HIGH COURT OF AUSTRALIA

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

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS & ANOR — RESPONDENTS

EX PARTE APPLICANTS S134/2002 — PROSECUTORS

Re Minister for Immigration and Multicultural and Indigenous Affairs;
Ex parte Applicants S134/2002
[2003] HCA 1
4 February 2003
S134/2002

ORDER

1. *The times fixed by the Rules of Court for commencing this proceeding are extended.*

2. *The order nisi granted by Gaudron J on 11 June 2002, as amended by the order of the Full Court made on 4 September 2002, is discharged with costs.*

Representation:

J Basten QC with M I Aronson and N C Poynder for the prosecutors (instructed by Craddock Murray Neumann)

D M J Bennett QC, Solicitor-General of the Commonwealth with N J Williams SC, S B Lloyd and G R Kennett for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondent

Intervener:

B M Selway QC, Solicitor-General for the State of South Australia with C Jacobi intervening on behalf of the Attorney-General for the State of South Australia (instructed by the Crown Solicitor for the State of South Australia)

B W Walker SC with D S Mortimer intervening on behalf of the Human Rights and Equal Opportunity Commission (instructed by the Human Rights and Equal Opportunity Commission)

CATCHWORDS

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002

Immigration – Refugees – Temporary protection visas – Refugee Review Tribunal ("the Tribunal") affirmed decision of delegate of the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") not to grant protection visas – Minister not bound to consider whether to exercise power – Minister decided not to exercise power under s 417 of the *Migration Act* 1958 (Cth) ("the Act") to substitute for the decision of the Tribunal a decision more favourable to the prosecutors – Whether decisions of the Tribunal and the Minister "privative clause decisions" under s 474 of the Act.

Immigration – Refugees – Applications for temporary protection visas by mother and children – First prosecutor's application asserted that she was a person to whom Australia had protection obligations under the Refugees Convention – Application not made on basis of membership of a family unit, to one of whom protection obligations were owed – Documents before the Tribunal indicated that the first prosecutor's husband held a temporary protection visa and had applied for a permanent protection visa – First prosecutor did not know of her husband's whereabouts or immigration status – Tribunal did not notice documents or appreciate their significance – Tribunal did not consider whether prosecutors entitled to protection visas on basis of membership of a family unit of which one person was owed protection obligations and had been granted a protection visa – Whether constructive failure to exercise jurisdiction – Whether denial of procedural fairness.

Immigration – Refugees – Whether jurisdictional error in decision by Minister to refuse to substitute for the decision of the Tribunal a decision more favourable to the prosecutors – Utility of relief.

Migration Act 1958 (Cth), ss 36, 65, 414, 417, 474.
Migration Regulations 1994 (Cth), Sched 2, pars 785.21, 785.22.

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. The first prosecutor is the mother of five children, who are the other prosecutors. There are, in order of birth, two sons and three daughters. All claim to be citizens of Afghanistan. They arrived in Australia on 1 January 2001.

The visa applications

2 On 21 February 2001, an application was made for Protection (Class XA) visas pursuant to the *Migration Act* 1958 (Cth) ("the Act") and the Regulations made thereunder ("the Regulations"). Visa Class XA includes two subclasses: 785 (temporary protection) and 866 (protection). The first is a temporary visa and the second a permanent visa. One criterion to be satisfied at the time of application for a permanent visa in the second subclass is that, at the time of the last entry into Australia of the applicant, the applicant be the holder of a current visa. The prosecutors arrived in Australia without any travel documentation and therefore could not satisfy the requirements for a permanent visa. The dispute before this Court concerns the applications for temporary protection visas.

3 On 22 May 2001, a delegate of the first respondent (the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister")) refused the applications. Section 47(1) had required the Minister to consider valid visa applications and s 496 conferred upon the Minister powers of delegation.

4 The delegate said that he was not satisfied that the first prosecutor:

> "is a person to whom Australia has protection obligations under the Refugees Convention and therefore does not meet a prescribed criterion under clause 785.221 for the grant of a Subclass 785 (Temporary Protection) visa. As the applicant fails to satisfy the criteria of either Subclass 785 or 866, I refuse her application for a Protection (Class XA) visa)."

The delegate continued:

> "None of the other family members included as part of the application addressed above have made separate claims for a Protection Visa. Given my findings in the case of Applicant 1, I also refuse their applications for a Protection Visa. No person included in this application has been granted a protection visa."

The Tribunal and the Minister

5 An application by the prosecutors then was made for review by the second respondent (the Refugee Review Tribunal ("the Tribunal")). As the Act then stood, Pt 7 (ss 410-473) dealt with review of protection visa decisions. Section 412 provided for applications for review by the Tribunal and, in the present case, s 414(1) stated that "the Tribunal must review the decision" of the delegate. Section 418 provided for the Secretary to the Minister's Department to give to the Registrar of the Tribunal documents in the Secretary's possession or control and considered by the Secretary to be relevant to the review. In its reasons for decision given on 26 July 2001, the Tribunal stated that it had before it the Department's file. In addition to the written material relied upon, the first prosecutor gave oral evidence to the Tribunal. Her elder son addressed the Tribunal.

6 The Tribunal affirmed the decision not to grant protection visas. The Tribunal was not satisfied that the first prosecutor's country of nationality was Afghanistan. It found that the first prosecutor's credibility in general was remarkably poor. The Tribunal was not satisfied that her children were Afghan nationals. In that regard, the Tribunal said:

> "The [first prosecutor] is not an Afghan national and there is no evidence the children have any nationality other than hers (the Tribunal does not accept that the [first prosecutor's] husband is an Afghan national as there is no evidence supporting this claim)."

In the result the Tribunal stated that it was not satisfied that the prosecutors had a well-founded fear of persecution in Afghanistan.

7 In her original application, the first prosecutor had stated that her husband, of Afghan nationality, was "MISSING SINCE 2 YRS AGO". Section 101 of the Act obliged the first prosecutor to fill in the application form in such a way that "no incorrect answers" were given. No point under that section is taken against the first prosecutor. The reasons given by the Tribunal include the following passage:

> "The Tribunal asked the [first prosecutor] what had since happened to her husband. The [first prosecutor] said she only knew that he had fled. She did not know what had happened to him. He left on foot in the middle of the night. He was on his own. The Tribunal asked whether her husband had left the country, and if so who helped him leave. The [first

prosecutor] said that about six months later someone came and told her father he had taken her husband out of the country."

8 It is now accepted that the Department's file, which was before the Tribunal, included two pages marked with folio numbers 121 and 124. Folio 121 indicates that the husband was in possession of a temporary protection visa and had made an application for a permanent protection visa. Folio 124 identifies by number the first prosecutor and under the heading "Informant 1" there appears "Afghan – husband is Pakistani who came on an earlier boat and has a visa – travelling with brother-in-law". There is also a handwritten notation but there is no agreement as to when or by whom it was made on the document. It reads:

"husband is in A/A – wife claims not to know his whereabouts".

9 On 3 August 2000 the husband had been granted a temporary protection visa with a period of validity until 3 August 2003. At some time thereafter and before the arrival of the first prosecutor and the children on 1 January 2001, he had lodged an application for a permanent protection visa. In that application, he had named the first prosecutor and the children as his dependants.

10 It is apparent from the tenor of the Tribunal's reasons that either it did not notice the presence of either folio on the file or it did not appreciate their significance. This conclusion is not really disputed in the submissions for the prosecutors. The result is that both the first prosecutor and the Tribunal proceeded upon a false basis as to the whereabouts of the husband. As will later appear, that is significant for the present litigation in this Court.

11 It appears that, two days after the Tribunal gave its decision, the first prosecutor learned of her husband's situation. An application then was made for the exercise by the Minister of his powers under s 417 of the Act to substitute for the decision of the Tribunal a decision more favourable to the prosecutors. Detailed advice was tendered to the Minister. This included as an issue for consideration by him a current investigation by the NSW Visa Integrity Unit of the Department which suspected that the husband was from Pakistan, not Afghanistan as he claimed. On 21 March 2002, the Minister decided not to exercise his power under s 417. The Minister's decision was notified to the first prosecutor by letter dated 2 April 2002.

<u>The order nisi</u>

12 On 11 June 2002, a Justice of this Court granted an order nisi directed to the Minister and the Tribunal to show cause why various final relief should not

be granted in respect of the decision of the Tribunal and the decision of the Minister. Certiorari, prohibition and mandamus were sought in respect of both decisions, with mandamus to the Minister requiring reconsideration of the exercise of the power under s 417 of the Act. Injunctive relief was sought against the Minister to restrain him from giving effect to or proceeding upon either decision. The applications for certiorari and mandamus in respect of the decision of the Tribunal were made outside of the times fixed by the High Court Rules and the necessary extensions are sought under those Rules[1].

13 On the second day of the hearing before the Full Court, counsel for the prosecutors obtained leave to amend the order nisi. The principal grounds now relied upon in respect of the decision of the Tribunal are that it:

> "(i) constructively failed to exercise the jurisdiction vested in it and the duty placed upon it by s 414(1) of the [Act], by failing to consider a material fact, namely that the [first] Prosecutor's spouse held a temporary protection visa and was an applicant for a permanent protection visa;
>
> (ii) breached its obligation of procedural fairness in failing to disclose to the Prosecutor[s] the information it had about that material fact".

The prosecutors also allege that, in refusing to make a decision in substitution for that of the Tribunal, the Minister acted upon an incorrect basis of fact and erred in law.

The amending legislation

14 The submissions put on behalf of the prosecutors raise issues of the infection of the decisions of the Tribunal and the Minister by reason of alleged jurisdictional error. On 2 October 2001, the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth) ("the Amendment Act") came into force. It inserted into the Act a new Pt 8 (ss 474-484), headed "Judicial review". The *Migration Legislation Amendment Act (No 1)* 2001 (Cth) had added a new Pt 8A (ss 486A-486C), headed "Restrictions on court proceedings".

15 Central to the operation of the new Pt 8 is the definition of "privative clause decision" in s 474(2). Section 474 is construed in *Plaintiff S157/2002 v*

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1 O 55 r 17, O 55 r 30, O 60 r 6.

The Commonwealth of Australia[2], with the result that, if they were infected by jurisdictional error, the decisions here of the Tribunal and the Minister were not privative clause decisions. The time limit imposed by s 486A on applications to this Court for judicial review did not apply to the decision of the Tribunal which was given prior to the commencement of the section. With respect to the decision of the Minister, the proceeding in this Court was instituted on 9 April 2002, being within the 35 day period specified in s 486A.

Construction of the Act and the Regulations

16 A valid application for review having been made, s 414(1) obliged the Tribunal to review the decision of the delegate of the Minister. For the purpose of that review, the Tribunal was empowered by s 415(1) to exercise all the powers and discretions conferred by the Act on the delegate.

17 Section 65 obliged the Minister (and thus the Tribunal), after consideration of valid applications for visas, to grant them if satisfied, among other things, that criteria for those visas prescribed by the Act or the Regulations have been satisfied. The first ground of jurisdictional error put forward by the prosecutors turns in particular upon a construction of the Regulations made under the Act which specify criteria to be satisfied by the prosecutors were they to be entitled pursuant to s 65 of the Act to the visas sought.

18 Section 36(2), as it stands after amendments by statutes up to and including the Amendment Act, reads:

> "A criterion for a protection visa is that the applicant for the visa is:
>
> (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
>
> (b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:
>
> (i) is mentioned in paragraph (a); and
>
> (ii) holds a protection visa."

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2 [2003] HCA 2.

19 It will be observed that in this form the Act itself now plainly draws a distinction between those to whom Australia has protection obligations and those who are spouses or dependants of such persons who hold protection visas. This distinction highlights an important point respecting the scope of the Refugees Convention and the Refugees Protocol[3].

20 This appears from pars 181-183 of the *Handbook on Procedures and Criteria for Determining Refugee Status*[4]. These paragraphs state:

> "181. Beginning with the Universal Declaration of Human Rights, which states that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State', most international instruments dealing with human rights contain similar provisions for the protection of the unit of a family.
>
> 182. The Final Act of the Conference that adopted the 1951 Convention:
>
> > 'Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:
> >
> > (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.
> >
> > (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.'
>
> 183. The 1951 Convention does not incorporate the principle of family unity in the definition of the term refugee. The above-mentioned Recommendation in the Final Act of the Conference is, however, observed

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3 Being, respectively, the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

4 Issued by the Office of the United Nations High Commissioner for Refugees, as re-edited at Geneva, January 1992.

by the majority of States, whether or not parties to the 1951 Convention or to the 1967 Protocol."

21 The point is developed by a commentator[5]:

> "Still another question not reflected in the Convention definition and open to a variety of interpretations is that of the status of family members. The principle of family unity is not incorporated in the Convention, but instead forms the subject matter of Recommendation B, included in the Final Act of the Conference of Plenipotentiaries of 1951[6] – an indication of the wish of the signatories to retain freedom in these matters."

That freedom is expressed in the Australian legislation in the distinct treatment of refugee claims and dependant claims by family unit members.

22 Recommendation B stated:

> "THE CONFERENCE,
>
> CONSIDERING that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and
>
> NOTING with satisfaction that, according to the official commentary of the *ad hoc* Committee on Statelessness and Related Problems (E/1618, p 40) the rights granted to a refugee are extended to members of his family,
>
> RECOMMENDS Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:
>
> (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has

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5 Sztucki, "Who is a refugee? The Convention definition: universal or obsolete?", in Nicholson and Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, (1999), 55 at 58-59.

6 189 [United Nations Treaty Series] 137 at 146.

fulfilled the necessary conditions for admission to a particular country;

(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

23 The distinction, now apparent on the face of s 36 of the Act, previously, and at the time of the application lodged on 21 February 2001 by the prosecutors, was drawn somewhat indirectly. Section 36 then stated:

"(1) There is a class of visas to be known as protection visas.

(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

24 Other criteria were found in Sched 2 to the Regulations. In particular, protection visas were referred to therein as "Protection (Class XA)" with two subclasses "785 (temporary protection)" and "866 (protection)". Paragraph 785.21 was headed "Criteria to be satisfied at time of application". It read, as par 785.211:

"The applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and:

(a) makes specific claims under the Refugees Convention; *or*

(b) claims to be a member of the same family unit as a person who:

(i) has made specific claims under the Refugees Convention; and

(ii) is an applicant for a Protection (Class XA) visa." (emphasis added)

25 In this way, there was to be found the implementation in Australian law of Recommendation B so that the Australian legislation went, as it still does, beyond observance of the international obligations imposed by the Refugees Convention.

26 Further, in Sched 2 to the Regulations par 785.22 was headed "Criteria to be satisfied at time of decision". It was so drawn as to reflect the disjunction in par 785.211 between the two categories of applicant. Sub-paragraph 785.221 stated:

> "The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention",

whilst par 785.222 stated:

> "In the case of an applicant referred to in paragraph 785.211(b):
>
> (a) the Minister is satisfied that the applicant is a member of the same family unit as a person who has made specific claims under the Refugees Convention (a ***claimant***); and
>
> (b) the claimant has been granted a Protection (Class XA) visa."

27 The visa application made on 21 February 2001 contained a statement that the first prosecutor believed that the definition of refugee in the Refugees Convention applied to her so that "therefore" she applied for a Protection (Class XA) visa. She stated that her husband, born in Afghanistan and of Afghan nationality, was not in Australia at the time of the application. An affirmative answer was given to the question in the application form "Do you have your own claims to be a refugee?" and Supporting Form C was completed. This disclosed the first prosecutor's date of birth as 1 January 1970 and country of birth as Afghanistan. The date of her marriage was given as 1 January 1987.

28 Thus, there was no assertion of an entitlement of the first prosecutor based on membership of a family unit, to one of whom, the husband and father, protection obligations were owed. Nor was any claim to that effect made to the Tribunal. The children were included in their mother's application on the footing that she claimed to be a refugee and they were members of the family unit. None of the prosecutors treated their husband and father as the main applicant. The Tribunal did not consider whether the prosecutors satisfied the criteria with respect to membership of a family unit of which one person was owed protection obligations, and had been granted a protection visa, as detailed in pars 785.211(b) and 785.222.

29 Nevertheless, it is submitted for the prosecutors that, on the proper construction of the Regulations, the Tribunal was obliged to consider entitlement to protection visas by reason of membership of the family unit of a person who, at the date of the Tribunal's decision, was an applicant for a permanent protection

visa and who already had been granted a temporary protection visa. It is on that footing that the status of the husband was classified by the prosecutors as a material fact which the Tribunal had been obliged to consider in the discharge of its obligation under s 414(1) to exercise the jurisdiction conferred by Pt 7 of the Act.

30 These submissions by the prosecutors should not be accepted. The existence in favour of an applicant for a protection visa of protection *obligations* under the Refugees Convention was neither the sole nor a necessary criterion for the grant of a temporary protection visa. The Regulations distinguished between those to whom such *obligations* arose and who thus were refugees within the definition in the Refugees Convention and those who were members of the same family unit as a person who had made specific claims to refugee status and who had been granted a protection visa.

31 None of the prosecutors relied upon the position of their husband and father as the main applicant to found a claim that they fell within the second category. The reasons why they did not do so are apparent, at the least, from their then state of knowledge respecting his whereabouts. The Tribunal was required to review the decision of the delegate who, in turn, had been required (by s 47) to consider the application and the criteria which that application had to meet, not the criteria for an application, never made, which might have been put on another basis.

32 Section 65(1) obliged the Minister, and thus the Tribunal, to determine their satisfaction as to whether the criteria for the visas sought had been satisfied. Paragraphs 785.21 and 785.22 posited criteria expressed in disjunctive terms, as indicated earlier in these reasons. There is no obligation imposed by s 65(1) to reach a state of satisfaction (or otherwise) respecting criteria which the prosecutors did not advance. There was no misapplication of the relevant criteria by the Tribunal and no jurisdictional error.

Procedural fairness

33 Alternatively, the prosecutors found upon the failure by the Tribunal to disclose to the prosecutors the information in folios 121 and 124. However, the Tribunal could not have disclosed that of which it was unaware. The Tribunal did not rely upon what was to be found in the folios. In those circumstances, it is not apparent that there was any absence of procedural fairness afforded to the prosecutors. It may be added that no question arises respecting the application of the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth). This came into force and applies to decisions made after that of the Tribunal.

34 The case which the prosecutors assert respecting the denial of procedural fairness fixes the Tribunal with the responsibility to be aware of the contents of the folios and, to that end, calls in aid notions of "constructive" notice and "mistake of fact". But why should the legislation be construed[7] as imposing, in this case, such a responsibility? If such a responsibility did exist, why should failure to observe it be attended by the remedies for jurisdictional error contained in s 75(v) of the Constitution?

35 In *R v Criminal Injuries Compensation Board, Ex parte A*[8], Lord Slynn of Hadley was prepared to accept that, at least in some circumstances, "material error of fact" was a recognised ground in English law for judicial review. In argument, reference had been made to the specific statutory provision made in Australia by s 5(3)(b) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act")[9]. Paragraph (b) of s 5(3) is an exegesis of the ground of review in s 5(1)(h) "that there was no evidence or other material to justify the making of the decision" and requires that the decision was based on the existence of a particular fact which did not exist. In the same case, Lord Hobhouse of Woodborough expressly reserved the question whether error of fact can, without more, be relied upon in England as a ground for judicial review[10].

36 In *Minister for Immigration and Multicultural Affairs v Rajamanikkam*[11], Kirby J said that, when the Australian legislative provisions to which the House of Lords had been referred were read against the pre-existing common law, it was difficult to escape the conclusion that a purpose of the ADJR Act had been "to extend and expand the availability of the pre-existing common law remedy of judicial review for want of evidence before the decision-maker". That view accords with what had been said by Mason CJ in *Australian Broadcasting Tribunal v Bond*[12].

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7 cf *Giumelli v Giumelli* (1999) 196 CLR 101 at 111 [2].

8 [1999] 2 AC 330 at 344-345.

9 [1999] 2 AC 330 at 335-336.

10 [1999] 2 AC 330 at 348.

11 (2002) 76 ALJR 1048 at 1063 [97]; 190 ALR 402 at 422.

12 (1990) 170 CLR 321 at 358. See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 655-656 [141]-[145].

37 In this case, unlike *R v Criminal Injuries Compensation Board, Ex parte A*, the complaint was not that the Tribunal had made an error of fact in deciding what it did. Rather, the complaint was that the Tribunal should have adverted to some material that had been sent to it by the Secretary to the Minister's Department, and made a further finding of fact. It is, therefore, not necessary to decide the particular questions that were examined in *R v Criminal Injuries Compensation Board, Ex parte A*.

38 The decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj*[13], upon which the prosecutors relied, is of no assistance for present purposes. In *Bhardwaj*, the Tribunal had purported to make a "decision" under the Act in circumstances where it had failed to comply with a fundamental requirement for the exercise of its jurisdiction; the Tribunal was authorised to embark again upon its review on the footing that the first "decision" was not an exercise of its statutory authority.

39 The prosecutors also refocused their submissions upon an alleged failure by the Tribunal to take into account a relevant consideration, that being the content of the folios. In that regard, the prosecutors referred to statements by Gibbs CJ and Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[14]. The Court there was concerned with an application for judicial review under the ADJR Act on the ground that, by not considering representations made to his predecessors, the Minister in question had failed to take into account a relevant consideration. The relevant consideration concerned the detriment to companies opposing a claim under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) which would be suffered by reason of a large deposit of uranium discovered lying wholly within an area recommended for grant.

40 By contrast, the relevant considerations in the present case concern the satisfaction by the prosecutors (or otherwise) of the criteria for the grant of temporary protection visas. That returns one to the issue considered above, namely whether there was a failure to exercise jurisdiction by the absence of consideration of the allegedly material fact that the spouse of the first prosecutor held a temporary protection visa and was an applicant for a permanent protection visa. As indicated, that issue should be decided adversely to the prosecutors.

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13 (2002) 76 ALJR 598; 187 ALR 117.

14 (1986) 162 CLR 24 at 31, 45 respectively.

41 Finally, something more should be said respecting the speech of Lord Slynn in *R v Criminal Injuries Compensation Board, Ex parte A*. The Board was a body set up not under statute but by the Executive Government acting under the prerogative[15]. The Executive instrument doing so obliged applicants to make out their case to the Board and provided for withholding or reduction of compensation if the Board considered that an applicant had not taken without delay all reasonable steps to inform the police of the circumstances of the injury[16]. In the instant case, a medical report by a police doctor, which favoured the version of accounts asserted by the applicant, had not been provided by the police to the Board. Lord Slynn (who gave the leading speech) decided that what had happened had been "a breach of the rules of natural justice and constituted unfairness"[17]. His Lordship concluded[18]:

> "I consider therefore, on the special facts of this case and in the light of the importance of the role of the police in co-operating with the board in the obtaining of evidence, that there was unfairness in the failure to put the doctor's evidence before the board and if necessary to grant an adjournment for that purpose. I do not think it possible to say here that justice was done or seen to be done."

42 There appears to have been no denial by the Board itself of procedural fairness but it would have been obvious to the police authorities that the police doctor was likely to have made (as was the case) a written report[19]. The Board had been entitled to rely upon the police to obtain relevant evidence. Seen in the light of the provisions in s 5 of the ADJR Act respecting applications for judicial review, the English case may perhaps best be characterised as one where, in the terms of par (b) of s 5(1), "procedures that were required by law to be observed in connection with the making of the decision were not observed". In any event, the decision does not provide support for the submission that, in the present case, there was a denial by the Tribunal of procedural fairness to the prosecutors.

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15 [1999] 2 AC 330 at 341.

16 [1999] 2 AC 330 at 342.

17 [1999] 2 AC 330 at 345.

18 [1999] 2 AC 330 at 347.

19 See [1999] 2 AC 330 at 346.

43 As is illustrated by the outcome in *Muin v Refugee Review Tribunal*[20], the grounds of review specified in the ADJR Act cast a wider net than those concerned with excess of jurisdiction. Whilst s 75(v) of the Constitution reflects the jurisdictional limitations flowing from the constitutional structure itself, the ADJR Act, with the *Administrative Appeals Tribunal Act* 1975 (Cth) and the *Ombudsman Act* 1976 (Cth), provided a comprehensive legislative scheme for the redress of grievances concerning federal administrative action[21].

The Minister's decision

44 The prosecutors complain that the refusal of the Minister to substitute a more favourable decision in place of that made by the Tribunal stemmed from a failure on his part to take into account their membership of the same family unit as their spouse and father, and the immigration status of that person.

45 However, when exercising the power under s 417, the Minister was not bound either by Subdiv AA (ss 44-51) or Subdiv AC (ss 65-69) of Div 3 of Pt 2 of the Act, or by the Regulations. That follows from the terms of s 417(2). Subdivision AC contains the central provision in s 65 obliging refusal to grant a visa if the Minister be not satisfied that the criteria prescribed by the Act or the Regulations for the relevant visa have been satisfied. Further, s 417(3) stipulates that the power under the section may only be exercised by the Minister personally. The identification of the Minister as the sole repository of the power indicates the legislative intention that the question of the substitution of a more favourable decision to disappointed applicants is to be answered by the taking of a broad approach[22].

46 The point is emphasised by the express statement in s 417(1) that the power is to be exercised if the Minister "thinks that it is in the public interest to do so" and by the requirement in sub-ss (4), (5) and (6) respecting the laying

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20 (2002) 76 ALJR 966 at 973 [21], 977 [46], 995 [169], 1008-1009 [251]; 190 ALR 601 at 609, 614, 640, 659.

21 *Shergold v Tanner* (2002) 76 ALJR 808 at 809-810 [3]; 188 ALR 302 at 303.

22 *Hot Holdings Pty Ltd v Creasy* (2002) 77 ALJR 70 at 78 [50], 81 [70]; 193 ALR 90 at 101, 105.

before each House of the Parliament of a statement by the Minister where a decision more favourable to the applicant has been substituted.

47 These considerations flowing from the text and structure of s 417 indicate that there was no jurisdictional error of the nature of which the prosecutors complain. Nor was there any illegality or impropriety of the nature which might attract injunctive relief under s 75(v) of the Constitution.

48 There is a further point to be made. On the footing that prohibition or injunction and certiorari issue, directed to the Minister, the prosecutors seek mandamus requiring the Minister to reconsider the exercise of his power under s 417(1). However, s 417(7) states in terms that the Minister does not have a duty to consider whether to exercise the power conferred by s 417(1). That gives rise to a fatal conundrum. In the express absence of a duty, mandamus would not issue without an order that the earlier decision of the Minister be set aside. Further, in that regard, there would be no utility in granting relief to set aside that earlier decision where mandamus could not then issue.

Conclusions

49 The extensions of time under the Rules should be granted but the order nisi should be discharged and the application dismissed with costs.

50 GAUDRON AND KIRBY JJ. This matter, which is the return of an Order Nisi for prohibition, certiorari and mandamus, was heard at the same time as *Plaintiff S157/2002 v The Commonwealth of Australia*[23] and raises related, although, not identical issues. The proceedings are brought by the prosecutors in their capacity as persons who applied for protection visas and, thus, pursuant to s 91X of the *Migration Act* 1958 (Cth) ("the Act")[24], they cannot be named by this Court.

Factual background

51 The prosecutors are, respectively, the wife and five children of a person who was granted a temporary protection visa under s 36 of the Act on 3 August 2000. The prosecutors were not then in Australia. They entered Australia on 1 January 2001, apparently unaware that their husband and father was in this country and that he had been granted a temporary protection visa. In this respect, an application for protection visas, lodged by the prosecutor wife on 21 February 2001 on her own and her children's behalf, stated "Husband missing since 2 yrs ago".

52 In her application for protection visas for herself and her children, the prosecutor wife claimed that she was a citizen of Afghanistan and that, being a Hazara and a Shi'a Muslim, she feared persecution in that country on grounds of race and religion. Her application was rejected by a delegate ("the delegate") of the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") on 22 May 2001. The delegate was not satisfied that the prosecutor wife was a citizen of Afghanistan and, therefore, not satisfied that her claimed fear of persecution was well founded. She then applied to have that decision

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23 [2003] HCA 2.

24 Section 91X of the *Migration Act* 1958 (Cth) relevantly provides:

> "(1) This section applies to a proceeding before the High Court, the Federal Court or the Federal Magistrates Court if the proceeding relates to a person in the person's capacity as:
>
> (a) a person who applied for a protection visa; or
>
> ...
>
> (2) The court must not publish (in electronic form or otherwise), in relation to the proceeding, the person's name."

It is to be assumed, in the absence of direct challenge, that s 91X is constitutionally valid.

reviewed by the Refugee Review Tribunal ("the Tribunal") pursuant to s 412 of the Act.

53 By a decision dated 26 July 2001, the Tribunal affirmed the delegate's decision not to grant protection visas to the prosecutors. In reaching that decision the Tribunal stated:

> "The primary applicant is not an Afghan national and there is no evidence the children have any nationality other than hers (the Tribunal does not accept that the applicant's husband is an Afghan national as there is no evidence supporting this claim). Consequently the Tribunal is not satisfied that the children are Afghan nationals."

54 Reference should be made to two documents in the Departmental file that was forwarded to the Tribunal pursuant to s 418(3) of the Act for the purpose of its review of the delegate's decision[25]. It is not now in issue that those documents reveal that the prosecutors' husband and father had been in Australia since June 2000, had been granted a temporary protection visa and had applied for a permanent protection visa. It would appear from the first of those documents that application was made for a permanent protection visa in August 2000, prior to the prosecutor wife's application for protection visas. Handwriting on the second of those documents indicated that it was believed that her husband was a Pakistani and, thus, presumably, not an Afghan national. However, it is not known when the handwritten notations were made.

55 It is stated in the Tribunal's decision that it had "before it the Department's file" which was said to include certain specified documents. The two documents relating to the status and whereabouts of the prosecutors' husband and father earlier referred to were not identified as included in the file and, save, possibly, to the extent that the Tribunal expressed its non-acceptance of her husband's Afghan nationality, the information in those documents was not taken into account in the decision-making process. Nor was that information conveyed to the prosecutors.

56 Some little time after the Tribunal's decision, the prosecutor wife learned of her husband's presence in Australia and, on 14 September 2001, a request was made to the first respondent, the Minister, to exercise his power under s 417 of the Act to substitute a more favourable decision for that made by the Tribunal.

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25 Section 418(3) of the Act requires the Secretary of the Department to "give to the Registrar [of the Tribunal] each other document ... that is in the Secretary's possession or control and is considered by the Secretary to be relevant to the review of [a] decision".

That request was based, in part, on the fact that her "husband and the father of her children ha[d] been accorded the status of refugee ... and now lives and works in Sydney."

57 On 2 April 2002, more than six months after her request and during which time the prosecutors remained in detention in Woomera where they had been since January 2001, the Minister informed the prosecutor wife that he had declined to exercise his power under s 417 of the Act. On 9 April 2002, the prosecutors instituted proceedings in this Court claiming relief by way of prohibition, certiorari, mandamus, injunction and declaratory order.

58 An Order Nisi for prohibition directed to the Minister to prevent him from acting either on the decision of the Tribunal or on his decision not to exercise his power under s 417 of the Act, for certiorari to quash those decisions and for mandamus directed to the Minister and the Tribunal to reconsider, respectively, the applications for the exercise of the Minister's power under s 417 and for review of the delegate's decision was granted on 11 June 2002. This is the return of that Order Nisi.

Sections 474 and 486A of the Act

59 Before turning to the question whether the decisions of the Tribunal and the Minister involve error of the kind that would entitle the prosecutors to the relief they seek, it is convenient to note that it was not contended on their behalf that either s 474 or s 486A of the Act, which were the subject of the proceedings in *Plaintiff S157/2002 v The Commonwealth of Australia*, was invalid. Nor was it contended that s 474, which came into force on 2 October 2001, did not operate with respect to the decision of the Tribunal which was made on 26 July 2001[26].

60 So far as s 486A is concerned, it is common ground that, no matter what operation that section may have, it cannot apply to the Tribunal's decision which was given prior to 27 September 2001[27] and that, so far as the Minister's decision is concerned, proceedings were commenced within 35 days of its notification.

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26 The *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth) which inserted a new Pt 8 into the Act provides that the new Pt 8, in which s 474 is found, applies in respect of any decision in which an application for judicial review had not then been lodged.

27 Section s 486A came into operation on 27 September 2001, see: *Migration Legislation Amendment Act (No 1)* 2001 (Cth) Sched 1. Amendments to s 486A made by Sched 1 to *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth) came into operation on 2 October 2001.

61 So far as s 474 of the Act is concerned, various arguments were put on behalf of the prosecutors, including that that provision does not operate to preclude relief in respect of decisions involving jurisdictional error. For the reasons given in *Plaintiff S157/2002 v The Commonwealth of Australia*, that argument must be accepted. Accordingly, the question for decision in this matter is whether either the decision of the Tribunal or that of the Minister involved jurisdictional error.

Legislative provisions relevant to the Tribunal's decision

62 The effect of ss 411(1)(c) and 415 of the Act is to require the Tribunal to review a decision refusing to grant a protection visa if a valid application is made for the review of that decision. It is not in issue that a valid application was, in fact, made.

63 Section 415(1) of the Act provides:

> " The Tribunal may, for the purposes of the review of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision."

It is well settled and it is not in issue that a review body invested with a review power of the kind conferred by s 415(1) of the Act is required, in conducting that review, to apply the law as it stands at the date of the review[28]. As at that date, s 36(2) of the Act provided:

> " A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

Further, s 504 of the Act provides now, as it did at the time of the Tribunal's decision, for the making of regulations "not inconsistent with [the] Act". Schedule 2 to the Migration Regulations 1994 ("the Regulations") provided then, as it does now, as to the criteria to be satisfied by an applicant for a protection visa.

64 Pursuant to Sched 2 to the Regulations, the criteria required to be satisfied by an applicant for a protection visa at the time of the application were, as they are now, that:

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28 See *Esber v The Commonwealth* (1992) 174 CLR 430 at 440-441 per Mason CJ, Deane, Toohey and Gaudron JJ.

"785.211 The applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and:

(a) makes specific claims under the Refugees Convention; or

(b) claims to be a member of the same family unit as a person who:

(i) has made specific claims under the Refugees Convention; and

(ii) is an applicant for a Protection (Class XA visa)."[29]

65 The criteria required by Sched 2 to the Regulations to be satisfied at the time of the decision included then, as they do now:

"785.221 The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

785.222 In the case of an applicant referred to in paragraph 785.211(b):

(a) The Minister is satisfied that the applicant is a member of the same family unit as a person who has made specific claims under the Refugees Convention (a ***claimant***); and

(b) the claimant has been granted a Protection (Class XA) visa."

66 The key provision governing the grant or refusal of a visa is, as it was at the time of the Tribunal's decision, s 65(1) of the Act. That sub-section provides:

" After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

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29 The Regulations provide for various classes of visas to be referred to by code (reg 1.06). Protection visas are referred to in the Regulations as "Protection (Class XA)". There are two sub-classes of such visas, namely "785 (Temporary Protection)" and "866 (Protection)".

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa."

Arguments with respect to the Tribunal's decision

67 Before turning to the legal issues presented by the arguments for the prosecutors and the respondent, it is necessary to note that, in the prosecutor wife's visa application which, it may be noted, was not signed but marked "X" where her signature was required, her husband was identified by name, date and place of birth. Although the spelling of her husband's name was a little different in her application from that on the documents in the Departmental file and the year of his birth was, also, different, the details provided by her were, in fact, sufficient to enable someone in the Minister's Department to identify the prosecutors as, or, as likely to be the wife and children of a person who had been granted a temporary protection visa and who had an application then pending for a permanent protection visa.

68 The prosecutor wife's application for protection visas contained details of the persecution allegedly suffered by her husband in Afghanistan. However and understandably, given that she did not know her husband was in Australia, no mention was made of his having made an application for a protection visa. Further, neither the application for protection visas nor the application for review asserted an entitlement to protection visas on account of membership of a family unit of which one person was owed protection obligations.

69 Notwithstanding that neither the application for protection visas nor the application for review made any claim in that regard, it was argued on behalf of the prosecutors that the Tribunal was required by Sched 2 to the Regulations to consider whether they were entitled to protection visas by reason that they were members of the family unit of a person who, at the time of their application, was an applicant for a Protection Visa (Class XA), namely a Permanent Protection visa, and who, at the date of the Tribunal's decision, had been granted a Protection Visa (Class XA), namely a Temporary Protection visa.

70 It was contended on behalf of the prosecutors that the Tribunal's failure to consider whether they were entitled to protection visas by reason of the status of

their husband and father amounts to jurisdictional error on the part of the Tribunal, consisting of a failure to exercise jurisdiction and a failure to perform the duty placed upon it by s 414(1) of the Act. In the alternative, it was put that, by failing to disclose to the prosecutor wife the information contained in the documents relating to her husband in the Departmental file, the Tribunal breached its obligation of procedural fairness and that its decision is, on that account, invalid.

Sections 65 and 474 of the Act

71 The questions whether the Tribunal constructively failed to exercise jurisdiction or denied the prosecutors procedural fairness require consideration of the nature of the obligation imposed on the Minister and, hence, the Tribunal by s 65 and its relationship with s 474 of the Act. The terms of that latter section are set out and its general nature and effect are discussed in *Plaintiff S157/2002 v The Commonwealth of Australia*. Accordingly, it is necessary in the present matter only to note that s 474 purports to limit judicial review by providing, inter alia, that certain decisions "under [the] Act"[30] are "final and conclusive"[31] and are "not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account."[32]

72 As already indicated and for the reasons given in *Plaintiff S157/2002 v The Commonwealth of Australia*, s 474 does not prevent the grant of prohibition, mandamus or certiorari in respect of decisions on the part of officers of the Commonwealth involving jurisdictional error for such decisions are not regarded, in law, as decisions at all and are, thus, not properly described as "a decision ... under [the] Act". However and as also explained in *Plaintiff S157/2002 v The Commonwealth of Australia*, the effect of a provision such as s 474 of the Act is to necessitate an examination of statutory limitations or requirements to ascertain whether, in the light of s 474's restrictions on judicial review, non-observance of those limitations or requirements does or does not result in jurisdictional error.

73 It is significant that, although a decision to grant or refuse a protection visa ultimately depends on the decision-maker's satisfaction or lack of satisfaction as to the various matters specified in s 65(1)(a) of the Act, that sub-section prescribes the circumstances in which a particular decision must be made and, in so doing, imposes two discrete obligations on the decision-maker. So far

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30 Section 474(2).

31 Section 474(1)(a).

32 Section 474(1)(c).

as concerns the actual decision to be made, the decision-maker is to grant the visa in question if satisfied as to the various matters specified in s 65(1)(a), and if not so satisfied, is to refuse it – obligations which in terms allow no discretion to the Minister with respect to the decision to be made.

74 The first obligation which s 65 imposes is to consider a valid visa application, an obligation clearly imported by the words "[a]fter considering a valid application". Further and in so far as s 65(1) specifies the precise decision that is to be made by reference to the decision-maker's satisfaction or lack of satisfaction with respect to the matters specified in that sub-section, the Act imposes a duty to have regard to those matters, including the criteria prescribed by the Act and the Regulations for the grant of the visa in question.

75 Because s 65(1) of the Act requires the decision-maker in question to have regard to the criteria which must be satisfied before a visa can be granted, there is a duty, in the case of persons who apply for protection visas on the basis that they, personally, are owed obligations under the Refugee Convention as defined in the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (together referred to as "the Convention"), to consider whether they are "refugees" as defined in Art 1A(2) of the Convention. More precisely, there is a duty to consider, in each case, whether "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, [the person concerned] is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country"[33].

76 Hitherto, if a decision-maker has, in considering an application for a protection visa, failed to give effect to the Convention because, for example he or she has misunderstood the nature of persecution[34] or the nature of the grounds to which the Convention refers[35], that failure has constituted jurisdictional error entitling an applicant to relief under s 75(v) of the Constitution. That is because a decision-maker who has not given effect to the Convention cannot be said either to have been satisfied or not to have been satisfied that the person concerned is a person to whom Australia owes protection obligations. And his or her satisfaction or lack of satisfaction in that regard is a condition precedent to the grant or refusal of a protection visa.

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33 Article 1A(2) of the Convention.

34 See *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

35 See *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293.

77 It was contended on behalf of the Minister that there is an apparent conflict between s 65(1) of the Act and s 474 and that, accordingly, it is necessary to effect a reconciliation of those provisions. In this regard, reliance was placed on *R v Hickman; Ex parte Fox and Clinton*[36] and *R v Murray; Ex parte Proctor*[37]. It was then contended that, when that reconciliation is effected, failure to have regard to the criteria prescribed by the Act or the Regulations, including, in the case of an application for a protection visa, a failure to give effect to the Convention, no longer constitutes jurisdictional error.

78 Sections 65 and 474 of the Act are to be reconciled, according to the argument for the Minister, by treating s 65(1)(a) as not requiring the Minister "to grant a visa if, having made a bona fide attempt to determine whether the conditions in sub-paragraphs (1)(a)(i)-(iv) are met, he or she reaches the view that they are not met (notwithstanding any legal or factual error in reaching that view)". A similar approach is to be taken, according to the submissions, in the case of the Minister's obligation under s 65(1)(b) to refuse a visa if the criteria are not satisfied. In effect, what is contended is that the words of s 65(1), which require particular decisions to be reached if the Minister is or is not satisfied of the matters specified in sub-pars (1)(a)(i)-(iv), can be ignored because none of the limitations or requirements of s 65 are essential to the validity of a decision to grant or refuse a visa.

79 As explained in *Plaintiff S157/2002 v The Commonwealth of Australia*, it is necessary, if there is apparent conflict between a privative clause and a statutory provision imposing limitations or restraints upon jurisdiction or power, to attempt a reconciliation of those provisions. It is not necessary that a reconciliation be effected. Indeed, a reconciliation with the particular provision in question may be impossible, as will be the case if, for example, it imposes an "inviolable" jurisdictional restraint[38]. However, if reconciliation is possible, the provision pursuant to which the act in question has been done or the decision taken will be construed so that observance of specified requirements or restraints is not essential to the validity of that act or decision.

80 It may be that there is no insuperable difficulty in reconciling a particular provision with s 474 of the Act in the case of a power to do some act or to make

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36 (1945) 70 CLR 598.

37 (1949) 77 CLR 387.

38 See *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 419 per Mason ACJ and Brennan J.

some decision that involves a significant discretionary element or in respect of which there is no detailed specification as to matters that must be satisfied before a particular act is done or a particular decision taken. In such a case it may be possible to construe the provision governing that act or decision as one which does not impose restraints or limitations which must be observed if the act or decision is to be valid.

81 On the other hand, reconciliation of a particular provision with s 474 of the Act is very difficult, if not impossible, if, as in the case of s 65(1) of the Act, there is detailed specification of conditions which must be satisfied before a particular act can be done or a particular decision taken and there is also prescription of the precise act that must be done or the precise decision that must be reached if the specified conditions are met.

82 It is important to note that s 65(1) of the Act applies to all visa applications, not merely applications for protection visas. Further, s 31 of the Act allows that "regulations may prescribe criteria for a visa or visas of a specified class" and the Regulations prescribe detailed criteria for various kinds of visa, including Bridging A[39], Bridging B[40], Bridging C[41] and Bridging (General)[42] visas, Spouse[43] and Child[44] visas, Adoption visas[45], Parent visas[46], Skilled – Australian-linked[47] and Regional-linked[48] visas, Aged Dependent Relative[49], Remaining Relative[50] and Orphan Relative[51] visas, Regional

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39 Migration Regulations 1994, Sched 2 Subclass 010 Divs 010.1–010.7.

40 Migration Regulations 1994, Sched 2 Subclass 020 Divs 020.1–020.7.

41 Migration Regulations 1994, Sched 2 Subclass 030 Divs 030.1–030.7.

42 Migration Regulations 1994, Sched 2 Subclass 050 Divs 050.1–050.7.

43 Migration Regulations 1994, Sched 2 Subclass 100 Divs 100.1–100.7.

44 Migration Regulations 1994, Sched 2 Subclass 101 Divs 101.1–101.7.

45 Migration Regulations 1994, Sched 2 Subclass 102 Divs 102.1–102.7.

46 Migration Regulations 1994, Sched 2 Subclass 103 Divs 103.1–103.7.

47 Migration Regulations 1994, Sched 2 Subclass 105 Divs 105.1–105.7.

48 Migration Regulations 1994, Sched 2 Subclass 106 Divs 106.1–106.7.

49 Migration Regulations 1994, Sched 2 Subclass 114 Divs 114.1–114.7.

50 Migration Regulations 1994, Sched 2 Subclass 115 Divs 115.1–115.7.

Sponsored Migration Scheme visas[52], Labour Agreement visas[53] and many others[54].

83 In light of the detailed specification in the Regulations of the criteria for the grant of various classes of visa, it is impossible to treat the consideration by the decision-maker of the relevant criteria and his or her satisfaction or lack of satisfaction in that regard as other than conditions precedent to a valid decision to grant or refuse a visa under s 65(1) of the Act.

84 Quite apart from the detailed specification in the Regulations of the criteria to be satisfied in the case of particular classes of visa, there is a further matter that strongly suggests that it was not intended that s 474 of the Act should operate so as to relieve a decision-maker from the obligation of giving effect to the criteria applicable in the case of protection visas. The *Migration (Legislation Amendment) Act (No 6)* 2001 (Cth) ("the Amending Act") came into force on the same day as the *Migration (Judicial Review) Amendment Act* 2001 (Cth) which inserted s 474 into the Act. The Amending Act inserted ss 91R[55], 91S[56], 91T[57]

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51 Migration Regulations 1994, Sched 2 Subclass 117 Divs 117.1–117.7.

52 Migration Regulations 1994, Sched 2 Subclass 119 Divs 119.1–119.7.

53 Migration Regulations 1994, Sched 2 Subclass 120 Divs 120.1–120.7.

54 See, for example, Distinguished Talent visas, Migration Regulations 1994, Sched 2 Subclass 124; Business Owner visas, Migration Regulations 1994, Sched 2 Subclass 127; Woman at Risk visas, Migration Regulations 1994, Sched 2 Subclass 204; Prospective Marriage visas, Migration Regulations 1994, Sched 2 Subclass 300; Visiting Academic visas, Migration Regulations 1994, Sched 2 Subclass 419; and Sport visas, Migration Regulations 1994, Sched 2 Subclass 421.

55 This section outlines what does and does not constitute "persecution" for the application of Art 1A(2) of the Convention, including examples of what may constitute "serious harm". This section also outlines the type of conduct the Minister is to disregard in determining whether a person has a well-founded fear of being persecuted.

56 This section outlines what evidence is to be disregarded when determining whether a "first person" has a well-founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person's family.

57 This section provides that Art 1F of the Convention is to have effect as if the reference to non-political crime were a reference to a crime where the person's motives for committing the crime were wholly or mainly non-political in nature subject to the crimes referred to in sub-s 3.

and 91U[58] into the Act, which sections make detailed provision with respect to matters which would otherwise fall for consideration by reference to the general terms of the Convention.

85 The detailed specification of matters bearing upon the grant of a protection visa inserted into the Act at the same time as was s 474 makes it clear that the Parliament was not enacting provisions to the effect that decision-makers could validly grant or refuse to grant protection visas on the basis of a bona fide attempt to determine whether the criteria for the grant of a protection visa have been satisfied, as distinct from the decision-maker's actual satisfaction or lack of satisfaction as to those criteria. And as already pointed out, a decision-maker cannot be said to be satisfied or not satisfied if effect is not given to those criteria because, for example, they have been misconstrued or overlooked.

Jurisdictional error

86 It follows from what has been said that there were two clear duties imposed on the Tribunal by the combined operation of ss 65, 414 and 415 of the Act. The first, which was in fact carried out, was to consider the prosecutor wife's application for protection visas. The second was to consider the matters prescribed by sub-pars 65(1)(a)(i) to (iv), including the criterion for a protection visa prescribed by s 36 of the Act and those prescribed by the Regulations.

87 Although the Tribunal noted the criterion specified in s 36 of the Act and also those specified in the Regulations and observed that "[i]n respect of applicants who are members of the same family unit, it is enough if one family member is a person to whom Australia has protection obligations", it considered only whether the prosecutors had a well-founded fear of persecution for a Convention reason, that being, for all practical purposes, the criterion specified by s 36(2) of the Act and by pars 785.211(a) and 785.221 of Sched 2 to the Regulations. The Tribunal did not consider whether the prosecutors satisfied the criterion specified in pars 785.211(b) and 785.222(a) of Sched 2 with respect to membership of a family unit of which one person was owed protection obligations under the Convention.

88 Because s 65(1) requires consideration of the criteria specified for a visa before there can be a valid decision to grant or refuse a protection visa, there was a jurisdictional error on the part of the Tribunal notwithstanding that no specific claim was made in that regard.

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58 This section outlines the definition of a particularly serious crime as referred to in Art 33(2) of the Convention including the definition of a "serious Australian offence" and a "serious foreign offence".

Utility of relief

89 To say that there was jurisdictional error on the part of the Tribunal in that it failed to consider a claim that was not advanced either in the prosecutor wife's visa application or in her application for review by the Tribunal is not to say that relief will be granted under s 75(v) of the Constitution in every case in which there is a failure to have regard to a criterion for the grant of a visa in respect of which no specific claim is made.

90 Relief by way of prohibition and mandamus is discretionary[59] and, ordinarily, if no specific claim is made in relation to a specified criterion for the grant of a visa, relief will be refused. It will be refused because, in the absence of a specific claim, it would have been impossible for the decision-maker to have been satisfied that that criterion had been met. However, the present case is unusual in that the Tribunal had before it material which, if it had been taken into account, might well have established the prosecutors' membership of a family unit of which one person had claimed to be owed protection obligations under the Convention and whose claims in that regard had been recognised.

91 Notwithstanding the material in the Departmental file forwarded to the Tribunal, it was argued on behalf of the Minister that relief should be refused. The argument for the Minister accepted that the prosecutors' husband and father was sufficiently identified in the visa application to raise the possibility that he was the person referred to in the two documents in the Departmental file. It also accepted that that person had an application for a permanent protection visa pending at the time of the prosecutor wife's visa application and had been granted a temporary protection visa at the time of the Tribunal's decision. However, it was put that, when properly construed, par 785.211(b) of Sched 2 to the Regulations requires an applicant to claim an entitlement to a protection visa on the ground of family membership and that an applicant who does not do so cannot satisfy the criterion specified in that paragraph.

92 Paragraph 785.211(b) of Sched 2 to the Regulations does not, in terms, require an applicant for a protection visa to make application on the basis of membership of the same family unit as a person who has made specific claims

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59 See *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400 per Latham CJ, Rich, Dixon, McTiernan and Webb JJ; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194 per Gibbs CJ; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82. See also Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed, (2000) at 577-581 and 596-604.

under the Convention and applied for a protection visa. Standing alone, that paragraph is ambiguous. It is capable of being read as requiring that a person claim to be a member of the same family unit as a person who, in fact, has made claims under the Convention and applied for a protection visa. Equally, it can be read as requiring that that person claim to be a member of the relevant family unit and, also, claim that a member of the family unit has made specific claims under the Convention and applied for a protection visa.

93 A reading of par 785.211(b) of Sched 2 to the Regulations so that it requires only that a person claim to be a member of a family unit of which one person has, in fact, made specific claims under the Convention and applied for a protection visa is consistent with the criteria to be satisfied at the time of the decision and specified in pars 785.222(a) and (b) of Sched 2. The criteria in those paragraphs refer to objective matters which can be factually determined, namely, that a family member "has made specific claims under the ... Convention" and "has been granted a Protection (Class XA) visa". Paragraph 785.211(b) of Sched 2 should be construed conformably with pars 785.222(a) and (b).

94 When construed consistently with pars 785.222(a) and (b), par 785.211(b) of Sched 2 to the Regulations requires only that an applicant for a protection visa should claim to be a member of the same family unit as a person who, in fact, has made specific claims under the Convention and has, in fact applied for a protection visa. As the prosecutor wife claimed to be a member of the same family unit as the person referred to in the two documents in the Departmental file, she satisfied that requirement. That being so, it cannot be said, as was contended for the Minister, that it was impossible for the Tribunal to have been satisfied as to the criterion specified in par 785.211(b) of Sched 2 to the Regulations.

Relief with respect to the Tribunal's decision

95 Because it cannot be said that it was impossible for the Tribunal to have been satisfied that the prosecutors met the criteria specified in pars 785.211(b) and 785.222(a) and (b) of Sched 2 to the Regulations, prohibition should issue to prevent the Minister acting on the Tribunal's decision. Certiorari should also issue to quash that decision.

96 So far as concerns relief by way of mandamus, it was contended on behalf of the prosecutors that, as they met the criteria of family membership specified in the Regulations, mandamus should issue to compel the Tribunal to grant protection visas to them. However, as the grant or refusal of protection visas is dependent on the satisfaction or lack of satisfaction of the Minister or other decision-maker to whom the Act refers, that argument must be rejected. Rather,

mandamus should issue to the Tribunal requiring it to determine the prosecutors' review application in accordance with law.

Other arguments with respect to the Tribunal's decision

97 As none of the other arguments advanced on behalf of the prosecutors with respect to the Tribunal's decision, including that asserting a denial of procedural fairness, could result in more favourable relief than that which must be granted by reason of jurisdictional error on the part of the Tribunal in failing to consider whether the prosecutors satisfied the family membership criteria in Sched 2 to the Regulations, those arguments need not be considered.

The Minister's decision: s 417 of the Act

98 Section 417(1) of the Act provides:

> " If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision."

99 On behalf of the prosecutors, it was contended that the Minister's refusal to substitute a more favourable decision for that made by the Tribunal was explicable only on the basis of a failure to take account of their membership of the same family unit as a person who had applied for a permanent protection visa at the time of their visa application and who held a temporary protection visa when the Tribunal made its decision. Because the grant of relief in respect of the Tribunal's decision sufficiently responds to the rights of the prosecutors, those arguments need not be considered. However, it is convenient to note s 417(7) of the Act.

100 Sub-section (7) of s 417 provides:

> " The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances."

Given that there is no duty on the Minister to consider an application that he substitute a more favourable decision under s 417(1) of the Act, mandamus cannot issue to compel consideration of the application made on behalf of the prosecutors even if the Minister's earlier refusal is set aside. Even if it could be said that the Minister's refusal to exercise his power under s 417(1) of the Act involved jurisdictional error – a matter on which we express no opinion – such that prohibition or certiorari might issue in respect of it, it may be that those

remedies would serve no useful purpose. That is because mandamus cannot issue and, absent relief by way of mandamus, the prosecutors' only right is to have their visa applications determined by the Tribunal in accordance with law, which right is secured by the relief with respect to the Tribunal's decision.

Orders

101 The Order Nisi for prohibition directed to the Minister prohibiting him from acting upon the decision of the Tribunal made on 26 July 2001, for certiorari to quash that decision and for mandamus directed to the Tribunal to determine the prosecutors' application for review in accordance with law should be made absolute. Otherwise, the Order Nisi should be discharged.

102 The first respondent should pay the prosecutors' costs.