affect rights, interests, or legitimate expectations, that attracts the requirement of procedural fairness. But decisions of that character are made in varying contexts. Here we are concerned with a decision to be made following a formal application. The nature, and extent, of communication between applicant and decision-maker that is in contemplation, in such a general context, will vary. At one extreme, an application may be made to a judicial decision-maker, in a context in which curial standards of procedural fairness will apply to the fullest extent. Even in such a case, fairness does not require a judicial officer to make a running commentary upon an applicant's prospects of success, so that there is a forewarning of all possible reasons for failure. Most administrative decisions are made in circumstances where a much less formal and extensive form of communication than that which occurs in a court is contemplated. In many cases, it is not contemplated that the applicant will either see, or hear anything from, the decision-maker before the decision is made.

32 Applications for visas may be made by people in a wide range of circumstances, either within or outside Australia. The people who, in practice, examine and determine such applications do not conduct formal hearings. There is no contradictor. No issue is joined. The information that may be considered by the decision-maker is not subject to the rules of evidence. Decision-makers, in the course of their ordinary work, no doubt receive, from many sources, including applicants, information, of varying degrees of reliability, about a wide range of subjects relevant to some visa applications.

33 It is against that background that Parliament, in the Act, set out to address the procedure to be adopted in the case of visa applications. What follows is a summary of the legislation as it stood at the relevant time.

34 As was noted, subdiv AB of Pt 2, Div 3 was described in its heading as a "[c]ode of procedure for dealing fairly, efficiently and quickly with visa applications". The expression "code" is not conclusive of the present issue; but it is not to be disregarded as an indication of legislative intention. As Merkel J said in *Minister for Immigration and Multicultural Affairs v A*[5], the legislature has been prescriptive as to the steps that a visa applicant and the Minister are obliged or permitted to take in relation to the provision of information about a visa application. The degree of prescriptiveness appears primarily from the content of the legislative provisions themselves, but it is emphasised by the description of those provisions as a code. It will be necessary to return to the reference to a code.

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5 (1999) 91 FCR 435 at 441.

35 The specificity with which the procedure to be followed is prescribed by the legislation is also to be considered in the context of a visa applicant's right to apply for a full merits review, by the Tribunal[6] or the Immigration Review Tribunal[7], of an adverse decision. As the somewhat different approaches in the reasons for judgment in *Twist v Randwick Municipal Council*[8] demonstrate, the legal significance of a full right of appeal from an administrative decision in relation to the decision-maker's duty to give a fair hearing may have a number of aspects. It does not require a conclusion that the decision-maker is not bound to accord procedural fairness. But it may be material, both as to that question and as to the question of the practical content of the requirements of fairness. In the present case, the Act does not dispense with requirements of fairness. On the contrary, it specifies procedures to be adopted in the interests of fairness, having regard also to what Parliament saw as the interests of efficiency and speed. In considering the procedures set out in the statute, it is material to note both that the delegate was required to give reasons for his decision, and that the prosecutor was entitled to a full merits review of the decision and to a hearing on that review.

36 The scheme of subdiv AB of Pt 2, Div 3, is as follows.

37 A visa applicant is required to communicate with the Minister in a prescribed way (s 52) and to give the Minister certain information (s 53). The Minister, in deciding whether to grant or refuse a visa, must have regard to all of the information in the application (s 54). A decision to grant or refuse a visa may be made without giving the applicant an opportunity to make written or oral submissions (s 54(3)).

38 Section 55 provides that, until a decision has been made, the applicant may give the Minister any additional relevant information. The Minister must have regard to such information. However, the Minister is not required to delay making a decision because the applicant might give, or has told the Minister of an intention to give, further information.

39 Sections 56, 57 and 58 provide:

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6 Under Pt 7 of the Act.

7 Under Pt 5 of the Act.

8 (1976) 136 CLR 106.

"56. (1) In considering an application for a visa, the Minister may, if he or she wants to, get any information that he or she considers relevant but, if the Minister gets such information, the Minister must have regard to that information in making the decision whether to grant or refuse the visa.

(2) Without limiting subsection (1), the Minister may invite, orally or in writing, the applicant for a visa to give additional information in a specified way.

57. (1) In this section, **'relevant information'** means information (other than non-disclosable information) that the Minister considers:

(a) would be the reason, or a part of the reason, for refusing to grant a visa; and

(b) is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member; and

(c) was not given by the applicant for the purpose of the application.

(2) Subject to subsection (3), the Minister must:

(a) give particulars of the relevant information to the applicant in the way that the Minister considers appropriate in the circumstances; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to consideration of the application; and

(c) invite the applicant to comment on it.

(3) This section does not apply in relation to an application for a visa unless:

(a) the visa can be granted when the applicant is in the migration zone; and

(b) this Act provides, under Part 5 or 7, for an application for review of a decision to refuse to grant the visa.

58. (1) If a person is:

(a) invited under section 56 to give additional information; or

(b) invited under section 57 to comment on information;

the invitation is to specify whether the additional information or the comments may be given:

(c) in writing; or

(d) at an interview between the applicant and an officer; or

(e) by telephone.

(2) Subject to subsection (4), if the invitation is to give additional information or comments otherwise than at an interview, the information or comments are to be given within a period specified in the invitation, being a prescribed period or, if no period is prescribed, a reasonable period.

(3) Subject to subsection (5), if the invitation is to give information or comments at an interview, the interview is to take place:

(a) at a place specified in the invitation, being a prescribed place or if no place is prescribed, a reasonable place; and

(b) at a time specified in the invitation, being a time within a prescribed period or, if no period is prescribed, a reasonable period.

(4) If a person is to respond to an invitation within a prescribed period, that period may be extended by the Minister for a prescribed further period, and then the response is to be made in the extended period.

(5) If a person is to respond to an invitation at an interview at a time within a prescribed period, that time may be changed by the Minister to:

(a) a later time within that period; or

(b) a time within that period as extended by the Minister for a prescribed further period;

and then the response is to be made at an interview at the new time."

Sections 62 and 63 provide:

"62. (1) If an applicant for a visa:

(a) is invited to give additional information; and

(b) does not give the information before the time for giving it has passed;

the Minister may make a decision to grant or refuse to grant the visa without taking any action to obtain the additional information.

(2) If an applicant for a visa:

(a) is invited to comment on information; and

(b) does not give the comments before the time for giving them has passed;

the Minister may make a decision to grant or refuse to grant the visa without taking any further action to obtain the applicant's views on the information.

63. (1) Subject to sections 39 (criterion limiting number of visas), 57 (give applicant information), 84 (no further processing), 86 (effect of limit on visas) and 94 (put aside under points system) and sub-sections (2) and (3) of this section, the Minister may grant or refuse to grant a visa at any time after the application has been made.

(2) The Minister is not to refuse to grant a visa after inviting the applicant to give information and before whichever of the following happens first:

(a) the information is given;

(b) the applicant tells the Minister that the applicant does not wish to give the information or does not have it;

(c) the time in which the information may be given ends.

(3) The Minister is not to refuse to grant a visa after inviting the applicant to comment on information and before whichever of the following happens first:

(a) the comments are given;

(b) the applicant tells the Minister that the applicant does not wish to comment;

(c) the time in which the comments are to be given ends."

41 Section 69, which is in subdiv AC, is also relevant. It provides that non-compliance by the Minister with subdiv AB does not mean that a decision to

grant or refuse a visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed. It also provides that if the Minister deals with a visa application in a way that complies with subdiv AB, the Minister is not required to take any other action in dealing with it.

42 The following observations may be made about the legislative scheme.

43 First, there is a difference between a code of procedure for dealing with visa applications and a comprehensive statement of the requirements of natural justice. For example, the requirements of natural justice include absence of bias, actual or apparent, on the part of the decision-maker. Subdivision AB says nothing about that subject. It does not contain "plain words of necessary intendment" which exclude the rule against bias[9]. It is improbable in the extreme that Parliament intended that bias on the part of a delegate would not vitiate the delegate's decisions. The description of the provisions as a code of procedure is significant, but its significance should not be overstated.

44 Secondly, the legislation addresses, in considerable detail, the kind of information on which the Minister (or delegate) is bound to invite comment before making a decision. It is identified in s 57. It is information which came from a source other than the applicant for a visa (s 57(1)(c)). And it is information which is specifically about the applicant or another person. The procedure for seeking comment is prescribed (s 58).

45 Thirdly, in addition to the limited duty imposed by s 57, there is a discretionary power to obtain additional information, from the applicant or some other source (s 56).

46 Fourthly, subject to the limited duty imposed by s 57, and the discretionary power given by s 56, and to the obligation to have regard to all the information in the application (s 54(1)), and any further information supplied by the applicant (s 55), a decision to grant or refuse a visa may be made without giving the applicant an opportunity to make oral or written submissions (s 54(3)).

47 Fifthly, the consequence of non-compliance with subdiv AB is stated in s 69(1). It does not mean the decision is invalid. It only means it may be wrong and might be set aside on review.

48 Sixthly, s 69(2) provides that if subdiv AB is complied with, the decision-maker is not required to take any other action.

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9 cf *Annetts v McCann* (1990) 170 CLR 596 at 598.

49 These provisions, read in the context of legislation which requires the decision-maker to give reasons, and entitles an unsuccessful applicant to a full review of the decision on the merits, evince an intention on the part of the legislature to prescribe comprehensively the extent to which, and the circumstances in which, the Minister or delegate is to give an applicant an opportunity to make comments or submissions, or provide information, in addition to the information in the original application or any supplementary information furnished by the applicant before a decision is made. That the provisions do not deal with other aspects of procedural fairness, such as rules about bias, does not suggest a contrary conclusion. Subject to the limited duty imposed by s 57 (which is not presently material), and the discretionary power given by s 56, the general provision is that contained in s 54(3): decisions may be made without giving an applicant an opportunity to make oral or written submissions. In the ordinary case, therefore, what an applicant is entitled to by way of a hearing is a consideration of the written information provided in the application.

50 What intention is evinced concerning a circumstance of the kind that arose in the present case?

51 The relevance of that question flows from the nature of the relief sought by the prosecutor. The contention is that the delegate's decision was made in excess of jurisdiction. The basis of that contention is that the power to refuse to grant a visa was conditioned upon the observance of a duty which was not fulfilled[10]. The duty, it is said, was a duty to invite the prosecutor to comment upon a change of circumstances which occurred between the application and the decision, alerting him to the fact that the delegate considered the change to be potentially material to the decision.

52 In *Annetts v McCann*[11], Brennan J, after pointing out that the focus of judicial review is a power created by statute, said:

> "The relevant law must be found in the statutory provisions which create the power and confer it on the repository, though the terms of the statute may be expanded by the implication of conditions supplied by the common law. Thus the 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

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10 *Kioa v West* (1985) 159 CLR 550 at 609 per Brennan J.

11 (1990) 170 CLR 596 at 604.

> 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 or confers the power … It follows that the statute, construed to include any terms supplied by the common law, must define the conditions governing the exercise of a statutory power by a statutory authority."

53 The true construction of the statute will determine not only whether the rules of natural justice apply, but also what those rules require[12]. In some cases, a statute may have little or nothing to say about the second question, and its provisions may merely constitute the background against which a court is to determine the practical requirements of fairness. But that is not this case. Where, as in the present case, the statute addresses the subject of procedure with particularity, manifesting an intention to address in detail the presently relevant requirements of procedural fairness, then the intention of Parliament as to the issue that has arisen will be decisive.

54 The provisions of s 54(3), read subject to the presently irrelevant qualifications in ss 56 and 57, and read together with s 69, show a clear intention that the decision-maker is not required to invite submissions on a matter regarded as potentially adverse to an applicant's case, whether the matter is based on a change in circumstances since the application or on any other relevant consideration.

55 The prosecutor has not shown that the exercise of the power to refuse to grant the visa was subject to a condition that has not been fulfilled, or that the decision of the delegate was made in excess of jurisdiction.

Discretion

56 On the view we take of the case, this question does not arise.

Conclusion

57 The order nisi should be discharged. The prosecutor should pay the respondents' costs.

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12 *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461 at 475 per Mason J. See also *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 419 per Gibbs J; *Kioa v West* (1985) 159 CLR 550 at 610 per Brennan J.

58 GAUDRON J. The prosecutor, Mr Miah, claims to be a refugee as defined in the Convention relating to the Status of Refugees 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 (together referred to as "the Convention"). His application for a protection visa under s 45(1) of the *Migration Act* 1958 (Cth) ("the Act") was rejected by a delegate ("the delegate") of the Minister for Immigration and Multicultural Affairs ("the Minister"). He seeks relief under s 75(v) of the Constitution with respect to the delegate's decision.

59 The unfortunate circumstances in which the matter has come before this Court are set out in other judgments and need not be repeated. The central question for determination is whether the delegate's decision involves an error of the kind that will ground relief under s 75(v) of the Constitution. The prosecutor contends that there are two such errors, the first being a constructive failure to exercise jurisdiction and the other being a denial of procedural fairness. If the prosecutor is correct on either ground, the further question arises whether, as a matter of discretion, relief should be refused.

60 The question whether the delegate's decision involves an error of the kind that will ground relief under s 75(v) of the Constitution requires, in the first instance, a consideration of the Convention. It also requires an analysis of the prosecutor's application for a protection visa and the delegate's reasons for rejecting it.

The Convention

61 A criterion for the issue of a protection visa is that the Minister, or his or her delegate[13], is satisfied that the applicant is a person to whom Australia has protection obligations under the Convention[14]. Subject to presently irrelevant exceptions, Australia has protection obligations to any 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"[15].

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13 Under s 496(1), the Minister may, by writing signed by him or her, delegate to a person any of the Minister's powers under the Act.

14 Sections 36(2) and 65; Migration Regulations 1994 (Cth), reg 2.03, Sched 2, cl 866.221.

15 Article 1A(2) of the Convention.

62 For the purposes of this case, it is necessary to note three important matters with respect to the Convention definition of "refugee". The first is that the Convention looks both to the position of the individual and to the conditions which pertain in the country of his or her nationality. More precisely, the question whether a person has a well-founded fear of persecution is one that has both subjective and objective elements and necessitates consideration of the mental and emotional state of the individual and, also, the objective facts relating to conditions in the country of his or her nationality[16].

63 The second matter that, for present purposes, should be noted with respect to the Convention definition of "refugee" is that persecution does not need to be carried out or, even, actively sanctioned by the authorities of the country concerned[17]. The relevant question is whether there is a well-founded fear of persecution such that the individual is unable or, owing to that fear, is unwilling to avail himself or herself of the protection of that country.

64 Where an individual asserts a well-founded fear of persecution at the hands of persons other than the authorities of the country concerned, the question whether that country is able and willing to provide protection is relevant to whether the fear is or is not well-founded. However, the concluding words of the Convention definition direct attention not to the question whether the country is able and willing to provide protection, but to whether the individual is unable or his or her fear is such that he or she is unwilling to avail himself or herself of its protection.

65 The distinction drawn in the concluding words of the Convention definition of "refugee" is important in two inter-related respects. In the first place, it acknowledges that an individual may be able to avail himself or herself

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16 See *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 396-397 per Dawson J, 405-406 per Toohey J, 415 per Gaudron J; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 263 per Brennan CJ, Toohey, McHugh and Gummow JJ; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ, 585 per Kirby J; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 658 [150] per Gummow J. See also Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, (1979, re-edited 1992), pars 37-38.

17 See *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 430 per McHugh J and the United States decisions there referred to; *Minister for Immigration and Multicultural Affairs v Ibrahim* (2000) 74 ALJR 1556 at 1559 [17] per Gaudron J; 175 ALR 585 at 589.

of the protection of the country concerned but that his or her fear may be such that he or she is unwilling to do so. As a practical matter, an individual is only able to avail himself or herself of protection if the country concerned is able and willing to provide him or her with that protection. Hence, the second important matter to be discerned from the Convention definition: because the definition postulates that an individual may be able to avail himself or herself of protection but, because of the nature of his or her fear, be unwilling to do so, the fact that the country concerned is able and willing to provide protection is not necessarily determinative of the question whether an applicant's fear is well-founded.

66 The third matter that should be noted with respect to the Convention definition of "refugee" is that the question whether a person has a well-founded fear of persecution and is unable or, owing to that fear, unwilling to avail himself or herself of the protection of his or her country has to be answered at the time of the determination of his or her application for a visa[18]. However, past events to which that person has been subjected are very material considerations in determining whether a fear is then well-founded, even if conditions have changed in the country concerned.

67 In *Chan v Minister for Immigration and Ethnic Affairs*, Mason CJ noted:

> "a logical starting point in the examination of an application for refugee status would generally be the reasons which the applicant gave for leaving his country of nationality. Those reasons will necessarily relate to an earlier time, since when circumstances may have changed. But that does not deny the relevance of the facts as they existed at the time of departure to the determination of the question whether an applicant has a 'fear of persecution' and whether that fear is 'well-founded'."[19]

68 Past events are relevant to the question whether the individual has a well-founded fear of persecution in two respects. First, as McHugh J observed in *Minister for Immigration and Multicultural Affairs v Ibrahim*, past acts of persecution are usually strong evidence that the person concerned will again be persecuted if returned to the country of his or her nationality[20]. Certainly, that is

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18 See *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 302 per Mason, Deane and Dawson JJ; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 386-387 per Mason CJ, 398-399 per Dawson J, 405 per Toohey J, 414 per Gaudron J, 432 per McHugh J.

19 (1989) 169 CLR 379 at 387.

20 (2000) 74 ALJR 1556 at 1570 [83]; 175 ALR 585 at 604. See also *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 391 per Mason CJ, 399 per Dawson J, 415 per Gaudron J; *Minister for Immigration and Ethnic Affairs v*

(Footnote continues on next page)

so if conditions in that country have not changed. However, past events may be a useful predictor of likely future events even if conditions have changed. Where, for example, a person has been subject to persecution by persons who act independently of government, a change in government or in government policy will not necessarily result in a change in the behaviour or attitudes of those persons. Nor will it necessarily result in a fear that was well-founded ceasing to be so.

69 Further, and as I pointed out in *Chan*[21], a fear which is well-founded because of persecution to which an individual has been subjected in the past will not, in the case of that individual, cease to be well-founded simply because circumstances have so changed that the current circumstances would not, of themselves, engender a well-founded fear in others. It is true, as Gummow J pointed out in *Minister for Immigration and Multicultural Affairs v Eshetu*[22], that what I said in *Chan* did not represent the view of the Court in that case. However, nothing that was said in *Chan* or that has been said in subsequent cases suggests that what I said was wrong.

70 To answer the question whether a fear is well-founded by reference to the current situation and without regard to persecution actually suffered by the individual concerned is to ignore the subjective aspect of the Convention definition of "refugee" and, also, the nature of fear. Further, it is to overlook what the concluding words of the definition postulate, namely, that a fear may be well-founded notwithstanding that the individual concerned is able to avail himself or herself of the protection of the country of his or her nationality.

The application for a protection visa

71 Mr Miah, a citizen of Bangladesh, came to Australia on a visitor's visa in March 1996. He applied for a protection visa on 1 April 1996. In his application, he claimed that, because of his father's unorthodox religious views, opposition to fundamentalist groups and support for independence for Bangladesh, his father was murdered by Muslim fundamentalists in 1971. This event, according to his application, led Mr Miah, as a student and, later, after

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Guo (1997) 191 CLR 559 at 574-575 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ; *Abebe v Commonwealth* (1999) 197 CLR 510 at 544 [82] per Gleeson CJ and McHugh J, 578 [192] per Gummow and Hayne JJ; Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, (1979, re-edited 1992), par 45.

21 (1989) 169 CLR 379 at 415.

22 (1999) 197 CLR 611 at 658 [150].

completing his studies, to engage in cultural activities which attracted the attention of fundamentalist Muslims and members of Jamat-I-Islam[23].

72 Jamat-I-Islam is a political party which, apparently, is comprised of fundamentalist Muslims. Moreover, it is a political party with which, according to Mr Miah's application, other political parties, namely the Awami League and the Bangladesh Nationalist Party ("BNP"), have, at times, considered that an alliance would be advantageous.

73 In his application for a protection visa, Mr Miah claimed that he had been the subject of violence from persons associated with Jamat-I-Islam. In particular, he stated that he was attacked by members of the student wing of that party in 1984, and, again, in 1989. On the latter occasion, according to his application, he was attacked with an axe and, when he attempted to flee, stabbed with a knife from behind. These events, it seems, occurred in Rajbari, where he attended school and, later, Pangsha College. During his time at Pangsha College, he claimed, fundamentalist Muslims branded him an atheist and issued a proclamation banishing him from his village.

74 After completing his exams at Pangsha College, Mr Miah fled from Rajbari and went to Dhaka, the capital of Bangladesh. He obtained work there in the film industry. However, according to his application, when Jamat-I-Islam came to know of his presence in Dhaka, "[t]hey tried to attack [him] several times at work." On one occasion, he claimed, "a hand made bomb was hurled inside [his] office." Thereafter, his employer asked him to leave and he fled to Thailand.

75 Mr Miah returned to Bangladesh in 1995 but, according to his application, he "was in constant clashes with the Jamat-I-Islam." These clashes came to a head when he and his Hindu wife "were given ... 101 lashes each in front of the local mosque" and given seven days to leave the village or be killed. The proclamation banning him from the village, according to his application, stated that "an atheist like [him] had no right to live in a country where Muslims constitutes [sic] the majority."

76 According to Mr Miah's application, his "life style, [his] stand against the fundamentalist group and [his] movement against them" brought him to the notice of Jamat-I-Islam. And, because they thought he might organise opposition in his locality, "they attempted to kill [him] again and again." He further claimed that the BNP government, which was then in power, supported fundamentalist groups and "[could] never and [would] not provide any protection for [his] life."

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23 The delegate refers to this group as the "Jamat-i-Islam" and a United States State Department report refers to it as the "Jamaat-E-Islami".

That claim was asserted in answer to questions in the official application form for a protection visa which asked "[d]o you think the authorities of [your] country can and will protect you if you go back? If not, why not?" There was no question specifically directed to Mr Miah's unwillingness to avail himself of the protection of Bangladesh.

The delegate's decision

77 The delegate's decision was not made until May 1997, a little over a year after Mr Miah lodged his application for a protection visa. The delegate noted Mr Miah's claims but did not make any specific findings with respect to the conduct to which he claimed he had been subjected. Instead, the delegate simply accepted that he "may have experienced harassment from the Muslim fundamentalists." The delegate also accepted that "the BNP government may have [had] some form of an alliance with the fundamentalists." After Mr Miah applied for a protection visa, however, elections in Bangladesh resulted in a change of government. It was by reference to that circumstance that his application was rejected.

78 Mr Miah was not invited to make further submissions to the delegate with respect to the elections or the subsequent change of government in Bangladesh. This notwithstanding, the delegate made a number of findings with respect to those matters. In particular, the delegate found that "the fundamentalist party" (presumably Jamat-I-Islam) only retained a few seats in the Parliament and that its popular vote had dropped. This, the delegate said, suggested that "Bangladeshis in general are tolerant and that the extremists whom the applicant fears make up a tiny minority of the population."

79 The delegate noted that the Bangladeshi Constitution provides for religious freedom and held, by reference to a United States Department of State report[24], that "[t]he current government respects this provision in practice". The delegate stated that although that government had "reportedly failed at times to denounce, investigate or prosecute the Islamic extremist attacks on religious minorities and women, there is no indication that it is totally powerless to stop those violations of other people's rights." The delegate then held that "[t]he current government can still be said to be capable of offering persons like the applicant effective protection against the religious fundamentalists." Accordingly, in the delegate's view, Mr Miah "[did] not have a real chance of Convention based persecution if returned to Bangladesh and ... his fear of persecution on return [was] ... not well founded."

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24 United States, Department of State, Bureau of Democracy, Human Rights, and Labor, *Bangladesh Country Report on Human Rights Practices for 1996*, (1997).

Constructive failure to exercise jurisdiction

80 The classic statement as to what constitutes constructive failure to exercise jurisdiction is that of Jordan CJ in *Ex parte Hebburn Ltd; Re Kearsley Shire Council*[25]. That statement, which has been approved by this Court on numerous occasions[26] identifies a constructive failure to exercise jurisdiction as occurring when a decision-maker "misunderstand[s] the nature of the jurisdiction which [he or she] is to exercise, and ... appl[ies] 'a wrong and inadmissible test'[27] ... or ... 'misconceive[s his or her] duty,' ... or '[fails] to apply [himself or herself] to the question which the law prescribes'[28] ... or '... misunderstand[s] the nature of the opinion which [he or she] is to form'[29]".

81 As Kirby J pointed out in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission*[30], it is not always easy to distinguish between an error of law which is jurisdictional because it involves a constructive failure to exercise jurisdiction and one that is not. However, the present case is, in my view, a clear case of constructive failure to exercise jurisdiction. That is because

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25 (1947) 47 SR (NSW) 416 at 420.

26 See, for example, *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 267-268 per Aickin J; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 350 per Wilson, Deane and Gaudron JJ; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 143-144 per Brennan J; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1356 [31] per Gleeson CJ, Gaudron and Hayne JJ; 174 ALR 585 at 594-595.

27 Referring to *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [1937] AC 898 at 917 per Lord Maugham, giving the advice of the Privy Council.

28 Referring to *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243 per Rich, Dixon and McTiernan JJ.

29 Referring to *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432 per Latham CJ.

30 (2000) 74 ALJR 1348 at 1367 [82]; 174 ALR 585 at 609. See also *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Amalgamated Engineering Union, Australian Section* (1953) 89 CLR 636 at 647 per Dixon CJ, Webb, Fullagar and Kitto JJ; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371 per Gibbs CJ; *Craig v South Australia* (1995) 184 CLR 163 at 178 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 84-85 [163] per Hayne J; 176 ALR 219 at 263; *Ex parte Mullen; Re Hood* (1935) 35 SR (NSW) 289 at 298 per Jordan CJ.

the delegate failed to consider the substance of Mr Miah's application and could only have failed to do so because he misunderstood what is involved in the Convention definition of "refugee".

82 In particular, in my view, the delegate failed to appreciate that Mr Miah was claiming to be a refugee because he, personally, had come to the attention of the Muslim fundamentalists as a result of his opposition to their policies and practices. Because of this, he, as an individual, had been the target of their attacks and his life had been threatened. His fear, if he returned to Bangladesh, was not merely that he would be the subject of further acts of persecution at the hands of Jamat-I-Islam, but that they would kill him. His claims as to the violence and threats to which he was subjected and as to his fears that he would be killed were never evaluated. As already pointed out, the delegate proceeded on the basis simply that Mr Miah "may have experienced harassment from the Muslim fundamentalists."

83 If, as Mr Miah claimed, he, as an individual, had been targetted for attacks and his life threatened by Jamat-I-Islam, the composite question whether he had a well-founded fear of persecution for a Convention reason and was unable or, owing to that fear, unwilling to avail himself of the protection of Bangladesh was not answered by considering whether the new government of the Awami League was "capable of offering persons like the applicant effective protection against the religious fundamentalists."

84 Even if the delegate's decision be read as meaning that the Awami League government was willing and able to offer effective protection, the question was not whether it could do so with respect to people like Mr Miah (whatever that might signify in a context in which Mr Miah claimed to have been targetted as an individual), but whether the government could and would protect him from extremists who, whether or not they be "a tiny minority", had, according to his claims, already tried to kill him.

85 Moreover, in a context in which the delegate noted that Islamic extremist attacks continued and the new Awami League government had "reportedly failed at times to denounce, investigate or prosecute" those responsible, there was a real question, if Mr Miah's claims were accepted, whether the change of government in Bangladesh was sufficient to preclude whatever fear he had developed as a result of the events to which he had been subjected from continuing to be well-founded.

86 The delegate constructively failed to exercise jurisdiction in this matter because he failed to appreciate that the Convention definition of "refugee" looks both to the individual and to the circumstances prevailing in his or her country of nationality. In consequence, the delegate failed to treat Mr Miah's application as one in which he claimed to have been individually targetted by Jamat-I-Islam.

Denial of procedural fairness

87 As I have concluded that the delegate constructively failed to exercise his jurisdiction, it is not strictly necessary to consider whether there was also a denial of procedural fairness. However, given the importance of the issues raised in relation to that question, it is appropriate that it be considered.

88 As already mentioned, the delegate's decision rejecting Mr Miah's application for a protection visa was made by reference to events which occurred after his application was made, namely, the holding of elections and the change of government in Bangladesh. And it was made without inviting Mr Miah to put submissions in that regard. However, it was contended on behalf of the Minister that the delegate complied with the provisions of subdiv AB of Div 3 of Pt 2 of the Act, which provisions constitute a code, and there was no obligation on the delegate to do more. Subdivision AB is headed "Code of procedure for dealing fairly, efficiently and quickly with visa applications". The heading is part of the Act[31] and, thus, must be taken into account in ascertaining the meaning and intent of subdiv AB.

89 Two views have emerged in the decided cases with respect to the obligation of an administrative decision-maker to act in accordance with the rules of natural justice. In *Kioa v West*, Mason J identified the obligation as "a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention."[32] On the other hand, Brennan J, in the same case, identified the rules of natural justice as an implication to be drawn from the legislation conferring decision-making authority[33]. The difference between the two views may not be as great as might at first appear[34]. Thus, in *Annetts v McCann*, Brennan J explained that the implication arises because "the 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."[35]

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31 See s 13(1) of the *Acts Interpretation Act* 1901 (Cth).

32 (1985) 159 CLR 550 at 584.

33 (1985) 159 CLR 550 at 614-615.

34 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 85-86 [168] per Hayne J; 176 ALR 219 at 264-265.

35 (1990) 170 CLR 596 at 604.

90 Whether the rules of natural justice derive from the common law or whether they are implied by the common law, the question that presently arises is not whether subdiv AB constitutes a code. Rather, if natural justice is a common law duty, the question is whether the provisions of that subdivision manifest a clear intention that that duty be excluded. On the other hand, if the rules of natural justice are seen as implied by the common law, the question is whether the provisions of subdiv AB manifest an intention that that implication not be made. Whatever approach is adopted, in the end the question is whether the legislation, "on its proper construction, relevantly (and validly) limit[s] or extinguishe[s] [the] obligation to accord procedural fairness"[36].

91 The provisions of subdiv AB which are relevant to the question of procedural fairness are ss 52 to 58 inclusive. Sections 52 and 53 specify how an applicant or an interested person is to communicate with the Minister and how the Minister is to communicate with the applicant. Section 54 is a key provision. It is as follows:

> " **(1)** The Minister must, in deciding whether to grant or refuse to grant a visa, have regard to all of the information in the application.
>
> **(2)** For the purposes of subsection (1), information is in an application if the information is:
>
> (a) set out in the application; or
>
> (b) in a document attached to the application when it is made; or
>
> (c) given under section 55.
>
> **(3)** Without limiting subsection (1), a decision to grant or refuse to grant a visa may be made without giving the applicant an opportunity to make oral or written submissions."

92 Section 55(1) enables an applicant to provide additional relevant information at any time prior to the Minister's decision, although the Minister is not required to delay making a decision because he or she has been told that the applicant intends to provide such information[37]. Pursuant to s 56, the Minister may seek any further information that he or she considers relevant and may invite

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36 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 61 [41] per Gaudron and Gummow JJ; 176 ALR 219 at 231.

37 Section 55(2).

further information from the applicant. Section 57(2) requires the Minister to give certain information to the applicant and invite comment upon it[38].

93 The information that must be provided under s 57(2) is "information (other than non-disclosable information)[39] that the Minister considers:

(a) would be the reason, or a part of the reason, for refusing to grant a visa; and

(b) is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member; and

(c) was not given by the applicant for the purpose of the application."[40]

Section 58 provides that, if the Minister seeks further information under s 56 or invites comment on information provided under s 57, he or she must specify how that information is to be provided or the comment made.

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38 Section 57(3) provides that the section does not apply in relation to an application for a visa unless the visa can be granted when the applicant is in the migration zone, and the Act provides, under Pt 5 (Review of Decisions) or Pt 7 (Review of Protection Visa Decisions), for an application for review of a decision to refuse to grant the visa.

39 "Non-disclosable information" is defined in s 5 as information or matter:

> "(a) whose disclosure would, in the Minister's opinion, be contrary to the national interest because it would:
>
> (i) prejudice the security, defence or international relations of Australia; or
>
> (ii) involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet; or
>
> (b) whose disclosure would, in the Minister's opinion, be contrary to the public interest for a reason which could form the basis of a claim by the Crown in right of the Commonwealth in judicial proceedings; or
>
> (c) whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence;
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> and includes any document containing, or any record of, such information or matter".

40 Section 57(1).

94 It is to be noted that the provisions outlined above are of two different types. Sections 54(1), 57(2) and 58 are mandatory and specify what the Minister must do; the others are permissive or facultative, relevantly providing that the Minister may make a decision without giving the applicant an opportunity to make submissions (s 54(3)) or may seek further information (s 56(1)), including by inviting the applicant "to give additional information in a specified way" (s 56(2)).

95 The only indication of the matters which are to inform the decision of the Minister whether or not to seek submissions or further information from the applicant is to be found in the heading to subdiv AB, namely "dealing fairly, efficiently and quickly with visa applications". That being so, those powers are to be exercised to ensure procedural fairness, albeit in a manner that is quick and efficient. Accordingly, the obligation to accord procedural fairness is not excluded by subdiv AB.

96 Once it is accepted that the Minister's power to invite submissions or further information is to be exercised to ensure procedural fairness, the fact that the Act confers a right of review by the Refugee Review Tribunal becomes irrelevant. The existence of a right of review cannot deprive the provisions of subdiv AB of the meaning and effect which the heading to that subdivision directs[41].

97 Of course, if a Minister rejects an application simply because he or she is not satisfied as to some or all of the information provided by an applicant, there will be no occasion for him or her to consider the exercise of his or her power to invite further submissions or further information. However, if he or she has regard to information other than that provided by the applicant, a question will arise whether procedural fairness requires that the powers conferred by ss 54(3) and 56(2) be exercised to permit the applicant to put submissions or provide further information. Inevitably, the answer to that question must depend on the nature of the claims made by the applicant and the information to which the Minister has had regard.

98 In the present case, the delegate did not simply reject the claims made by Mr Miah. Indeed, he barely considered them. Rather, he had regard to the recent elections and change of government in Bangladesh and drew inferences from limited and, to some extent, equivocal information which he seemed to think rendered Mr Miah's claims virtually irrelevant. A question, thus, arose whether, as subdiv AB contemplates, he should have invited further information or submissions from Mr Miah to ensure procedural fairness.

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41 See *Twist v Randwick Municipal Council* (1976) 136 CLR 106.

99 The basic principle with respect to procedural fairness is that a person should have an opportunity to put his or her case and to meet the case that is put against him or her[42]. Mr Miah was not given the opportunity to put a case by reference to the change in government in Bangladesh or to answer the case made against him by reference to that change. Procedural fairness required that he be given that opportunity.

100 It was submitted on behalf of the Minister that if, as has proved to be the case, there was a failure on the part of the delegate to accord Mr Miah procedural fairness, that failure is excused by s 69 of the Act. That section provides:

> " **(1)** Non-compliance by the Minister with Subdivision AA or AB in relation to a visa application does not mean that a decision to grant or refuse to grant the visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed.
>
> **(2)** If the Minister deals with a visa application in a way that complies with Subdivision AA, AB and this Subdivision, the Minister is not required to take any other action in dealing with it."

101 It is convenient to deal first with s 69(2). So far as concerns subdiv AB, s 69(2) is not merely concerned with the mandatory requirements found in ss 54(1), 57(2) and 58 of the Act. It is concerned with the subdivision as a whole. It is therefore concerned with the proper exercise of the powers to invite submissions and further information to ensure procedural fairness. In the present case, there was either a decision not to exercise those powers or a failure to consider their exercise. In either event, there was a failure to comply with the requirements of subdiv AB.

102 So far as concerns s 69(1) of the Act, there is nothing in that provision to indicate an intention to preclude this Court from exercising its jurisdiction under s 75(v) of the Constitution. It is now clear that breach of the rules of natural

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42 See *Delta Properties Pty Ltd v Brisbane City Council* (1955) 95 CLR 11 at 18 per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ; *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 112 per Mason J; *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 495 per Murphy J; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 350 per Gibbs CJ, 360 per Mason J, 376 per Aickin J; *Kioa v West* (1985) 159 CLR 550 at 569 per Gibbs CJ, 582 per Mason J, 602 per Wilson J, 628 per Brennan J, 633 per Deane J.

justice will ground relief under s 75(v)[43]. That being so, if legislation does not exclude those rules, it cannot validly exclude the jurisdiction to grant relief for their breach that is conferred on this Court by s 75(v)[44]. That is not to say that the Parliament may not legislate in such a way that relief will be refused if an erroneous decision is made, provided that the decision does not exceed the authority conferred by the legislation in question and it constitutes a bona fide attempt to exercise the powers in issue and relates to the subject-matter of the legislation[45]. However, that is not what s 69(1) of the Act purports to do.

103 Section 69(1) of the Act simply purports to give validity to a decision notwithstanding non-compliance with, amongst other provisions, those of subdiv AB. The concluding words of the sub-section do not give it any wider operation. To say that non-compliance "only means that the decision might have been the wrong one and might be set aside if reviewed" is not to limit the

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43 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 56 [17], 61 [41] per Gaudron and Gummow JJ, with whom Gleeson CJ agreed, 81 [142] per Kirby J, 86 [170] per Hayne J; 176 ALR 219 at 223, 231, 258, 265.

44 See *The Commonwealth v New South Wales* (1923) 32 CLR 200 at 216 per Isaacs, Rich and Starke JJ; *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 606 per Latham CJ, 614, 616 per Dixon J, 620 per McTiernan J; *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418 per Mason ACJ and Brennan J, 421 per Murphy J, 427 per Deane and Dawson JJ; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 250 per Mason CJ, 270 per Brennan J, 306 per Dawson J; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 179 per Mason CJ, 192 per Brennan J, 204-205, 207 per Deane and Gaudron JJ; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 631-632 per Gaudron and Gummow JJ; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 85 [166] per Hayne J; 176 ALR 219 at 264.

45 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598. See also *Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437 at 442-443 per Dixon CJ; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219 at 252-253 per Kitto J; *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418 per Mason ACJ and Brennan J, 422 per Murphy J; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 248-250 per Mason CJ, 286-287 per Deane, Gaudron and McHugh JJ, 305 per Dawson J; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 179-180 per Mason CJ, 194-195 per Brennan J; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 630-631 per Gaudron and Gummow JJ.

avenues of review. Certainly, those words are apt to include judicial review pursuant to s 75(v) of the Constitution.

104 The purpose of s 69 of the Act is to ensure that an applicant's rights are to be ascertained by reference to the Minister's decision unless and until set aside. It says nothing as to an applicant's statutory or constitutional rights to have a decision reviewed. Still less does it purport to excuse non-compliance with the Act or the rules of natural justice.

105 One other matter should be noted. Were I of the view that subdiv AB constitutes a code, I should very much doubt that the delegate observed the requirement in s 54, namely, that he "have regard to all of the information in [Mr Miah's] application." In this respect, it is unnecessary to do more than state that the matters which, in my view, direct the conclusion that there was a constructive failure to exercise jurisdiction would also seem to indicate a failure to have regard to all the information in Mr Miah's application. In this respect, the words "have regard to", in their ordinary meaning, require something more than the mere noting of the information in question.

Remedy: discretionary considerations

106 Although relief by way of prohibition under s 75(v) of the Constitution is discretionary[46], the guiding principle is that "[t]hose 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."[47]

107 It was put that relief should not issue in this case because of the delay involved in bringing proceedings in this Court. The delay has been explained. In brief, the delay occurred only because Mr Miah sought to have his claims properly considered without the need to institute the present proceedings. The Minister declined to exercise powers which may have rendered the proceedings unnecessary. That being so, the argument that relief should be refused on discretionary grounds is wholly without merit.

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46 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52; 176 ALR 219.

47 See *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 [56] per Gaudron J; cited in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 65 [55] per Gaudron and Gummow JJ, with whom Gleeson CJ agreed; 176 ALR 219 at 236.

Conclusion and orders

108 Mr Miah is entitled to the relief which he claims. The order nisi granted by McHugh J on 17 January 2000 should be made absolute with costs.

109 McHUGH J. The present proceedings are brought in the original jurisdiction of the Court to make absolute orders nisi for writs of mandamus, prohibition and certiorari granted by me on 17 January 2000. The prosecutor seeks relief on two main grounds. First, that the delegate of the Minister breached the rules of natural justice in rejecting an application for a protection visa and second, that there was a constructive failure of jurisdiction in that the delegate failed to address the correct legal question.

110 Mr Md Ataul Haque Miah ("the prosecutor") is a national of Bangladesh. He arrived in Australia on 9 March 1996. On 1 April 1996 he applied for a protection visa pursuant to s 36 of the *Migration Act* 1958 (Cth) ("the Act"). His entitlement to that visa depended upon whether he was a refugee for the purposes of the Convention relating to the Status of Refugees[48]. Relevantly, the Convention defines a refugee as a person who[49]:

> "… 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 …"

His application was rejected by a delegate ("the delegate") of the Minister for Immigration and Multicultural Affairs ("the Minister"). It is with respect to that decision that the prosecutor brings these proceedings seeking relief under s 75(v) of the Constitution.

111 Four issues arise in the proceedings:

- Whether the delegate was under a duty to exercise his power according to the rules of natural justice.

- Whether in the statutory context and the circumstances of the case, the delegate breached the rules of natural justice by not offering the prosecutor an opportunity to respond to material that came into existence after the date of the application and which the delegate considered decisive against the prosecutor's claim.

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48 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 (together referred to as "the Convention").

49 Article 1A(2) of the Convention.

- Whether the delegate committed a jurisdictional error by applying an incorrect test in determining whether the prosecutor was a refugee.

- Whether any of the above grounds entitle the prosecutor to the relief he seeks under s 75(v) and if so whether the Court should exercise its discretion to refuse relief, given the delay in bringing these proceedings.

In my view, the orders nisi should be made absolute because the delegate was under a duty to offer the prosecutor an opportunity to respond to new material and failed to do so. It is unnecessary to consider whether the delegate applied an incorrect test in determining whether the prosecutor was a refugee.

Application for protection visa

112 According to his application for a protection visa, the prosecutor was born into a progressive, unorthodox and cultural-minded family. His father was headmaster of the local school and a vocal opponent against Islamic fundamentalists. During the Independence War of 1971, the prosecutor's father formed a resistance group against fundamentalists allied with the Pakistan army. Because of his father's activities in support of independence and unorthodox views on culture and religion, fundamentalists harassed the prosecutor's family and set fire to their house. In December 1971, the prosecutor's father was murdered, along with other intellectuals.

113 The prosecutor was brought up according to the ideas and beliefs of his late father. At high school he became involved in cultural groups and organised literary and theatrical activities. In Year 9 one of his groups clashed with the student wing of the Jamat-I-Islam Party, the same fundamentalist party that was responsible for killing his father.

114 After leaving school, the prosecutor continued his cultural activities. He established a group which aimed, through theatre, to educate people about war criminals and fundamentalists. He also protested against the religious Mullahs. Explaining why he chose artistic forms as a means of political protest, the prosecutor said he wanted to protest but was confused about the stand taken by various political parties and expressed equal frustration with both major parties: "The Awami League, which was the leading force in the Independence War, wanted to form [a] coalition with the Jamat-I-Islam in order to form the government. On the other hand the Bangladesh Nationalist Party, the BNP, planned to go to power with the aid of the Jamat-I-Islam." The people criticised in the dramas were still influential in society. They were outraged by the performances. The fundamentalists banished him from the village and threatened his life. On one occasion, they attacked him with an axe and stabbed him with a knife.

115 The repeated threats and the attempt on his life caused the prosecutor to flee to Dhaka. In Dhaka, he worked with a film-making organisation. The fundamentalists tracked him down and tried to attack him at work. A hand-made bomb was hurled into the office, causing damage. The owner of the business politely asked him to quit his job.

116 The prosecutor decided he had no alternative but to leave the country and went to Thailand in 1993. In 1995, he returned to Bangladesh but was involved in constant clashes with the Jamat-I-Islam. He married a Hindu woman, an act which infuriated the local Mullahs. As punishment, they gave the prosecutor and his wife 101 lashes each in front of the local mosque and told them to leave the village. They banished his wife's father and made further threats to kill the prosecutor if he did not leave.

117 After these events the prosecutor came to Australia and applied for a protection visa. In his application, he stated that he was definite that, if he returned to Bangladesh, fundamentalist groups would kill him.

118 Question 40 of the application form for the protection visa asked: "Do you think the authorities of that country can and will protect you if you go back? If not, why not?" In response, the prosecutor outlined his concerns that the government of the day, the Bangladesh Nationalist Party ("the BNP"), had been supportive of fundamentalists in the past and continued to have a fundamentalist character. As an example of the lack of support he received from the authorities, he referred to the local Municipal Chairman and Thana administrative officer jointly issuing a notice in the presence of local fundamentalist groups, ordering him to leave the locality. He was "definite that the present government, which supports fundamentalist groups, can never and will not provide any protection".

The delegate's decision

119 The delegate rejected the application for a protection visa on 13 May 1997, some 13 months after it had been lodged. In the interim, there had been a general election in Bangladesh.

120 The delegate did not assess, challenge or doubt the background material in the application and "accept[ed] that the [prosecutor] may have experienced harassment from the Muslim fundamentalists." He accepted also that "the BNP government may have some form of an alliance with the fundamentalists." However, he then considered the impact of the recent general election. In doing so, he relied upon a United States Department of State report[50] released in

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50 United States, Department of State, *Bangladesh Country Report on Human Rights Practices for 1996*, (1997).

January 1997 and a Reuter Business Briefing from July 1996[51] about the election. The delegate said:

> "3.4.1 ... However, during the recent elections, the BNP government was ousted from power and the party which the applicant described as pro-independence, the Awami League, took over. More significantly, the fundamentalist party only managed to retain a few seats in the Parliament and their popular vote dropped in comparison to what they got during the previous elections.
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> 3.4.2 The electoral loss of the fundamentalist political party during the last elections is viewed as an indication that the people in Bangladesh are basically religious moderates who shun the radical brand of Islam. This suggests that Bangladeshis in general are tolerant and that the extremists whom the applicant fears make up a tiny minority of the population.
>
> 3.4.3 The Bangladeshi Constitution provides for the right to practice the religion of one's choice. The current government respects this provision in practice. While the government has reportedly failed at times to denounce, investigate or prosecute the Islamic extremist attacks on religious minorities and women, there is no indication that it is totally powerless to stop those violations of other people's rights. The current government can still be said to be capable of offering persons like the applicant effective protection against the religious fundamentalists."

The delegate found that the prosecutor did not have a real chance of Convention-based persecution if he returned to Bangladesh and consequently that his fear of persecution was not well-founded. Accordingly the delegate concluded that the prosecutor was not a refugee and was owed no protection obligations by Australia.

Attempts to review the decision of the delegate

121 A letter communicating the delegate's decision was sent to the prosecutor. It informed him of his right to apply to the Refugee Review Tribunal ("the Tribunal") for a review of the decision and the 28-day time limit for applying[52].

122 On 23 May 1997, the prosecutor instructed his then solicitors to lodge an application for review of the decision to the Tribunal. He attended their offices,

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51 "Two Main Parties Undercut 'Only Upholder of Islam' Claim as Moderates Turn Backs on Radicalism", from Reuter Business Briefing Electronic Download (sourced from *South China Morning Post*), 1 July 1996.

52 See ss 411 and 412 of the Act.

completed the application form, signed it and entrusted it to the solicitors for lodgment. Instead of filing the application form, the solicitors misplaced it. They advised the prosecutor of their error in July 1997, after the 28-day deadline had passed. It is not possible to extend the deadline[53]. The solicitors advised the prosecutor that his only option for review was to write to the Minister pursuant to s 48B of the Act, asking him to dispense with s 48A of the Act which prohibits a person refused a protection visa from making a further application.

123 The solicitors sent a request to that effect to the Minister in August 1997. They received a response some eight months later, in April 1998, informing them that the Minister had decided not to exercise the power. Further requests were sent to the Minister in June and July of 1998. Eight months after these requests were sent, the Minister responded in March 1999 informing the prosecutor that his case did not meet the relevant guidelines.

124 In October 1999, the prosecutor's then solicitors received advice from senior counsel that proceedings should be commenced in this Court and that it was preferable that other solicitors act in those proceedings. The prosecutor instructed new solicitors and commenced proceedings in the original jurisdiction of this Court shortly thereafter.

Natural justice ground

125 The prosecutor contends that the delegate breached the rules of natural justice by failing to offer him an opportunity to respond to new material critical to adverse findings against his application. The respondents contend that there was no such duty. They claim that subdiv AB of Div 3 of Pt 2 of the Act provides a comprehensive "code" of procedure in relation to dealing with visa applications. This "code", they contend, does not include the specific duty upon which the prosecutor relies. Alternatively, the respondents argue that, in the circumstances of the case, the requirements of natural justice did not require the delegate to inform the prosecutor that he was considering taking into account the change of government. The delegate, therefore, had no duty to offer the prosecutor an opportunity to respond to the effect on his application of the change of government.

126 It is now settled that, when a statute confers on a public official the power to do something which affects a person's rights, interests or expectations, the rules of natural justice regulate the exercise of that power "unless they are excluded by plain words of necessary intendment"[54]. An intention on the part of

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53 This was not contested by the parties: see s 412 of the Act; *Fernando v Minister for Immigration and Multicultural Affairs* (2000) 97 FCR 407.

54 *Annetts v McCann* (1990) 170 CLR 596 at 598.

the legislature to exclude the rules of natural justice is not to be assumed nor spelled out from "indirect references, uncertain inferences or equivocal considerations"[55]. Nor is such an intention to be inferred from the presence in the statute of rights which are commensurate with some of the rules of natural justice[56]. As I pointed out in *Theophanous v Herald & Weekly Times Ltd*[57]:

> "The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture."

The common law rules of natural justice are part of this background. They are taken to apply to the exercise of public power unless clearly excluded.

127 Accordingly, the relevant question in the present proceedings is whether the terms of the Act, particularly subdiv AB, display a legislative intention to exclude the common law rules of natural justice. More specifically, the question is whether the Act intended to deny an applicant "an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise"[58].

128 It is highly improbable that the legislature intended to exclude all the common law requirements of natural justice from subdiv AB. There are no clear words to that effect. Where Parliament has wanted to exclude common law rules from applying to the administration of the Act, it has not hesitated to do so in clear words[59]. Moreover, subdiv AB is headed "Code of procedure for dealing *fairly*, efficiently and quickly with visa applications"[60]. It therefore assumes that the "code" will operate fairly. The subdivision sets out various formal procedures which the Minister may or must follow to ensure fairness to applicants. But subdiv AB does not declare that they exhaustively define the content of fair procedure. The subject matter of the Act, the fact that it

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55 *Annetts v McCann* (1990) 170 CLR 596 at 598, citing *The Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396.

56 *Annetts v McCann* (1990) 170 CLR 596 at 598; *Baba v Parole Board of New South Wales* (1986) 5 NSWLR 338 at 344-345, 347, 349.

57 (1994) 182 CLR 104 at 196.

58 *Kioa v West* (1985) 159 CLR 550 at 628 per Brennan J.

59 See for example s 476(2).

60 Emphasis added.

implements Australia's international obligations, and the omission of words unambiguously pointing to an intention to exclude all the common law rules of natural justice indicate that the exercise of power under subdiv AB is conditioned on the observance of those rules except where the provisions of the Act specifically supersede them.

129 Once it is acknowledged that there is a general duty to accord natural justice to an applicant applying for a protection visa, the inquiry drops from a matter of general principle to the particular. In *Kioa v West*, Brennan J said that "[i]t is not possible precisely and exhaustively to state what the repository of a statutory power must always do to satisfy a condition that the principles of natural justice be observed."[61] The content of the principles which the legislature intends to be applied in the circumstances of a particular case cannot be discovered by reference solely to the statute[62]. In *Kioa*, Brennan J also pointed out that[63]:

> "The principles of natural justice have a flexible quality which, chameleon-like, evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power."

The critical questions then, are what are the principles of natural justice required in the particular circumstances of this case and has any provision of the Act specifically excluded one or more of them.

130 The starting point for determining the content of the duty to accord natural justice is therefore the statutory context. The respondents contend that three features of the Act demonstrate that Parliament did not require the delegate to give the prosecutor an opportunity to deal with the results of the election. They are (1) that subdiv AB is a "code" which cannot be supplemented, (2) that s 69 of the Act precludes the relief sought, and (3) that the prosecutor had the right to a full *de novo* appeal to the Tribunal.

The "code" argument

131 The respondents contend that the statutory provisions demonstrate an intention to provide a "code" of procedures for determining applications for refugee status. By necessary implication, they argue, the "code" excludes any separate or additional incidents of procedural fairness that are not prescribed

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61 (1985) 159 CLR 550 at 611.

62 *Kioa v West* (1985) 159 CLR 550.

63 (1985) 159 CLR 550 at 612.

within it. They point to the wording of the heading[64] of subdiv AB – "*Code* of procedure for dealing fairly, efficiently and quickly with visa applications"[65]. But the use of the term "code" is too weak a reason to conclude that Parliament intended to limit the requirements of natural justice to what is provided in subdiv AB. It is hardly to be supposed, for example, that the Parliament of this nation intended to exclude the common law rules concerning actual bias or corruption of the decision-making process. Indeed, the use of the word "fairly" makes it difficult to extrapolate a manifestly clear intention to exclude rules of natural justice from applying to the procedures set out in the subdivision.

132 In addition, the respondents point to the Explanatory Memorandum[66] which states that subdiv AB aims to "replace the uncodified principles of natural justice with clear and fixed procedures which are drawn from those principles." However, even when a Minister, in introducing legislation, has expressed a view as to the meaning of that legislation, the court will not give the enactment that meaning if such a reading is not justified. The need to act on the text of the enactment and not the Minister's statements is particularly important when the Minister's meaning has serious consequences for an individual[67].

133 I turn now to consider the terms of subdiv AB.

134 Section 52 of the Act states that an applicant for a visa or people providing information about the applicant must communicate with the Minister in a way prescribed by the regulations. How the Minister is to communicate with the applicant is dealt with in s 53.

135 Section 54 imposes a mandatory duty on the Minister, in deciding whether to refuse or grant a visa, to have regard to all information in the application. Section 54(3) states that a decision to grant or refuse to grant a visa may be made without giving the applicant an opportunity to make oral or written submissions.

136 Section 55 allows the applicant to give any additional relevant information to the Minister up until the decision has been made. If the applicant does this, the Minister must have regard to that information in making the decision.

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64 Under s 13(1) of the *Acts Interpretation Act* 1901 (Cth) "[t]he headings of the Parts Divisions and Subdivisions into which any Act is divided shall be deemed to be part of the Act."

65 Emphasis added.

66 Explanatory Memorandum to the Migration Reform Bill 1992 (Cth), par 51.

67 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520 per Mason CJ, Wilson and Dawson JJ, 532 per Deane J.

137 Section 56 provides for information that the Minister may seek. Section 56(1) states that "[i]n considering an application for a visa, the Minister may, if he or she wants to, get any information that he or she considers relevant but, if the Minister gets such information, the Minister must have regard to that information in making the decision whether to grant or refuse the visa." Section 56(2) states that, without limiting sub-s (1), the Minister may invite, orally or in writing, the applicant to give additional information in a specified way. Thus, s 56 enables the delegate to take into account material such as the election material that was relied on in this case.

138 Section 57 makes it mandatory for the Minister to give certain "relevant information" to the applicant. Relevant information means information that the Minister considers (a) would be the reason, or a part of the reason, for refusing to grant a visa; and (b) is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member; and (c) was not given by the applicant for the purpose of the application. In such circumstances the Minister must give particulars of the relevant information to the applicant, ensure the applicant understands why it is relevant and "invite the applicant to comment on it." However, information that the prosecutor says ought to have been provided to him for comment is not "relevant information" within the meaning of s 57.

139 The respondents argue that, because the statute establishes a mandatory duty to inform applicants about certain kinds of information, Parliament could not have intended that a similar duty should be imposed in relation to other types of information. But to so argue is to fall into the error of inferring from the presence of some matters concerned with natural justice that Parliament intended to exclude natural justice in all other respects[68].

140 A basic principle of the common law rules of natural justice is that a person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his or her interests that the repository of the power proposes to take into account in deciding upon its exercise[69]. This does not mean that all material which comes before the decision-

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68 *Annetts v McCann* (1990) 170 CLR 596 at 598; *Baba v Parole Board of New South Wales* (1986) 5 NSWLR 338 at 349: "Reliance on the maxim expressio unius personae vel rei, est exclusio alterius can seldom, if ever, be enough to exclude the common law rules of natural justice."

69 *Kioa v West* (1985) 159 CLR 550 at 628, citing *Kanda v Government of Malaya* [1962] AC 322 at 337; *Ridge v Baldwin* [1964] AC 40 at 113-114; *De Verteuil v Knaggs* [1918] AC 557 at 560, 561.

maker must be disclosed but, "in the ordinary case … an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made."[70] Thus, the Federal Court has held that information of a non-personal nature relating to changed political circumstances that was decisive to the outcome of a refugee decision ought to have been put to the applicant[71]. Nothing in the Act, or in s 56 in particular, indicates a clear intention to exclude this principle of natural justice.

141 Section 56 is not a mandatory power, but a permissive power. It says nothing as to what must be done with the information that the Minister obtains under s 56(1). Nothing in the section states, expressly or by necessary implication, that once the delegate chooses to exercise the power, natural justice does not condition its exercise. In some cases, exercises of the power, although conditioned by the rules of natural justice, will *not* require that the applicant have an opportunity to comment on the material. Examples of material that would not require comment by the applicant would include non-adverse country information, favourable or corroborative information in the public domain and information based on the circumstances already described in the application. But there are cases where the exercise of this power *does* require that the applicant be given an opportunity to comment on the material. An example is where the delegate proposes to use new material of which the applicant may be unaware and which is or could be decisive against the applicant's claim for refugee status. The need for disclosure by the delegate is even stronger where the material concerns circumstances that have changed since the date of application and is being used after considerable delay. It is stronger still when the material is equivocal or contains information that the applicant could not reasonably have expected to be used in the way the delegate uses it.

142 Here the new material was undoubtedly decisive of the prosecutor's claim. The material was totally new. The election took place in Bangladesh more than two months after the application was made in April 1996. The reports relied on by the delegate were issued three months and nine months respectively after the application was made. The delegate's decision was made more than 13 months after the date of the application. But over and above these considerations is the fact that it was seemingly irrelevant to the prosecutor's fears whether or not the Awami League or the BNP were in government. Both political parties were arguably unable or unwilling to offer the prosecutor protection from the Islamic fundamentalists – according to the prosecutor they were in coalition with them.

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70 *Kioa v West* (1985) 159 CLR 550 at 629.

71 *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 43 FCR 100 at 129; *David v Minister for Immigration and Ethnic Affairs* unreported, Federal Court of Australia, 12 October 1995 at 17 per Wilcox J.

This was made clear in the prosecutor's application[72]. It was also apparent from one of the very reports that the delegate relied on in using the material[73]. Furthermore, the prosecutor could not reasonably have expected this type of information to be used. Certainly, he could not reasonably have been expected to provide information about a matter that he reasonably perceived as irrelevant to his situation. In other words, this is a case where "the requirements of procedural fairness may be of added importance ... in that they ensure an opportunity of raising for consideration matters which are *not already obvious*."[74]

143 The rules of natural justice are flexible and adaptable to the particular circumstances of each case. In the particular circumstances outlined above, they required the delegate, in exercising power under subdiv AB, to inform the prosecutor that he was contemplating using information about the election results and to offer the prosecutor an opportunity to comment. There was, accordingly, a breach of the rules of natural justice. The "code" argument fails.

The section 69 argument

144 Section 69, which appears in subdiv AC of Div 3 of Pt 2 of the Act, provides:

> "**69**(1) Non-compliance by the Minister with Subdivision AA or AB in relation to a visa application does not mean that a decision to grant or refuse to grant the visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed.
>
> (2) If the Minister deals with a visa application in a way that complies with Subdivision AA, AB and this Subdivision, the Minister is not required to take any other action in dealing with it."

For the reasons given by Gaudron J in her judgment, I agree that s 69 does not assist the respondents' argument.

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72 "The Awami League … wanted to form coalition with the Jamat-I-Islam in order to form the government. On the other hand ... the BNP planned to go to power with the aid of the Jamat-I-Islam."

73 Reuter Business Briefing: "On religion, the two parties are seen as no less religious than the Jamat."

74 *Kioa v West* (1985) 159 CLR 550 at 633 per Deane J (emphasis added).

The right of appeal argument

145 The respondents contend that the right to a full *de novo* review by the Tribunal, pursuant to Pt 7 of the Act, also indicates that Parliament intended to limit the requirements of natural justice at the stage where a delegate is examining the application.

146 It is true that the existence of appeal or review rights may affect the extent to which the requirements of natural justice apply at an earlier level of decision-making. But there is no general rule that a right of appeal or review necessarily denies or limits the application of the rules of natural justice. There is no inflexible rule that the presence of a right of appeal or review excludes natural justice[75]. As Barwick CJ said in *Twist v Randwick Municipal Council*[76]: "The mere existence of an appeal may not in some circumstances satisfy the requirements of natural justice." In the same case, Mason J said that[77]:

> "… the earlier cases should not be regarded as deciding that the presence of an appeal to another administrative body is an absolute answer to a departure from natural justice or the standard of fairness. The existence of such an appeal does not demonstrate in itself that the inferior tribunal is at liberty to deny a hearing."

Indeed, the insistence by this Court of "plain words of necessary intendment" to exclude the rules of natural justice[78] has led courts to reject the view that a right of appeal might provide an answer to a complaint that procedural fairness was denied in relation to an initial determination[79]. The cases indicate, however, that the presence or absence of certain factors can often be relevant in determining whether such a right does exclude or limit the rules of natural justice. These factors include:

> **Nature of the original decision: preliminary or final.** Natural justice requirements are less likely to attach to decisions that are preliminary in nature. Examples are decisions to lay charges or commence disciplinary proceedings. The closer a decision is to having finality and immediate

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75 *Twist v Randwick Municipal Council* (1976) 136 CLR 106; see also *Ackroyd v Whitehouse* (1985) 2 NSWLR 239 at 250 per Kirby P.

76 (1976) 136 CLR 106 at 111.

77 (1976) 136 CLR 106 at 116. See also at 118 per Jacobs J.

78 *Annetts v McCann* (1990) 170 CLR 596 at 598.

79 See *Hill v Green* (1999) 48 NSWLR 161 at 195.

consequences for the individual, however, the more likely it is that natural justice requirements apply[80]. Here, the decision was not of an investigatory or preliminary nature. It decided the ultimate question in issue: whether the prosecutor was a refugee. It was complete and effective. This is reinforced by s 69(1) of the Act which provides that the decision in relation to a visa application is valid until set aside.

Original decision made in public or private. In some cases, whether or not the initial decision is made in public or private is relevant to determining whether the rules of natural justice apply to that decision. This is particularly so in preliminary decisions which would not otherwise call for natural justice. Thus, cases where a person's reputation is likely to be affected may require a fair hearing at first instance, for example cases involving allegations of crime or professional misconduct[81]. Here, the prosecutor was not concerned about his reputation, but rather his livelihood. The delegate's decision did not affect his reputation in any way. But that fact is not a reason – in so important a matter as a claim for refugee status – to hold that the rules of natural justice are excluded by reason of the decision being made in private.

Formalities required for original decision. The formalities required in the process of making the original decision[82] may be relevant to the effect of an appeal right. Here, there was a requirement to give reasons and various other formal procedures were in place for dealing with applications[83]. In that context, it is harder to say that the existence of an appeal right was intended to limit the requirements of natural justice at an

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80 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Murray v Legal Services Commissioner* (1999) 46 NSWLR 224; *Rees v Crane* [1994] 2 AC 173. See *Cornall v AB* [1995] 1 VR 372 where, at 395, the Appeal Division of the Victorian Supreme Court distinguished cases like *Ainsworth* and *Rees v Crane* as "special cases where the outcome of the investigation and the recommendations made or opinions formed by the investigators were either final in the process thereby undertaken or led to immediate consequences of such importance to the individual investigated that the investigating body was obliged to afford procedural fairness." See also *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 158-162; *Parker v Anti-Corruption Commission* unreported, Full Court of the Supreme Court of Western Australia, 31 March 1999.

81 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Rees v Crane* [1994] 2 AC 173.

82 *Twist v Randwick Municipal Council* (1976) 136 CLR 106.

83 See discussion of subdiv AB above.

earlier level. Where formal procedures apply at the first level of decision-making, they support an inference that the appeal is not the sole source of procedural fairness. On the other hand, where there is no obligation to provide reasons and no formal procedures, as in *Twist*[84], they support the inference that the right of appeal excludes the rules of natural justice.

Urgency of original decision. In a similar vein, the urgency which may attend the original decision will be relevant. This was a significant factor in *Twist*, which involved a council's decision to demolish a building which was threatening the neighbourhood. In this case, there was no urgency pressing upon the decision-maker. That is obvious from the fact that the decision was made 13 and a half months after the date of the application.

Nature of the appellate body – judicial, internal, "domestic". If the appellate body is a court, it is easier to infer that the right to appeal was intended to limit or exclude the rules of natural justice at the earlier level. In *Twist*, the appeal was to the District Court. That was a significant factor for Barwick CJ, who distinguished *Ridge v Baldwin*[85] on the basis that "it was not an appeal to a court of law"[86]. Similarly, Jacobs J might have taken a "different view … if the appeal were to anything less than a court of the wide jurisdiction and consequent legal standing possessed by the District Court"[87]. Mason J[88] also had regard to some of the earlier decisions where the appeals were not to a court[89].

In contrast to courts, appellate bodies internal to the same organisation as the original decision-maker are less likely to be independent[90]. This is a factor requiring the rules of natural justice to be

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84 (1976) 136 CLR 106 at 114.

85 [1964] AC 40, where the provision for an appeal did not deter the court from finding that natural justice ought to have been afforded in the decision below.

86 (1976) 136 CLR 106 at 111.

87 (1976) 136 CLR 106 at 119.

88 (1976) 136 CLR 106 at 115.

89 For example *Cooper v Wandsworth Board of Works* (1863) 14 CB(NS) 180 [143 ER 414]; *Vestry of St James and St John, Clerkenwell v Feary* (1890) 24 QBD 703.

90 See for example *Ackroyd v Whitehouse* (1985) 2 NSWLR 239 at 252 per Kirby P, 257 per Samuels JA.

applied at all levels of decision-making. Some internal appellate processes, however, may indicate such independence on the part of the tribunal or have such statutory authority that it is proper to infer that the initial decision-maker was not required to accord natural justice even if the appellate body is a "domestic" one. "Domestic" means the processes are founded on "consensual acceptance". The committee of the Australian Jockey Club in *Calvin v Carr* is an example of such a body because the procedures in issue had been consented to by "those engaged in the various activities connected with horse racing."[91] This case is clearly different from such "domestic" proceedings. Appeal lay not to a court but to a tribunal, albeit an independent one.

Breadth of appeal – *de novo* or limited. Perhaps one of the most important factors is the breadth of the appeal. If there is provision for a complete *de novo* appeal on the merits of the case, then it is easier to infer from the rules or circumstances applicable at first instance that the requirements of natural justice were intended to be excluded or modified[92]. Here, there was a right of appeal to a tribunal that would consider the application *de novo*. This is not, however, always determinative and the court "retains a discretion to grant other relief if that is justified in the circumstances of the case."[93]

Nature of the interest and subject matter. Finally, the nature of the interest of and consequences for the individual, as well as the subject matter of the legislation, are important[94]. Here, the nature of the interest is the prosecutor's personal security. The consequences for him include returning to face serious threats to his personal security, if not to his life. The subject matter of the legislation is undeniably important – it enacts Australia's international obligations towards some of the world's most vulnerable citizens.

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91 *Calvin v Carr* [1980] AC 574 at 589.

92 *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 111, 113, 118; *Calvin v Carr* [1980] AC 574; *Hill v Green* (1999) 48 NSWLR 161 at 197; *Oates v Williams* (1998) 84 FCR 348 at 360 (reversed on appeal without reference to this issue: *Attorney-General (Cth) v Oates* (1999) 198 CLR 162). For discussion of different types of appeal, see *Walsh v Law Society (NSW)* (1999) 198 CLR 73 at 90-93 [50]-[58] per McHugh, Kirby and Callinan JJ.

93 *Hill v Green* (1999) 48 NSWLR 161 at 197.

94 *Calvin v Carr* [1980] AC 574 at 593; *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 113, 117.

Balancing the factors above in relation to these proceedings, the right of appeal to the Tribunal is insufficient to conclude that Parliament intended that the delegate was not required to accord natural justice in the manner asserted. The only factor truly pointing to an intention to exclude the rules of natural justice is the *de novo* right of review by an independent tribunal. But important though that is, it does not outweigh the inference to be drawn from the fact that the refusal of the application may put an applicant's life or liberty at risk and, as a practical matter, will often – perhaps usually – mean that an applicant will be detained in custody pending the review of the delegate's decision. That being so, it is proper to infer that the Parliament, by giving a right of review, did not intend to exclude the common law rules of natural justice where they were applicable.

Conclusion on natural justice ground

147 The delegate had a duty to exercise his power in accordance with the rules of natural justice. He failed to do so. He did not question the prosecutor's claims about what he experienced in Bangladesh or doubt his credibility. He relied on information that he obtained pursuant to powers conferred by subdiv AB. The information concerned events that occurred after the prosecutor applied for a visa. The delegate consulted that information well after the date of the application. The information was equivocal. The delegate relied on it in relation to the core issue for determination and his reliance on it was decisive of the outcome of the application. In those circumstances, the delegate ought to have informed the prosecutor of the new material and offered him an opportunity to respond to it before acting on it.

Breach of natural justice entitles the prosecutor to s 75(v) relief

148 Relief under s 75(v) of the Constitution is available for failure to accord natural justice. This Court so held in *Re Refugee Review Tribunal; Ex parte Aala*[95]. The finding that the delegate breached the rules of natural justice is accordingly sufficient to entitle the prosecutor to the relief he seeks under s 75(v). It is therefore not necessary to consider the second ground.

Availability of relief and exercise of discretion

149 The respondents argue, however, that the Court should exercise its discretion and refuse relief because of the delay in bringing these proceedings.

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95 (2000) 75 ALJR 52 at 54 [5] per Gleeson CJ, 56 [17], 61 [42], 66 [59] per Gaudron and Gummow JJ, 81 [142] per Kirby J, 86 [170]-[171] per Hayne J; 176 ALR 219 at 221, 223, 231, 237-238, 258, 265. See also *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171, cited in *Craig v South Australia* (1995) 184 CLR 163 at 178.

150 This Court articulated the relevant principles for exercising its discretion to refuse relief under s 75(v) in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd*[96]:

> "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."

151 The onus is on the respondents to demonstrate circumstances justifying withholding the remedy.

152 The delay of the prosecutor was not "unwarrantable". It has been explained as resulting from a combination of the dilatoriness of the lawyers and the delay by the Minister in determining whether or not to dispense with the requirement of s 48A of the Act. There is no "more convenient and satisfactory remedy" – the deadline for the Tribunal's review has expired, the Minister has twice refused to exercise a power to reconsider the visa application, and damages do not seem to be available to the prosecutor. If they are, they are far from appropriate as a remedy in these circumstances. There has been no bad faith on the part of the prosecutor.

153 Accordingly, in all the circumstances, the delay was not such as to merit the disqualification of the prosecutor from relief to which he otherwise would be entitled in this Court.

Order

154 The orders nisi granted by me on 17 January 2000 should be made absolute with costs.

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96 (1949) 78 CLR 389 at 400, cited in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 65 [56] per Gaudron and Gummow JJ; 176 ALR 219 at 236-237.

155 KIRBY J. These proceedings concern refugee law. They do not reveal public administration or legal practice in Australia at their best. An order nisi was granted by McHugh J, returning the matter before this Court as now constituted[97]. The question presented is whether Australian law tolerates the procedural injustice revealed in the evidence. In my view, it does not. The law provides relief. The order nisi should be made absolute.

The facts

156 Most of the facts necessary to understand the proceedings have already been set out[98]. The reasons of the delegate[99] ("the delegate") of the Minister for Immigration and Multicultural Affairs ("the Minister") have also been summarised[100]. I have made additional references to the facts below to help explain the conclusion which I have reached.

157 The delegate determined an application for a protection visa under the *Migration Act* 1958 (Cth) ("the Act") lodged by Md Ataul Haque Miah, now the prosecutor in this Court ("the prosecutor"). In his reasons, the delegate accepted that the prosecutor "may have experienced harassment from the Muslim fundamentalists" in the country of his nationality, Bangladesh[101]. The provisional way in which that finding was expressed can be explained by the fact that the delegate felt able to reach his decision without determining the existence and genuineness of the prosecutor's "fear of being persecuted" for Convention reasons. The basis for rejecting the prosecutor's application was that circumstances had occurred between the time of the prosecutor's application to the Minister and the delegate's decision which changed matters in important respects[102].

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97 Granted on 17 January 2000.

98 Reasons of Gleeson CJ and Hayne J at [1]-[10]; reasons of Gaudron J at [71]-[76]; reasons of McHugh J at [112]-[118], [121]-[124].

99 Acting pursuant to the *Migration Act* 1958 (Cth), s 65. The power of the Minister to delegate decisions is found in the Act, s 496(1).

100 Reasons of Gleeson CJ and Hayne J at [11]-[18]; reasons of Gaudron J at [77]-[79]; reasons of McHugh J at [119]-[120].

101 See the delegate's reasons, par 3.4.1, set out in the reasons of Gleeson CJ and Hayne J at [12].

102 See the delegate's reasons, pars 3.4.1-3.4.3, set out in the reasons of Gleeson CJ and Hayne J at [12] and the reasons of McHugh J at [120].

158 In that interval, the former government of Bangladesh had been defeated in national elections. The fundamentalist political party had also lost electoral support. According to the delegate, extremism had been rejected and the basic tolerance of Bangladeshis had been restored. The new government respected the constitutional guarantee of religious freedom. It was capable of preventing the violence of extremist attacks on religious minorities and women. Thus, in the delegate's opinion, the foundation of the prosecutor's alleged fear fell away.

159 Neither the Minister nor the delegate, nor anyone else in the Minister's department, called any of these considerations to the notice of the prosecutor for his submission or comment before the delegate's decision, based upon these very considerations, was made.

160 Notwithstanding the provisional form of the delegate's conclusion about harassment, there was nothing on the face of the prosecutor's statements in support of a protection visa, or in the other "information in the application"[103], or in the material "specifically about the applicant" revealed in the papers[104], that cast doubt on the serious circumstances upon which the prosecutor relied. Some of those circumstances, such as the murder of his father, would, presumably, have been open to objective investigation, resulting in proof or disproof.

161 The prosecutor's father had been a school headmaster and the organiser of cultural and theatrical activities. He opposed the religious fundamentalists (the Mullahs) who, in his view, distorted the religion of Islam. As a result, in December 1971, along with other intellectuals, the father was murdered, allegedly by members of "the fundamentalist group". The prosecutor stated that, in 1984, whilst still a school student, he had been injured by the "student front" of the extremist group responsible for the death of his father. The prosecutor claimed (and this could easily have been verified) that his body still bore "numerous marks of stabbings the [student front] had inflicted".

162 In his application to the Minister, the prosecutor explained his disquiet about the collaboration of the Bangladesh Nationalist Party (BNP), then in government, with the fundamentalist group. He stated that he had attempted to maintain the cultural and theatrical activities of his father, which included dramas portraying the identity of "the war criminals and the fundamentalists" responsible for violence. He described how, on one occasion, in 1989, he had been attacked at his college with an axe, as a result of which his right arm was severely injured. He later fled from the rural district in which he had grown up to the capital of Bangladesh, Dhaka. By 1993 he concluded that the extremists would try to kill

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103 The Act, s 54(1).

104 The Act, s 57(1)(b).

him wherever he went in that country. He therefore decided to leave and temporarily did so.

163 In 1995, the prosecutor returned to Bangladesh and married. His wife is a Hindu. He said that, because his wife had not converted to Islam, "the Muslim Mullahs of my locality were furious with me. They decided I should be punished for my deeds, and both of us were given a 101 [sic] lashes each in front of the local mosque." The couple were given seven days to leave the village and were threatened with death if they returned. The prosecutor's father-in-law was also evicted from the village. It was after these events that, in March 1996, the prosecutor came to Australia and soon after made his application for protection as a refugee.

164 Much of the prosecutor's statement in support of this application described the lack of protection he had received from the government and law enforcement officials of Bangladesh. Specifically, he complained that the local municipal and village officials had "jointly issued a notice, in the presence of the local fundamentalists groups [sic], ordering me to leave that locality". It was against this background that the prosecutor alleged that the government of Bangladesh could not (or would not) provide protection for him.

165 The application for a protection visa was lodged on 1 April 1996. The decision of the delegate refusing it was not made until 13 May 1997, an interval of thirteen and a half months. On 23 May 1997, the prosecutor gave instructions to his then solicitor to seek review by the Refugee Review Tribunal ("the Tribunal") of the delegate's decision. Such application had to be lodged not later than 28 days after the notification of the decision[105]. The solicitor mistakenly placed the necessary form inside the prosecutor's file instead of lodging it with the Tribunal. By 7 July 1997, when this mistake was discovered, the time for application to the Tribunal had expired. It has been held (and was not in contest before this Court) that there is no power in the Tribunal to extend time, even in a case where the time default is short, is explained and where the person affected has a substantial case on the merits[106]. In such cases, the aggrieved person must apply to the Minister to exercise the discretion to permit a second application to be made[107]. The prosecutor made such an application.

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105 The Act, s 412(1)(b). See also s 414(1).

106 cf *Allesch v Maunz* (2000) 74 ALJR 1206 at 1215 [47]-[50]; 173 ALR 648 at 660-661.

107 The Act, s 48B.

166 On 29 March 1998, the Minister refused to permit a second application to be made. The prosecutor's then solicitor was notified three weeks later. Shortly afterwards, a second application was made to the Minister to permit a fresh application for a protection visa, this time invoking, additionally, the Torture Convention[108]. On 19 March 1999, this application was also refused. Thereafter, counsel were briefed, the solicitors changed, and the present application was brought to this Court.

167 The story revealed by the foregoing is one of delay, error on the part of the prosecutor's original solicitor and a further failing, when the error was discovered, to invoke the constitutional jurisdiction of this Court without additional delay. Nevertheless, behind the solicitor is a client, personally innocent of delay or error, who now asks this Court to excuse the lateness of his application, in light of his explanation of how that lateness came about and in view of the legal merits of his case, so far undetermined.

The applicable legislation

168 Because, in this Court, the prosecutor's claim for relief was based on a fundamental failure of the delegate to perform his functions as required by law, it is necessary to consider what the law required of the delegate at the time of his decision. Most of the relevant requirements are contained in the Act. Its provisions lay down the test by which the Minister (and hence the delegate) must determine whether to grant or refuse a visa such as the prosecutor sought. The Act contains what it describes as a "Code of procedure for dealing fairly, efficiently and quickly with visa applications"[109]. This "Code" became the focus of the submissions of the parties, as did s 69 of the Act[110].

169 The Act incorporates into Australian law the protection obligations assumed by Australia under the Refugees Convention and Protocol[111]. The

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108 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on 10 December 1984, (1989) *Australia Treaty Series* No 21 (entered into force 7 September 1989).

109 The heading to Pt 2, Div 3, Subdiv AB of the Act.

110 Set out in the reasons of Gaudron J at [100] and the reasons of McHugh J at [144].

111 Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, (1954) *Australia Treaty Series* No 5 (entered into force 22 April 1954) ("the Convention"). The Convention is now to be read as amended by the Protocol relating to the Status of Refugees, done at New York on 31 January 1967, (1973) *Australia Treaty Series* No 37 (entered into force 13 December 1973). The history of the incorporation in the Act of the definition of "refugee" in Art 1A(2) of the

(Footnote continues on next page)

provisions and operation of the Act establishing the test to be applied in deciding an application for a protection visa, based on the alleged status of an applicant as a "refugee", are explained in past decisions of this Court[112].

The issues

170 The foregoing facts and the applicable legislation, considered together with the principles of natural justice ("procedural fairness"), present the following issues for decision by this Court.

1. Is the code of procedure contained in the Act ("the Code") an exhaustive statement of the applicable rules of natural justice, such that no additional requirement (relevantly, to bring information of general relevance concerning supervening events regarded as critical to the decision to be made to the notice of the person affected) may be implied in the Act or added by the common law to the provisions of the Code?

2. If not, did the delegate, in determining the prosecutor's application for a protection visa, breach an applicable requirement of the rules of natural justice by failing to draw such information to the prosecutor's attention for his submission or comment if so desired?

3. In determining the prosecutor's application by reference to the consideration that the government of the prosecutor's country of nationality was not "totally powerless to stop ... violations of other people's rights", did the delegate apply the wrong test, having regard to the requirements of the Convention as incorporated in the Act?

4. If the delegate relevantly breached a rule of natural justice, or applied the wrong test in determining the prosecutor's application, were either of these defaults excused by s 69(1) of the Act?

5. If not so excused, in order to secure relief from this Court pursuant to s 75(v) of the Constitution, is the prosecutor obliged to demonstrate that either of the delegate's errors amounted to "jurisdictional error" and, if so obliged, did the prosecutor establish an error of such a kind?

Convention is set out in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-232, 251-256, 287 ("*Applicant A*").

112 See *Applicant A* (1997) 190 CLR 225 at 230-232, 251-256, 287; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 74 ALJR 1556 at 1561-1562 [36], 1574 [107], 1575 [109]; 175 ALR 585 at 593, 611.

6. If all, or a sufficient number, of the foregoing questions are answered favourably to the prosecutor, should this Court nonetheless refuse to make absolute the constitutional writs and other relief sought by him? Should it do so in the exercise of the Court's discretion, including: (a) by reference to the failure of the prosecutor to invoke review on the merits by the Tribunal; and/or (b) by reference to the delay of the prosecutor in bringing the proceedings in this Court?

The Code is not exhaustive

171 *Statute and natural justice*: The Minister, who contested the prosecutor's claim for relief, argued that it ran into a fundamental obstacle. Whatever the common law might provide in respect of the obligations of natural justice, the requirement of procedural fairness applicable to a case of this kind had been spelt out exhaustively in the Act. The Code's provisions did not contain any obligation on the part of the delegate of the precise kind that the prosecutor urged. Therefore, so it was argued, it was impermissible for a court to impose such a requirement. This was so, whichever of the two theories propounded for the interaction between statute and common law in this respect was accepted[113]. The argument was said to be consistent with an understanding of the common law obligations of natural justice as those which judges inferred or derived from the silences of the statute as rules which, "of course", the Parliament would have provided if it had thought it necessary to spell them out. The same was contended if such requirements were additional, and supplementary, obligations which the common law grafted onto the statute, affording a separate and additional foundation for duties about which the statute said nothing. On either theory, the Minister submitted, a requirement inconsistent with, or additional to, those which the Parliament had stated exhaustively could not be added by a court.

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113 The two theories are referred to in *Kioa v West* (1985) 159 CLR 550 at 584-586, 615 ("*Kioa*"); *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652 ("*Haoucher*"); *Annetts v McCann* (1990) 170 CLR 596 at 604 ("*Annetts*"); *Abebe v The Commonwealth* (1999) 197 CLR 510 at 553-554 [112]-[113]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 60-61 [38]-[42], 85-86 [168]-[169]; 176 ALR 219 at 230-231, 264-265 ("*Aala*").

172 The common law may not be inconsistent with the Constitution[114]. Nor may it be inconsistent with applicable statute law[115]. In either case, judge-made law gives way to the superior authority of constitutional and legislative provisions. These propositions were not disputed. The controversies in this case lay deeper. They concerned the scope and operation of the Code and the implications to be derived from the scheme and structure of the Act, most relevantly the provisions for a merits review of the delegate's decision by the Tribunal.

173 *The Minister's arguments*: The Minister relied on a number of arguments. First, attention was drawn to the purpose that led to the introduction of the Code into the Act. According to the explanatory memorandum that accompanied the legislation having that effect[116] subdiv AB of Pt 2, Div 3 of the Act ("Subdiv AB"), containing the Code, was "intended to end the uncertainty about what is required to make a fair decision on a visa application"[117]. Its object was to "replace the uncodified principles of natural justice with clear and fixed procedures which are drawn from those principles"[118]. The memorandum drew to attention the delays and costs involved in challenges to decisions on the grounds of natural justice[119]. The exclusion of judicial review in the Federal Court, on the ground that the decision-maker had not observed the rules of natural justice[120], was justified by reference to the provision for judicial review on the ground that procedures explicitly required by the Act had not been observed. Obviously, the legislation did not purport to exclude the constitutional jurisdiction of this Court to consider complaints about departures by officers of the Commonwealth from the requirements imposed on them by law, including (if

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114 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566; *Lipohar v The Queen* (1999) 200 CLR 485 at 557 [180]; *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1135 [142]; 172 ALR 625 at 662.

115 *Damjanovic & Sons Pty Ltd v The Commonwealth* (1968) 117 CLR 390 at 408-409; *Aala* (2000) 75 ALJR 52 at 66 [60]; 176 ALR 219 at 238.

116 Explanatory Memorandum to the Migration Reform Bill 1992 (Cth) ("the Explanatory Memorandum").

117 Explanatory Memorandum at 23 [51].

118 Explanatory Memorandum at 23 [51].

119 Explanatory Memorandum at 23 [52].

120 Introduced by s 33 of the *Migration Reform Act* 1992 (Cth). See now the Act, s 476: *Aala* (2000) 75 ALJR 52 at 77 [124], 79 [134], 94 [218], n 231; 176 ALR 219 at 253, 256, 275-276.

applicable) the legal requirement to accord natural justice to persons affected by their decisions[121].

174 Secondly, the Minister emphasised that the Act had described the procedures as a "Code". It had done this in the heading to the relevant subdivision of the Act. By law, that heading is treated as part of the Act[122]. Normally, a code expresses the entirety of the law on the subject matter with which it deals[123]. Therefore, from the terms of the Act and its apparent object, it was submitted that the Parliament had stated exhaustively the procedural laws governing the conduct of the delegate when making the subject decision. If this were so, the suggestion that a court should impose additional procedural requirements was one that should be resisted. Adding judicially devised obligations would run into precisely the problems of delay and cost that the statutory Code was designed to avoid.

175 Thirdly, it was pointed out that it was open to the prosecutor, during the long interval in which the delegate had considered his application, to place any additional information before the delegate which he wished the delegate to take into account[124]. There was nothing to prevent the prosecutor from making an inquiry of the delegate concerning the considerations that were regarded as relevant to the decision to be made. It could be inferred that the prosecutor would have been generally aware of political developments in Bangladesh, including the defeat of the BNP government in which religious fundamentalists had participated and about whom the prosecutor had complained. In such circumstances, it would have been reasonable for the prosecutor to have anticipated the significance that this important political development in Bangladesh would have had for the decision of the delegate. The prosecutor's failure to supplement the materials in his application was, therefore, the prosecutor's fault.

176 Fourthly, the delegate was not a tribunal. He was not obliged to conduct a hearing. Nor was he required to proceed in the more formal manner of adjudicative decision-making, appropriate to a tribunal or court. He was a departmental official. By inference, he conducted many visa determinations. As

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121 Pursuant to the Constitution, s 75(v).

122 *Acts Interpretation Act* 1901 (Cth), s 13(1).

123 Discussed in *R v Barlow* (1997) 188 CLR 1 at 31-33 referring to *Stuart v The Queen* (1974) 134 CLR 426 at 437; *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1 at 22; *Boughey v The Queen* (1986) 161 CLR 10 at 30 and *Robinson v Canadian Pacific Railway Co* [1892] AC 481 at 487.

124 The Act, s 55(1).

an official, he was entitled, indeed expected, to remain abreast of the general political developments in countries from which applicants for refugee status commonly derive. Formalities that might be expected, as a matter of natural justice, on the part of a tribunal or court, are not appropriate to an administrative official. According to the Minister, this was sufficiently indicated by the express requirement of the Act identifying information which the delegate was obliged to bring to the notice of a person such as the prosecutor. That obligation was limited, relevantly, to information "specifically about the applicant" and "not just about a class of persons of which the applicant ... is a member"[125]. Because the Parliament had taken the trouble to express the duty applicable to such a case it had, so it was argued, inferentially excluded any duty to give an applicant information liable to affect the delegate's decision which was of a general character (such as information on contemporary political developments). Thus, the changing circumstances of the political scene in Bangladesh were, by the terms of the Code, excluded from those matters which the delegate was legally bound to call to the notice of the prosecutor. Where the Parliament had held back from imposing such a duty (whilst imposing certain others) it was not for a court to supplement what the Act had provided.

177 Fifthly, the Minister relied on the structure of the Act and the place of the delegate's determinations within it. Although it was true that, in this case, the determination was not reviewed by the Tribunal, that was only because of default on the part of the prosecutor's then solicitor. That circumstance could not distort the proper operation of the Act. The scheme of the Act envisaged that the delegate's decision could be reviewed on the merits by the Tribunal. Normally, arguments of the kind now voiced by the prosecutor would be decided, in effect, by the Tribunal. There, it would be open to a person concerned to advance detailed information and submissions about the political considerations that had influenced the decision of the delegate. In other contexts, the scope of appeal or review has been treated as relevant to determining the nature of the primary decision and the procedures by which such a decision should be made. Where a full merits review is available, to "cure" defects in the substance of a primary decision or any imperfect procedures by which it was reached, the formalities expected of the primary decision-maker would be lessened by the ready availability of correction[126].

178 *The Code is not exhaustive*: I accept the force of the Minister's arguments. I agree that, in deciding what is required of the delegate, the fundamental duty of a court is to express a rule that is harmonious, and not inconsistent, with the

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125 The Act, s 57(1)(b).

126 *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 116.

enacted provisions[127]. Decisions upon such matters must be made by reference to the language of the legislation, its history, the apparent purposes of any amendments and the conclusion reached concerning the exclusivity of the statutory remedies which the Parliament has provided. I acknowledge that minds might differ about the threshold point argued for the Minister, as indeed they have. I also agree with the Minister's submission that the unfortunate procedural predicament in which the prosecutor finds himself should not be allowed to distort the intended operation of the Act under which delegates must make thousands of visa decisions every year in the fair, efficient and quick way that the Act has envisaged[128]. For a number of reasons, however, I have concluded that the Code does not afford an answer to the prosecutor's claim[129]. My reasons are as follows.

179 First, the Parliament did not enact, in terms, that the Minister (and thus the delegate) was under no obligation to provide information to an applicant such as the prosecutor where, otherwise, the rules of natural justice would have necessitated that course. In other provisions of the Act[130], a distinction has been drawn between the exclusion of the Code and the express exclusion of the rules of natural justice. As the Act has acknowledged that distinction, it is virtually impossible to treat the Code as the statutory equivalent of the entire subject matter of natural justice. It was left to inference as to whether other obligations of natural justice could be imposed by law on the Minister, taking into account the use of the word "Code" in the heading to the subdivision of the Act and the relief provided where there had been non-compliance with the subdivision[131].

180 The latter argument, concerning non-compliance, will be addressed below. As to the former, it cannot be accepted that the Code is a code in the strict sense. It does not contain, or expressly exclude, every rule of natural justice that the law imposes upon officers of the Commonwealth, such as the Minister and the delegate. For example, there is nothing in the Code[132] that refers to those aspects

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127 cf *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 324 [97].

128 See the language of the heading to Subdiv AB, and s 420(1) of the Act.

129 My conclusions are similar to those reached by Lord Wilberforce in *Wiseman v Borneman* [1971] AC 297 at 317 who rejected the argument in that case "which merely takes the relevant statutory provision ... subjects it to a literal analysis and cuts straight through to the conclusion that Parliament has laid down a fixed procedure which only has to be literally followed to be immune from attack".

130 The Act, ss 501(2), 501(5).

131 The Act, s 69.

132 That is, nothing within Subdiv AB.

of natural justice that concern the disqualification of a decision-maker for ostensible bias[133]. It is inconceivable that the Parliament would have had a purpose to exempt the Minister (and hence the delegate) from the consequences that would flow, by law, from bias against an applicant for a visa[134]. Yet, upon the argument of the Minister, if the Code were given its technical meaning, the absence of any provision in Subdiv AB concerning that aspect of natural justice would exempt the Minister (and the delegate) from such a deeply entrenched presumption of the law. I find this conclusion impossible to accept.

181 Secondly, because the obligation to conform to the rules of natural justice is so deeply entrenched in the assumptions upon which our law is based, it can normally be treated as implicit in legislation enacted by the Parliament[135]. It would require much clearer words than exist in Subdiv AB to convince me that the provisions of the Code exhaust the applicable rules of natural justice, although not mentioned and however important such requirements might be in the particular case.

182 Thirdly, a constitutional consideration reinforces this conclusion. The fact that relief may be granted by this Court, pursuant to s 75(v) of the Constitution, suggests that truly fundamental obligations of natural justice, otherwise imposed on the decision-maker by law, are not excluded by provisions such as are contained in the Code. Thus, s 75(v) of the Constitution would, on the face of things, afford a vehicle for securing relief against an established case of actual or ostensible bias on the part of the Minister (or a delegate) as an officer of the Commonwealth. This consideration reinforces the inference that Subdiv AB does not exhaust all the enforceable rules of natural justice governing the officers of the Commonwealth concerned.

183 It follows that a meaning of the word "Code" must be adopted in this context which falls short of an exhaustive statement of the legal rules of natural justice. Once this conclusion is accepted, ordinary presumptions which run so deep in the common law may be given effect. In the absence of the clearest possible indication to the contrary, courts will normally assume that an

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133 The bias rule is conventionally seen as part of the requirements of the law of natural justice: *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553-554. Indeed, it has been described as an essential principle of the rule of law: Raz, *The Authority of Law: Essays on Law and Morality* (1979) at 217.

134 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* [2001] HCA 23 at [54]-[73] of my own reasons.

135 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 204.

Australian parliament does not intend to work serious procedural injustice upon persons whose interests are adversely affected by legislation. This is not a presumption that challenges the authority of such parliaments. It is one respectful of the assumption that, in Australia, parliaments ordinarily act justly and expect the repositories of power under legislation to do likewise[136].

184 Fourthly, it should not be assumed that the delegate's decision is inconsequential, simply because a facility exists for merits review in the Tribunal. The very fact that the delegate makes many decisions, affecting many people (and has been subjected to the Code requiring observance of rules of procedural fairness in some respects going beyond the obligations of the common law), indicates the high expectations of the Parliament. Such repositories of legislative power are expected to act in a way that avoids serious injustice and procedural unfairness to those who are affected by their decisions. The delegate is an office-holder who makes a decision in the place of the Minister. The Minister is a constitutional office-holder. The decision of the delegate is therefore, on the face of things, a most important and responsible one. Without doubt, it can have very significant consequences. It may be presumed that the Parliament envisaged that such a decision would be made carefully and justly[137]. The delegate is not simply an anonymous official within the Minister's department. He or she is a statutory office-holder on whom particular powers and duties are conferred by Act of Parliament.

185 In many cases, it can be expected that applicants for refugee status will be vulnerable, alone, without friends or family, and with limited access to legal and other assistance. Such considerations serve to emphasise the importance of the primary decision by the delegate. In the vast majority of cases, the delegate's decision will (and should) conclude the application. Published statistics suggest that, as a matter of practicality, adverse determinations by delegates of refugee applications in Australia are rarely disturbed by the Tribunal[138]. If this is so, it

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136 The presumption is secured by a rule of construction which has been observed by common law courts for at least a century that it is "in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness": *Maxwell on the Interpretation of Statutes*, 12th ed (1969) at 116 cited by Lord Steyn in *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587.

137 *Wiseman v Borneman* [1971] AC 297 at 317; *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 109-110.

138 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 216, n 130 noted in *Aala* (2000) 75 ALJR 52 at 79 [131], n 151; 176 ALR 219 at 255.

lends still greater emphasis to the importance of ensuring that the initial decision is correct.

186 Fifthly, it is relevant to take into account the special significance of the decision for the person affected. Of its nature, the decision to grant or refuse a protection visa is not merely concerned with the financial interests or reputation of an applicant. It is not even a determination that necessarily concerns the liberty of an applicant, although in particular cases it may be so. Rather, the determination concerns persecution. It is a decision potentially affecting the life and physical safety of an applicant and perhaps his or her family and associates. It is also one that is designed to ensure compliance by Australia with international obligations of a humanitarian character which Australia has voluntarily accepted and enacted as part of its laws[139].

187 Sixthly, it should not be concluded that the Parliament would have envisaged, still less mandated, that an office-holder, making decisions of the kind required of the delegate, would deprive himself or herself of relevant information, important to making the correct or preferable decision. At common law, the rules of natural justice are not inflexible. They adapt to the circumstances of the particular case. In some instances, it may well be that a delegate would be under no obligation to draw to an applicant's notice, for comment, criticism or submission, information that has come to the delegate's notice where this is of no more than passing significance. But where the information is new and is considered critical for, and even determinative of, the decision, particular circumstances can combine to oblige the decision-maker to place such information before the person whose interests are so seriously affected so as to gain assistance in the making of the decision. I cannot derive from the provisions of the Act a clear purpose of the Parliament to exclude an obligation so obviously important to the making of a correct decision on such a potentially serious matter[140].

188 Accordingly, neither in the terms of the Code nor in the provision for review of the delegate's determination by the Tribunal or otherwise, has the Parliament expelled "the justice of the common law"[141]. The threshold objection

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139 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 74 ALJR 1556 at 1561-1562 [36], 1574 [107], 1575 [109], 1594-1595 [197]-[199]; 175 ALR 585 at 593, 611, 639-640.

140 See *Baba v Parole Board of New South Wales* (1986) 5 NSWLR 338 at 344, 347 cited in *Annetts* (1990) 170 CLR 596 at 598.

141 *Cooper v Wandsworth Board of Works* (1863) 14 CB(NS) 180 at 194 [143 ER 414 at 420]; cf *Ridge v Baldwin* [1964] AC 40 at 69; *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 588.

of the Minister therefore fails. As a consequence, it is necessary to consider the remaining issues.

Natural justice required notification of the supervening information

189 In determining the requirements which the rules of natural justice, relevant to procedural fairness, imposed on the delegate in this case, it is appropriate to take into account a number of considerations.

190 First, the statutory context for the delegate's decision, and the facility for review of that decision by the Tribunal, require paramount consideration[142]. The Act contemplates a merits review by the Tribunal. Clearly, this is relevant. However, it does not imply that the delegate is at liberty to deny an applicant a fundamental legal entitlement designed to ensure that the "decision" made is an informed and just one[143]. The scope of the applicable legal entitlement is defined by the rules of natural justice consistent with the Act. Those requirements are neither absolute[144] nor rigid[145]. They adapt to all of the circumstances of a particular case. They have been described as "chameleon-like"[146].

191 Secondly, administrative decisions made by officials such as the delegate are not to be "over-judicialise[d]"[147] by notions of natural justice, nor "clogged" by procedures "which are not relevant to [the] decision or which are of little significance to the decision which is to be made"[148]. In the decisions of the

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142 *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 503-504; *Brettingham-Moore v St Leonards Municipality* (1969) 121 CLR 509 at 523-524; *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 326; *Kioa* (1985) 159 CLR 550 at 584-585.

143 *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 111, 116; cf *Marine Hull & Liability Insurance Co Ltd v Hurford* (1986) 10 FCR 476 at 486; *Courtney v Peters* (1990) 27 FCR 404 at 410-411.

144 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256 per Evatt J.

145 *Haoucher* (1990) 169 CLR 648 at 652; cf *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 applied *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 552.

146 *Kioa* (1985) 159 CLR 550 at 612 per Brennan J.

147 *Bushell v Secretary of State for the Environment* [1981] AC 75 at 97.

148 *Kioa* (1985) 159 CLR 550 at 628.

courts there is great variation as to what must be disclosed and in what manner[149]. But once it is accepted that an interest may be seriously affected by the exercise of a statutory power, an opportunity ought ordinarily to be given to the person concerned to respond to adverse information that is credible, relevant and significant to the decision to be made[150]. The circumstances of the present case included an apparently reliable history given by the prosecutor of actual physical violence against himself and members of his family. This had endured over a considerable time. The violence had manifested itself in serious incidents, some of which had occurred shortly before the prosecutor's departure from Bangladesh and his claim for refugee status in Australia. In *Kioa*, Brennan J acknowledged that there might be cases where withholding information from the person concerned is justified[151]. Such cases could arise where the information was confidential or where there was a need for secrecy or particular speed in making the decision. But none of these elements govern the present case. In such circumstances, adapting what Brennan J said in *Kioa*[152]:

> "The failure to give [the prosecutor] an opportunity to deal with [the information] before making an order that [he] be deported left a risk of prejudice which ought to have been removed. There was nothing in the circumstances of the case … which would have made it unreasonable to have given [the prosecutor] that opportunity. The failure [to do so] amounts to a non-observance of the principles of natural justice. The result is that the condition governing the power to make the deportation orders was not satisfied and the orders must be set aside."

192 Thirdly, of the many principles of natural justice that govern the exercise of statutory power by repositories entrusted by the Parliament with that exercise, few are more important than the obligation to give those affected an opportunity to be heard before an adverse result is reached in a significant decision on the basis of undisclosed materials[153]. The explanation of the theoretical reason why this is so – because it is imputed to the Parliament[154]; because it upholds the

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149 Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 414.

150 *Kioa* (1985) 159 CLR 550 at 629.

151 (1985) 159 CLR 550 at 629.

152 (1985) 159 CLR 550 at 629.

153 *Kioa* (1985) 159 CLR 550 at 582.

154 Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 396.

legitimate expectations of individuals[155]; or because it is part of the justice of the common law – is less important than that it represents a legal rule deeply embedded in our legal system[156].

193 Fourthly, whilst the position might be different in other circumstances[157], here there were special considerations which suggested that the delegate was obliged to call the information on which he acted to the notice of the prosecutor: (1) the very long delay between the application and the primary decision, which was not the result of anything the prosecutor did and which suggested that an opportunity of comment could have been afforded without unreasonably retarding an efficient decision; (2) the fact that the information was not confidential or secret; (3) the fact that it was judged of crucial importance, even determinative, for the outcome of the application; (4) the consideration that the delegate's decision would have been better informed had he enjoyed the benefit of a submission on the information concerned[158]; and (5) the fact that the delegate would have been aware that the decision was very important for the prosecutor and would have known that, for practical purposes, as in most cases, it represented, and was intended by the Act ordinarily to be, the final decision in the case[159].

194 The requirement of disclosure, relevant to a case such as the present, has been expressed by the Full Court of the Federal Court in terms that I accept[160]:

> "[The] entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material

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155 *Haoucher* (1990) 169 CLR 648 at 683; *Annetts* (1990) 170 CLR 596 at 599; cf *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 at 170-171.

156 cf the restriction placed on the jurisdiction of the Federal Court to review a decision for a breach of the rules of natural justice: *Abebe v The Commonwealth* (1999) 197 CLR 510 at 522 [19], 534 [50], 554 [114], 568 [157].

157 *Re Minister for Immigration and Multicultural Affairs; Ex parte P T* [2001] HCA 20 at [25].

158 See Hotop, *Principles of Australian Administrative Law*, 6th ed (1985) at 171; Richardson, "The Duty to Give Reasons: Potential and Practice", (1986) *Public Law* 437 at 440-441.

159 cf *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 360-361.

160 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 592; see also Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 424-425.

> from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question."

195 I do not agree that the prosecutor was obliged, speculating on the delegate's decision-making processes, to provide the delegate with a running commentary on events in Bangladesh that might influence the decision[161]. The fact that the political intelligence about the situation in Bangladesh, relied on by the delegate, was said to be powerful and convincing did not relieve the delegate of a duty to disclose it. In a sense, the greater the significance of the information, the more pressing became the necessity to disclose it to the prosecutor for his submission or comment[162].

196 It follows that the prosecutor ought not to have been taken by surprise, as he was[163]. To conclude in this way does not imply that every delegate, receiving any update of political information, would be obliged, before deciding a refugee application, to call such information to the notice of the person affected for comment[164]. That requirement would add unacceptable inflexibilities to the efficient performance by delegates of their functions under the Act. But, in this case, the combination of circumstances which I have mentioned rendered it substantially unjust for the delegate, as the repository of statutory power, to proceed in the way that he did. The prosecutor has therefore established that, in reaching the decision to refuse him a visa, the delegate acted in breach of the rules of natural justice. What follows?

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161 cf *David v Minister for Immigration and Ethnic Affairs* unreported, Federal Court of Australia, 12 October 1995 at 17 per Wilcox J.

162 *Kioa* (1985) 159 CLR 550 at 633; Davis and Pierce, *Administrative Law Treatise*, 3rd ed (1994), vol 2 at 140-145; Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 415-416.

163 See *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282 at 293; *Pantorno v The Queen* (1989) 166 CLR 466 at 473.

164 *Re Minister for Immigration and Multicultural Affairs; Ex parte P T* [2001] HCA 20 at [25].

The delegate did not apply the wrong test

197 Although the foregoing would be sufficient to require consideration of the prosecutor's claim for relief against the decision of the delegate, the prosecutor advanced an additional and independent ground of complaint that I shall mention. This was that, in referring to the fact that the government of Bangladesh was not "totally powerless" to stop the violations of other people's rights, the delegate had misdirected himself and thus reached a decision that was unlawful and erroneous.

198 An applicant for refugee status may establish a "well-founded fear of being persecuted", of which Art 1A(2) of the Convention (and the Act) speak, notwithstanding that the law of the country of nationality provides ostensible rules for the protection of the individual. This may be so despite the steps taken by the government of that country, and its agencies, to prevent and punish conduct that breaches such rules. Whatever the law provides and the officials attempt, if the country of nationality is unable, as a matter of fact, to afford protection, the "fear" of an applicant may be classified as "well-founded" and the conclusion may be reached that "protection is unavailable" in the person's country of nationality[165]. The elements of the Convention definition will, to that extent, be established.

199 The prosecutor complained that, by addressing himself, as he did, to whether the present government of Bangladesh was "totally powerless to stop those violations", the delegate had applied an incorrect test. His decision was not, therefore, one such as the Act contemplated, ie one addressed to the applicable considerations.

200 This argument has a superficial attractiveness, when the phrase complained of is taken in isolation. However, I agree with Gleeson CJ and Hayne J[166] that it fails. This Court has said many times that judicial review of administrative decisions must avoid "combing through the words of the decision-maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law"[167]. True, the reasons provided by the delegate ordinarily afford the only available clue about the process of the delegate's thinking and the only insight into whether the

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165 *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at 709; see also *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 430.

166 Reasons of Gleeson CJ and Hayne J at [19]-[25].

167 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291; see also at 272.

correct legal test has been applied to the facts as found[168]. The sentence in the delegate's reasons, of which the prosecutor complains, is infelicitous. But, if it is read in context, it is tolerably clear that the delegate did not suppose that the question for his decision was merely the power of the government in the prosecutor's country of nationality to stop violations of the rights of people such as the prosecutor. This is evidenced by the succeeding sentence which is, in a sense, an elaboration and clarification of the passage in the reasons to which the prosecutor objects.

201 The prosecutor, however, submitted that the succeeding sentence, with its reference to the ability of the government to offer people like him effective protection, compounded the error. He argued that it underlined the focus of the delegate's attention upon the mere capability of the government of Bangladesh and its agencies, rather than their actual willingness to act to protect people like the prosecutor. I do not read the passage in the delegate's reasons in this way. I take the reference to the government's capability of offering effective protection to be concerned with considerations of willpower as well as available means. This is made clear by the reference to the provision of "effective" protection. The words appear in the context of the suggested political shift in Bangladesh from incipient religious extremism to moderation. Where political and religious moderation prevail, effective protection would be more likely to eventuate. Thus, the "capability" referred to included important practical notions and not simply theoretical ones.

202 It follows that, although the prosecutor was not entitled to succeed on his second ground of complaint, he did make good the first ground. Subject to what follows, he is therefore entitled to relief under s 75(v) of the Constitution.

Section 69(1) of the Act does not validate the decision

203 The Minister submitted that, if the Court were to come to the foregoing conclusion, he was nonetheless entitled to succeed by force of the protective provisions of s 69 of the Act. Those provisions purport to provide for the "[e]ffect of compliance or non-compliance" with the provisions of the Act, relevantly, the provisions of Subdiv AB containing the Code.

204 By s 69(1) of the Act it is stated that non-compliance by the Minister with Subdiv AB does not mean that the decision to refuse to grant the visa is not a valid decision "but only means that the decision might have been the wrong one

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168 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 268; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 144; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 632 ("*Darling Casino*").

and might be set aside if reviewed". Obviously, this is a provision designed to limit judicial review of the delegate's decisions and to channel disputes about such decisions to the Tribunal. However, s 69(1) has no present application because the prosecutor's complaint is not of non-compliance with Subdiv AB, as such, but of non-conformity with a fundamental principle of natural justice not stated in that subdivision but binding on the delegate nevertheless.

205 However, s 69(2) of the Act is, on its face, designed to relieve the Minister of liability beyond the Code. The sub-section states:

> "If the Minister deals with a visa application in a way that complies with Subdivision ... AB ... the Minister is not required to take any other action in dealing with it."

206 There are several textual answers to the appeal to this sub-section. There is also a fundamental constitutional answer so far as these proceedings are concerned. As the text discloses, s 69(2) of the Act provides immunity to the Minister. No explicit reference is made to relief of a delegate. It is not absolutely certain that, in the language used, the exemption in the sub-section extends to the delegate. But assuming that it does, the sub-section runs into the problem already mentioned. Despite its title, Subdiv AB does not constitute an entire code of the rules of natural justice. Accordingly, s 69(2) of the Act could only afford exemption to the Minister (and possibly the delegate) to the extent that the subdivisions to which it refers (relevantly Subdiv AB) cover the subject matter in respect of which the exemption is invoked. If, as here, the subdivision is silent on that subject matter, I would not read s 69(2) as having the effect of protecting the Minister from the consequences of non-compliance with a legal requirement arising outside the Code.

207 Even if, contrary to this view, s 69(2) of the Act did have that operation, the Minister (and the delegate) are still required to make a "decision" as envisaged by s 65 of the Act. This means, relevantly, a decision that complies with the law, including the applicable law of natural justice in respect of the requirements of procedural fairness. Otherwise, the decision to "refuse to grant the visa"[169] is not such a decision as the Act contemplated. Against such a departure from the Act, s 69(2) could afford no statutory immunity to the Minister, still less to the delegate. In other words, s 69(2) of the Act does not attach to this case because the sub-section must be read as if it were expressed "if the Minister *lawfully* deals with a visa application in a way that complies with [Subdiv AB] …". Any other dealing is outside the contemplation of s 69(2).

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169 The Act, s 69(1).

208 More fundamentally, if s 69(2) of the Act purported to operate in a way similar to a privative provision, as the Minister seemed to think, it would run into the repeated holdings in this Court relevant to the jurisdiction which the prosecutor has invoked. I refer to the jurisdiction afforded under the constitutional relief sought against an officer of the Commonwealth pursuant to s 75(v) of the Constitution. Given the centrality of that provision to the scheme of the Constitution (and in particular its importance for ensuring compliance with the rule of law on the part of officers of the Commonwealth) any purported extended operation of s 69(2) of the Act would have to overcome that constitutional obstacle.

209 If the Constitution affords the means of obtaining relief against unlawful conduct by an officer of the Commonwealth, including on the ground of breach of the rules of natural justice, the Parliament cannot "denude that jurisdiction of effective content by precluding the Court from determining whether the impugned conduct is or is not in fact unlawful"[170]. If s 69(2) of the Act is a privative clause, it cannot oust the jurisdiction of this Court to review decisions and orders which are shown to have exceeded constitutional limits[171]. Specifically, it cannot deprive this Court of the jurisdiction conferred on it by s 75(v) of the Constitution[172]. This is so, as Gaudron and Gummow JJ pointed out in *Darling Casino*[173], because the constitutional power sustaining the validity of the provision of the Act relied on (here s 69(2) of the Act) is found in s 51 of the Constitution. That section expresses the conferral of legislative power as being "subject to" the Constitution. This necessarily imports, "subject to s 75(v)". In this way, the superintendence of the lawfulness of the acts of all officers of the Commonwealth is reserved to this Court. Because it is reserved by the Constitution, such superintendence cannot be diminished by such a technique of legislative drafting, assuming that to be what s 69(2) of the Act was attempting. Because, in my view, the sub-section can be read as avoiding constitutional excess, it is unnecessary for me to consider what would have followed from an opposite conclusion.

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170 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 206; see also *Darling Casino* (1997) 191 CLR 602 at 629-633.

171 *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418, 421; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 250; *Re Australian Railways Union; Ex parte Public Transport Commission* (1993) 67 ALJR 904 at 910; 117 ALR 17 at 25; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 194; *Darling Casino* (1997) 191 CLR 602 at 632.

172 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616; *Aala* (2000) 75 ALJR 52 at 85 [166]; 176 ALR 219 at 264.

173 (1997) 191 CLR 602 at 632.

The demonstrated error attracts the constitutional writs

210 The Minister submitted that remedies, such as those sought by the prosecutor pursuant to s 75(v) of the Constitution, were not available simply to correct an error of law. They were confined to correcting such an error of law as amounted to a "jurisdictional error". An error of that kind is one in which an act, although appearing or purporting to be a performance by the repository of the statutory power conferred on it, is not in truth a real exercise of that power at all[174].

211 The foundation for the availability of the constitutional writs, and the remedy of injunction, provided in s 75(v) of the Constitution, is not, in my opinion, finally settled[175]. For example, in *Abebe v The Commonwealth*, Gaudron J pointed out that "it may well be" that an injunction, being a remedy mentioned in that paragraph, would lie "to prevent an officer of the Commonwealth from giving effect to an administrative decision based on error, even if that error is not jurisdictional error"[176]. If that is so, no rational foundation would exist for confining the constitutional writs, otherwise mentioned in the paragraph, to the provision of relief where jurisdictional error is demonstrated. In England, the former distinction between jurisdictional and non-jurisdictional error, once of great significance in cases concerned with the prerogative writs, has now been abandoned[177]. The precise scope of error classified as "jurisdictional" was always uncertain. In contemporary Australian

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174 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242; *R v Bowen; Ex parte Federated Clerks Union* (1984) 154 CLR 207 at 209-210.

175 Noted in Cowen and Zines, *Federal Jurisdiction in Australia*, 2nd ed (1978) at 52 citing the submission of Mr Owen Dixon KC to the Royal Commission on the Constitution in 1927: "He said that it was by no means clear how much of the common law governing the character and nature of these remedies, the procedure by which they are administered, the occasions upon which they may be granted, is stereotyped and made immutable by this provision."

176 (1999) 197 CLR 510 at 551-552 [105].

177 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171; Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 166-172.

law, the boundary between error regarded as "jurisdictional" and error viewed as "non-jurisdictional" is, to say the least, often extremely difficult to find[178].

212 Nevertheless, in Australia, the law on this subject has developed differently from England. In part, this might be because of the reluctance of this Court to disturb the traditional understandings of the legal requirements of the writs provided in s 75(v) of the Constitution. This reluctance, which has flowed over to administrative law generally, may, in part, also be traced to an opinion (erroneous in my view) that the content of the writs referred to in s 75(v) of the Constitution was frozen by their incidents in 1900, when the Constitution was adopted. This error has been reinforced by the repeated reference to the constitutional writs in the decisions of this Court as "prerogative". This is an incorrect appellation which I hope will now fade away[179]. Once it is appreciated that the writs referred to in s 75(v) are distinct, are not confined to their historical provenance, have high constitutional purposes in Australia and may adapt over time within the limits of their essential characteristics, the old insistence upon preserving the chimerical distinction between jurisdictional and non-jurisdictional error of law might be interred, without tears, in Australia as has happened elsewhere. I need say no more about this subject.

213 The applicable complaint is of a failure on the part of the repository of statutory power to exercise that power in accordance with the rules of natural justice. Such a failure has long been regarded as involving an error of law classified as jurisdictional[180]. The recent decision of this Court in *Aala* proceeded on that basis. When Mr Aala proved that he had been denied procedural fairness, it was held, without dissent on this issue, that he was entitled to the constitutional writ of prohibition, unless disentitled by reference to a discretionary ground[181]. In *Aala*, the point was put succinctly by Gaudron and Gummow JJ[182]:

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178 *Craig v South Australia* (1995) 184 CLR 163 at 179-180; cf *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.

179 *Aala* (2000) 75 ALJR 52 at 56 [21] per Gaudron and Gummow JJ, 71 [86] per McHugh J, 81 [144] of my own reasons, 85 [165]-[166] per Hayne J; cf at 86 [173] per Callinan J; 176 ALR 219 at 224, 244, 258-259, 263-264; cf at 266.

180 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243; *Aala* (2000) 75 ALJR 52 at 60 [38]; 176 ALR 219 at 230.

181 *Aala* (2000) 75 ALJR 52 at 54 [5] per Gleeson CJ, 61 [41] per Gaudron and Gummow JJ, 81 [141]-[142] of my own reasons, 86 [170] per Hayne J, 93-94 [216] per Callinan J; 176 ALR 219 at 221, 231, 258, 265, 275.

182 *Aala* (2000) 75 ALJR 52 at 61 [41]; 176 ALR 219 at 231.

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

214 This expression of the availability of the constitutional writs referred to in s 75(v) makes it unnecessary, in these proceedings, to explore this issue any further. Unless denied relief for a discretionary reason, the prosecutor is entitled to have the order nisi made absolute.

Discretionary considerations favour relief

215 The Minister submitted that, even if all, or a sufficient number, of the foregoing issues were decided in favour of the prosecutor, this Court should refuse relief in the exercise of its discretion. Principally, this submission was based upon the great delay in prosecuting the application in this Court.

216 Time began to run when the prosecutor was first notified of the decision of the delegate. This was no later than 23 May 1997 when the prosecutor met his then solicitor whom he instructed to lodge his "appeal" to the Tribunal. As the proceedings in this Court were not commenced for a further two and a half years, the Minister argued that the order nisi should be discharged to emphasise that such remedies must be invoked quickly. He submitted that, in effect, the prosecutor was seeking to repair his failure to follow the ordinary form of review contemplated by the Act. Even when it became clear that he had failed to apply to the Tribunal in time for such review, additional substantial and unnecessary delay had ensued.

217 The recent decision in *Aala* establishes that, whatever may have been the differential availability of the prerogative writs of prohibition and mandamus in English law, the writs provided by s 75(v) of the Constitution are discretionary remedies[183]. It is equally clear, as stated by Gibbs CJ in *R v Ross-Jones; Ex parte Green*[184], that where a party aggrieved establishes a want or excess of jurisdiction, the writ of prohibition will issue "almost as of right". This dictum

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183 *Aala* (2000) 75 ALJR 52 at 54 [5] per Gleeson CJ, 64-65 [54] per Gaudron and Gummow JJ, 81-82 [145]-[148] of my own reasons, 86 [172] per Hayne J, 93 [217] per Callinan J; 176 ALR 219 at 221, 236, 259, 265, 275.

184 (1984) 156 CLR 185 at 194.

was approved in *Aala*[185]. This Court therefore retains a discretion to grant or refuse relief. However, it is a discretion to be exercised judicially, with a clear appreciation that the constitutional remedy exists not simply to uphold the private rights of the party invoking it but also to ensure obedience to the law by officers of the Commonwealth, which is a matter of wider concern.

218 There has been an extremely long delay in the finalisation of the prosecutor's application under the Act. However, a considerable period of the lost time should be levelled at the Minister. Even before the delegate reached the decision that is now challenged, thirteen and a half months passed whilst the primary application was being processed. A further eight months elapsed before the prosecutor was informed that the first request to file an application under s 48B was refused. An additional eight months elapsed whilst the second request was considered and before it was ultimately denied. In such circumstances, I do not consider the entire delay can be blamed on the prosecutor's side, still less on the prosecutor personally[186].

219 Obviously, the prosecutor's former solicitor should have commenced the proceedings in this Court promptly, instead of losing time in the ultimately fruitless appeals for an indulgence from the Minister. However, it would be wrong to treat this mistake as fatal. Clearly enough, having become enmeshed in a procedural difficulty that complicated the reconsideration of his substantive application, the prosecutor himself would simply have acted as he was advised. No effective remedy could be secured by his suing his former solicitor. The Minister did not seek to demonstrate any actual prejudice resulting from the overall delay. If the prosecutor were able to persuade a decision-maker that he was entitled to protection as a refugee, his removal from Australia to Bangladesh would be contrary to Australia's protection obligations under the Convention. There are additional considerations which lead me to the view that, despite the great delays, time for these proceedings should be extended and relief granted in the exercise of this Court's discretion.

220 There is no inconsistency between this conclusion and the ordinary reliance by a person, in the position of the prosecutor, upon the decision of the delegate to ground an application for review by the Tribunal. The apparent difficulty presents an old legal paradox[187]. However logically intriguing may be

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185 (2000) 75 ALJR 52 at 54 [5]-[6] per Gleeson CJ, 64 [51] per Gaudron and Gummow JJ, 82 [149] of my own reasons; 176 ALR 219 at 221, 235, 259-260.

186 *Comcare v A'Hearn* (1993) 45 FCR 441.

187 cf *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307 at 316-317; 2 ALD 1 at 6-7.

the rival theories of invalidity of defective orders, those theories cannot, as a practical matter, be invoked to remove an invalid decision from the scope of appellate or other review[188]. It is not inconsistent with an ultimate conclusion that the delegate's decision was unlawful, and even one flawed by "jurisdictional error", to acknowledge that the prosecutor might, within time, have invoked the delegate's decision to ground an application for review by the Tribunal or in this Court.

221 I emphasise that my conclusion expresses no view about the merits of the prosecutor's claims. The constitutional writs are not a means to obtain review on the merits such as the prosecutor lost when his then solicitor failed to invoke the jurisdiction of the Tribunal within time. It is the essence of the prosecutor's complaint that he has never had his entitlement to a protection visa considered lawfully on its merits.

222 The issue of a constitutional writ, and the writ of certiorari to make it effective, will not ensure that the prosecutor's claim ultimately succeeds. But it will ensure that it is determined by a delegate as the law of Australia requires. That means, in this case, with the benefit of submissions of the prosecutor that seek to persuade the decision-maker that, notwithstanding supervening political developments in Bangladesh, the well-founded fear that he asserted when he left that country and made his claim for refugee status in Australia has continued and warrants a conclusion that the country of nationality would not, or could not, provide him with protection. In this field of decision-making particularly, it is important that the primary decision should be correct and justly made. It is often the case that these two postulates of our law coincide. Just procedures, as required by the circumstances of the case, tend to contribute, in practice, to correct outcomes[189].

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188 *Calvin v Carr* [1980] AC 574 at 590; Taggart, "Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences", in Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1986) 70; cf *Yilmaz v Minister for Immigration and Multicultural Affairs* (2000) 100 FCR 495 at 514 [87] per Gyles J referring to *Residual Assco Group Ltd v Spalvins* (2000) 74 ALJR 1013 at 1027 [69]; 172 ALR 366 at 385-386.

189 cf *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 at 463-464; *Balmain Association Inc v Planning Administrator for the Leichhardt Council* (1991) 25 NSWLR 615 at 638; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 420.

Relief from immaterial time defaults should be granted

223 The circumstances of this case suggest that consideration should be given to amendment of the Act to permit extension of time in proper cases where a person seeking review of an adverse decision on a protection visa becomes out of time, as happened here. If there is no discretion to extend time, whatever the excuse for the default or the merits of the case, a serious legal inflexibility arises. Unless repaired, the consequence is certain to be more cases like the present invoking the original jurisdiction of this Court.

224 Procedural slips can happen even with the most diligent and conscientious of parties and their representatives. Anyone who denies this has had no practical experience of the law's operation. Slips may be more common in the case of persons claiming to be refugees because of the very nature of their predicament. In such cases it should be possible for the Tribunal, in proper circumstances, to excuse explained delay if the delay is short and the prosecutor has an arguable case on the merits. To deny any facility of extension, whatever the circumstances, is to address attention solely to questions of procedure rather than substance. In the discharge of the humanitarian purposes of the Act, of protecting refugees[190], the legislation should, in my view, provide a measure of latitude where this can be clearly justified[191]. For at least a century, the courts and the law in Australia have marched away from a rigid, unyielding application of rules as to time towards a more realistic acceptance of the fact that human error is inescapable and priority should be given to substantive merits[192]. There is no reason why refugees should be excluded from this advance. There is every reason why they should not.

Orders

225 The order nisi should be made absolute with costs.

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190 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 74 ALJR 1556 at 1594-1595 [197]-[199]; 175 ALR 585 at 639-640.

191 See "Review into Migration Amendment Bill (No 2) 2000", in Administrative Review Council, *Twenty-Fourth Annual Report 1999-2000* (2000) 63 at 63-65.

192 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 172; *Jackamarra v Krakouer* (1998) 195 CLR 516 at 541-542 [66]; cf *In re Salmon (decd)* [1981] Ch 167 at 175.