HIGH COURT OF AUSTRALIA

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

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS APPELLANT

AND

RAJIV BHARDWAJ RESPONDENT

Minister for Immigration and Multicultural Affairs v Bhardwaj
[2002] HCA 11
14 March 2002
S37/2001

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

J Basten QC with R T Beech-Jones for the appellant (instructed by Australian Government Solicitor)

D F Jackson QC with J R Young for the respondent (instructed by Newman & Associates)

CATCHWORDS

Minister for Immigration and Multicultural Affairs v Bhardwaj

Immigration – Immigration Review Tribunal – Powers and duties of Tribunal – Capacity of Tribunal to correct own error – Decision cancelling visa – Failure to consider correspondence from respondent – Reconsideration of decision – Whether decision involving jurisdictional error is a nullity – Whether Tribunal may of its own motion reconsider its decision – Whether validity of decision open to collateral attack.

Administrative law – Judicial review – Procedural fairness – Administrative decision – Tribunal required to give respondent opportunity to appear – Decision made after Tribunal mistakenly assumed respondent declined to appear – Whether jurisdictional error constituted by denial of procedural fairness – Whether failure to exercise jurisdiction – Whether Tribunal authorised to make fresh decision – Whether invalidity of decision could be raised in collateral attack on validity of decision in proceedings.

Words and phrases – "decision on review".

Migration Act 1958 (Cth), Pts 5 and 8, ss 360, 367 and 368.
Acts Interpretation Act 1901 (Cth), s 33(1).

1 GLEESON CJ. This appeal concerns an administrative tribunal's capacity to correct its own error when, in consequence of that error, it has failed to discharge its statutory function.

2 The respondent, whose student visa was cancelled by a delegate of the appellant, applied to the Immigration Review Tribunal ("the Tribunal") for a review of the decision. The application was received on 21 August 1998. The Tribunal proposed to deal with the matter on 15 September 1998, and invited the respondent to attend a hearing. Late in the afternoon of 14 September 1998 the Tribunal received, from the respondent's agent, a letter stating that the respondent was ill and would be unable to attend the next day, and requesting an adjournment. By an administrative oversight, the letter did not come to the attention of the member of the Tribunal to whom the matter had been assigned. The Tribunal dealt with the matter on 15 and 16 September, adversely to the respondent, and notified the respondent and his agent on 17 September. The reason given for the Tribunal's decision was that the respondent had not provided any information which suggested that the cancellation of his visa was unfair or inappropriate. When the respondent's agent was informed of the decision, the attention of the Tribunal member was drawn to the letter of 14 September. A new hearing date was arranged. The Tribunal heard the respondent's explanation of the conduct which had resulted in the cancellation of his visa, accepted the explanation, and, on 22 October 1998, revoked the cancellation.

3 The issue that now arises concerns the capacity of the Tribunal to proceed as it did. The appellant contends that the power of the Tribunal to review the delegate's decision was spent after it made the decision in September. The resolution of the issue depends upon the nature and extent of the power conferred upon the Tribunal by the legislation under which it was acting[1].

4 The appellant brought proceedings in the Federal Court seeking the setting aside of the October decision on the ground that the Tribunal "had previously made a decision in respect of the same application and was *functus officio*." The application failed before Madgwick J[2]. An appeal to the Full Court was dismissed[3].

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1 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211 per Gummow J.

2 *Minister for Immigration and Multicultural Affairs v Bhardwaj* [1999] FCA 1806.

3 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2000) 99 FCR 251 (Beaumont and Carr JJ, Lehane J dissenting).

5 There is nothing in the nature of an administrative decision which requires a conclusion that a power to make a decision, once purportedly exercised, is necessarily spent. In *Ridge v Baldwin*[4], Lord Reid said:

> "I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid."

6 That general proposition must yield to the legislation under which a decision-maker is acting. And much may depend upon the nature of the power that is being exercised and of the error that has been made.

7 In *Chandler v Alberta Association of Architects*[5] Sopinka J, speaking for the majority in the Supreme Court of Canada, pointed out that, as a general rule, subject to a power to correct a slip or an error of expression, a tribunal cannot revisit its own decision because it has changed its mind, or recognises that it has made an error within jurisdiction, or because there has been a change of circumstances[6]. However, the Court held that the principle of *functus officio* should not be strictly applied if the tribunal has failed to discharge its statutory function and "there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation."[7]

8 The requirements of good administration, and the need for people affected directly or indirectly by decisions to know where they stand, mean that finality is a powerful consideration. And the statutory scheme, including the conferring and limitation of rights of review on appeal, may evince an intention inconsistent with a capacity for self-correction. Even so, as the facts of the present case show, circumstances can arise where a rigid approach to the principle of *functus officio* is inconsistent with good administration and fairness. The question is whether the statute pursuant to which the decision-maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen. That requires examination of two questions. Has the tribunal discharged the functions committed to it by statute? What does the statute provide, expressly or by implication, as to whether, and in what circumstances, a failure to

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4 [1964] AC 40 at 79.

5 [1989] 2 SCR 848.

6 As to a change in circumstances, see *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at 355 [30].

7 [1989] 2 SCR 848 at 862 per Sopinka J.

discharge its functions means that the tribunal may revisit the exercise of its powers or, to use the language of Lord Reid, reconsider the whole matter afresh?

9 Here the statutory scheme is found in the *Migration Act* 1958 (Cth) ("the Act"). The appellant argues that the Act manifests an intention to preclude the reconsideration undertaken by the Tribunal in the present case.

10 The appellant points to the following features of the Act. The Act permits merits review by the Tribunal of primary decisions, and judicial review of the Tribunal's decisions, within a closely confined structure. There is no express power in the Tribunal to reconsider its own decisions. The Act contains restrictions upon the making of applications for further visas after earlier applications have been refused, and provides a mechanism by which the Minister may allow a person to make a second application for a protection visa only. Judicial review of Tribunal decisions in the Federal Court is available only upon limited grounds, and depends upon the filing of an application within a fixed period. The scheme for removal of unlawful non-citizens is related to the date of final determination of a visa application. It was argued that it would be inconsistent with that scheme if there existed a residual power in the Tribunal to re-open a decision once made.

11 To say that a tribunal has considered an application, reached a conclusion, and informed affected parties of its decision, is to make a statement of fact. But the legal consequences of that fact depend upon the Act; and the answer to a question about those consequences may depend upon the purpose for which the question is asked. The answer to the question whether a legally effective decision has been made may depend upon the kind of legal effect that is under consideration, and upon further facts as to what was done, or not done, following the communication of the decision.

12 In *Leung v Minister for Immigration and Multicultural Affairs*[8], Finkelstein J, discussing the effect of decisions that are invalid in that they can be impugned for jurisdictional error, or on certain other grounds, said[9]:

> "There is no doubt that an invalid administrative decision can have operational effect. For example it may be necessary to treat an invalid administrative decision as valid because no person seeks to have it set aside or ignored. The consequence may be the same if a court has refused to declare an administrative decision to be invalid for a discretionary reason. In some circumstances the particular statute in pursuance of

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8 (1997) 79 FCR 400.

9 (1997) 79 FCR 400 at 413.

which the purported decision was taken may indicate that it is to have effect even though it is invalid or that it will have effect until it is set aside."

13 I would accept that it is inconsistent with the scheme of the Act to conclude that the Tribunal, upon being persuaded that it has denied procedural fairness, at any time after it has made or purported to make a decision, and regardless of what a person affected by the decision has done or failed to do, may treat that decision as legally ineffective and consider afresh the matter that was originally before it. In *Re Refugee Review Tribunal; Ex parte Aala*[10], it was held that a failure to accord procedural fairness by the Refugee Review Tribunal resulted in an excess of jurisdiction sufficient to attract prohibition under s 75(v) of the Constitution. It was also held that the remedy of prohibition was discretionary. The relevant legislation denied to the Federal Court power to set aside the Tribunal's decision on the ground of the denial of procedural fairness, and this Court's power to set the decision aside on that ground was discretionary. It follows that, at the time the decision was made, it was inaccurate to say that it was completely without legal effect.

14 In the present case there was a denial of procedural fairness; but there was more to it than that. There was an error of the kind described as "error in fact" in the context of proceedings by writ of error: the non-fulfilment or non-performance of a condition precedent to regularity of adjudication such as would ordinarily induce a tribunal "to stay its hand if it had knowledge, or to re-open its judgment had it the power."[11] The Act, in Pt 5 Div 5, prescribed the procedures according to which the Tribunal was required to conduct its review of the delegate's decision. If the Tribunal was not prepared to decide in the respondent's favour on the written material before it, then s 360 required that it give the respondent an opportunity to appear and give evidence and present arguments. The Tribunal set out to give the respondent such an opportunity. It intended to follow the statutory procedure. As a result of an administrative slip, it denied the respondent the opportunity that he wanted to have, and that the Tribunal intended to give him. And, in consequence, it dealt with the matter in the belief that the respondent had nothing to say by way of explanation of the conduct that had resulted in the cancellation of his visa. The Tribunal, through an administrative error, failed to implement its own intention, and failed to comply with the statutory requirement to give the respondent an opportunity to be heard. In its reasons for its "decision", the Tribunal merely noted the delegate's decision, and observed that nothing had been put before it as to why

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10 (2000) 204 CLR 82.

11 Gordon, "Certiorari and the Revival of Error in Fact", (1926) 42 *Law Quarterly Review* 521 at 526.

the decision was unfair or inappropriate. That did not amount to the conduct of a review. The Act provided, in s 353, that the Tribunal, in reviewing the delegate's decision, was not bound by technicalities or legal forms and should act according to substantial justice. When it learned of its own administrative error, the Tribunal recognised that it had not performed its functions and proceeded to do so.

15 In those circumstances, it was not inconsistent with the statutory scheme for the Tribunal, upon becoming aware that it had not given effect to its own intention, and that it had failed to conduct a review of the delegate's decision, to give the respondent the opportunity which the statute required, which he wanted, and which the Tribunal had intended to give him. On the contrary, it was in accordance with the requirements of the Act.

16 The appeal should be dismissed with costs.

17 GAUDRON AND GUMMOW JJ. In this appeal, the appellant, the Minister for Immigration and Multicultural Affairs ("the Minister"), argues that the Immigration Review Tribunal ("the Tribunal") has no power to cure an error in its decision-making process by treating a decision involving jurisdictional error as a nullity and, then, proceeding to make a further decision on the same matter.

The facts and the history of the proceedings

18 The respondent, Rajiv Bhardwaj, was granted a student visa to study in Australia. Initially, he enrolled at Holmesglen Institute of Technical and Further Education but later transferred to the Australian International College of Business ("the Australian International College") and, later still, to the Kookaburra College. The Department of Immigration and Multicultural Affairs ("the Department") was informed that Mr Bhardwaj had failed to commence his course with the Australian International College but, apparently as a result of some oversight by the Kookaburra College, was not informed that he had commenced studies at the latter college.

19 Upon being informed that Mr Bhardwaj had failed to commence his studies with the Australian International College, the Department notified him that he should provide reasons why his visa should not be cancelled. No reply was received and, on 6 August 1998, a delegate of the Minister cancelled his visa ("the delegate's decision"). On 20 August 1998, he applied for a review of that decision. On 2 September, he was notified that the Tribunal would conduct a review hearing on Tuesday, 15 September 1998.

20 Apparently Mr Bhardwaj became ill on 13 September. Sometime after 6 pm on 14 September, his agent sent an urgent facsimile message to the Tribunal informing it of that fact and seeking another hearing date. The facsimile was received at 6.40 pm but did not come to the attention of the person constituting the Tribunal for the purpose of conducting the review requested by Mr Bhardwaj. On 16 September, the Tribunal affirmed the delegate's decision to cancel his visa ("the September decision"). That decision was then communicated to the Department and to Mr Bhardwaj.

21 No application was made to the Federal Court for review of the September decision. Nor was an application made to this Court under s 75(v) of the Constitution. Rather, on 18 September, Mr Bhardwaj's agent sent a further urgent facsimile message to the Tribunal referring to his earlier facsimile of 14 September. In consequence, the Tribunal wrote to Mr Bhardwaj "confirm[ing] that the time for [the] hearing ha[d] been changed." A hearing then took place on 23 September. On 22 October, the Tribunal published a decision revoking the cancellation of Mr Bhardwaj's visa ("the October decision").

22 On 19 November 1998, the Minister applied to the Federal Court for review of the October decision, seeking an order that that decision be set aside. In essence, the Minister argued that, by reason of the September decision, the Tribunal lacked power and/or jurisdiction to make the October decision[12]. The application was dismissed by Madgwick J. A subsequent appeal to the Full Federal Court was dismissed by majority (Beaumont and Carr JJ, Lehane J dissenting). The Minister now appeals to this Court.

The statutory scheme

23 The Minister bases his appeal on the statutory scheme for review of immigration decisions contained in Pts 5 and 8 of the *Migration Act* 1958 (Cth) ("the Act") as it stood at the time of the September and October decisions. It is necessary to refer to the then relevant provisions of that Act in some detail and it is convenient to refer to them as if they were still in force.

24 Section 346(1)(d), which is in Div 3 of Pt 5 of the Act, provides that prescribed decisions are "IRT-reviewable decisions". The decision to cancel Mr Bhardwaj's visa is a prescribed decision[13]. By s 348(1) "the Tribunal must review" an IRT-reviewable decision, if, as was the present case, an application is properly made for review.

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12 The amended grounds upon which review was sought were:

> "1. The decision involved an error of law.
>
> Particulars
>
> (1) The Tribunal erred in law by purporting to make a decision in respect of an application for review before it when it had previously made a decision in respect of the same application and was *functus officio*.
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> 2. The person who purported to make the decision did not have jurisdiction to make the decision.
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> ...
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> 3. The decision was not authorised by the Act."

The Minister referred to the particulars provided for the first ground of review in particularising the second and third grounds.

13 Migration Regulations (Cth), reg 4.09(d) as then in force.

25 The powers of the Tribunal in relation to a review are set out in s 349 of the Act. In general terms, the Tribunal may exercise all the powers and discretions that are conferred on the person who made the original decision, may affirm, vary or set aside that decision and, if it sets aside the decision, substitute a new decision. By s 349(3), any varied or substituted decision is taken to be the decision of the Minister.

26 Division 4 of Pt 5 of the Act details the manner in which the Tribunal is to exercise its powers in relation to a review. Relevantly, s 353(1) requires the Tribunal to "pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick." And s 353(2) provides that, in reviewing a decision, the Tribunal:

> "(a) is not bound by technicalities, legal forms or rules of evidence; and
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> (b) shall act according to substantial justice and the merits of the case."

27 Provision is made in Div 5 of Pt 5 with respect to the Tribunal's conduct of a review. Relevantly, the Tribunal is first required to consider the written material before it and, if it is not "prepared to make the decision or recommendation ... that is most favourable to the applicant"[14], then, in accordance with s 360(1), it:

> "(a) must give the applicant the opportunity to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review; and
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> (b) may obtain such other evidence as it considers necessary."

And by s 361, the applicant may request the Tribunal to call witnesses and obtain written material.

28 The procedures to be followed by the Tribunal with respect to its decisions are set out in Div 6 of Pt 5 of the Act. Briefly, the Tribunal is required to prepare a written statement setting out its decision, its reasons and findings and referring to the evidence or other material on which those findings are based[15]. It is also required to forward a copy of that statement to the Secretary of the Department

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14 Section 359(1).

15 Section 368(1).

and to the applicant[16] and, thereafter, to return relevant papers to the Secretary[17]. By s 369, the written statement is to be published.

29 Part 8 of the Act provides for review of certain decisions by the Federal Court, including decisions of the Tribunal. The grounds of review are limited to those set out in s 476(1) of the Act. The Act expressly provides that those grounds do not include the ground "that a breach of the rules of natural justice occurred in connection with the making of the decision"[18]. Decisions of the Tribunal may also be the subject of proceedings for prohibition and mandamus in this Court under s 75(v) of the Constitution[19]. And in this Court, decisions may be set aside for denial of natural justice[20].

30 By s 478(1) of the Act, an application for Federal Court review must be made within 28 days of notification of the decision in question[21]. And s 478(2) provides:

> " The Federal Court must not make an order allowing, or which has the effect of allowing, an applicant to lodge an application outside the period specified in [s 478](1)(b)."

31 Three other provisions of the Act with respect to Federal Court review should be noted. The first is s 482 which provides, in sub-s (1), that, subject to that section:

> "the making of an application [for review] to the Federal Court in relation to a judicially-reviewable decision does not:
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> (a) affect the operation of the decision; or

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16 Section 368(2).

17 Section 368(3).

18 Section 476(2)(a).

19 See *Abebe v Commonwealth* (1999) 197 CLR 510.

20 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

21 See *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 71 FCR 1 at 28 per Sackville J (with whom Jenkinson and Kiefel JJ concurred). See also *"H" v Minister for Immigration and Multicultural Affairs* [2001] FCA 43 at [8]-[9], [15] and the cases there cited.

(b) prevent the taking of action to implement the decision; or

(c) prevent the taking of action in reliance on the making of the decision."

32 The second provision which should be noted with respect to review by the Federal Court is s 485. Relevantly, that section provides:

"(1) In spite of any other law, including section 39B of the *Judiciary Act 1903*, the Federal Court does not have any jurisdiction in respect of judicially-reviewable decisions ... other than the jurisdiction provided by this Part or by section 44 of the *Judiciary Act 1903*.

...

(3) If a matter relating to a judicially-reviewable decision is remitted to the Federal Court under section 44 of the *Judiciary Act 1903*, the Federal Court does not have any powers in relation to that matter other than the powers it would have had if the matter had been as a result of an application made under this Part."

33 The final provision to be noted with respect to a review by the Federal Court is s 486 which provides:

" The Federal Court has jurisdiction with respect to judicially-reviewable decisions and that jurisdiction is exclusive of the jurisdiction of all other courts other than the jurisdiction of the High Court under section 75 of the Constitution."

34 In addition to the provisions of the Act, reference should be made to s 33(1) of the *Acts Interpretation Act* 1901 (Cth). That sub-section provides:

" Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

<u>The argument for the Minister</u>

35 It was accepted on behalf of the Minister that, unless a contrary intention is to be discerned from the statute in question, s 33(1) of the *Acts Interpretation Act* displaces the common law doctrine that a power is spent once it is exercised. But, it was argued that, although the Act is silent as to whether the Tribunal may ignore or reconsider a previous decision, a contrary intention is manifest from the scheme of Pts 5 and 8 of the Act. Accordingly, it was said, the fact that the Tribunal made a decision in September precluded it from making a second

decision in October and, in consequence, the latter decision should have been set aside by the Federal Court.

36 The argument that a contrary intention was to be discerned from the scheme of Pts 5 and 8 of the Act is based on various of its requirements including that the Minister be notified by the Tribunal when a decision is made and the inflexible time limit for the bringing of an application for judicial review in the Federal Court. In this respect, it was put that it would be destructive of the scheme of Pts 5 and 8 of the Act if the Tribunal could revisit an earlier decision after that decision had been communicated to the Minister and/or the person affected by it. It was also put that it would be incongruous if the Tribunal might revisit a decision when the time had expired for seeking judicial review in the Federal Court.

37 Another incongruity to which reference was made on behalf of the Minister is one that is highlighted by the facts of the present case. Should it be possible for the Tribunal to revisit a decision reached in breach of the rules of natural justice, it would be able to do that which the Federal Court cannot. So, too, in a case in which the Tribunal revisited a decision of that kind, an application for review of the later decision would, in effect, result in the Federal Court reviewing the earlier decision on the ground of denial of natural justice – a ground expressly forbidden to it. And that would be so even if no application was made to the Federal Court for review of the earlier decision within the time limited by s 478(1) of the Act.

The argument for Mr Bhardwaj

38 The argument for Mr Bhardwaj impliedly acknowledged the incongruities upon which the Minister's argument relied. However, it was contended that the September decision was not a "decision on review" for the purposes of ss 367 and 368 of the Act and, for that reason, had no legal effect. Moreover, counsel for Mr Bhardwaj pointed to s 353(2) of the Act which, as already noted, exempts the Tribunal from, inter alia, "technicalities [and] legal forms" and requires it to act "according to substantial justice and the merits of the case."

39 In addition to the above matters, it was argued that it was consistent with general principles relating to administrative decisions reached in breach of the rules of natural justice for the Tribunal to revisit or reconsider its September decision. In this last regard, reference was made to statements in a number of decided cases, including *Ridge v Baldwin*[22], which endorse the proposition that,

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22 [1964] AC 40 at 79 per Lord Reid, 99 per Lord Evershed, 129 per Lord Hodson. See also *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 115-116 per Mason J; *R v Kensington and Chelsea Rent Tribunal, Ex parte MacFarlane* [1974]

(Footnote continues on next page)

as a general rule, an administrative tribunal may cure a breach of the rules of natural justice by subsequently providing a proper hearing to the person thereby affected.

The September decision

40 Procedural fairness, which is one aspect of the rules of natural justice, requires that a person who may be affected by a decision be informed of the case against him or her and that he or she be given an opportunity to answer it[23]. The opportunity to answer must be a reasonable opportunity[24]. Thus, a failure to

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1 WLR 1486 at 1492-1493; [1974] 3 All ER 390 at 395-396; *Calvin v Carr* [1980] AC 574 at 592; *R v Hertfordshire County Council, Ex parte Cheung* (TLR 4 April 1986); *Posluns v Toronto Stock Exchange* [1968] SCR 330 at 340 per Ritchie J; *Re Trizec Equities Ltd and Area Assessor Burnaby-New Westminster* (1983) 147 DLR (3d) 637 at 643 per McLachlin J; *Chandler v Alberta Association of Architects* [1989] 2 SCR 848 at 862-863 per Sopinka J (with whom Dickson CJ and Wilson J concurred), 872-873 per L'Heureux-Dubé J (dissenting, with whom La Forest J concurred).

23 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 109-110 per Barwick CJ, 112 per Mason J; *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 495 per Murphy J, 498-499 per Aickin 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 569-570 per Gibbs CJ, 582 per Mason J, 602 per Wilson J, 628 per Brennan J, 633 per Deane J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 906 [99] per Gaudron J, 910 [127] per McHugh J; 179 ALR 238 at 260, 266-267.

24 See *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343 per Deane J; *R v Ludeke; Ex parte Customs Officers' Association of Australia* (1985) 155 CLR 513 at 528 per Brennan J; *Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513 at 519 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ; *Re Association of Architects of Australia; Ex parte Municipal Officers Association of Australia* (1989) 63 ALJR 298 at 305 per Gaudron J; *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 per Tucker LJ; *Kanda v Government of Malaya* [1962] AC 322 at 337 per Lord Denning. But cf *Kioa v West* (1985) 159 CLR 550 at 615 per Brennan J; *Roderick v Australian and Overseas Telecommunications Corporation Ltd* (1992) 39 FCR 134 at 142 per Hill J (with whom Keely and O'Loughlin JJ concurred).

accede to a reasonable request for an adjournment can constitute procedural unfairness[25].

41 It was not disputed by the Minister that the September decision was made in circumstances in which Mr Bhardwaj was denied a reasonable opportunity to answer the case against him. It, thus, involved a breach of the rules of natural justice and may be set aside by this Court pursuant to s 75(v) of the Constitution[26]. Further, as was contended on behalf of Mr Bhardwaj, the September decision was not a "decision on review" for the purposes of ss 367 and 368 of the Act.

42 The function of the Tribunal was to conduct a review of the delegate's decision in accordance with the Act. In particular, the Tribunal was required to give Mr Bhardwaj an opportunity to attend the hearing, to give evidence and put argument. And it is implicit from the terms of s 368(1) detailing the matters to be recorded in the written statement embodying a decision that the Tribunal was to reach a decision only after considering the evidence and the argument advanced against the cancellation of Mr Bhardwaj's visa.

43 The failure of the Tribunal to give Mr Bhardwaj a reasonable opportunity to present evidence and argument had the consequence that it did not reach a decision after considering evidence and argument against the cancellation of his visa. That being so, it follows that the Tribunal did not conduct a review as required by the Act and the September decision was, thus, not a "decision on review" for the purposes of ss 367 and 368 of the Act.

44 To say that the September decision was not a "decision on review" for the purposes of ss 367 and 368 of the Act is simply to say that it clearly involved a failure to exercise jurisdiction, and not merely jurisdictional error constituted by the denial of procedural fairness. Either of these grounds would entitle Mr Bhardwaj to have the September decision quashed by this Court as an

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25 See *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343 per Deane J; *Murray v Greyhound Racing Control Board of Queensland* [1979] Qd R 111 at 117-118; *Opitz v Repatriation Commission* (1991) 29 FCR 50 at 58-59; *Ex parte Bone; Robins and the Shire of Greenough* [1990] WAR 94; *Shadforths Ltd v Human Rights Commission* (1991) 32 FCR 303; *Rose v Humbles (Inspector of Taxes)* [1972] 1 WLR 33 at 44 per Sachs LJ; [1972] 1 All ER 314 at 322; *R v Thames Magistrates' Court, Ex parte Polemis* [1974] 1 WLR 1371; [1974] 2 All ER 1219; *Ostreicher v Secretary of State for the Environment* [1978] 1 WLR 810 at 815-816 per Lord Denning MR; [1978] 3 All ER 82 at 86.

26 See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

incident of relief by way of mandamus or prohibition under s 75(v) of the Constitution. This notwithstanding, the question whether the Tribunal could disregard its September decision depends on the scheme of Pts 5 and 8 of the Act[27]. To understand that scheme, it is necessary to say something as to the nature of an administrative decision.

The nature of administrative decisions

45 It is sometimes convenient to ask whether administrative decisions which involve reviewable error are either void or voidable, the former signifying that the decision is "ineffective for all purposes" and the latter that it is "valid and operative unless and until duly challenged but ... deemed to have been void ab initio."[28] The tendency to conceptualise erroneous administrative decisions as voidable rather than void may be the result of the need to treat a decision as having at least sufficient effect to ground an "appeal" or other legal proceedings. Thus, it was said by Lord Wilberforce in *Calvin v Carr* that:

> "Their Lordships' opinion would be, if it became necessary to fix upon one or other of [the] expressions ['void' or 'voidable'], that a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or court, it may have some effect, or existence, in law. This condition might be better expressed by saying that the decision is invalid or vitiated. In the present context, where the question is whether an appeal lies, the impugned decision cannot be considered as totally void, in the sense of being legally non-existent."[29]

46 In our view, it is neither necessary nor helpful to describe erroneous administrative decisions as "void", "voidable", "invalid", "vitiated" or, even, as "nullities". To categorise decisions in that way tends to ignore the fact that the real issue is whether the rights and liabilities of the individual to whom the decision relates are as specified in that decision. And, perhaps more importantly, it overlooks the fact that an administrative decision has only such force and effect as is given to it by the law pursuant to which it was made. Further, the use of the term "appeal" and the proposition that an administrative decision must have sufficient vitality to provide the subject-matter of such a curial proceeding should not obscure the fundamental proposition that such an "appeal" or other

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27 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

28 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 277 per Aickin J.

29 [1980] AC 574 at 589-590.

proceeding for judicial review is an exercise of original jurisdiction by the court concerned[30]. It will be necessary to refer further to this consideration later in these reasons.

47 Subject to the Constitution, including s 75(v) which gives this Court original jurisdiction in matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, the Parliament may give an administrative decision whatever force it wishes. It may, for example, enact a privative clause providing that, within the limits of constitutional power, a decision is final and binding and not subject to legal challenge except pursuant to s 75(v) of the Constitution. The effect of the present state of authority is that such a clause would have the consequence that the decision could be challenged only in this Court and only on constitutional grounds[31].

48 Because it is fundamental to the rule of law that persons affected by administrative decisions should have access to the courts to challenge those decisions, privative clauses are strictly construed[32]. The same consideration dictates that legislative provisions should not be construed as giving rise to an implication which gives an administrative decision greater force or effect than it would otherwise have unless that implication is strictly necessary.

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30 See *Steele v Defence Forces Retirement Benefits Board* (1955) 92 CLR 177 at 185-188 per Dixon CJ, Williams, Webb, Fullagar and Kitto JJ; *Walsh v Law Society (NSW)* (1999) 198 CLR 73 at 90 [50] per McHugh, Kirby and Callinan JJ, 103 [83] per Gummow J.

31 See, with respect to privative clauses, *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, in which the privative clause there in question was construed as allowing challenge only where officers of the Commonwealth had exceeded their jurisdiction provided in the relevant statute or in the Constitution itself. See also *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 631-632 per Gaudron and Gummow JJ.

32 See *Clancy v Butchers' Shop Employés Union* (1904) 1 CLR 181 at 204-205 per O'Connor J; *Hockey v Yelland* (1984) 157 CLR 124 at 130 per Gibbs CJ, 142 per Wilson J; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160 per Dawson and Gaudron JJ; *Jamieson v The Queen* (1993) 177 CLR 574 at 596 per Gaudron J; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633 per Gaudron and Gummow JJ; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 170 per Lord Reid.

The nature of Tribunal decisions

49 So far as Pt 8 of the Act operates both to limit the ground upon which a decision of the Tribunal may be challenged and, also, to limit access to the courts, it operates only to limit the grounds upon which a decision may be challenged and the time within which it may be challenged in the Federal Court. No provision of Pt 8 limits the basis upon which a decision may be challenged for jurisdictional error in this Court or the time within which it may be challenged.

50 Certainly, it follows from Pt 8 of the Act, particularly s 478, that a decision which does not involve jurisdictional error and which is not challenged within 28 days is effective for all purposes notwithstanding that, for the purposes of that Part, it involves reviewable error. There is no like limit with respect to decisions involving jurisdictional error which may be the subject of proceedings in this Court. It follows that, only if the general law so requires or the Act impliedly so directs, are decisions involving jurisdictional error to be treated as effective unless and until set aside.

Decisions involving jurisdictional error: the general law

51 There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all[33]. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged. A fortiori in a case in which the

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33 See *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420 where Jordan CJ stated that constructive failure to exercise jurisdiction left "the jurisdiction in law constructively unexercised". See also *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243 per Rich, Dixon and McTiernan JJ; *Posner v Collector for Inter-State Destitute Persons (Vict)* (1946) 74 CLR 461 at 483 per Dixon J; *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 483 per Gibbs J; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 349-350 per Wilson, Deane and Gaudron JJ; *Craig v South Australia* (1995) 184 CLR 163 at 179; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 227 [82] per Kirby J; *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1439 at 1473 [189] per Gummow and Hayne JJ; 182 ALR 657 at 703.

decision in question exceeds constitutional power or infringes a constitutional prohibition.

52 The view that a decision involving jurisdictional error does not prevent the decision-maker from correcting that error by making a later decision has been accepted by the Supreme Court of Canada. Thus, in *Chandler v Alberta Association of Architects*, Sopinka J, with whom Dickson CJ and Wilson J concurred, said:

> "As a general rule, once [an administrative] tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances ...
>
> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law."[34]

In the same case, his Lordship cited[35] with approval a statement by McLachlin J that:

> "as a matter of logic and on the authorities ... a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision"[36].

53 In our view, logic and legal principle both direct the conclusion that the approach of the Supreme Court of Canada is correct. As already pointed out, a decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all. Once that is accepted, it follows that, if the duty of the decision-maker is to make a decision with respect to a person's rights but, because of jurisdictional error, he or she proceeds to make what is, in law, no decision at all, then, in law, the duty to make a decision remains

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34 [1989] 2 SCR 848 at 861-862.

35 [1989] 2 SCR 848 at 862-863.

36 *Re Trizec Equities Ltd and Area Assessor Burnaby-New Westminster* (1983) 147 DLR (3d) 637 at 643.

unperformed. Thus, not only is there no legal impediment under the general law to a decision-maker making such a decision but, as a matter of strict legal principle, he or she is required to do so. And that is so, regardless of s 33(1) of the *Acts Interpretation Act*.

The Act and jurisdictional error

54 There being no provision of the Act which, in terms, purports to give any legal effect to decisions of the Tribunal which involve jurisdictional error, as did the September decision, it is necessary to consider whether, nevertheless, the Act should be construed as impliedly having that effect. The only provisions of the Act which might conceivably sustain that implication are s 476(1) which limits the grounds upon which the Federal Court may set aside a Tribunal decision, s 478(1) which requires that applications for judicial review be made within 28 days and ss 485(1) and (3) which expressly provide that the Federal Court has no jurisdiction with respect to judicially-reviewable decisions other than that conferred by Pt 8 of the Act.

55 It may be accepted that, if the provisions referred to above require the Federal Court to treat a decision involving jurisdictional error as having legal effect until set aside, they require the Tribunal to do the same. In this respect, it would be odd, to say the least, if the Tribunal could do what the Federal Court cannot. Conversely, if the provisions in question do not require the Federal Court to treat a decision involving jurisdictional error as having legal effect until set aside, there is nothing in the Act to indicate that the Tribunal is required to do so.

56 It is correct, as was submitted on behalf of the Minister, that unless the Act is construed as impliedly requiring the Federal Court to treat the September decision as having effect according to its terms until set aside by this Court, the Federal Court was required, at least indirectly, to review that decision even though no application was made for review within the time limited in s 478(1) and to review it on a ground expressly forbidden by the Act. In our view, however, the Act should not be so construed.

57 In the context of administrative decisions, the expression "judicial review" tends to obscure the fact that the reviewing court is not simply examining the decision in question to see whether it is affected with error of the kind that requires it to be set aside or varied. Judicial review is an exercise of judicial power. As such, it is an exercise directed to the making of final and binding

decisions as to the legal rights and duties of the parties to the review proceedings[37].

58 When an administrative decision is challenged in judicial proceedings, the question that is ultimately decided is not whether the decision was affected by error but whether the rights of the party to whom the decision relates are determined by that decision which, they will not be, if the decision must be set aside. And that question is answered by application of the relevant body of law to the decision in issue.

59 As the result of the decision in *Abebe v Commonwealth*[38], the Parliament may limit the body of law to which the Federal Court may have regard when reviewing a decision under Pt 8 of the Act. However, it does not follow that the Parliament may require it to act on the basis that the law to be applied is contrary to that which would be applied in this Court if an application were made for prohibition or mandamus under s 75(v) of the Constitution.

60 Assuming that Ch III of the Constitution does not preclude the Parliament from requiring the Federal Court to act on the basis that the law is contrary to that which would be applied by this Court in proceedings under s 75(v) of the Constitution[39], there are nonetheless good reasons why the Act should not be construed as impliedly so requiring. To so construe the Act would be to construe it on the basis of a legal fiction and to subvert the function of the Federal Court in review proceedings. It is impossible to impute such an intention to the Parliament. The construction for which the Minister contends must be rejected.

Conclusion and orders

61 By instituting proceedings for judicial review of the October decision, the Minister was putting in issue the question whether Mr Bhardwaj was, in law, entitled to retain his student visa permitting him to remain in Australia. That

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37 See *Nicholas v The Queen* (1998) 193 CLR 173 at 207 [70] per Gaudron J and the cases there cited.

38 (1999) 197 CLR 510.

39 See generally, *Milicevic v Campbell* (1975) 132 CLR 307; *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 606-607 per Deane J, 689 per Toohey J, 703-705 per Gaudron J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26-27 per Brennan, Deane and Dawson JJ; *Nicholas v The Queen* (1998) 193 CLR 173 at 185-186 [13]-[15] per Brennan CJ, 206-209 [68]-[74] per Gaudron J.

question necessarily involved the question whether the September decision precluded the Tribunal from so deciding. As that decision involved jurisdictional error, the Federal Court was bound to hold that it did not.

62 The appeal should be dismissed with costs.

63 McHUGH J. Subject to two matters, this appeal should be dismissed for the reasons given by Gaudron and Gummow JJ. In my view, neither matter affects the essential basis of the reasoning that leads their Honours to conclude that the September decision was of no force or effect because of jurisdictional error on the part of the Tribunal. Nor does either matter affect their Honours' conclusion that the Tribunal was authorised to revoke the cancellation of Mr Bhardwaj's visa.

64 The first matter is the contention that judicial review "is an exercise directed to the making of final and binding decisions as to the legal rights and duties of the parties to the review proceedings"[40]. If that contention refers to the rights and duties in issue before the body whose decision is being judicially reviewed, as I think it does, I do not agree with it. Nor do I agree with the contention that, when an administrative decision is challenged in judicial proceedings, what "is ultimately decided is not whether the decision was affected by error but whether the rights of the party to whom the decision relates are determined by that decision which, they will not be, if the decision must be set aside"[41].

65 In my view, these contentions could be accepted only if the minority view in *Abebe v The Commonwealth*[42] as to what constitutes a justiciable "matter" had prevailed. If a tribunal holds that a person is not entitled to a licence, but that person contends that the tribunal denied him or her natural justice, what is decided in proceedings for judicial review is whether natural justice was denied and whether the decision should be set aside. The proceedings for judicial review say nothing as to whether or not the person is entitled to the licence.

66 The second matter inevitably follows from my views about the first matter. I do not agree that, by instituting judicial proceedings, "the Minister was putting in issue the question whether Mr Bhardwaj was, in law, entitled to retain his student visa permitting him to remain in Australia"[43]. What was in issue in the judicial proceedings was whether "the Tribunal lacked power and/or jurisdiction to make the October decision"[44]. It was that question, and not the question of the entitlement to retain the student visa, that "necessarily involved

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40 Reasons of Gaudron and Gummow JJ at [57].

41 Reasons of Gaudron and Gummow JJ at [58].

42 (1999) 197 CLR 510.

43 Reasons of Gaudron and Gummow JJ at [61].

44 Reasons of Gaudron and Gummow JJ at [22].

the question whether the September decision precluded the Tribunal"[45] from making the October decision.

67 As the reasons of their Honours show, the Tribunal was authorised to make its decision in October 1998 revoking the cancellation of Mr Bhardwaj's visa. That was because its September 1998 decision affirming the cancellation was of no force or effect by reason of jurisdictional error and nothing in the Act gave the September decision "greater force or effect than it would otherwise have"[46].

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45 Reasons of Gaudron and Gummow JJ at [61].

46 Reasons of Gaudron and Gummow JJ at [48].

68 KIRBY J. This appeal comes from a divided decision of the Full Court of the Federal Court of Australia[47]. It requires consideration of the theories of nullification of administrative action done without, or contrary to, legal authority[48].

69 This is a subject upon which rival propositions have been advanced to sustain judicial decisions in particular cases[49]. Discussion of the theories has elicited unflattering commentary. Lord Hailsham said that the resulting law in England attempted to "stretch or cramp" the facts of particular cases "on a bed of Procrustes invented by lawyers for the purposes of convenient exposition"[50]. Professor Craig has expressed caution about any theory that would attribute to invalid orders a "Houdini-like" capacity to operate validly for some purposes but to become void for others[51]. The present proceedings were not free of rhetoric. The primary judge (Madgwick J) rejected submissions now advanced as "pharisaical"[52].

70 Undeterred, I embark on the task before me. Both sides accepted that the basic character of that task was one of construing the *Migration Act* 1958 (Cth) ("the Act"). However, each derived the opposite conclusion. I have previously expressed my opinion about the inflexible time limitations that appear in the Act and the rigid administration of its terms, in ways seemingly indifferent to the realities of life[53]. The consequence of such rigidity is effectively to force those who are its victims to invoke constitutional and related relief in this Court where

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47 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2000) 99 FCR 251 ("*Bhardwaj*") (Beaumont and Carr JJ; Lehane J dissenting).

48 See eg Hutley, "The Cult of Nullification in English Law", (1978) 52 *Australian Law Journal* 8.

49 Taggart, "Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences", in Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (1986) 70.

50 *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 at 190; [1979] 3 All ER 876 at 883.

51 Craig, *Administrative Law*, 4th ed (1999) at 662.

52 *Minister for Immigration and Multicultural Affairs v Bhardwaj* [1999] FCA 1806 at [31].

53 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 929-930 [223]-[224]; 179 ALR 238 at 294 ("*Miah*").

the exercise of a discretion to afford such relief may be available[54]. The question is not whether there should be flexibility in the functions of the Tribunal. It is whether the outcome required by the Act, as a matter of law, is that urged upon this Court. If it is, it is the duty of this Court to uphold it, however unwise or unjust the resulting law might seem[55].

71 The facts and the history of these proceedings are explained in the reasons of Gleeson CJ[56], and of Gaudron and Gummow JJ[57] and of Hayne J[58]. I will avoid unnecessary repetition. This Court was assured that the issue between the parties in the appeal was still a live one, notwithstanding the effluxion of further time.

The decisions of the Federal Court

72 The primary judge rejected the argument of the Minister for Immigration and Multicultural Affairs ("the appellant") that the October decision of the Tribunal was invalid on the ground that, when the Tribunal made it, it was *functus officio*. In this respect, he distinguished earlier authority of the Federal Court relating to a different but similar tribunal[59]. That decision had held that the Tribunal had no power to reconsider its own decisions. The primary judge held that this ruling only applied where the earlier decision was "lawful". He concluded that, in the present case, the September decision had not been lawful because it involved a breach of s 360 of the Act and of the rules of natural justice[60]. A failure to observe those rules meant that there had been no "review" by the Tribunal of the delegate's decision. The Tribunal's "decision" was therefore open to collateral attack in the Federal Court. That attack having been

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54 Under the Constitution, ss 75(v) and 76(i) with *Judiciary Act* 1903 (Cth), s 30(a).

55 This assumes the constitutional validity of the provisions of the Act. No party suggested that the Act was invalid and ample constitutional power exists to sustain the relevant provisions: cf *Abebe v The Commonwealth* (1999) 197 CLR 510.

56 Reasons of Gleeson CJ at [2]-[3].

57 Reasons of Gaudron and Gummow JJ at [18]-[22].

58 Reasons of Hayne J at [138]-[140].

59 *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 76 FCR 301. The case involved the Refugee Review Tribunal but the statutory provisions were analogous.

60 *Minister for Immigration and Multicultural Affairs v Bhardwaj* [1999] FCA 1806 at [27].

mounted by Mr Bhardwaj ("the respondent"), he was entitled to succeed. The Tribunal was unimpeded by the September "decision". That "decision" had been flawed by a failure "to accord an applicant a fundamentally important right"[61].

73 Alternatively, the primary judge held that the appellant was endeavouring to vindicate formal and unmeritorious arguments. On that basis too, he concluded that the appellant should be denied relief. This followed, he said, from the Court's discretion to provide, or withhold, relief of that character[62].

74 In the Full Court, the majority (Beaumont and Carr JJ) upheld the orders of the primary judge. Their Honours concluded that the Tribunal had the power and duty to reconsider the September "decision"[63]. In doing so, the Tribunal had merely "pre-empted"[64] the need for judicial intervention. The power to act as it did was held to be inherent in the statutory scheme governing the Tribunal[65]. Further, it was supported by the power afforded by the *Acts Interpretation Act* 1901 (Cth)[66] ("the Interpretation Act") once the Tribunal became aware of the procedural mistake that had occurred in making the September "decision". By virtue of that Act, the power of decision after a review, could be exercised, and the Tribunal's duty performed, "as occasion requires"[67]. The majority in the Full Court suggested that, if the Tribunal could be obliged to exercise its functions of "review" by order of a court, it would be anomalous if it were forbidden from doing so of its own motion, once it had accepted that it had first acted mistakenly[68]. A consideration relevant to the majority's reasoning was the requirement in the Act that the Tribunal act in a way that was "fair, just, economical, informal and quick"[69] and that it was "not bound by technicalities,

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61 *Minister for Immigration and Multicultural Affairs v Bhardwaj* [1999] FCA 1806 at [27].

62 *Minister for Immigration and Multicultural Affairs v Bhardwaj* [1999] FCA 1806 at [28]-[31].

63 *Bhardwaj* (2000) 99 FCR 251 at 259-260 [34]-[38], 261 [46].

64 *Bhardwaj* (2000) 99 FCR 251 at 261 [45].

65 *Bhardwaj* (2000) 99 FCR 251 at 259 [35]-[37].

66 s 33(1): see *Bhardwaj* (2000) 99 FCR 251 at 258 [28]-[30].

67 *Bhardwaj* (2000) 99 FCR 251 at 258 [28].

68 *Bhardwaj* (2000) 99 FCR 251 at 261 [45].

69 The Act, s 353(1): *Bhardwaj* (2000) 99 FCR 251 at 259 [35].

[or] legal forms"[70]. On the contrary, it was obliged to perform its functions in accordance with "substantial justice and the merits of the case"[71].

75 In his dissenting opinion, Lehane J concluded that the Act made it impossible to treat the September decision as a nullity which the Tribunal could ignore, as if it did not exist[72]. The decision having been made, it could not lawfully be made again. Nor could the Federal Court enter upon a consideration of the validity of the September decision, given that the only authority to do so was subject to a time limitation that had already expired[73]. His Honour also rejected the suggestion that the appellant could be refused relief on discretionary grounds. He said that there was nothing unreasonable or improper in the appellant's conduct but rather a proper insistence upon the due application of the law[74]. It followed, in Lehane J's opinion, that the appeal should be upheld.

The applicable legislation

76 At the time of both decisions in question in this appeal the Act contained, in Pt 5, a number of provisions governing the way in which the Tribunal should exercise its powers (Div 4) and the way in which it should conduct a review sought by an applicant in respect of a primary decision (Div 5).

77 In Div 4, s 353 set out the requirement governing the manner in which the Tribunal should operate fairly and economically without being bound by technicalities and according to substantial justice. In Div 5 of the same part, a number of provisions should be noticed because they are important to my approach to the appeal. They were accurately summarised in the Full Court[75].

78 It is necessary to make particular reference to certain provisions in Div 3 of Pt 5 and Div 2 of Pt 8 of the Act[76]. In the former, express provision was made in respect of "reviewable decisions" that alone enlivened the jurisdiction and powers of the Tribunal. Amongst the "decisions" so specified was a decision

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70 The Act, s 353(2)(a): *Bhardwaj* (2000) 99 FCR 251 at 259 [36].

71 The Act, s 353(2)(b): *Bhardwaj* (2000) 99 FCR 251 at 259 [37].

72 *Bhardwaj* (2000) 99 FCR 251 at 263 [56].

73 The Act, s 478(1)(b).

74 *Bhardwaj* (2000) 99 FCR 251 at 267 [65].

75 *Bhardwaj* (2000) 99 FCR 251 at 257-258 [23].

76 *Bhardwaj* (2000) 99 FCR 251 at 262-263 [54]-[55].

"prescribed to be [reviewable]". It was common ground that the delegate's decision in the present case fell into that class[77]. No express authority was given by the Act to render "reviewable" before the Tribunal one of its own earlier "decisions" or the cancellation of such a decision. Nor was express authority given by the Act to the Tribunal to conduct a second review of a reviewable decision in respect of which an earlier review had been conducted and a decision made.

79 A degree of specificity in respect of the application for review of a "reviewable decision" was indicated by s 347 of the Act. That section talked of "[a]n application for review" (in the singular[78]) to be made "in the approved form" and to be "given to the Tribunal within the prescribed period". Fixed times after "the notification of the [Tribunal's] reviewable decision" were specified in respect of the application for review by the Tribunal[79]. The specification appeared in language of high particularity. In the case of the respondent's application for review of the decision of the delegate, this enlivened a duty in the Tribunal. It was obliged to "review the decision"[80]. Then, in a specification of the "[p]owers of [the] Tribunal"[81], the Act provided in s 349:

> "(1) The Tribunal may, for the purposes of the review of [a] … reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision.
>
> (2) The Tribunal may:
>
> (a) affirm the decision; or
>
> (b) vary the decision; or
>
> (c) if the decision relates to a prescribed matter – remit the matter for reconsideration in accordance with

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77 *Bhardwaj* (2000) 99 FCR 251 at 262 [54].

78 The Act, s 347(1).

79 The Act, s 347(1)(b).

80 The Act, s 348(1). Section 348(2) contained an exception ("must not review, or continue to review") where the Minister had issued a conclusive certificate under ss 338(3) or 346(4). However, such provisions are not presently relevant.

81 This is the statutory heading to s 349 of the Act.

such directions or recommendations of the Tribunal as are permitted by the regulations; or

(d) set the decision aside and substitute a new decision.

(3) If the Tribunal:

(a) varies the decision; or

(b) sets aside the decision and substitutes a new decision;

the decision as varied or substituted is taken (except for the purpose of appeals from decisions of the Tribunal) to be a decision of the Minister.

(4) To avoid doubt, the Tribunal must not, by varying a decision or setting a decision aside and substituting a new decision, purport to make a decision that is not authorised by the Act or the regulations."

80 By s 352(1) of the Act, the Registrar of the Tribunal was required "as soon as practicable" to give the Secretary of the appellant's Department written notice of the making of the application. The section also imposed on the Secretary the duty to give the Registrar, within a specified time, a statement setting out the findings of fact of the person who made the primary decision, referring to the evidence on which those findings were based and giving the reasons for the decision[82]. By s 368 of the Act an equivalent obligation was imposed on the Tribunal itself to record and notify its decisions once made:

"(1) Where the Tribunal makes its decision on a review, the Tribunal must … prepare a written statement that:

(a) sets out the decision of the Tribunal on the review;

(b) sets out the reasons for the decision;

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based.

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82 The Act, s 352(2).

(2) The Tribunal shall give the applicant and the Secretary a copy of the statement prepared under subsection (1) within 14 days after the decision concerned is made.

(3) Where the Tribunal has prepared the written statement, the Tribunal shall:

(a) return to the Secretary any document that the Secretary has provided in relation to the review; and

(b) give the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based."

81 By s 369, the Registrar was obliged[83] to "ensure that statements prepared by the Tribunal pursuant to sub-section 368(1) are published".

82 Within Pt 8 of the Act were contained provisions that governed exhaustively the review by the Federal Court of "decisions" of the Tribunal[84]. It was pursuant to such provisions that the appellant applied for judicial review of the October decision in the present case. Neither party applied for judicial review of the September decision. This was so because the appellant was content with that decision. The respondent was content to treat it as having no legal effect because it was revoked by the October decision.

83 The applicable grounds for review in the Federal Court of a "judicially-reviewable decision" were limited by the Act[85]. It excluded a ground that a breach of the rules of natural justice had occurred in connection with the making of the decision[86]. However, it included grounds that "procedures that were required by this Act … to be observed in connection with the making of the decision were not observed"[87]; "that the decision was not authorised by this Act"[88]; and that the decision "involved an error of law, being an error involving

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83 Subject to a direction under s 378 of the Act providing for restriction on publication of specified matters.

84 The Act, s 475(1).

85 The Act, s 476.

86 The Act, s 476(2)(a).

87 The Act, s 476(1)(a).

88 The Act, s 476(1)(c).

an incorrect interpretation of the applicable law … whether or not the error appears on the record of the decision"[89].

84 A strict time limit was imposed for an application to the Federal Court for judicial review of a decision of the Tribunal[90]. That Court was obliged not to make an order extending time[91]. It enjoyed no relevant jurisdiction "in respect of judicially-reviewable decisions" other than the jurisdiction conferred by Pt 8 of the Act[92].

85 Finally, because it was relied on by the respondent, it is relevant to note the language of s 33(1) of the Interpretation Act[93]. As this is set out in the reasons of other members of this Court, I will not repeat it[94].

The issues

86 The following issues arise in the appeal:

(1) *The procedural flaw:* Was the September decision of the Tribunal legally flawed for want of compliance with the requirements of the Act (or of the residual common law of natural justice) obliging the Tribunal, before it made a decision, to "give the applicant the opportunity to appear before it to give evidence and present arguments"[95]?

(2) *Validity of first decision:* If the answer to (1) is yes, was the September decision a nullity so that the Tribunal was required or entitled, even without a court order or declaration to that effect, to ignore it and proceed to make the October decision as if the September decision did not exist?

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89 The Act, s 476(1)(e).

90 The Act, s 478(1).

91 The Act, s 478(2).

92 The Act, s 485(1). There is jurisdiction to deal with a matter remitted by this Court under the *Judiciary Act* 1903 (Cth), s 44. However the Federal Court has no powers in relation to such a matter other than those contained in Pt 8 of the Act.

93 cf *Bhardwaj* (2000) 99 FCR 251 at 258 [28].

94 Reasons of Gaudron and Gummow JJ at [34]; reasons of Hayne J at [156].

95 The Act, s 360(1). This is an equivalent to the *audi alteram partem* rule at common law obliging a decision-maker to hear a party affected before making an important decision affecting that person.

Or was any defect in it, in the circumstances, such as to make the September decision "voidable", so that it was valid until set aside by a court of competent jurisdiction in competent proceedings brought by a competent party within a proper time? In short, was the purported "decision" of the Tribunal in September a "decision" at all within the meaning of the Act or merely a pretended "decision" which, in law, had no validity so that the Tribunal and the parties were entitled to ignore it[96]? Alternatively, was it open to the respondent to mount a collateral challenge to the validity of the September decision as a response to the appellant's application for judicial review of the October decision?

(3) *Validity of revocation:* Having regard to the answer to (2), was it competent for the Tribunal to make the October decision revoking the cancellation of the respondent's student visa which the Tribunal had earlier decided to confirm in its September decision? Did the Tribunal have the power under the Act or otherwise to make a fresh decision of that character as it purported to do? Was the October decision, in law and substance, a "decision" the setting aside of which was reserved by the Act to the Federal Court or by the Constitution to this Court in the exercise of judicial review?

(4) *Discretionary considerations:* If, having regard to the answers to the foregoing questions, the appellant was otherwise entitled to relief, was relief properly withheld from him in the discretion of the Federal Court having regard to the circumstances and the power of that Court which the appellant had invoked?

A serious procedural flaw

87 In the Federal Court, all of the judges assumed or accepted that, had an application been filed by the respondent within time in that Court, under Pt 8 of the Act, seeking review of the September decision, such application would have resulted in that decision being set aside[97]. In this respect, the Full Court applied its own earlier decision in *Minister for Immigration and Multicultural Affairs v*

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96 cf *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 172; *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 414-416.

97 See eg *Bhardwaj* (2000) 99 FCR 251 at 260-261 [42]-[45] per Beaumont and Carr JJ, 265-266 [63] per Lehane J.

Capitly[98]. That decision, in turn, followed other authority of the Federal Court[99]. By that authority, the obligation of the Act requiring that an applicant be given "an opportunity to appear before [the Tribunal] to give evidence" had been held to be an ongoing one, obliging the provision of a reasonable opportunity to appear. Thus, unreasonably short notice of a hearing date was held not to conform to the statutory obligation of notice.

88 In its earlier decision in *Capitly*, the Federal Court had recorded a submission for the appellant that the Tribunal had sufficiently discharged its obligations in law by advising of the proposed hearing date and the right to give evidence. That submission was based upon the notion that the Act was concerned only with the obligations of the Tribunal and not with anything that might happen thereafter to an applicant. However, the Federal Court gave a broad meaning to the phrase "opportunity to appear". It rejected the submission that its approach would "open the floodgates to applicants seeking adjournments for the purposes of delaying a hearing"[100].

89 The construction of the Full Court was open on the statutory language. It was one apt to promote the attainment of the relevant legislative purpose. It was also broadly consonant with the importance attached by the common law to the right to be heard before important decisions having adverse consequences are made[101]. A relevant consideration is the statutory restriction on the right of an applicant to be represented before the Tribunal by another person[102].

90 The appellant complained that the Full Court had not addressed his argument that the earlier authority was wrong and should not have been followed. I would reject this complaint. In any event, since these proceedings, the Act has been amended in a way apparently designed to overcome the earlier

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98 (1999) 55 ALD 365 at 371-372 [31]-[36]. The case concerned the Refugee Review Tribunal and s 425(1) of the Act but the position was analogous. The majority in the Full Court cited this passage with approval: *Bhardwaj* (2000) 99 FCR 251 at 260-261 [42].

99 *Budiyal v Minister for Immigration and Multicultural Affairs* (1998) 82 FCR 166.

100 (1999) 55 ALD 365 at 372 [35].

101 *Egan and Davis v Harradine* (1975) 6 ALR 507 at 536; *Sullivan v Department of Transport* (1978) 20 ALR 323; *Rose v Humbles* [1972] 1 WLR 33; [1972] 1 All ER 314.

102 The Act, s 366A(3); cf *Ostreicher v Secretary of State for the Environment* [1978] 1 WLR 810; [1978] 3 All ER 82.

decision[103]. That amendment suggests parliamentary acceptance of the correctness of the previous authority. I would not disturb the conclusion of the Federal Court on this basis.

The impact on the Tribunal's decision

91 *Respondent's arguments:* The respondent accepted that it was not competent to the Tribunal to reopen a decision on a review already decided, simply because of a change of mind or the tender of later or different evidence, however compelling[104]. But he submitted that it was competent for the Tribunal, recognising its own mistake, to correct an administrative error, without waiting for a court to do so. It could do so provided it acted within a reasonable time of the original decision[105]. In support of this approach, the respondent relied on arguments drawn from general principles of the common law, from the language of the Act and from supporting provisions in other legislation.

92 So far as general principles were concerned, the respondent invoked a dictum of Mason J in *Twist v Randwick Municipal Council*[106]. That was a case concerning the right of a ratepayer to be heard by a local authority before the authority made a decision to demolish his building. Under the legislation, that decision was subject to appeal to the District Court. By majority[107], this Court concluded that the terms of the legislation excluded a legally enforceable right to be heard by the council as well.

93 In the course of his reasons, Mason J, as one of the majority, approved a passage in the speech of Lord Reid in *Ridge v Baldwin*[108] saying "that if a body under a duty to hear a person threatened with dismissal against whom a charge has been made fails to hear him, it may rectify the breach of natural justice by giving him a full and fair hearing de novo, in which event it is the later, not the earlier, decision that is effective"[109]. The respondent submitted that this was a

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103 The Act, s 361(1)(a) now requires the new tribunal to "notify the applicant … that he or she is invited to appear before the Tribunal to give evidence and present arguments".

104 cf *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 76 FCR 301.

105 *Bhardwaj* (2000) 99 FCR 251 at 261 [47].

106 (1976) 136 CLR 106 at 115.

107 Barwick CJ and Mason J; Jacobs J dissenting.

108 [1964] AC 40 at 79.

109 *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 115.

lawful approach and one that furthered good administration. If an administrative body noticed an oversight or other similar flaw in its decision-making process, it should be able to correct its mistake swiftly without necessarily waiting for an order of judicial review. It could do so because, by reason of such an error, it was not *functus officio*. For minor slips and mistakes, self-correction was an appropriate course for administrators, even if not always available in the more formal world of court judgments and orders.

94 In further support of this argument, the respondent relied on two decisions of the Supreme Court of Canada. In *Chandler v Alberta Association of Architects*[110], Sopinka J, expressing the majority opinion of that Court, said:

> "As a general rule, once [an administrative] tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd v J O Ross Engineering Corp*[111].
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> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
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> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation."

95 This opinion reflects the earlier endorsement by the Supreme Court of Canada of the same passage in the speech of Lord Reid in *Ridge v Baldwin*[112] which Mason J had approved in *Twist*[113]. In *Posluns v Toronto Stock*

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110 [1989] 2 SCR 848 at 861-862.

111 [1934] SCR 186.

112 [1964] AC 40 at 79.

113 (1976) 136 CLR 106 at 115.

Exchange[114], the Supreme Court had before it a complaint concerning an investigation by the Board of the Toronto Stock Exchange in respect of certain impugned transactions. The investigation was conducted under the by-laws of the Exchange. A first hearing was undertaken to consider whether a member of the Exchange was guilty of any offence under the by-laws. The member was misinformed about the nature of the inquiry. Orders were made against him personally. Following representations to the Board, on the following day, it acceded to his request to conduct a rehearing. At the rehearing other serious orders were made against the member. He then brought court proceedings complaining that the Exchange had acted illegally and contrary to the rules of natural justice. Ritchie J[115], writing for the Supreme Court, endorsed the extract from the speech of Lord Reid in *Ridge v Baldwin*[116]:

> "I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid."

96 In this appeal the respondent submitted that this reasoning was given further support by the common law principle that a decision made by a repository of power, which exercises the power without regard to conditions explicitly established by the enabling statute (or in breach of a fundamental rule of natural justice such as that obliging it to give a hearing to a person affected), is vitiated in law. So far as the law was concerned, it was not a "decision" at all. In support of that proposition, the respondent relied upon yet another Canadian decision given by the present Chief Justice of Canada when a member of the Supreme Court of British Columbia. In *Re Trizec Equities Ltd and Area Assessor Burnaby-New Westminster*[117], McLachlin J, also invoking the passage from Lord Reid, said:

> "I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision".

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114 [1968] SCR 330.

115 [1968] SCR 330 at 338, 340.

116 [1964] AC 40 at 79. This passage was also relied upon by the majority in the Full Court: *Bhardwaj* (2000) 99 FCR 251 at 259-260 [38]; cf reasons of Gleeson CJ at [5].

117 (1983) 147 DLR (3d) 637 at 643.

97 The respondent submitted that the same approach was consistent with the law in Australia[118]. Where the flaw in the original "decision" was so fundamental that it deprived that administrative act of its validity, the so-called "decision" was not a "decision" within the Act, still less a decision on a "review". It was a nullity. It could be ignored by the respondent, the Tribunal and everyone else. In effect, this, so the respondent submitted, was what the Tribunal, by giving its October decision, had proceeded to do.

98 The respondent also invoked the language of the Act. He argued that Pt 5 of the Act was intended to afford persons like himself a *real* opportunity for a comprehensive merits review before the Tribunal. This was a view of Pt 5 of the Act that was reinforced by the "severely truncated" facilities of judicial review available in the Federal Court pursuant to Pt 8 of the Act[119]. Those facilities of judicial review postulated the *lawful* exercise of the rights of merits review provided in Pt 5[120]. These features of the Act, together with the severe time limits upon judicial review, presented reasons why it was open to the Tribunal to acknowledge, and in effect to correct, its own defective procedures so as to fulfil the requirements of the Act as the Parliament had intended.

99 The respondent argued that, although no express power had been afforded by the Act to permit the Tribunal to proceed as it had, making another decision, such a power was implicit in the scheme of the Act, taking into account the emphasis it placed in ss 359 and 360 upon assuring to an applicant a real opportunity for a hearing on the merits. The duty imposed upon the Tribunal by s 353 was designed to free it from inappropriate constraints that might be applicable to courts of law[121]. What the Tribunal had done was therefore no defiance of the Act nor an excess of the Tribunal's jurisdiction and power under it. On the contrary, in the exceptional circumstances that had arisen, it represented no more than the fulfilment of the parliamentary expectations as to how the Tribunal should operate.

100 Finally, the respondent called in aid s 33(1) of the Interpretation Act. Once the Tribunal had acknowledged and corrected its own earlier administrative error, it was not denied the opportunity to make a "decision" to replace the

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118 *Yilmaz v Minister for Immigration and Multicultural Affairs* (2000) 100 FCR 495 at 507-508 [66]-[68].

119 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 522 [21].

120 *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 440 [55].

121 cf *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 628 [49].

earlier, invalid, "decision" flawed by administrative error. It was permitted to do so because s 33(1) would apply. That sub-section authorised the Tribunal to exercise the power given by the Act, as the occasion then required. The relevant "occasion" was the discovery of a mistake in the earlier purported exercise of the decision-making function, an acknowledgment of that error and a consequent necessity to proceed to make the "decision" validly for the first time.

101 *Invalidity and statutory construction:* The debate about the invalidity of administrative decisions, made in breach of statutory requirements (or of the rules of natural justice where applicable or where the "decision" is tainted by fraud or misrepresentation)[122], presents one of the most vexing puzzles of public law. Principle seems to pull one way. Practicalities seem to pull in the opposite direction. The view that decisions, made with serious vitiating faults, may be treated as void, ie null and void or legally non-existent[123], represents the absolute theory of invalidity. According to this theory, a decision flawed in such a way is no "decision" at all. It is as if it did not in fact exist because, for the law, it has no operation. It might just as well not have happened. It can be ignored[124].

102 The problem with this extreme theory is immediately apparent. If the decision is void in this sense, how can it support an appeal or (if it be available) a proceeding by way of judicial review? That was the point argued in *Calvin v Carr*[125], an Australian appeal to the Privy Council. The complaint of the plaintiff in that case too was that a decision had been made contrary to the rules of natural justice. If the suggested default rendered the decision void, the question was posed: how did a court enjoy its jurisdiction to hear an appeal from, or review of, that decision? Lord Wilberforce, speaking for the Privy Council, said of this "difficult area"[126]:

> "Their Lordships' opinion would be, if it became necessary to fix upon one or other of these expressions ['void', 'voidable'], that a decision made contrary to natural justice is void, but that, until it is so declared by a

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122 Campbell, "Effect of Administrative Decisions Procured by Fraud or Misrepresentation", (1998) 5 *Australian Journal of Administrative Law* 240 referring to *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400.

123 See generally Rubinstein, *Jurisdiction and Illegality* (1965).

124 *General Medical Council v Spackman* [1943] AC 627 at 635; *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 172.

125 [1980] AC 574.

126 [1980] AC 574 at 589-590.

> competent body or court, it may have some effect, or existence, in law. This condition might be better expressed by saying that the decision is invalid or vitiated. In the present context, where the question is whether an appeal lies, the impugned decision cannot be considered as totally void, in the sense of being legally non-existent. So to hold would be wholly unreal … [The] consequences [of disqualification] remained in effect unless and until the stewards' decision was challenged and, if so, had sufficient existence in law to justify an appeal."

103 This approach has led to the relative theory of invalidity. According to this view a decision tainted by jurisdictional error is valid and effective in law unless and until it is retrospectively invalidated (ie declared "void") by a court. This theory was expounded in this Court by Aickin J in *Forbes v New South Wales Trotting Club Ltd*[127]:

> "That which is done without compliance with applicable principles of natural justice, in circumstances where the relevant authority is obliged to comply with such principles, is not to be regarded as void ab initio so that what purports to be an act done is totally ineffective for all purposes. Such an act is valid and operative unless and until duly challenged but upon such challenge being upheld it is void, not merely from the time of a decision to that effect by a court, but from its inception. Thus, though it is merely voidable, when it is declared to be contrary to natural justice the consequence is that it is deemed to have been void ab initio."

104 Strong support for the relative theory of invalidity may be found in decisions of the House of Lords[128], the Privy Council[129], the Supreme Court of

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127 (1979) 143 CLR 242 at 277; cf *Posner v Collector for Inter-State Destitute Persons (Vict)* (1946) 74 CLR 461 at 483.

128 *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 320-321; *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 at 187; [1979] 3 All ER 876 at 881.

129 *Isaacs v Robertson* [1985] AC 97.

Canada[130] and the New Zealand Court of Appeal[131]. It also gains support from distinguished writers[132].

105 In the Australian context, the issue of nullification for fundamental legal flaws has special significance in at least two important contexts. The first is that presented when it is discovered, perhaps years later, that legislation upon which individuals, courts and tribunals have based their actions and decisions, lacked constitutional underpinning. This is a not uncommon problem in a federal system of government. It was last considered by this Court in the cases that followed the decision invalidating parts of the cross-vesting legislation and invalidating State licences for tobacco and alcohol sales held to be duties of excise[133].

106 After the cross-vesting decision, State legislation was quickly enacted which purported to remedy the situation in respect of cases which were then (invalidly) proceeding in federal courts[134]. In the ensuing challenges to the validity of such State legislation, questions arose as to whether such "decisions" as had been made by a federal court (in the form of judgments and orders) were, for want of constitutional authority, absolutely void. If so, that conclusion would deprive all parties, relying on them, of any rights whatever purportedly given by them. It would remove any difficulty of invalidity for a State law on the grounds of constitutional inconsistency[135]. There would then be no federal law or order of a federal court to compete with a State law. The purported order of a federal court could be completely ignored *ab initio*.

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130 *Re Wilby and Minister of Manpower and Immigration* (1977) 80 DLR (3d) 607 affirming the decision of the Federal Court of Appeal (1975) 59 DLR (3d) 146.

131 *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 at 4; *Love v Porirua City Council* [1984] 2 NZLR 308 at 311; *Hill v Wellington Transport District Licensing Authority* [1984] 2 NZLR 314.

132 Wade, "Unlawful Administrative Action: Void or Voidable?", (1967) 83 *Law Quarterly Review* 499; (1968) 84 *Law Quarterly Review* 95; Cooke, "Third Thoughts on Administrative Law", (1979) 5 *New Zealand Recent Law* 218 at 222.

133 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. See also *Ha v New South Wales* (1997) 189 CLR 465 and *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 76 ALJR 203 at 228 [124]; 185 ALR 335 at 370.

134 *Federal Courts (State Jurisdiction) Act* 1999 of the States.

135 Constitution, s 109.

107 This Court rejected the notion of absolute invalidity, although for varying reasons[136]. In her reasons in *Re Macks; Ex parte Saint*[137], Gaudron J pointed out that "the presence of s 75(v) in Ch III of the Constitution indicates … that the Constitution expressly contemplates that federal courts might be empowered to make decisions with respect to their own jurisdiction which are binding until set aside".

108 It follows that, in Australia, even in the sphere of constitutional invalidation which is so fundamental to the very source of law-making power, this Court has rejected the absolute theory of nullification. In the cases mentioned, it has done so in the context of judgments and orders of federal courts declared by legislation to be "superior courts" of record. The decisions and other formal acts of officers of the Commonwealth, who are not judges of such courts, may be in a different category. However, the assumption upon which s 75(v) is written appears to be that even fundamentally flawed decisions by officers of the Commonwealth, without constitutional power or otherwise contrary to federal law, will remain valid for some purposes and have to be obeyed until set aside by a court, at the very least to the extent of engaging the jurisdiction of this Court under the Constitution.

109 A second reason why the extent of nullification is important in Australia is the proliferation of privative clauses. These attempt to oust, or limit, the supervisory jurisdiction of the courts. Whatever may be the position in respect of State legislation, federal legislation of this kind must confront s 75(v) of the Constitution. This Court has consistently held that privative clauses cannot destroy the jurisdiction of this Court to pronounce upon the validity of a decision of an officer of the Commonwealth (including in a federal court or tribunal) which is alleged to exceed jurisdiction or to transcend constitutional limits upon power[138].

110 Again, this is not a problem presented in the present appeal. But it provides a strong reason for caution before embarking upon general propositions about the invalidity of the September decision of the Tribunal in this case. The

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136 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 660 [77]; *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

137 (2000) 204 CLR 158 at 185 [52].

138 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616; *R v Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australasia Ltd* (1947) 75 CLR 361; *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123; *R v Murray; Ex parte Proctor* (1949) 77 CLR 387.

occasion to elucidate the operation of general theories of invalidity in the context of federal legislation in Australia would be a case where the Parliament has purported, by a privative clause, to circumscribe or expel constitutional review in this Court. That is not the present case. I would therefore confine myself to ascertaining the true meaning and operation of the Act applicable in this case. This, after all, is the way both parties urged the Court to proceed. In my view, it is from the Act, rather than from broad expositions of the common law or large judicial statements about rival theories of invalidity of administrative decisions, that the answer to the present appeal is to be found[139].

111 *A "decision" on a "review":* The governing obligation of a court or tribunal in this country is to give effect to valid legislation where it applies. It is not to import into legislation theories that developed about invalidation of administrative decisions in judge-made law uttered in contexts divorced from that of the Australian Constitution and different from that of the Act under scrutiny.

112 General judicial observations that decision-makers in police watch committees[140], stock exchange boards[141] or other administrative proceedings[142] may change their mind, withdraw an earlier decision and substitute a new one, must necessarily give way, in a particular case, to the express language and implied operation of the particular legislation under which the decision in question was made. Attention must therefore be addressed to the language of the Act.

113 When that language is considered in the present appeal it contradicts the presupposition upon which the Tribunal purported to act when it proceeded to make its October decision. It is not suggested that the Tribunal had any express power under the Act, or otherwise, to ignore or revoke and reconsider its September decision. Accordingly, the question is whether such a power can be inferred from the true construction of the Act, allied with any additional facility provided by the Interpretation Act, s 33(1). In my view, neither of these statutes, nor both of them in combination, afforded jurisdiction and power to the Tribunal to make the October decision. On the contrary, the Act, properly construed, forbade it.

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139 cf reasons of Gleeson CJ at [3], reasons of Hayne J at [147] with which, in this respect, I agree.

140 *Ridge v Baldwin* [1964] AC 40.

141 *Posluns v Toronto Stock Exchange* [1968] SCR 330.

142 *Chandler v Alberta Association of Architects* [1989] 2 SCR 848.

114 As to the Act, many of its provisions indicate that the course adopted was contrary to the parliamentary purpose. The language of the Act makes it abundantly clear that the Parliament envisaged a single exercise of the "review" performed by the Tribunal which, perfect or imperfect, would be given effect in a "decision". Whether or not such a "decision" had been made was not left in doubt. On the contrary, explicit provisions of considerable detail were enacted identifying the steps to be observed in the making of any such "decision" if it were to be so treated under the Act. Legislative provisions governed, in considerable detail, the way in which the "decision" was to be recorded[143], what it was to contain[144], how it was to be supplied to the respondent and to the Secretary of the appellant's Department[145], what was then to follow[146], how ordinarily it was to be published and how, unless made the subject of "appeal", it was to be given force and effect[147]. All of these provisions, particularly when read in combination, contradict the case of the respondent.

115 Consistently with the Act, it is impossible to postulate a residual power of the Tribunal to revoke an earlier decision that formally complied with provisions of the Act (or otherwise to withdraw from, or retrieve it or ignore it). Under the Act, the "decision" involved a formal process which immediately set in train a series of procedural and substantive consequences. Those provisions either had to be obeyed or they followed automatically by force of the Act itself. Other legislation might yield a different conclusion. This legislation denies it.

116 Further reinforcement for this interpretation of the Act is found in the strict instructions both to the Tribunal[148] and the Federal Court[149], forbidding variation from the statutory scheme. These are rigid provisions. They may sometimes occasion injustice[150]. But whilst they are valid laws of the Parliament they must be obeyed by the Tribunal, the Federal Court and this Court. Far from helping the respondent's case, the fact that the facility of judicial review in the

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143 The Act, s 368(1).

144 The Act, s 368(1).

145 The Act, s 368(2).

146 The Act, s 368(3).

147 The Act, s 349(2) and (3). See also s 351.

148 The Act, s 349(4).

149 The Act, s 478(2).

150 *Miah* (2001) 75 ALJR 889; 179 ALR 238.

Federal Court is defined by valid federal legislation[151] argues strongly against the enjoyment by the Tribunal of flexible powers to ignore, cancel or withdraw its own earlier statutory decision for a suggested flaw consequential upon discovery of a failure to observe the requirements of the Act or to conform to the common law rules as to natural justice.

117 Any such defects would clearly enliven the possibility of an application for review in the Federal Court[152]. However, any such review would itself be subject to the strict time limit that required commencement of such a proceeding no later than 28 days after the applicant was "notified of the decision"[153]. The "decision" there contemplated was not left to debate. It was the "decision" within the statutory scheme that activated the Parliament's instructions of notice, follow up and time limits. Accordingly, serious consequences attached to the making of a "decision" for the purposes of the Act and to the objective determination of whether or not a "decision" had been made. The will of the Parliament spelt out the results of making a "decision". It would defy the provisions of the Act, with its requirement to bring any application to the Federal Court within the short time (and forbidding any extension of time[154]), to postulate a broad discretion in the Tribunal, of its own motion, itself to revoke an earlier "decision" within any time that would retrospectively be judged as "reasonable"[155]. Why should the Tribunal have such power when the Parliament had taken such pains to define and limit the powers of the Federal Court? Similarly, it would defy the provision of the Act establishing a time for invoking relief from the Federal Court in respect of the decision to permit such relief to be given at a much later time in a "collateral attack" on the decision.

118 Perhaps "reasonable" times should have been provided in the Act to govern the correction of slips and mistakes. However, the Parliament decided otherwise. The provisions of the Act are therefore inconsistent with the implied power of reconsideration found by the majority of the Federal Court. The contrary analysis of Lehane J[156] was correct. It follows that s 33(1) of the Interpretation Act had no application. The provision in that Act must yield to a "contrary intention" in the particular statute. By the Act, this is one case where

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

152 Pursuant to the Act, s 476(1)(a), (c), (e) and possibly (b).

153 The Act, s 478(1)(b).

154 The Act, s 478(2).

155 *Bhardwaj* (2000) 99 FCR 251 at 261 [47].

156 *Bhardwaj* (2000) 99 FCR 251 at 262-263 [54]-[55].

the sometimes "inconvenient … doctrine … that a power conferred by statute was exhausted by its first exercise"[157] applied. Once the September decision was made, it set in train irreversible consequences both within the Tribunal and for the Federal Court. They ousted the possibility of a repeated exercise of the power. To hold otherwise would undermine the regime that the Parliament has enacted. As the Act is constitutionally valid, no judge-made law may contradict the legislative requirements. Any attempt to do so would inevitably occasion still more detailed legislative provisions to spell out the will of the Parliament. Relevantly, that was to implement a strict timetable, set in train by a clear, ascertainable, unmistakable and identifiable event – namely the formal making of the Tribunal's statutory "decision".

119 There is therefore no place in the scheme of the Act for general theories of nullification of invalid administrative acts. Nor is there room for a view that the September decision might be subject to collateral attack in court proceedings instituted to challenge the validity of the October decision.

120 Obedience to the Act is not an intolerable burden in the present case. The "fundamental flaw" that moved the Tribunal to its attempted correction of its first decision would not necessarily be left unrepaired. The Act provides expressly a mechanism for repair in the Federal Court. It must be promptly applied for. But if successful, it would result in the quashing, or setting aside, of the decision with effect from the date of the order or some other date as specified by the Federal Court[158]. Alternatively, this Court retains its constitutional jurisdiction and power to provide relief in a proper case, even where relief was no longer available in the Federal Court[159].

121 *Administrative practicalities:* To the complaint of the respondent that this outcome is unduly inflexible and restrictive of the capacity of a tribunal enjoined to observe informal procedures, to cure its own obvious mistakes, there is a ready answer. It is no more than the legal reply that the Tribunal is obliged to obey legislation enacted by the Parliament. The notion that an administrator or informal tribunal must have a power of self-correction in some circumstances is attractive. Consistently with the enabling legislation, it might occasionally be available. But the proposition that an apparent "decision" of a body such as the present Tribunal could be ignored by it, or treated as a nullity, is self-evidently untenable.

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157 *Halsbury's Laws of England*, 1st ed, vol 27 at 131 cited by Gummow J in *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211.

158 The Act, s 481(1)(a).

159 *Miah* (2001) 75 ALJR 889; 179 ALR 238.

122 I beg forgiveness for intruding an element of practicality into the resolution of this issue. The decisions of the Tribunal in this case are important ones. They affect not only the respondent and people like him. They often affect the families of such persons and the persons who administer the Act. They involve the composition of the Australian population. Significant consequences, including possible deportation, may follow directly and quite quickly from the Tribunal's decisions. If a decision unfavourable to an applicant could be ignored, or treated as provisional by the Tribunal, the appellant, the respondent or anyone else on the ground that it is not really a "decision" or is of no legal effect, a favourable decision could equally be left uncertain. The result would be confusion or even chaos in the administration of the Act.

123 The Parliament has decided that migration decisions represent one field of the law's operation where there should be a high measure of clarity and certainty. The application to a decision of the Tribunal, formally made in accordance with the Act, of a theory of legal nullification in a case such as the present is inadmissible. It is incompatible with the provisions and contemplation of the Act whose validity has not been challenged. It would be grossly inconvenient. It would also be destructive of good administration which I, at least, am prepared to assume was a purpose of the Parliament in providing for decisions in the Act in the manner that it did. Certainly, it need not be embraced to cure any irremediable injustice suffered by the respondent. Other remedies, perfectly effective, exist in law, some even now, to cure any such injustice. I dissent from the interpretation of the Act that effectively makes decisions of the Tribunal, to which so many statutory consequences attach, provisional.

The purported second decision was invalid

124 Although this conclusion is sufficient, subject to discretionary considerations, to dispose of the matters of substance in the appeal, it is appropriate to deal briefly with the third issue.

125 The actual terms of the October decision purport to "[revoke] the cancellation of the Applicant's visa which was issued to him for the purpose of engaging in studies in Australia". The Tribunal was a subordinate body, the repository of limited statutory powers afforded to it by the Parliament. It had no jurisdiction to do general justice between the parties, even in cases otherwise within its jurisdiction. Its powers had to be found in those expressly granted to it by the Act or any that were implied from the powers granted to, or from the nature and functions of, the Tribunal itself.

126 When the powers of the Tribunal are studied, they were limited to action in relation to the primary decision, in this case the decision by the delegate of the appellant. Although the powers extended to variation, setting aside and substitution of the primary decision, they did not extend to variation, setting

aside and substitution of the Tribunal's own decision[160]. Therefore, in the face of the earlier decision of the Tribunal, there was no basis in the Act to permit such a power of "revocation" to be implied amongst the defined powers of the Tribunal. On the contrary, for reasons already explained, the scheme of the Act contradicted the provision to the Tribunal of any such powers. The power of "revocation" purportedly exercised by the October decision was, in effect, a usurpation by the Tribunal of the power of judicial review for which the Act expressly provided (but in the Federal Court)[161] or the power of review under the Constitution belonging to this Court[162].

127 By the time of the October decision, the cancellation of the respondent's visa no longer rested on the decision of the delegate. Its legal basis was by then the September decision of the Tribunal, affirming the primary decision to cancel the respondent's visa. What then was the power of the Tribunal in October to "revoke" the cancellation of the respondent's visa, given that this necessarily involved revocation of its own (September) decision? No such powers existed under the Act. The pretended exercise of such powers was not only unsupported by the language and scheme of the Act, it was incompatible with the Act.

128 The respondent attempted to overcome this difficulty by suggesting that it was open to him, in the appellant's appeal to the Federal Court, to rely on a collateral attack on the validity of the September decision of the Tribunal. He argued that it was open to the Federal Court to declare that the September decision was void. This argument is flawed for reasons that I have foreshadowed.

129 No application was made to the Federal Court by either party for judicial review of the September decision. The primary judge correctly held that, by the time the matter was before him, that decision could not be impugned[163]. As the September decision had not been made the subject of a valid application for judicial review, it would contradict the explicit constraints applied by the Parliament on the jurisdiction of the Federal Court[164] to hold that, in an application challenging the October decision, it was open to a party well out of

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160 The Act, s 349(1) and (2).

161 The Act, s 476(1). And then is subject to the time limit for bringing any such application: s 477(1)(b).

162 Constitution, ss 75(v) and 76(i) and *Judiciary Act* 1903 (Cth), s 30(a).

163 *Minister for Immigration and Multicultural Affairs v Bhardwaj* [1999] FCA 1806 at [16].

164 The Act, s 485(1).

time for doing so, to challenge the September decision. In the Full Court, Lehane J concluded that the assumption by the Federal Court of any jurisdiction in relation to the September decision would, in the circumstances, be inconsistent with the express provisions of s 485(1) of the Act[165]. I agree. A collateral challenge to the validity of an administrative decision may sometimes be available[166]. But, having regard to the explicit language of the Act, it was not available in this case. Least of all in a proceeding where no such collateral attack was properly mounted. The provisions of the Act that expressly allowed a challenge in the Federal Court to the validity of the September decision were unavailing because no party had invoked those provisions within time.

Discretionary considerations favour relief

130 Under s 481(1) of the Act, on an application for review of a "judicially-reviewable decision", the Federal Court had a discretion to provide (and hence to withhold) relief in terms of the section. Whatever doubt might have existed if the section had simply used the word "may"[167], this was removed by the express statement in the Act that the orders specified were "in [the] discretion" of the Federal Court.

131 Nonetheless, a discretion must be exercised by the repository of the power consistently with the character of that body, the reasons for which the power has been afforded and the interests involved in the decision in question which (in a public law matter) will commonly involve the community's interest in lawful administration, as well as the individual interest of a party anxious to win its case.

132 It follows that the Tribunal acted beyond its powers, having made a "decision" under the Act, in purporting to make a second "decision" and thereby to revoke the earlier decision which it had made[168]. The circumstances found by

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165 *Bhardwaj* (2000) 99 FCR 251 at 266 [64].

166 *Ousley v The Queen* (1997) 192 CLR 69 at 91, 109, 130-131, 147-148.

167 cf *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 applied in *Walton v Gardiner* (1993) 177 CLR 378 at 414; *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 97; *Mitchell v The Queen* (1996) 184 CLR 333 at 345; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 563; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 425 [253].

168 *Scarfe v Federal Commissioner of Taxation* (1920) 28 CLR 271; *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429 at 444;

(Footnote continues on next page)

the Tribunal in its October decision appeared to warrant the provision of some relief to the respondent from the effect of the September decision. But whilst that "decision" remained in place, the provision of that relief was reserved in the case of this Tribunal to the Federal Court in accordance with the Act or to this Court in accordance with the Constitution.

133 Potentially, the action of a tribunal, established under the Act, proceeding to ignore or "revoke" an earlier decision would be disruptive of the scheme instituted by the Act[169]. The appellant, within the time stipulated by the Act, duly invoked the jurisdiction of the Federal Court to uphold the statutory scheme. One can be critical, as I have been, of the rigidities of the Act. But whilst the Act provides as it does, and its constitutional validity is not contested or doubted, it is a proper function of the Minister, where he sees fit, to invoke the jurisdiction of the courts to uphold the law as the Parliament has enacted it. This includes by proceedings such as the present.

134 Counsel for the appellant made it plain that if, following these proceedings, the respondent were to invoke the jurisdiction of this Court under the Constitution[170], no point would be raised, on discretionary grounds, in objection to the provision of relief by reference to the delay that has ensued as a result of the present litigation. That was a proper concession. Past cases show that, in appropriate circumstances, even after long delay, this Court will issue a constitutional writ and provide related relief to repair a proved injustice[171].

135 Notwithstanding success in the appeal, it would be open to the appellant, of his own motion, to provide the respondent with a new visa, based upon the facts disclosed in the October decision. If he did so in the circumstances of this case, that would not be surprising. But if he did not, the respondent has direct access to this Court. This is not, therefore, a case of irremediable injustice.

Jayasinghe v Minister for Immigration and Ethnic Affairs (1997) 76 FCR 301 at 316-317.

169 cf *Burgess v Minister for Immigration and Multicultural Affairs* (2000) 101 FCR 58 at 63 [19].

170 Constitution, ss 75(v) and 76(i) read with *Judiciary Act* 1903 (Cth), s 30(a): *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 651-652.

171 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5], 117 [82]-[83], 137 [150]-[151], 144 [172]; *Miah* (2001) 75 ALJR 889 at 927-930 [210]-[224]; 179 ALR 238 at 290-294.

136 Because I am of the opinion that the appellant was entitled in law to bring his application to the Federal Court, and that the Tribunal was not entitled in law to act as it purported to do in its October decision, relief should issue to uphold the law enacted by the Parliament. This is not pharisaical as the primary judge thought. On the contrary, it is what obedience to a valid law of the Parliament demands. And that is an essential postulate of the Constitution.

Orders

137 The appeal should be allowed. The orders of the Full Court of the Federal Court of Australia, except as to costs, should be set aside. In place thereof, it should be ordered that the appeal to that Court be allowed; the orders of the primary judge, except as to costs, should be set aside. In place thereof, the decision of the Immigration Review Tribunal dated 22 October 1998 concerning the respondent should be quashed. In accordance with the agreement between the parties, the appellant should pay the respondent's costs in this Court.

138 HAYNE J. The essential facts giving rise to this appeal can be stated very simply. In September 1998, the Immigration Review Tribunal ("the Tribunal") made, and published to the Minister and to the respondent, what, on its face, was its written decision on a review which the respondent had sought of a decision by the Minister's delegate to cancel his student visa. This decision, the "September decision", was to affirm the delegate's decision to cancel the respondent's visa.

139 The respondent, by his migration agent, made representations to the Tribunal expressing surprise that a decision had been made despite his request that the hearing be deferred on account of the respondent's illness. Although not cast in these terms, the representations that were made could be understood as contending, in effect, that the Tribunal had reached the September decision without following procedures prescribed by the *Migration Act* 1958 (Cth) and without giving the respondent procedural fairness. The Tribunal fixed a new hearing date and received evidence from the respondent. In October 1998, the Tribunal made, and published to the Minister and the respondent, what, again on its face, was its decision on the review. This decision, the "October decision", revoked the cancellation of the respondent's visa.

140 The Minister applied to the Federal Court of Australia for an order of review of the October decision. He contended that the Tribunal had made an error of law in making the October decision because, having made the September decision, its powers were exhausted – it was functus officio. At first instance, that application was dismissed. The Minister appealed to the Full Court of the Federal Court. By majority (Beaumont and Carr JJ; Lehane J dissenting), that appeal was dismissed[172]. He now appeals to this Court.

141 The arguments in this Court, and in the courts below, have been put in terms of the *power* of the Tribunal to reconsider its earlier decision and they have resorted to the difficult and vexed distinctions sought to be captured by a distinction between what is void and what is voidable. In my opinion, the issue that arises is more accurately described as being when did the Tribunal perform its statutory task? If it performed that task by making and publishing the September decision, the steps which the Tribunal took during October, and which culminated in it making and publishing its October decision, were done without statutory authority. By contrast, if the Tribunal did not perform its statutory task by making and publishing the September decision, it did so when it made and published its October decision.

142 The questions that must now be considered do not arise in the abstract. The Federal Court was, and this Court now is, required to consider the legal

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172 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2000) 99 FCR 251.

consequences that are to be attached to certain events that have happened, and the Federal Court was, and this Court is, required to do so in litigation between the Minister (whose delegate had cancelled the respondent's visa) and the respondent (whose visa had been cancelled). To ask whether the Tribunal has "power to reconsider its decision" makes no reference to the circumstances in which the September decision was made. It obscures the fact that it is necessary to examine what, if any, legal significance should be attached to those circumstances. In particular, it poses the issue in a way that hides the existence of the question whether what happened in September 1998 should be found to be an exercise of the powers given to the Tribunal under the Act, and a performance of the duties imposed on the Tribunal by the Act. That is, asking whether the Tribunal has power to reconsider its decision hides the necessity to ask whether the events which happened in September constituted the Tribunal making a decision to which legal consequences should be attributed.

143 Moreover, to ask simply whether the Tribunal has power to reconsider its decision may pay insufficient regard to the fact that, in the present matter, the Federal Court was required to determine *as between the Minister and the respondent* whether the various steps which had been taken by the Tribunal were to be held to constitute a decision affirming the delegate's revocation of the respondent's visa or a decision setting aside that revocation. No question arose in these proceedings about the rights or duties of other persons who may have acted in reliance on one or other of the two decisions.

144 More than 30 years ago, H W R Wade pointed out that in considering unlawful administrative action "there is no such thing as voidness in an absolute sense, for the whole question is, void against whom? It makes no sense to speak of an act being void unless there is some person to whom the law gives a remedy."[173] That is why, as Wade went on to say[174],

> "[i]t may be no more than a truism to point out … that words such as 'void' and 'nullity' are legally meaningless except in the context of an actual or assumed decision of a court. … But it is an important truism for the present discussion, since a conclusion emerges: 'void' and 'voidable' are in their present application indistinguishable in meaning. The reason is simply that no disputed act of a public authority can safely be treated as void in law unless the court can be persuaded to condemn it."

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173 H W R Wade, "Unlawful Administrative Action: Void or Voidable? Part I", (1967) 83 *Law Quarterly Review* 499 at 512.

174 (1967) 83 *Law Quarterly Review* 499 at 515-516.

145 Two important consequences follow. First, if the Minister, for whatever reason, had chosen not to contend that the October decision revoking the cancellation of the respondent's visa was ineffective, asking whether the September decision was "void", "voidable" or a "nullity" would serve no practical purpose. Similarly, asking whether the Tribunal had power to reconsider its September decision would be to ask an entirely theoretical question unless either the Minister or the visa holder not only sought to contend to the contrary but also resorted to the courts for relief, the grant of which depended upon the courts forming a conclusion about the contention.

146 The second consequence follows from the first. If, as here, there is a contest about the legal effect of what has happened, that contest is not to be resolved by attributing a particular legal characterisation (such as "decision") to the first set of events, and then asking whether there was some power to revoke or reconsider that "decision". The dispute between the parties in the present case is a dispute about whether the events in September 1998 should be given particular legal significance. Describing the events of September 1998 as a "decision" begs that question.

147 The inquiry about the legal consequences to be attributed to what was done in September 1998 must begin and end with the Act. The relevant provisions are set out in the reasons of Kirby J and I do not repeat them. It was assumed, at first instance, and on appeal to the Full Court of the Federal Court, and it was not seriously challenged in this Court, that the provisions of s 360(1)(a) of the Act (in their then form) had obliged the Tribunal to give the respondent "a continuing opportunity"[175] to give evidence to the Tribunal, and that that opportunity must take account of circumstances as they existed from time to time until the opportunity to give evidence was either taken or not. It was not seriously disputed in the courts below, or in this Court, that, due to an oversight, the Tribunal had not given the respondent the opportunity which s 360(1)(a) required he be given before the Tribunal made the September decision. Accordingly, the argument of the appeal in this Court proceeded from an assumption from which it followed that, if application had been made either to the Federal Court for an order of review on the ground that the Tribunal had not observed the procedures required by the Act[176], or to this Court for a writ of prohibition, the respondent would have been entitled to have the September decision set aside, or further proceedings on it prohibited. While it may be right to say that no application could be made to the Federal Court for review on the

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175 *Minister for Immigration and Multicultural Affairs v Capitly* (1999) 55 ALD 365 at 371 [34].

176 s 476(1)(a).

ground that there had been a denial of natural justice[177], what is important, for present purposes, is that the respondent could have obtained from a court (here, either the Federal Court or this Court) an order setting aside, or quashing, the September decision. And, this Court could have granted relief on the ground of denial of natural justice[178].

148 No less importantly, it must be recognised that, after the September decision, the respondent would have been entitled to mandamus compelling the Tribunal to perform its duty to review the decision made by the Minister's delegate[179]. Moreover, as the decision in *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* reveals, mandamus would have been available even though no order quashing the September decision was sought or obtained. It would have been enough for the respondent to show "that the ostensible determination [of the Tribunal] is not a real performance of the duty imposed by law upon the tribunal"[180].

149 The error committed by the Tribunal in reaching its September decision was a jurisdictional error. What it did was not authorised by the Act and did not constitute performance of its duty under the Act. As the availability of mandamus demonstrates, the September decision was not a decision of the review that the respondent had sought in relation to the decision of the Minister's delegate. The error made by the Tribunal in this case must be contrasted with other, non-jurisdictional, errors that a decision-maker may commit. In particular, a jurisdictional error of the kind made in relation to the September decision is fundamentally different from a case where, for whatever reason, a decision-maker has second thoughts about such matters as findings of fact. No doubt the word "error" can be applied to the circumstances last mentioned, but the legal significance of such an error is, for the reasons given by Brennan J in *Attorney-General (NSW) v Quin*[181], radically different from the significance of a jurisdictional error. As his Honour said:

> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. … The

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177 s 476(2)(a).

178 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

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

180 *Bott* (1933) 50 CLR 228 at 242 per Rich, Dixon and McTiernan JJ.

181 (1990) 170 CLR 1 at 35-36.

> merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

An "error" about the findings of fact that are made, which does not constitute or reveal a jurisdictional error, concerns the merits of administrative action, not its legality.

150 The question that now arises is *not* one concerning good administrative practice. It is not the province of the courts to say whether particular administrative practices are prudent or efficient and yet there would be little dispute that characteristics of prudence and efficiency are relevant to good administrative practice. It is, therefore, not to the point to ask whether the Tribunal was *wise* to make its October decision without first having the comfort and certainty of a court order holding the September decision to have been not a lawful performance of the Tribunal's duties any more than it is to the point to ask about the efficiency of adopting the course that was followed in this matter. Further, to attribute legal consequences to the September decision of the Tribunal because, on its face, it purported to be a decision made under the Act, not only begs the question that is presented about its legal consequences, it impermissibly confuses administrative decisions with the particular and peculiar features accorded to decisions of superior courts of record.

151 In general, judicial orders of superior courts of record are valid until they are set aside on appeal, even if they are made in excess of jurisdiction[182]. By contrast, administrative acts and decisions are subject to challenge in proceedings where the validity of that act or decision is merely an incident in deciding other issues[183]. If there is no challenge to the validity of an administrative act or decision, whether directly by proceedings for judicial review or collaterally in some other proceeding in which its validity is raised incidentally, the act or decision may be presumed to be valid[184]. But again, that is a presumption which operates, chiefly, in circumstances where there *is* no challenge to the legal effect of what has been done. Where there is a challenge, the presumption may serve

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182 *Cameron v Cole* (1944) 68 CLR 571 at 590-591 per Rich J, 606 per Williams J; *DMW v CGW* (1982) 151 CLR 491 at 504-505 per Gibbs CJ; *Ousley v The Queen* (1997) 192 CLR 69 at 107 per McHugh J, 129-130 per Gummow J; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 177-178 [20]-[23] per Gleeson CJ, 235-236 [216] per Gummow J, 274-275 [328]-[329] per Hayne and Callinan JJ.

183 See, for example, *Director of Public Prosecutions v Head* [1959] AC 83.

184 *Ousley* (1997) 192 CLR 69 at 130-131 per Gummow J; *Hoffmann-La Roche v Trade Secretary* [1975] AC 295 at 365; Campbell, "Inferior and Superior Courts and Courts of Record", (1997) 6 *Journal of Judicial Administration* 249 at 258.

only to identify and emphasise the need for proof of some invalidating feature before a conclusion of invalidity may be reached. It is not a presumption which may be understood as affording all administrative acts and decisions validity and binding effect until they are set aside. For that reason, there is no useful analogy to be drawn with the decisions of the Court concerning the effect of judgments and orders of the Federal Court of Australia made in proceedings in which that Court had no constitutionally valid jurisdiction[185].

152 This is not to adopt what has sometimes been called a "theory of absolute nullity"[186] or to argue from an a priori classification of what has been done as being "void", "voidable" or a "nullity". It is to recognise that, if a court would have set the decision aside, what was done by the Tribunal is not to be given the same legal significance as would be attached to a decision that was not liable to be set aside. In particular, it is to recognise that if the decision would be set aside for *jurisdictional error*, the statutory power given to the Tribunal has not been exercised. As Dixon J said in *Posner v Collector for Inter-State Destitute Persons (Vict)*[187]:

> "[W]hen a party is entitled *as of right* upon a proper proceeding to have an order set aside or quashed, he may safely ignore it, at all events, *for most purposes*. It is, accordingly, natural to speak of it as a nullity whether it is void or voidable, and, indeed, it appears almost customary to do so. …
>
> When there has been a failure of the due process of law at the making of an order, to describe it as void is not unnatural. But what has been said will show that, except when upon its face an order is bad or unlawful, *it is only as a result of the construction placed upon a statute* that the order can be considered so entirely and absolutely devoid of legal effect for every purpose as to be described accurately as a nullity." (emphasis added)

153 Nothing in the Act requires (or permits) the conclusion that despite the jurisdictional error, some relevant legal consequence should be attributed to the September decision. In particular, the fact that the Federal Court had only limited jurisdiction to review the decision does not lead to the conclusion that the September decision is to be treated as having some effect. Once it is recognised

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185 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629; *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

186 Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 494-501, 504.

187 (1946) 74 CLR 461 at 483.

that *a* court could set it aside for jurisdictional error, the decision can be seen to have no relevant legal consequences.

154 Applying the description of "nullity" or some similar term is a statement of conclusion, not a statement of reasons for reaching the conclusion. The critical steps in the reasoning must, as I have said, begin and end in the statutory provisions which are the source of the power that it is said has been exercised.

155 That is why, in the present case, I consider the issue to be *when* the Tribunal exercised its powers and performed its duties to review the delegate's decision. Once it is recognised, as it must be in the present case, that in September 1998 the Tribunal had *not* performed the duty imposed on it (to review in accordance with the statutory procedures, including allowing the respondent to be heard) it is clear that not only was there no bar to the Tribunal completing its task by the steps it took in October, it was duty bound to do so.

156 It also follows that no question arises which requires consideration of s 33(1) of the *Acts Interpretation Act* 1901 (Cth) and its provision that:

> "Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

Here the Tribunal performed its duty only once – by the making and publication of its October decision.

157 It may be that other considerations would arise if there were no available remedy to quash the decision. It may be, as H W R Wade said, meaningless to speak of an act being void, or a nullity, where the law will give no remedy to any person in respect of that act. It is unnecessary to express a conclusion on this question in this case.

158 The appeal should be dismissed with costs.

159 CALLINAN J. In the exercise of its powers with respect to immigration and aliens, the Parliament may legislate to restrict, control or regulate entry into, and residence in, this country by non-nationals in such way as it thinks fit. It could, if it were so minded (and subject only to one qualification), provide that an executive or administrative decision by the minister or an official should be in all respects non-reviewable and final, whether there has been a breach of the rules of natural justice or not. The qualification is the right of an affected person to seek review by way of prerogative writs and other relief pursuant to s 75(v)[188] of the Constitution[189].

160 The Parliament, by the *Migration Act* 1958 (Cth) ("the Act"), has however made provision for review of an official or ministerial decision, in the first instance by the Immigration Review Tribunal ("the Tribunal"), and then, on grounds less ample than those afforded by the *Administrative Appeals Tribunal Act* 1975 (Cth), by the Federal Court. The relevant sections of the Act and the scheme for which they provided at the time when this respondent's review was sought are set out in the joint judgment of Gaudron and Gummow JJ and need not be repeated here. It is of importance to note, however, that although s 353 of the Act requires the Tribunal to accord substantial justice, s 476 of the Act expressly negatives the occurrence of a breach of the rules of natural justice in

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188 "In all matters:

…

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction."

189 As to the scope of s 75(v), however, see *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 615 per Dixon J; *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; *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; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 179-180 per Mason CJ, 194-195 per Brennan J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 906 [102] per Gaudron J; 179 ALR 238 at 261 (construing privative clauses as expanding the jurisdiction of the decision-maker and therefore limiting the availability of s 75(v) to those cases where the decision is a bona fide attempt to exercise the power in issue, the decision relates to the subject matter of the legislation, and on its face the decision does not go beyond the power).

connexion with the making of its decision as a ground of review by the Federal Court.

161 In this case, the respondent in responding to the appellant's appeal was able to demonstrate that the initial decision, the decision made by the Tribunal on 16 September 1998 to affirm the Minister's decision to cancel the respondent's visa, was made in breach of the rules of natural justice. Because of the time limits set by the Act for review by the Federal Court referred to in the joint judgment and the unavailability of a breach of the rules of natural justice as a ground of review, unless the Tribunal's decision of 22 October 1998 is valid, the respondent's visa is cancelled and he will be obliged to leave the country.

162 In my opinion, whether the Tribunal's October decision is good depends upon whether the September decision was bad in a jurisdictional sense: and whether it was bad in that respect will depend in turn upon whether the respondent has demonstrated that what occurred in connexion with its making was something more than a breach of the rules of natural justice, for that it surely was because the respondent was effectively denied a hearing of both his application for an adjournment, and, in consequence, his substantive case, in September 1998.

163 I have formed the opinion that what happened in September 1998 was something more than a breach of the rules of natural justice. It was a failure to exercise a jurisdiction which the Tribunal was bound to exercise. If one thing is abundantly clear, it is that the Tribunal *must*, if an application has properly been made[190] as it was here, review the Minister's decision. This means that the Tribunal must exercise the jurisdiction of reviewing the Minister's decision: that is to say, it must make a decision on the application and any documents properly submitted by an applicant, with, as part of, or relevant to it. To fail, or refuse to receive and consider such a document, and to make a decision without regard to it, is a failure to exercise jurisdiction. This is more than a failure to give a party a hearing. It is to proceed on a false basis, that such a document simply does not exist or has not been communicated to the Tribunal. The Tribunal would in these circumstances no more be exercising its jurisdiction than a court would be in

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190 At the time of the application, s 348 of the Act provided:

> "(1) Subject to subsection (2), if an application is properly made under section 347 for review of an IRT-reviewable decision, the Tribunal must review the decision.
>
> (2) The Tribunal must not review, or continue to review, a decision in relation to which the Minister has issued a conclusive certificate under subsection 338(3) or 346(4)."

deciding a case in favour of a defendant without looking at the plaintiff's initiating document and pleading, or even knowing that they had been filed in the registry of the court.

164 The application for an adjournment was an important document. The Tribunal was bound to give it consideration. This was not a case in which a document or a piece of evidence was merely not referred to in a decision. This is a case in which it is known that the application for an adjournment was not brought to the attention of the Tribunal in order to enable it to exercise its jurisdiction to grant or refuse the adjournment, and if it refused it, to undertake the review in the knowledge, and on the understanding that it had been refused. If the Tribunal had, at the time of making its September 1998 decision, known of the application for an adjournment, it might, if it were so minded, have decided to refuse it. It might perhaps in refusing it, have been unnecessary to give any, or any detailed reasons why it did so. But what it did have to do was to exercise its jurisdiction, that is, relevantly, to make a decision about it and the Court does know that that is one thing which it did not do.

165 It follows, in my opinion, that the Tribunal had not exercised its jurisdiction in September 1998 and that therefore it was open for it to do so in October 1998.

Orders

166 Accordingly, I would dismiss the appeal with costs.