HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS — FIRST RESPONDENT

EX PARTE APPLICANT S20/2002 — PROSECUTOR

Re Minister for Immigration and Multicultural Affairs;
Ex parte Applicant S20/2002
[2003] HCA 30
17 June 2003
S20/2002

ORDER

Application dismissed with costs, including any reserved costs.

Representation:

B W Walker SC with L J Karp for the prosecutor (instructed by McDonells Solicitors)

S J Gageler SC with G R Kennett for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondent.

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

APPELLANT S106/2002 APPELLANT

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

Appellant S106/2002 v Minister for Immigration and Multicultural Affairs
17 June 2003
S106/2002

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

B W Walker SC with L J Karp for the appellant (instructed by McDonells Solicitors)

S J Gageler SC with G R Kennett for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002
Appellant S106/2002 v Minister for Immigration and Multicultural Affairs

Immigration – Refugees – Temporary protection visas – Application for certiorari, prohibition and mandamus under s 75(v) of the Constitution – Where Refugee Review Tribunal found that applicant was an unreliable witness and discounted evidence said to be corroborative – Whether Tribunal's decision was "irrational, illogical and not based upon findings or inferences of fact supported by logical grounds" – Whether Tribunal's decision was affected by actual bias or by a reasonable apprehension of bias – Whether Tribunal's decision was vitiated by jurisdictional error – Distinction between discretionary decisions and decisions involving the finding of facts essential to the exercise of jurisdiction – Whether Tribunal's decision evidenced an erroneous approach to the finding of jurisdictional facts.

Constitutional law – Section 75(v) of the Constitution – Review of administrative decisions – Jurisdictional error – Bias – Extent to which the content of the constitutional writs is affected by common law developments in administrative law – Availability of constitutional writs in proceedings that include an appeal concerning related issues.

Administrative law – Judicial Review – Whether Tribunal's decision was "irrational, illogical and not based upon findings or inferences of fact supported by logical grounds" – Unavailability of review of factual or evidentiary merits – Whether relief available under *Migration Act* 1958 (Cth) ("the Act") or under the Constitution, s 75(v) – Whether Tribunal had no jurisdiction to make the decision – Whether the decision was not authorised by the Act – Whether the decision was marred by error of law – Whether the decision was so unreasonable that no reasonable tribunal would have made it.

Words and Phrases – "jurisdictional error", "jurisdictional fact", "apprehended bias", "actual bias", "*Wednesbury* unreasonableness".

Constitution, s 75(v).
Administrative Decisions (Judicial Review) Act 1977 (Cth), s 5.
Migration Act 1958 (Cth), ss 36(2), 65, 414, 415, 430, 476(1)(b), (c), (f), 476(2)(b), 476(3), 496.
Migration Legislation Amendment Act (No 1) 2001 (Cth).
Migration Legislation Amendment (Judicial Review) Act 2001 (Cth).

1 GLEESON CJ. The nature of the proceedings, the facts, and the relevant statutory provisions appear from the reasons for judgment of McHugh and Gummow JJ.

2 In both proceedings, a challenge is made to a decision of the Refugee Review Tribunal ("the Tribunal") which, upon review of a decision of a delegate of the Minister for Immigration and Multicultural Affairs under the *Migration Act* 1958 (Cth) ("the Act"), refusing to grant a protection visa, affirmed that decision. The Tribunal's conclusion, following some 21 pages of reasoning, was as follows:

> "Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant does not satisfy the criterion set out in s 36(2) of the Act for a protection visa."

3 By reason of ss 65 and 415 of the Act, if the Tribunal was not satisfied that the relevant statutory criterion for a protection visa was satisfied, the Tribunal was bound to affirm the delegate's decision.

4 The challenge to the Tribunal's decision is based on two grounds. First, it is said that the decision "was illogical, irrational, or was not based on findings or inferences of fact supported by logical grounds." Secondly, it is said that the decision was affected by either actual or apprehended bias. The claim of actual or apprehended bias did not play a prominent part in the argument. It was based on substantially the same criticisms of the Tribunal's reasoning as were advanced in support of the first ground, the argument being that the reasoning was so defective as to demonstrate, or at least give rise to a reasonable apprehension of, bias in the decision-maker. If the criticisms of the reasoning are not sustained, then both grounds fail.

5 As was pointed out in *Minister for Immigration v Eshetu*[1], to describe reasoning as illogical, or unreasonable, or irrational, may merely be an emphatic way of expressing disagreement with it. If it is suggested that there is a legal consequence, it may be necessary to be more precise as to the nature and quality of the error attributed to the decision-maker, and to identify the legal principle or statutory provision that attracts the suggested consequence.

6 The Tribunal had the power, and the duty, to decide whether to affirm, vary, or set aside the delegate's decision (s 415). If the Tribunal was not satisfied that the criterion for a protection visa had been satisfied in the case of the

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1 (1999) 197 CLR 611 at 626 [40] per Gleeson CJ and McHugh J.

applicant/appellant, the Tribunal was obliged to affirm the delegate's decision (ss 65, 415). The Tribunal was not so satisfied. Relevantly, the criterion to be satisfied was that the applicant/appellant was a person to whom Australia had protection obligations under the Convention. His claim that Australia had such obligations was based upon a contention that he had a well founded fear of persecution in Sri Lanka for reasons of political opinion, arising from assistance he said he had given to two dissidents in that country, and from the reaction of the authorities to that assistance. The Tribunal did not believe his story about the assistance, or the conduct of the authorities. The Tribunal referred, for reasons stated in detail, to the "overall implausibility of [his] claim", and to significant parts of his evidence which were regarded as incredible and were disbelieved.

7 The attack is directed to the reasons given by the member of the Tribunal for concluding that, considering the evidence as a whole, she was not satisfied that the applicant/appellant was a person to whom Australia had protection obligations. It was not directed to her appreciation of the whole of the evidence. It was not suggested that it was not reasonably open to the Tribunal, on the material, to find that the claim was implausible, or that there were features of the applicant/appellant's story that might reasonably be doubted or disbelieved. The illogicality was said to be in the Tribunal's process of reasoning, and, in particular, in the way in which the member dealt with certain information relied upon as corroboration.

8 Before dealing with the merits of the criticism advanced, with a view to identifying the nature of the supposed error, and determining whether its existence has been demonstrated, it is convenient to note the context in which the argument is advanced. We are concerned with statutory provisions which operate upon the state of satisfaction, or lack of satisfaction, of an administrative decision-maker. In *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[2], Dixon J said:

> "But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some

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2 (1949) 78 CLR 353 at 360.

such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition."

9 To describe as irrational a conclusion that a decision-maker is not satisfied of a matter of fact, or a state of affairs, because the decision-maker does not believe the person seeking to create the state of satisfaction, or to describe the process of reasoning leading to such a conclusion as illogical, on judicial review of an administrative decision, might mean no more than that, on the material before the decision-maker, the court would have reached the required state of satisfaction. Ordinarily, however, it will be necessary to go further, as in the respects mentioned by Dixon J. If, in a particular context, it is material to consider whether there has been an error of law, then it will not suffice to establish some faulty inference of fact[3]. On the other hand, where there is a duty to act judicially, a power must be exercised "according to law, and not humour"[4], and irrationality of the kind described by Deane J in *Australian Broadcasting Tribunal v Bond*[5] may involve non-compliance with the duty. Furthermore, where "the true and only reasonable conclusion contradicts [a] determination" then the determination may be shown to involve legal error[6]. It is often unhelpful to discuss, in the abstract, the legal consequences of irrationality, or illogicality, or unreasonableness of some degree. In a context such as the present, it is necessary to identify and characterise the suggested error, and relate it to the legal rubric under which a decision is challenged.

10 Turning to s 476 of the Act, the criticisms of the Tribunal's decision made on behalf of the applicant/appellant are based on s 476(1)(b) and (c): there are attributed to the Tribunal errors of such a kind that the Tribunal did not have jurisdiction to make its decision, or that the decision was not authorised by the Act.

11 The principal suggested error concerns the way in which the member of the Tribunal dealt with the evidence of a witness who claimed to have observed

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3 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 per Mason CJ.

4 *Sharp v Wakefield* [1891] AC 173 at 179 per Lord Halsbury LC.

5 (1990) 170 CLR 321 at 367.

6 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 36 per Lord Radcliffe; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 450 [25].

the way in which the Sri Lankan authorities treated the applicant/appellant after he had assisted two persons associated with a subversive group. The relevant passages are set out in the reasons of McHugh and Gummow JJ. The key passage is:

> "In light of the Tribunal's findings above that the [applicant/appellant] thoroughly lacks credibility, and its findings that the [applicant/appellant] had misled the Tribunal in regard to his claims to fear harm by the Sri Lankan authorities, it cannot be satisfied with the corroborating evidence given by the ... witness, and gives no weight to this evidence."

12 It was contended that this passage shows that the Tribunal member adopted a flawed approach to her evaluation of the evidence, failing to assess the evidence of the applicant/appellant in the light of the corroborating evidence, and giving no weight to the evidence of the corroborating witness for reasons that had nothing to do with the quality of that evidence. The essence of the complaint is that the Tribunal failed to consider the evidence as a whole, but first considered, and disbelieved, the evidence of the applicant/appellant, without taking account of the corroboration, and then considered and rejected the corroboration because of the rejection of the evidence of the applicant/appellant. I do not accept that this is a fair criticism of the Tribunal's reasons. In my view, all that the member was saying was that, for reasons already given at length, she found the applicant/appellant's story implausible, and in some important respects unbelievable, and that she also rejected the evidence of the corroborating witness, even though she had no separate reason to doubt his credibility other than the reasons that she had already given for rejecting the claim she was considering. The member could have expressed herself more clearly. It is not necessarily irrational, or illogical, for a finder of fact, who is convinced that a principal witness is fabricating a story, which is considered to be inherently implausible, to reject corroborative evidence, even though there is no separate or independent ground for its rejection, apart from the reasons given for disbelieving the principal witness.

13 Upon analysis, the complaint is that the Tribunal member did not have regard to the whole of the evidence before deciding whether she believed the applicant/appellant, and did not properly assess the significance of the evidence of the corroborating witness. I am not persuaded that this criticism is justified.

14 Decision-makers commonly express their reasons sequentially; but that does not mean that they decide each factual issue in isolation from the others. Ordinarily they review the whole of the evidence, and consider all issues of fact, before they write anything. Expression of conclusions in a certain sequence does not indicate a failure to consider the evidence as a whole. I do not think that the Tribunal member intended to convey that she made up her mind about the evidence of the applicant/appellant before taking account of the evidence of the witness who was said to corroborate him.

15 The other alleged errors concern the way in which the Tribunal dealt with certain other information relied upon as corroboration. That information came from a dentist and a doctor. The Tribunal said:

> "In regard to the letter from Dr [D], the applicant's dentist (30 June 1999), the Tribunal notes that the applicant's dentist stated that the applicant is 'restless' and had 'psychological depression' and was 'suffering from post traumatic stress disorder'. There is nothing to suggest that the applicant's dentist has any training or qualification to make such findings. And while the dentist states that the injuries she observed 'could be the result of an assault' she is unable to suggest the nature or circumstances of any assault. In light of the applicant's dentist being wholly unqualified to make findings on the applicant's psychological state the Tribunal cannot give weight to her comments in this regard. And in light of the dentist's ambiguous statement about how any injuries to the applicant were sustained, the Tribunal cannot be satisfied that these injuries were sustained for a Convention related reason.
>
> The Tribunal cannot give weight to the report by Dr [K], because the doctor is relying on the applicant's assertions as to how the hernia was sustained, and the Tribunal has found above that the applicant is not credible and cannot be satisfied that the applicant was ever detained or physically mistreated by the Sri Lankan authorities."

16 After those passages, the reasons go on to deal further with the credibility of the applicant/appellant, and with post-hearing submissions on that critical issue.

17 I see no error in the way in which the information from the dentist and the doctor was treated.

18 The grounds of judicial review under s 476(1)(b) and (c) have not been established, and no other ground has been shown for the exercise of this Court's original jurisdiction.

19 It follows, additionally, that there is no foundation for the allegations of actual or apprehended bias.

20 There was debate, in the Federal Court and in this Court, as to the operation in the present case of s 476(2)(b). In the light of the views I have expressed about the errors attributed to the Tribunal, that is not a question that arises for decision. It is a subject that was considered in *Minister for*

Immigration v Eshetu[7]. The effect of s 476(2)(b) in a given case turns upon the nature of the error, and the statutory provision by reference to which the error might give rise to a claim for relief. Here, no material error has been shown. In formulating his argument, counsel for the applicant/appellant alleged illogicality and irrationality, and avoided the term "unreasonable", perhaps with an eye to s 476(2)(b). As with illogicality and irrationality, unreasonableness is a protean concept, and may require closer definition where it is said to be relevant to judicial review of an administrative decision. The grounds of judicial review under the Act overlap, and some decisions may fall within a number of those grounds, and may also fairly be described as unreasonable, or even unreasonable to a high degree. That does not necessarily mean that s 476(2)(b) comes into play.

21 I agree with the orders proposed by McHugh and Gummow JJ.

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7 (1999) 197 CLR 611 at 626-629 [39]-[52].

22 McHUGH AND GUMMOW JJ. There are before the Full Court of this Court two proceedings. One is an appeal from a decision of the Full Court of the Federal Court of Australia[8]. The other is an application in the original jurisdiction conferred by s 75(v) of the Constitution for remedies against the Minister for Immigration and Multicultural Affairs ("the Minister"). The Minister is the respondent in the appeal. The second respondent in the s 75(v) application is the Refugee Review Tribunal ("the Tribunal") constituted under the *Migration Act* 1958 (Cth) ("the Act").

23 The appellant and the applicant are the same individual and in these reasons he will be identified as "the appellant". Section 91X of the Act purports to direct this Court in these proceedings not to publish in electronic form or otherwise the name of the appellant. No challenge has been made in these proceedings to the validity of s 91X.

24 In the Federal Court litigation giving rise to the appeal, Branson J on 2 August 2000[9] dismissed an application by the appellant for review pursuant to s 476 of the Act (as it then stood) of a decision of the Tribunal given on 30 September 1999. The Tribunal had affirmed a decision of a delegate of the Minister not to grant the appellant a protection visa, being that class of visa for which provision is made in s 36 of the Act. Her Honour ordered that the decision of the Tribunal be affirmed. The Full Court on 21 May 2001, by majority (Hill and Stone JJ; Finkelstein J dissenting) dismissed an appeal.

25 The proceeding in the original jurisdiction was instituted by an application for an order nisi which was stood over for listing with the pending special leave application in respect of the Federal Court appeal. On 5 March 2002, special leave was granted in respect of the Full Federal Court decision and pursuant to O 55 r 2 of the High Court Rules the application in the original jurisdiction was referred into the Full Court as an application for orders absolute in the first instance for certiorari, prohibition and mandamus. The matters have been argued together.

26 In broad terms, the appellant's purpose in moving under s 75(v) of the Constitution is to ensure that there are available any grounds of review which, if the construction given s 476 of the Act by the majority of the Full Court were to prevail, otherwise would not be open.

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8 (2001) 109 FCR 424.

9 [2000] FCA 1025.

27 Section 75(v) of the Constitution entrenches a minimum measure of judicial review[10]. The Parliament may legislate to provide in a broader measure for federal judicial review. In some respects, the Parliament did so when enacting the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act") and conferring jurisdiction thereunder on the Federal Court. Subsequently, the Parliament legislated to contract the scope of the ADJR Act, in particular as regards decisions under the Act. This was done by the introduction into the Act of what at the time of this litigation was s 476. That provision presents questions of construction concerning the degree to which Parliament has contracted what otherwise would be the operation of the ADJR Act. Further, there remains the independent operation in this Court of s 75(v) of the Constitution. The contraction in the operation of the ADJR Act has attached added significance to s 75(v). The decisions upon s 75(v), which extend across the whole period of the Court's existence, may have been overlooked or discounted by administrative lawyers as being largely of immediate concern for industrial law. That, as this litigation illustrates, can no longer be so.

The applicable statute law

28 The decision of the Tribunal and the decision of the Full Court were given before the enactment of the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth) ("the 2001 Act"). This commenced on 2 October 2001. It is accepted that the appeal to this Court is governed by the Act in its former form; in particular s 476 remains applicable despite its repeal by the 2001 Act.

29 With respect to the application under s 75(v) of the Constitution, the new privative clause provisions now found in Pt 8, Divs 1 and 2 (ss 474-484) of the Act do not apply in relation to review by this Court of the decision of the Tribunal[11].

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10 *Plaintiff S157/2000 v The Commonwealth* (2003) 77 ALJR 454 at 474 [103]; 195 ALR 24 at 51-52.

11 It is agreed that cl 8(2) of Sched 1 to the 2001 Act, which applies to Pt 8 decisions where no application for judicial review had been made before the commencement of the 2001 Act, has no relevant operation because the application to the Federal Court had been made in relation to the decision of the Tribunal before that commencement date. It is further accepted that, construed in accordance with authority, the new s 474 effects a substantive change to the powers of decision-makers and so does not apply to the decision of the Tribunal: *Maxwell v Murphy* (1957) 96 CLR 261 at 267.

30 As indicated above, the decision of the Tribunal was made on 30 September 1999. Section 486A of the Act, which imposes a time limit upon applications to this Court which invoke its original jurisdiction, does not apply here. The section, which was inserted substantially in its present form by the *Migration Legislation Amendment Act (No 1)* 2001 (Cth), applies to applications to this Court in respect of decisions which are made after 27 September 2001[12].

31 The decision at the root of the subsequent litigation, that of a delegate of the Minister, had been made on 29 July 1997 and under s 65 of the Act. Provision was made by s 496 for the delegation by the Minister of powers under the Act. Section 65 obliged the delegate to grant the visa sought if satisfied that, among other things, the criterion provided for in s 36(2) was satisfied; if not so satisfied, the delegate was required to refuse to grant the visa. This structure of s 65, conditioning the obligation to exercise the power to grant or to refuse upon the satisfaction of the Minister, is of central importance for the arguments advanced in this Court.

32 The relevant text of s 65 was:

> "(1) 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; …
>
> *is to grant the visa*; or
>
> (b) if not so satisfied, is to refuse to grant the visa." (emphasis added)

Section 36(2) stated as a criterion for a protection visa that the applicant for the visa was a non-citizen in Australia to whom Australia had protection obligations under the Refugees Convention as amended by the Refugees Protocol.

33 The Tribunal, an application having been made to it by the appellant, was required by s 414 of the Act to "review" the decision of the delegate. For that purpose, s 415 empowered the Tribunal to "exercise all the powers and discretions" conferred by the Act upon the decision-maker; that is to say, the

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12 Sched 1, s 5.

Tribunal stood in the place of the delegate of the Minister and its decision on the review was governed by s 65 in conjunction with s 36(2).

Jurisdictional error

34 The appellant submits in the application for constitutional writs that the Tribunal's decision displays jurisdictional error. This is said to be because its determination that the condition upon which depended the power (or duty) to grant him a protection visa was not met was irrational, illogical and not based upon findings or inferences of fact supported by logical grounds. In framing the issue that way, the appellant relied upon what had been said in *Minister for Immigration and Multicultural Affairs v Eshetu*[13].

35 The appellant did not rely upon any analogy to what has been suggested to be a ground of appellate review of factual determinations for taint by "gross error, manifest illogicality and unreasoned perversity"[14]. Nor did he rely upon the broad statement by Lord Clyde in *Reid v Secretary of State for Scotland*[15] that, under what appears to be the equivalent in Scotland of the single proceeding for judicial review provided for England and Wales by RSC O 53:

> "the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it ... But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence."

36 It was pointed out in *Eshetu* that some stricter view perhaps should be taken of what must be shown to make out a case of error grounding relief under s 75(v) of the Constitution where the legislation, as does s 65, conditions the attraction of jurisdiction upon the attainment by the decision-maker of

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13 (1999) 197 CLR 611 at 656-657 [145].

14 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 151. See Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 211-212.

15 [1999] 2 AC 512 at 541-542. See also the discussion of *R v Criminal Injuries Compensation Board, Ex parte A* [1999] 2 AC 330 at 344-345 by Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ in *Re Minister for Immigration and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 77 ALJR 437 at 443 [35]-[37], 444 [41]-[42]; 195 ALR 1 at 9-10, 10-11.

satisfaction that a certain state of affairs exists and that state of affairs includes factual matters[16]. Such a stricter view would appear to have been taken with the distinction drawn in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*[17]. This contrasts insufficiency of evidence to support a conclusion of fact by an administrative decision-maker and the absence of any foundation in fact for the fulfilment of the conditions upon which, in law, the existence of a power depends. In *Melbourne Stevedoring*, Dixon CJ, Williams, Webb and Fullagar JJ went on[18]:

> "The inadequacy of the material is not in itself a ground for prohibition. But it is a circumstance which may support the inference that the tribunal is applying the wrong test or is not in reality satisfied of the requisite matters. If there are other indications that this is so or that the purpose of the function committed to the tribunal is misconceived it is but a short step to the conclusion that in truth the power has not arisen because the conditions for its exercise do not exist in law and in fact."

37 Without further consideration of what was said in *Melbourne Stevedoring*, the formulation of the criterion which is relied upon by the appellant may be accepted for present purposes. But, as will appear, much depends upon the particular circumstances disclosed by the written statement required by s 430 of the Act. In this case, the determination by the Tribunal was not irrational or illogical as the appellant contends.

The Tribunal's reasons

38 The Tribunal was required by s 430 of the Act to prepare a written statement setting out its decision on the review, "the reasons" for that decision and "the findings on any material questions of fact", and referring to "the evidence or any other material" on which those findings were based. In *Minister for Immigration and Multicultural Affairs v Yusuf*, Gleeson CJ said of s 430[19]:

> "It is impossible to read the expression 'the findings' as meaning anything other than the findings which the Tribunal has made. By setting out its findings, and thereby exposing its views on materiality, the Tribunal may

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16 (1999) 197 CLR 611 at 657 [146].

17 (1953) 88 CLR 100 at 119.

18 (1953) 88 CLR 100 at 120.

19 (2001) 206 CLR 323 at 331-332 [10]. See also at 338 [34]-[35] per Gaudron J, 345-346 [67]-[69] per McHugh, Gummow and Hayne JJ, 392 [217] per Callinan J.

> disclose a failure to exercise jurisdiction, or error of a kind falling within a ground in s 476(1) other than s 476(1)(a), or may provide some other ground for judicial review. There may be cases where it is proper to conclude that the Tribunal has not set out all its findings. The consequences that might follow are not presently in issue. No one suggests that the present are such cases. But all the Tribunal is obliged to set out is such findings as it has made."

39 We turn now to consider the terms of the decision of the Tribunal respecting the appellant reflected in the written statement furnished under s 430. This is a document of 21 pages.

40 The Tribunal found that the appellant is a citizen of Sri Lanka who arrived in Australia on 19 March 1995 on a two month visa. He was 27 years of age at the time of the decision of the Tribunal. The appellant claims membership of a wealthy Buddhist family. After his arrival in this country, he obtained a temporary resident visa which was twice extended, the second extension being until 31 July 1997. On 25 June 1997, more than two years after arriving in Australia, the appellant applied for refugee status. In that application he claimed that he had been taken into custody in Sri Lanka and tortured for two months because he had given accommodation to two Tamils who were members of the Liberation Tigers of Tamil Eelam ("the LTTE"). The appellant said that after his release from custody, instead of reporting to the police as required, he fled to Australia.

41 The appellant's claims were further developed in written submissions to the Department of the Minister, written submissions to the Tribunal, and oral evidence given to it on two occasions.

42 In the Tribunal's statement of reasons, consideration in turn was given to the claims made by the appellant in this sequence. Thereafter, in the section of the written statement headed "FINDINGS AND REASONS", and under the sub-heading "The applicant's credibility", the Tribunal said:

> "The Tribunal finds that the [appellant's] claims in his statement to the Department of Immigration, his written statement to the Tribunal and his oral evidence given at hearing were exaggerated, far-fetched and implausible and therefore lacking in credibility. In consideration of the [appellant's] lack of credibility, the Tribunal cannot be satisfied that there is any real chance of the [appellant] being harmed for a Convention reason in Sri Lanka in the foreseeable future.
>
> His claims and evidence were not only far-fetched, but also inconsistent with the independent evidence, and some notable inconsistencies in the

> [appellant's] evidence that suggest the [appellant] has fabricated these claims.
>
> In particular the Tribunal does not accept as credible or plausible the [appellant's] claims and evidence that:
>
> - He was arrested on suspicion of supporting the LTTE as a result of having given residence to two young Tamil men
> - His whole family have 'all been arrested and killed' by the Sri Lankan security forces".

43 The Tribunal then went on to elaborate its conclusions on each of those latter two matters. In the course of dealing with the first, the Tribunal said:

> "The [appellant] confirmed that he was '*very good friends*' with these two Tamils, yet when asked about them, he did not know where they came from; he did not know their surnames; he did not know and had never met their parents; he could not say where their parents resided; he could not say if they had any siblings. His physical description of each of them was extremely ill-defined."

44 In dealing with the second matter, that concerning the fate of the appellant's family, the Tribunal said:

> "In light of:
>
> - the remarkable lack of detail about the circumstances of the arrest and killing of the [appellant's] 'whole family' and;
> - the [appellant's] extreme vagueness about the person who reported these events to him and what that person saw and;
> - the [appellant's] claim that his family was arrested because of his 'escape' from Sri Lanka and his evidence at hearing that he in fact left the country legally and without difficulty
>
> And finally, because the Tribunal has made grave adverse findings … on the [appellant's] credibility in relation to his claims to be of interest to the Sri Lankan authorities, the Tribunal cannot be satisfied that the [appellant's] family have been arrested or killed. The Tribunal is satisfied that there could be any number of reasons for the [appellant's] family to be absent from their home, but whatever the reason, the Tribunal cannot be satisfied it is Convention related."

45 This passage is so expressed as to indicate that the phrase "[i]n light of" is used synonymously with "by reason of" or "because", rather than in a looser sense of "against the general background". The employment of the passive rather than the active voice throughout the statement of reasons is also significant. It may tend to soften the appearance of what are the actual findings by the decision-maker, rather than expressions of opinion. The document is to be read with an appreciation that what the writer was setting out to put down were "the findings on any material questions of fact" required by s 430(1)(c) of the Act. Further, s 65 put the ultimate issue in terms of satisfaction that the criteria for a protection visa were met; if not so satisfied, the Tribunal was obliged to refuse the visa.

46 The ultimate finding by the Tribunal was expressed as follows:

> "At the Tribunal hearing, the overall implausibility of the [appellant's] claim to have been imputed with an LTTE profile was pointed out to him. The [appellant] was given the opportunity to respond to the Tribunal's concerns but has been unable to do so in any meaningful way. Given the significant adverse findings on credibility in relation to the [appellant], the Tribunal cannot be satisfied that the [appellant] has a real chance of being persecuted for a Convention reason in Sri Lanka in the foreseeable future, and is therefore not satisfied that the [appellant's] fear of persecution for a Convention reason is well founded."

47 However, it is an earlier passage in the Tribunal's statement under s 430 of the Act which has attracted the greatest attention in submissions in this Court. There, in what we shall identify as "the critical passage", the Tribunal said:

> "In light of the Tribunal's grave adverse findings on the [appellant's] credibility in relation to his claims to be of interest to the Sri Lankan authorities for any Convention reason, and further, in light of the [appellant's] behaviour after his arrival in Australia, namely his procrastination in making an application for protection and his assorted [and unsatisfactory] explanations for this delay, the Tribunal cannot be satisfied that the [appellant] has been truthful about why he left Sri Lanka or why he does not wish to return.
>
> *In light of the Tribunal's findings* above that the [appellant] thoroughly lacks credibility, *and its findings that the [appellant] has misled the Tribunal* in regard to his claims to fear harm by the Sri Lankan authorities, *it cannot be satisfied with the corroborating evidence given by the [appellant's] witness, and gives no weight to this evidence*." (emphasis added)

48 It will be observed that the phrase "in light of" appears twice in the critical passage. As with the use of the phrase earlier in the statement of reasons, here

also it identifies reasons for conclusions expressed. The Tribunal has found not only that the appellant thoroughly lacked credibility, but also that he had misled the Tribunal; that is to say, that the appellant had lied.

49 In a dispute adjudicated by adversarial procedures, it is not unknown for a party's credibility to have been so weakened in cross-examination that the tribunal of fact may well treat what is proffered as corroborative evidence as of no weight because the well has been poisoned beyond redemption. It cannot be irrational for a decision-maker, enjoined by statute to apply inquisitorial processes (as here), to proceed on the footing that no corroboration can undo the consequences for a case put by a party of a conclusion that that case comprises lies by that party. If the critical passage in the reasons of the Tribunal be read as indicated above, the Tribunal is reasoning that, because the appellant cannot be believed, it cannot be satisfied with the alleged corroboration. The appellant's argument in this Court then has to be that it was irrational for the Tribunal to decide that the appellant had lied without, at that earlier stage, weighing the alleged corroborative evidence by the witness in question. That may be a preferable method of going about the task presented by s 430 of the Act. But it is not irrational to focus first upon the case as it was put by the appellant.

50 The appellant's witness referred to in the passage set out above, Mr Lalanantha Kadigamuwa, had given evidence to the Tribunal on 29 July 1999. The Tribunal, earlier in its reasons, described that evidence as follows:

> "He stated that he was a flight engineer for the Sri Lankan Airforce based in Ratmalana. He left the Airforce on 15 April 1995 because he did not want to be involved in killing and because he feared for his own safety. He arrived in Australia on 22 July 1997 as a student. The witness stated that he heard about the [appellant] for the first time in November 1994. He used to go to the Temple once a month and he was approached by a Buddhist Monk [whose] name he cannot remember. The witness stated that the Monk asked him for assistance because the witness had assisted people to be released in the past. In 1991-92 he assisted JVP suspects to be released from custody. He stated that he used his influence and contacts. The witness stated that the Monk told him that the [appellant] had been arrested because he gave residence to LTTE suspects.
>
> The witness stated that he tried to locate the [appellant] and after about two weeks found out he was being held in Colombo Fort Army Camp. The witness stated that he spoke to his commanding officer and his commanding officer used his influence to have the [appellant] released. The witness stated that he went to the army camp with his commanding officer and was accompanied by the [appellant's] father and the Monk. They arranged for the [appellant] to be released.

> The witness stated that the [appellant] could not walk properly, his face was damaged, he had no teeth and his lips were damaged. The [appellant] was released. The witness did not see the [appellant] after this. The witness stated that he was told by one guard that the [appellant] was arrested for assisting the LTTE, while another guard said he had been arrested for giving residence to the LTTE.
>
> The Tribunal asked the witness how he came to know that the [appellant] is in Australia. The witness stated that he met a friend called Ranjith at a party and people were asking the witness about the current situation in Sri Lanka which he said was bad. The witness said to these people that he had helped some people get released from custody and he mentioned the name of the [appellant]. Ranjith then told the witness that the [appellant] was a friend here in Australia."

51 The Tribunal, after stating that it gave no weight to this evidence, went on to refer to the evidence of two other persons. There had been supplied a letter from the appellant's dentist stating that injuries to him which she had observed could have been the result of an assault upon the appellant. The Tribunal said it could not be satisfied that the injuries in question were sustained for a Convention related reason, in light of what it said was the "ambiguous statement" by the dentist as to how the injuries were sustained. The Tribunal further declared that it could not give weight to a written report from a medical practitioner in Australia stating that the appellant had had surgery for a right inguinal hernia, not a common occurrence in 27-year-old persons such as the appellant. The Tribunal discounted the medical report for its reliance upon assertions by the appellant as to the circumstance in which the hernia had been sustained.

52 The decision of the Tribunal has not been shown to have been, in the sense propounded by the appellant, illogical, irrational, or lacking a basis in findings or inferences of fact supported on logical grounds. To a significant degree the appellant's failure follows from rejection of the construction placed by the appellant upon the critical passage in the Tribunal's statement of reasons. That construction also was relied upon to found a submission that the reasoning of the Tribunal raised a reasonable apprehension in the mind of a hypothetical reasonable observer that the Tribunal had not brought an impartial mind to the proceedings. There is no substance in that submission.

Fact and law

53 In addition to controverting the submissions for the appellant, as detailed above, the Minister urged the rejection of the appellant's claims to relief under s 75(v) of the Constitution and that this be done by treating distinctions between legal and factual errors as providing the decisive discrimen. The Minister

submitted that the "ultimate" question for the Tribunal was its satisfaction (or lack of it) respecting the appellant's well-founded fear of persecution for a Convention reason, whereas at the "lower level" there were questions of "primary fact". Further, it was submitted that (i) want of logic in making findings of such primary facts does not constitute an "error of law" and (ii) the presence of an "error of law" is essential for a finding of jurisdictional error for s 75(v).

54 The introduction into this realm of discourse of a distinction between errors of fact and law, to supplant or exhaust the field of reference of jurisdictional error, is not to be supported. The "jurisdictional fact" which supplies the hinge upon which a particular statutory regime turns may be so identified in the relevant law as to be purely factual in content. It was to prevent litigation directly on such questions of fact that legislatures stipulated the opinion of the decision-maker as to specified matters[20]. That in turn led the courts to treat the formation of the statutory state of satisfaction as "reasonable" and thus to posit some criterion for the assessment of the factual elements which went to supply that state of satisfaction. For example, the law in question in *Melbourne Stevedoring*[21] conditioned the power of the Australian Stevedoring Industry Board to cancel or suspend the registration of an employer upon the Board's satisfaction that the employer was "unfit to continue" to be so registered. The decision was that the facts disclosed no basis for supposing such unfitness and an order for prohibition was made. That conclusion was reached without recourse to distinctions between errors of law and those of fact.

55 In various areas of the law, there is a critical line drawn between factual and legal matters. The distinction between law and fact has informed the functions of judge and jury. It has been of central importance, both for the conduct of trials at *nisi prius* and the detection of reviewable jury error under the old appellate processes of the courts of common law. The matter is discussed by Jordan CJ in *McPhee v S Bennett Ltd*[22]. Rights of appeal have been conferred by statute from the decisions of courts and tribunals but only in respect of what are identified in the statute as errors of law. The various pieces of New South Wales legislation considered in *Azzopardi v Tasman UEB Industries Ltd*[23] and, more recently, in *Maurici v Chief Commissioner of State Revenue*[24] provide two examples.

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20 *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385 at 403.

21 *Stevedoring Industry Act* 1949 (Cth), s 23.

22 (1934) 52 WN (NSW) 8 at 9.

23 (1985) 4 NSWLR 139.

24 (2003) 77 ALJR 727; 195 ALR 236.

56 In *Hayes v Federal Commissioner of Taxation*[25], to which the Minister referred, the right of "appeal" to this Court given from decisions of a Taxation Board of Review was confined to decisions which "involve[d]" a question of law[26]. Thereafter, s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth) provided for an "appeal" to the Federal Court "on a question of law" from a decision of the Tribunal. Such provisions have occasioned difficulty where the fact-finding process appears to have miscarried but, it is said, without engendering any error of law.

57 The Minister's reliance upon what was said by Mason CJ in *Australian Broadcasting Tribunal v Bond*[27] was misplaced. Mason CJ there was construing those of the grounds of review of decisions, specified in s 5 of the ADJR Act, in particular that the decision "involved an error of law", which might embrace complaints as to fact finding. The Court was not considering notions of jurisdictional error elaborated in the decisions given under s 75(v) of the Constitution. Section 5 is constructed with a scope which spans more than jurisdictional error. Thus, for example, it is a ground under s 5(1) that "the decision involved an error of law" (par (f)), yet as *Muin v Refugee Review Tribunal*[28] illustrates, there may be errors of law within jurisdiction and so beyond the constitutional writs. In any event, as the judgments in *Minister for Immigration and Multicultural Affairs v Rajamanikkam*[29] illustrate, what was said in *Bond* respecting erroneous fact finding and review under s 5 of the ADJR Act may give rise to differences of opinion in this Court.

58 The critical nature of the line drawn in the above areas of the law between factual and legal matters varies with the purposes it serves. The distinction between the functions of judges and juries is one thing, the limitation placed by legislatures upon statutory "appeals" from specialist tribunals and decision-makers, and the scope of judicial review procedures created by statutes, are

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25 (1956) 96 CLR 47. See also *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14.

26 *Income Tax and Social Services Contribution Assessment Act* 1936 (Cth), s 196(1).

27 (1990) 170 CLR 321 at 355-360.

28 (2002) 76 ALJR 966 at 973 [21], 979 [56], 997 [182]-[183], 1008-1009 [251]; 190 ALR 601 at 609, 616, 642, 659.

29 (2002) 76 ALJR 1048 at 1053-1054 [30]-[34], 1056-1057 [48]-[52], 1063-1064 [99], 1066 [111], 1067-1068 [114]-[118], 1076 [158]; 190 ALR 402 at 408-409, 412-413, 422-423, 426, 427-428, 439.

others. Section 75(v) of the Constitution, as mentioned above and as emphasised in recent decisions of this Court, stands in a special position in the national legal structure.

59 In *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*[30], we emphasised that the distinction between jurisdictional and non-jurisdictional error which informs s 75(v) manifests the separation between the judicial power and the legislative function of translating policy into statutory form and the executive function of administration of those laws. In this Australian constitutional setting, there is added significance to the point that the English common law courts "always disowned judicial review for error of fact" and "jurisdictional fact review proceeds on the basis that it is a jurisdictional error of law for someone to exercise public power in the absence of a jurisdictional fact"[31].

60 These considerations militate against acceptance of the Minister's submissions. On the other hand, they also caution against the introduction into the constitutional jurisprudence attending s 75(v) of broader views of the scope for consideration of factual error in "appeals" on questions of law which are created by statute[32], or in legislatively created systems of judicial review. There, what is engaged are principles of statutory, not constitutional, construction.

The Federal Court appeal

61 The provisions of s 5 of the ADJR Act provided an apparent basis from which s 476 of the Act was constructed. There remains for consideration the appellant's appeal against the Full Court decision. There the construction of s 476 loomed large.

62 The appellant submits that the Full Court should have held that Branson J had erred in not holding that the grounds in pars (b) and (c) of s 476(1) of the Act were made out and that their operation was not curtailed or excluded by par (b) of s 476(2). The Full Court gave its decision shortly before this Court decided

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30 (2003) 77 ALJR 699 at 712 [76]-[77]; 195 ALR 502 at 520. See also the judgments of Gleeson CJ, Gummow, Kirby and Hayne JJ and Gaudron J respectively in *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 152-153 [43]-[44], 157 [56].

31 Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 205.

32 cf *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 151.

Minister for Immigration and Multicultural Affairs v Yusuf[33]. The appellant relies upon what was said in the joint judgment in *Yusuf* respecting pars (b) and (c)[34] as supporting his argument that the case he makes for jurisdictional error in the s 75(v) proceeding also would fall within pars (b) and (c) of s 476(1), so that the appeal should be allowed.

63 The text of sub-ss (1) and (2) of s 476 was as follows:

"(1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

(a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;

(b) *that the person who purported to make the decision did not have jurisdiction to make the decision*;

(c) *that the decision was not authorised by this Act or the regulations*;

(d) that the decision was an improper exercise of the power conferred by this Act or the regulations;

(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;

(f) *that the decision was induced or affected by fraud or by actual bias*;

(g) that there was no evidence or other material to justify the making of the decision.

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

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33 (2001) 206 CLR 323.

34 (2001) 206 CLR 323 at 349-352 [78]-[83].

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

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

64 The Minister supports as sufficient answer to the appellant's reliance upon pars (b) and (c) of s 476(1) the interpretation placed by the majority of the Full Court upon par (b) of s 476(2). Hill J concluded[35] that "the lack of rationality in the Tribunal's decision" did not provide "a relevant ground of review not excluded by s 476(2) of the Act". Stone J, in coming to the same conclusion, saw "no reason to give the words of s 476(2)(b) a meaning other than their conventional meaning or to be unduly technical in their interpretation"[36]. On the other hand, Finkelstein J said[37]:

> "Section 476(2)(b) would not take a case of flawed logic outside s 476(1). Section 476(2)(b) is concerned solely with *Wednesbury* unreasonableness. The paragraph is a paraphrase of Lord Greene's statement of the relevant principle. Moreover, it is concerned only with discretionary decisions, and decisions made by the tribunal are not of that character."

65 What became s 476 first appeared as s 166LB, within Pt 4B inserted by s 33 of the *Migration Reform Act* 1992 (Cth). Section 166LK (later s 485) evinced an intention to remove what otherwise would have been the conferral of jurisdiction upon the Federal Court by the ADJR Act, and the availability of the grounds of review spelled out in s 5 of the ADJR Act.

66 Section 5 of the ADJR Act had been so drawn as to stipulate as discrete grounds of review both of the paragraphs which later appeared in s 476(2). Breaches of the rules of natural justice were the subject of par (a) of s 5(1) of the ADJR Act. Exercises of power "so unreasonable that no reasonable person could have so exercised the power" were specified in par (g) of s 5(2) as instances of an "improper exercise" of power which was the ground provided in s 5(1)(e) of the ADJR Act. The phrase in par (g) of s 5(2), like that later found in par (b) of

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35 (2001) 109 FCR 424 at 428.

36 (2001) 109 FCR 424 at 446.

37 (2001) 109 FCR 424 at 433.

s 476(2), followed the words used by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[38].

67 This is not the occasion to explore fully what later came to be called "*Wednesbury* unreasonableness". However, several matters may be noted. First, in *Wednesbury*, the plaintiff owner and licensee of the cinema in that town in Staffordshire, sought a declaration that the condition (attached to its licence in exercise of a statutory power to impose "such conditions as the authority think fit to impose") "was ultra vires and unreasonable"[39]. The plaintiff drew comfort and support from earlier authorities respecting cinema licences, including *R v Burnley Justices. Ex parte Longmore*[40]. There the Divisional Court ordered that prohibition go as to that part of conditions attached by the justices to a licence issued under the *Cinematograph Act* 1909 (UK), which stated that no film was to be exhibited to which objection was taken by any three of the licensing justices. Avory J said[41] that the condition was "so uncertain in its operation that it is invalid"[42], and added[43]:

> "It is unreasonable because the licensee might be prohibited by three Justices on one day from exhibiting a particular film, and permitted to exhibit it on the next day by three others, and then prohibited again on the third day by the first three Justices."

Thus, the reasoning of Lord Greene MR did not appear in a void; indeed, what he said respecting the exercise of broadly drawn statutory discretions may be traced at least as far back as the decision of the House of Lords in *Sharp v Wakefield*[44], which then was applied in the early years of this Court in *Randall v Northcote Corporation*[45].

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38 [1948] 1 KB 223 at 230.

39 [1948] 1 KB 223 at 223, 224.

40 (1916) 85 LJ (KB) 1565.

41 (1916) 85 LJ (KB) 1565 at 1569.

42 cf the remarks by Kitto J in *Television Corporation Ltd v The Commonwealth* (1963) 109 CLR 59 at 70.

43 (1916) 85 LJ (KB) 1565 at 1569.

44 [1891] AC 173 at 179-180.

45 (1910) 11 CLR 100 at 105-106, 110-111.

68 Secondly, there is an affinity between *Sharp v Wakefield* and the well-known statement by Dixon, Evatt and McTiernan JJ in *House v The King*[46] respecting appeals from the exercise of judicial discretion:

> "It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

69 Thirdly, the threads later were drawn together by Dixon CJ when he said in *Klein v Domus Pty Ltd*[47]:

> "This Court has in many and diverse connexions dealt with discretions which are given by legislation to bodies, sometimes judicial, sometimes administrative, without defining the grounds on which the discretion is to be exercised and in a sense this is one such case. We have invariably said that wherever the legislature has given a discretion of that kind you must look at the scope and purpose of the provision and at what is its real object. If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion. But within that very general statement of the purpose of the enactment, the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case."

70 It may readily be accepted that in a given case there may be a degree of overlapping between two or more of the grounds specified in s 476(1) of the Act. Further, a breach of the rules of natural justice that occurred in connection with the making of a decision may also mean, for example, that there has been a procedural failure identified in par (a) of s 476(1). If that be so, the subjection of s 476(1), by its opening words, to s 476(2), denies the ground of review otherwise provided by par (a) of s 476(1).

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46 (1936) 55 CLR 499 at 505.

47 (1963) 109 CLR 467 at 473.

71 The ground in s 476(1) to which par (b) of s 476(2) has apparent affinity is the reference in par (d) of s 476(1) to improper exercises of power. That is to be construed as required by s 476(3). This states:

> "(3) The reference in paragraph (1)(d) to an improper exercise of a power is to be construed as being a reference to:
>
> (a) an exercise of a power for a purpose other than a purpose for which the power is conferred; and
>
> (b) an exercise of a personal discretionary power at the direction or behest of another person; and
>
> (c) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
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> but not as including a reference to:
>
> (d) taking an irrelevant consideration into account in the exercise of a power; or
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> (e) failing to take a relevant consideration into account in the exercise of a power; or
>
> (f) an exercise of a discretionary power in bad faith; or
>
> (g) any other exercise of the power in such a way that represents an abuse of the power that is not covered by paragraphs (a) to (c)."

72 Cases may be imagined where an exercise of power, not "improper" for s 476(1)(d) as it fell outside the class limited by s 476(3), nevertheless was said to produce a decision "not authorised" by the Act because it involved an exercise of a power so unreasonable that no reasonable person could have so exercised the power. Such a decision would not attract review on the ground provided, by par (c) of s 476(1), that it was "not authorised". This would be by reason of the operation upon par (c) of s 476(2)(b).

73 The case put by the appellant is not one of vitiation of an outcome, namely the supposed exercise of a discretion, the genus identified in *Klein v Domus Pty Ltd*[48], of which what has been called *Wednesbury* unreasonableness is a species.

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48 (1963) 109 CLR 467 at 473.

Rather, the appellant's case is that, as it is put in cases such as *Melbourne Stevedoring*[49], the power (in truth, the duty to grant or refuse the protection visa) had not arisen because the conditions for its exercise did not exist in law. The conventional meaning of the terms used in par (b) of s 476(2) is inapt to identify the latter as well as the former.

74 The appellant is correct in the submission that the majority of the Full Court erred in treating par (b) of s 476(2) as an answer to any case he might otherwise have had under s 476(1). However, that does not mean that the appeal must succeed. The reasoning which led to the rejection of the case of jurisdictional error in the s 75(v) application is fatal also to the reliance upon pars (b) and (c) of s 476(1).

75 The appellant also relies on the ground of actual bias provided by par (f) of s 476(1). That ground, *a fortiori* to that of apprehended bias already mentioned, must fail.

Conclusions

76 In Matter No S20 of 2002, the application should be dismissed with costs, including any reserved costs. In Matter No S106 of 2002, the appeal should be dismissed with costs.

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49 (1953) 88 CLR 100 at 120.

77 KIRBY J. The issue in these proceedings is whether serious illogicality, disclosed in the reasons of a statutory tribunal, entitles a person adversely affected by the tribunal's decision to have that decision set aside.

78 It is possible to find judicial opinions to sustain decisions made by repositories of statutory power against correction, even where such decisions are "perverse", "illogical" or "marred … by patent error", so long as they can be classified as decisions about the facts[50]. I do not accept that view[51]. I do not regard it as part of the law of Australia. No decision of this Court so holds.

79 In these proceedings all of the judges of the Federal Court of Australia were critical of the reasoning of the Refugee Review Tribunal ("the Tribunal"). However, the primary judge and a majority of the Full Court of the Federal Court, felt unable to afford relief[52]. That Court was limited to the grounds of review stated in the *Migration Act* 1958 (Cth) ("the Act")[53].

80 In this Court there is a challenge, by an appeal brought by special leave, against the judgment that followed the majority conclusion below. In addition, application is made for constitutional writs and associated relief, invoking this Court's original jurisdiction pursuant to s 75(v) of the Constitution. That provision is not subject to the statutory restrictions that limited the powers of the judges of the Federal Court.

81 Where the reasons of a tribunal established by the Parliament to make decisions and exercise powers of the kind in question, disclose an irrational, illogical or perverse process of reasoning, it may sometimes be concluded that the "decision" thereby made does not conform to the requirements of the Act. It may involve jurisdictional error. Under the provisions of the Act as then applicable, such error could authorise relief from the Federal Court. More importantly, it will authorise relief from this Court under its constitutional mandate to hold all officers of the Commonwealth answerable to the Constitution and to the other laws pursuant (or subject) to which they exercise their powers.

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50 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 ("*Azzopardi*") at 155-157.

51 *Azzopardi* (1985) 4 NSWLR 139 at 151; cf *Donnelly v Victims Compensation Fund Corp* (1995) 82 A Crim R 55 at 63; *X v The Commonwealth* (1999) 200 CLR 177 at 218-219 [136]. See also *Hill v Green* (1999) 48 NSWLR 161 at 174-175 [72], 176-177 [85]-[86], 209-213 [229]-[244].

52 (2001) 109 FCR 424 per Hill and Stone JJ, Finkelstein J dissenting.

53 See s 476 as it stood before the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth).

The facts

82 *Clarifying the appellant's arguments*: The general history of the proceedings is stated in the reasons of McHugh and Gummow JJ[54] ("the joint reasons"). Their Honours set out relevant findings of the Tribunal and provisions of the Act[55]. I will not repeat any of this material. However, because the basis of the argument of illogicality or irrationality (as well as of bias) upon which this Court was asked to intervene is not there elaborated, it is necessary for me to refer to further evidence in order to explain my contrary conclusion. In referring to the parties, I will accept the descriptions used in the joint reasons[56].

83 *Rejection of the appellant's credibility*: The appellant is a national of Sri Lanka of Singhalese ethnicity. Some time after his arrival in Australia he sought a protection visa under the Act invoking this country's obligations under the Refugees Convention[57]. His application was based on a claim that he had a well-founded fear of persecution if he were to return to Sri Lanka, because officers of the government of that country had imputed to him a political opinion of support for the Liberation Tigers of Tamil Eelam ("LTTE"). The LTTE are an armed revolutionary group that sought to establish a separate Tamil State in Sri Lanka.

84 Before the delegate of the Minister, and again before the Tribunal, the appellant claimed that his troubles arose out of his friendship with two young men, Ravi and Babu. He met them during a cooking course that he attended at a hotel in Colombo. For a time he provided them with accommodation at his parental home. The appellant stated that, in August 1994, the home had been surrounded by security forces and he, Babu and Ravi had been taken first to a local police station and then to police headquarters in Colombo. It transpired that Babu and Ravi were of Tamil ethnicity. The appellant was accused of harbouring members of the LTTE. Later the appellant was transferred to Army headquarters at Colombo Fort. He was accused of betraying his race. He

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54 At [22]-[25].

55 Joint reasons at [32], [63].

56 Joint reasons at [23]. The Act, s 91X, provides that the Court must not publish the appellant's name. In the absence of a direct challenge to the validity of this provision, it will be assumed that the section is constitutionally valid: see *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454 ("*Plaintiff S157/2002*") at 464 [44]; 195 ALR 24 at 37.

57 Convention relating to the Status of Refugees done at Geneva on 28 July 1951, ATS 1954 No 5, now read with the Protocol relating to the Status of Refugees done at New York on 31 January 1967, ATS 1973 No 37. See the Act, s 36.

claimed that he was tortured and violently assaulted. He stated that he was only released in December 1994 following the intervention of a Buddhist monk. Being in fear of further persecution, he fled Sri Lanka coming to Australia. He later heard that his family had been taken into custody. He had no contact with his family after that time and inferred that they may have been killed.

85 The Tribunal rejected the appellant's evidence that he had been detained and tortured in Colombo by agents of the Sri Lankan government. It found that there were internal inconsistencies in his evidence which, it said, was also incompatible with independent information before the Tribunal. It concluded that it could not be "satisfied that the [appellant] has been truthful about why he left Sri Lanka or why he does not wish to return".

86 It was at this point in its reasons that the Tribunal expressed a concluded opinion against the veracity of the appellant's claim under the Act. It did so before considering three items of supportive evidence which the appellant had tendered to confirm his testimony. These were (a) a dental report; (b) a surgeon's report; and (c) a report of an independent witness affirming the circumstances of his release from army custody.

87 *Treatment of the confirmatory evidence*: The Tribunal made reference to the corroborating evidence dismissing it with a curt explanation:

> "In light of the … findings … that the [appellant] thoroughly lacks credibility, and … that [he] has mislead the Tribunal in regard to his claims to fear harm by the Sri Lankan authorities, [the Tribunal] cannot be satisfied with the corroborating evidence … and gives no weight to this evidence."

88 So far as items (a) and (b) are concerned, there is at least a superficial logic to the way the Tribunal reasoned. Thus, where the opinion of a medical specialist is dependent upon factual assumptions provided in a patient's history, such an opinion will only be as acceptable as the history on which it is based[58]. However, as Finkelstein J pointed out in the Full Court[59], the injuries and complaints recorded by the dentist and the surgeon (whose honesty was not impugned) were confirmatory of the history given by the appellant to the Tribunal concerning torture and gross assaults whilst he was in official custody at Colombo Fort.

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58 *Ramsay v Watson* (1961) 108 CLR 642 at 647-649.

59 (2001) 109 FCR 424 at 433-434 [34]-[39].

89 The dentist, for example, had seen the appellant in December 1994, immediately after his release. He described fractures of the front six teeth requiring their extraction, complete rest and further dental treatment. The dentist also noted "wounded and swollen hands", "swelling in lips", "depression" and "post-traumatic stress disorder". The Tribunal rejected the last-mentioned diagnoses as outside the specialty of a dentist. The record of the dentist's observations of the extensive dental injuries could not be so easily dismissed.

90 It is possible that, walking down the hill to the city from Colombo Fort, the appellant might have fallen over, suffered a random assault, bitten on a very large object or been struck in the face by a cricket ball hit for six. However, the peremptory dismissal of such significant injuries, recorded at a point in time so close to the events of assault and torture alleged by the appellant, happening in a country in which so many citizens have been killed or injured in communal conflict, appears unsatisfactory. With all respect to the contrary view, it amounts to a failure in the process of fact-finding by the repository of the power. It cannot be explained on the footing that the appellant's credibility had otherwise been so weakened that the corroborative evidence deserved no weight at all. Metaphors about poisoned wells[60] are, in my opinion, less telling in a case such as the present than the objective evidence of six fractured or missing teeth which a specialist declared to be the likely "result of an assault"[61]. Assaults in official custody were precisely what the appellant complained of.

91 To similar effect is the Tribunal's treatment of the surgery which the appellant underwent in 1999 in Australia to repair a right inguinal hernia. The surgeon recorded that "hernias are not a common occurrence at [the appellant's] age"[62]. He described the recorded history as indicative of a "severe trauma" that could have produced the abdominal wall injury found by him on operation. Therefore, the occurrence of the hernia was consistent with the appellant's claim of the blows that he said he had suffered when struck by rifle butts administered to his body by the Sri Lankan security forces.

92 Again, it is possible that such an injury might have occurred in some extraneous way: straining in the Bentota surf or in some unidentified work effort in Australia. But, at the very least, the fact of his age suggested the need for some explanation as to why the condition found on operation was given no weight but dismissed because of the earlier recorded lack of confidence in the appellant's credibility.

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60 Joint reasons at [49].

61 (2001) 109 FCR 424 at 434 [37].

62 (2001) 109 FCR 424 at 434 [38].

93 In this field, as in others, tribunals and courts need to be guarded in their reliance upon their ability to assess the truthfulness of a witness from that witness' appearance alone[63]. Yet here the Tribunal seems to have felt able to do just that. In essence, it reached a conclusion, adverse to the appellant, on the basis of its estimate of his untruthfulness and the "plausibility" of his story. Because that estimate was adverse to the appellant the Tribunal felt entitled to reject out of hand reports about his condition given by the dentist and surgeon. A moment's thought should have convinced the Tribunal that this was a highly illogical, if not an irrational and perverse, way of going about the process of decision-making. A proper approach to that process, as mandated by the Act, would have required weighing any impressions, and perceived defects, in the appellant's testimony, together with any supporting evidence before coming to a final conclusion. That is not the way this Tribunal went about reaching the decision entrusted to it.

94 The appellant makes a similar complaint in relation to the Tribunal's approach to the evidence of the independent witness whom he called to affirm his detention and to describe the circumstances of his release. At the time this witness had been a flight engineer in the Sri Lankan Airforce. He was stationed at a base near Army headquarters at Colombo Fort. He was approached by a Buddhist monk from a nearby temple and asked to help obtain the appellant's release. According to this witness' evidence, he was eventually successful in his endeavours, seeing the appellant for the first time on that occasion. The witness noticed that the appellant appeared to have been beaten. His face appeared swollen and cut. He had many teeth missing and he could not walk properly[64]. The witness affirmed that he had never spoken with the appellant and did not previously know him. He only became aware of the appellant's proceedings while studying to be a pilot in Melbourne. The witness agreed to give evidence to the Tribunal concerning his part in the appellant's release. Save as described, he said that the appellant was a stranger to him.

95 The evidence of this witness appeared credible. Yet the Tribunal, without mentioning him or his evidence at all, gave it no weight. It was simply swept aside with a general observation concerning the Tribunal's assessment of the appellant's lack of credibility and the implausibility of his story[65].

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63 *State Rail Authority of NSW v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 327-330 [87]-[88]; 160 ALR 588 at 615-618; *Fox v Percy* (2003) 197 ALR 201 at 209-210 [30]-[31], 238-239 [148].

64 (2001) 109 FCR 424 at 434 [40].

65 (2001) 109 FCR 424 at 437 [50].

96 There are a number of other serious defects in the reasoning of the Tribunal. They are mentioned in the opinions of the judges of the Federal Court. I will not record them all. The foregoing is enough to indicate why the appellant had a strongly arguable complaint about the illogical process of reasoning by which the "decision" of the Tribunal had been reached.

97 *The approach of this Court*: As Finkelstein J remarked in the Federal Court: "If there were a general right of appeal from a decision of the Tribunal, [its] findings would not stand and its decision would be set aside"[66]. His Honour acknowledged that there was no such right. Nor is there such a right in this Court. But if this Court were to reject the appellant's claim for relief (either in his appeal or in his constitutional application), it should, in my view, do so only if the defects in the Tribunal's reasons do not, in law, give rise to relief (and the consequential "decision" thus remains one of the kind for which the Act provides). It should not do so by affirming that the Tribunal's reasoning is acceptable or was open to it, or still less, that it is convincing. Least of all should it affirm that the failure by the Tribunal to address properly the confirmatory evidence called by the appellant meets the standards of decision-making contemplated by the Parliament.

The claims of bias

98 *Actual bias*: Before the primary judge in the Federal Court (Branson J), the appellant advanced a number of arguments in support of his application for relief. One of these was that the decision was affected by actual bias[67]. The appellant framed his claim in this way because, under the Act, this was the only available basis for relief in that Court on the ground of bias[68].

99 The primary judge dismissed the claim of actual bias, relying on the distinction between bias of that order and "mere error, or even wrong-headedness, whether in law, logic, or approach"[69]. Whilst her Honour acknowledged that "the approach taken by the Tribunal to the evidence before it … created … a sense of unease as to the willingness of the Tribunal to be persuaded of the truth of the [appellant's] story", she was not persuaded that

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66 (2001) 109 FCR 424 at 437 [51].

67 Reasons of the primary judge: [2000] FCA 1025 at [25].

68 The Act, s 476(1)(f).

69 *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 127. See also *Li v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 125 at 133-134 [42].

actual bias had been proved. The Full Court upheld this conclusion[70]. In my opinion, that was the correct result on the actual bias issue. The mere fact that a reviewing court does not agree with the reasoning of an administrative decision-maker, or regards such reasoning as illogical, irrational or even perverse, is not, in itself, sufficient to establish actual bias.

100 *Inferred bias*: It is convenient to deal immediately with the bias aspect of the constitutional proceedings, where this Court may also afford relief on the ground of *imputed* or *inferred* bias. The requirements for that form of bias are more readily established[71]. The question is whether a reasonable observer, knowing the relevant facts, might conclude that the decision-maker might have been affected by pre-judgment or prejudice against the person complaining[72].

101 In the Full Court, Stone J was of the view that if "the criterion … were *apprehended* bias the appellant would be on strong ground"[73]. However, a manifestly defective or illogical approach to the consideration of evidence, and even irrationality in the reasons for a conclusion, may create an impression of confusion, lack of care or incompetence. Such an approach does not necessarily demonstrate imputed bias. An allegation of bias, in this sense, involves the appearance that the mind of the decision-maker was committed to a conclusion *already formed* and incapable of alteration. Instead, as I read the Tribunal's reasons, it proceeded in an unsatisfactory way, misconceiving the fact-finding function or the nature of the appellant's case. This was a proper matter for complaint. But it did not amount to bias against the appellant, actual or inferred. This conclusion permits me to confine my attention to the remaining grounds relied upon.

The claims of seriously illogical reasoning

102 *Illogicality and the resulting "decision"*: The appellant presented his remaining arguments in different ways. Before the primary judge he asserted breaches of the rules of natural justice, errors of law and extreme (or *Wednesbury*) unreasonableness[74]. By the time his appeal reached the Full Court[75]

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70 (2001) 109 FCR 424 at 426 [1], 444 [84].

71 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 537-538 [95], 548-549 [134]-[135], 564 [184]-[185].

72 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 158 [90].

73 (2001) 109 FCR 424 at 442 [79] (original emphasis).

74 After *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230, 234 per Lord Greene MR.

his submissions were further refined. The appellant brought to the fore his complaint about the suggested manifest and serious defect in the reasoning of the Tribunal, contending that this had produced a flawed "decision", one that was undermined by a reviewable error.

103 Each of the judges of the Federal Court made observations or findings critical of the Tribunal's reasoning. As this criticism constituted the foundation for the appellant's arguments in this Court, it is important to note what their Honours said.

104 *Illogicality: The primary judge*: The primary judge made some highly critical comments regarding the Tribunal's decision. At one stage her Honour said[76]:

> "It seems plain … from the Tribunal's reasons that the Tribunal did not seek to make an assessment of the [appellant's] credibility having regard to all of the evidence and other material before it. Rather, the Tribunal made an adverse assessment of [his] credibility and then turned to consider the evidence of [the independent witness] and the medical and dental reports concerning [him]."

Her Honour further observed[77]:

> "I have grave reservations about the integrity of the fact-finding process engaged in by the Tribunal in this case."

Later she remarked[78]:

> "The significant errors made by the Tribunal in this case are open to be seen as errors attributable to lack of competence."

105 However, her Honour was of the view that the requirements of the Act and the state of legal authority prevented her from providing relief, given the way the appellant's case was presented[79]:

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75 (2001) 109 FCR 424 at 438 [55], 439 [59]-[60], 444 [85].

76 [2000] FCA 1025 at [18].

77 [2000] FCA 1025 at [21].

78 [2000] FCA 1025 at [34].

79 [2000] FCA 1025 at [36].

> "I conclude with some regret that there is no ground upon which this Court is able to set aside the decision of the Tribunal."

106 *Illogicality: The Full Court*: The judges in the Full Court expressed similar conclusions about the Tribunal's reasoning. Thus the presiding judge, Hill J, said[80]:

> "I should say that I do agree that it is difficult to see how the Tribunal could have reached the conclusion it did on rational grounds".

107 Stone J (who gave the principal reasons for the majority) said[81]:

> "The Tribunal's reasons for its decision are unsatisfactory in a number of ways. The most striking deficiency is the way in which the Tribunal approached the evidence that the appellant put before it."

108 Finkelstein J described the decision of the Tribunal as "flawed"[82]. He analysed the identified defects by reference, amongst other things, to the treatment given to the evidentiary items (a), (b) and (c) previously described in these reasons. He classified "[m]any of the findings made by the Tribunal concerning the 'inconsistencies' in [the appellant's] evidence" as well as the "supposedly 'inconsistent' independent evidence" as "plainly erroneous"[83]. He acknowledged that such erroneous findings of primary fact were not, as such, reviewable under the Act. However, in his Honour's view, "the manner in which the Tribunal dealt with the corroborative evidence stands on a different footing"[84].

109 To suggest that because the appellant was not to be believed *therefore* the evidence of apparently independent witnesses should *also* be disbelieved or rejected involved serious illogicality of reasoning. The conclusion did not follow the premise as a matter of rational deduction[85]. Finkelstein J went on[86]:

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80 (2001) 109 FCR 424 at 428 [16].

81 (2001) 109 FCR 424 at 442 [76].

82 (2001) 109 FCR 424 at 433 [34], 437 [54].

83 (2001) 109 FCR 424 at 437 [51].

84 (2001) 109 FCR 424 at 437 [53].

85 (2001) 109 FCR 424 at 437-438 [54].

86 (2001) 109 FCR 424 at 438 [54].

> "As with the evidence given by [the appellant], the corroborative evidence may be impeached. But unless it were impeached, it could not be ignored. Importantly, in the process of reasoning, the Tribunal was not entitled to pay no regard to the corroborative evidence in the course of deciding whether the evidence of [the appellant] was true or probable and then use its conclusion on that evidence (that it was untrue) to impeach the corroborative evidence. This is what the Tribunal did, to some extent in the case of the two medical reports, and completely in the case of [the independent witness]."

The issues

110 *The legal questions*: The reservations expressed by the judges of the Federal Court concerning the Tribunal's process of reasoning are compelling. Their conclusions, in this respect, should not be lightly dismissed by this Court.

111 Once this point is reached, a number of legal questions are posed. Did the Act, in its form at the relevant time, prevent the Federal Court from giving the appellant relief against the "decision" of the Tribunal founded on such an illogical and irrational process of decision-making? In defence of a lawful standard of decision-making on the part of the Tribunal (as may be imputed to the Parliament in providing for "decisions" under the Act) was there no relief that the Federal Court might give with respect to such a seriously flawed "decision" so as to require it to be made properly? And even if the Act, by its restrictions on judicial review, prevented the Federal Court from intervening, is the appellant entitled to relief from this Court under the Constitution?

112 *Legality and factual merits*: Both proceedings before this Court concern judicial review. The proceedings in the Full Court were an "appeal". However, the appellant was there appealing against the decision of the primary judge, in turn reviewing the Tribunal's decision. Similarly, the application for constitutional writs seeks this Court's review of the legality of the "decision" of the Tribunal member, being an "officer of the Commonwealth" within s 75(v) of the Constitution.

113 In an application for judicial review, the focus is upon the nature and source of the power exercised by the administrative decision-maker who made the impugned decision, as well as the source of the court's power to review that decision and the process by which it was made. The nature and source of the official's power will usually be deduced from the enactment pursuant to which he or she has acted. By contrast, the review can be conducted pursuant to the

common law, or a general judicial review statute[87], or pursuant to the statute that confers the power on the official[88], or the Constitution (in proceedings for the constitutional writs).

114 Regardless of the supervisory jurisdiction invoked in a particular case, judicial review is said to be limited to reviewing the legality of administrative action. Such review, ordinarily, does not enter upon a consideration of the factual merits of the individual decision. The grounds of judicial review ought not be used as a basis for a complete re-evaluation of the findings of fact[89], a reconsideration of the merits of the case[90] or a re-litigation of the arguments that have been ventilated, and that failed, before the person designated as the repository of the decision-making power[91].

115 The foregoing fundamentals were not challenged before this Court. The limitations inherent in proceedings for judicial review were acknowledged by the appellant. The primary function of the judicature is to declare and enforce the law. Judges do not ordinarily lay claim to any special advantages in administrative decision-making. Furthermore, the grounds of judicial review in the appellant's proceedings in the Federal Court, available under the Act, had been significantly narrowed.

116 As Finkelstein J acknowledged, a wrong finding of fact by an administrative official does not provide a sufficient ground for a court's

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87 Such as the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), which was inapplicable in the present proceedings.

88 It was the Act, in s 476, that supplied the grounds of review in the Federal Court; cf s 37(4)(a) of the *Workers' Compensation Act* 1926 (NSW) providing for "appeal" in "point of law" from decisions of the Workers' Compensation Commission, considered in *Azzopardi* (1985) 4 NSWLR 139 at 141, 151.

89 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 ("*Bond*") at 355-356; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 ("*Guo*") at 597-598.

90 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 ("*Quin*") at 36-38; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 ("*Chan*") at 391; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 ("*Wu Shan Liang*") at 271-272, 291; *Guo* (1997) 191 CLR 559 at 577.

91 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 ("*Yusuf*") at 344 [63], 372 [153]; *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 76 ALJR 1048 ("*Rajamanikkam*") at 1053 [26], 1065 [105]; 190 ALR 402 at 408, 425.

intervention[92]. However, an analysis of the process of fact-finding, and the degree to which findings are referrable to the evidence adduced, may disclose reviewable error. Whether a court is entitled to intervene then depends upon the decision-making and statutory context, as well as the grounds of review that are available. Flaws apparent in fact-finding may, for instance, disclose, or confirm, that the administrator has misunderstood the applicable legal criteria, or otherwise trespassed beyond the jurisdiction or authority conferred by the enactment. It has also been said that the requirement for findings of fact to be based on probative material and logical grounds may be an aspect of natural justice[93].

117 The appellant's case before the Federal Court was that the Tribunal's process of reasoning was irrational, illogical and flawed so as to demonstrate a relevant legal error that enlivened that Court's intervention. However, the majority in the Full Court were of the view that, even if the appellant had established one of the grounds of review in s 476(1), the disclosed error also fell under the "unreasonableness" rubric and therefore relief was foreclosed by the operation of s 476(2)(b) of the Act[94]. A similar result would have followed if the Tribunal's reasoning involved a breach of the rules of natural justice[95].

118 *Jurisdictional error*: The joinder of the appeal and the proceedings in the original jurisdiction of this Court seeking the issue of constitutional writs, has become an unfortunate but not uncommon occurrence. Inevitably, it brings the application of s 75(v) of the Constitution into sharp focus.

119 According to the present doctrine of this Court interpreting s 75(v), a person seeking relief under that provision must establish jurisdictional error in order to secure the issue of the writs of Mandamus or prohibition. Therefore, if the appellant can establish jurisdictional error, he may obtain relief from this Court. This would be either because relief would be available under the Act (pursuant to s 476(1)(b) or (c))[96]; or, if the operation of s 476(2) of the Act precluded such relief, establishing jurisdictional error would entitle the appellant to the issue of the constitutional writs unless some discretionary consideration stood in the way.

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92 (2001) 109 FCR 424 at 437 [51]. See *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77 per Brennan J.

93 *Mahon v Air New Zealand* [1984] AC 808 at 820-821, 838; *Bond* (1990) 170 CLR 321 at 367-368.

94 (2001) 109 FCR 424 at 428 [14], [16], 446 [92]-[93].

95 See the Act, s 476(2)(a).

96 *Yusuf* (2001) 206 CLR 323 at 350-352 [81]-[84].

120 Distinguishing between errors that are jurisdictional and those that are not is a difficult task. Applying that distinction in particular circumstances may yield different answers depending on the perception of the case by different judges. It is not possible to catalogue exhaustively the kinds of error that indicate that a decision-maker has exceeded, or constructively failed to exercise, the jurisdiction conferred, distinguishing clearly those that do not. Moreover, the answer cannot be found through incantations about facts and law. Where the exercise of jurisdiction is conditioned upon a particular factual state, judicial inquiry into the evidence and fact-finding process may be necessary.

121 In *Pearlman v Keepers and Governors of Harrow School*[97], Lord Denning MR alluded to the difficulties of characterisation (in the context of reviewing a decision of an inferior court). His Lordship said:

> "[T]he distinction between an error which entails absence of jurisdiction – and an error made within jurisdiction – is very fine. So fine indeed that it is rapidly being eroded."

The Master of the Rolls went on to comment that, in a particular instance, a court would often have the choice whether to interfere with a decision through an appropriate characterisation of the error invoked by the person seeking relief[98]. Such judicial candour tends to cause discomfort for those who vainly yearn for bright lines and a clear legal rule.

122 Where do these observations leave the principled decision-maker? To the extent that the notion of jurisdictional error is retained without becoming meaningless, the reasons for its retention, and the principles for its proper application, need to be elucidated. In *Re McBain; Ex parte Australian Catholic Bishops Conference* I commented on the legal and constitutional policy that is said to underpin the notion of jurisdictional error[99]:

> "The unsatisfactory distinction between an 'error within jurisdiction', 'jurisdictional error' (including a constructive failure to exercise jurisdiction) and 'non-jurisdictional error' has been noted in many cases. The distinction, always elusive to judges, has been abolished in England. However, it has not been discarded by this Court. The given explanation for its retention … is the separation … between federal

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97 [1979] QB 56 at 69.

98 [1979] QB 56 at 70.

99 (2002) 76 ALJR 694 at 726-727 [173]; 188 ALR 1 at 45-46 (footnotes omitted).

judicial power and other governmental powers conferred by or under the Constitution".

123 The legislative provision that confers the jurisdiction on the administrative decision-maker and the nature of the decision for which it provides, construed in its statutory and constitutional context, will also supply the limits of that jurisdiction and indicate the circumstances that will establish whether the decision-maker has trespassed beyond, or otherwise misconceived, his or her authority to act.

Jurisdictional error and fact-finding

124 Because the Tribunal was acting in the place of the Minister for the purpose of the decision to grant or refuse a visa, it was not engaged in making a discretionary decision. It was re-exercising the power conferred by s 65 of the Act. In its terms, this was not discretionary. The exercise of that power was conditioned upon the Minister (and consequently the Tribunal) reaching an opinion, or state of satisfaction, as to the appellant's status as a person to whom Australia owes protection obligations under the Refugees Convention. Once a particular opinion is formed, the result of granting or refusing the visa would follow as a consequence.

125 In *Minister for Immigration and Multicultural Affairs v Eshetu*, Gummow J referred to the decision-maker's satisfaction regarding the status of an applicant for a protection visa, as a "jurisdictional fact" upon which the exercise of the power depended[100]. The reference to "jurisdictional fact" in this area of discourse presents a somewhat awkward concept[101]. It encompasses a set of legal, factual, evidentiary and procedural considerations about the way in which the administrative decision-maker went about reaching the opinion (or satisfaction) that supplied the foundation for his or her jurisdiction.

126 As Latham CJ explained in *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd*[102], on review a court's inquiry is limited to determining "whether the opinion required by the relevant legislative provision has really been formed". Where the decision and the reasons and critical findings of fact that form the basis of that decision are recorded (as was obligatory under the Act in the present case[103]) the Tribunal's reasoning may disclose a misconception about

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100 (1999) 197 CLR 611 ("*Eshetu*") at 650 [127].

101 (1999) 197 CLR 611 at 651 [130].

102 (1944) 69 CLR 407 at 432.

103 See the Act, s 430(1).

the nature of the fact-finding process required by the Act. It may then become apparent that the fact-finding has miscarried to a significant degree, in the sense that it does not conform to the requirements, express or implied, in the empowering statute. In such circumstances it may be concluded that the opinion or satisfaction reached was not the kind of opinion contemplated by the statute. In each case, the identified pre-condition for the exercise of the power conferred would not be fulfilled.

127 In the Supreme Court of New South Wales, Spigelman CJ has noted, in an observation with which I agree[104]:

> "[W]here a statute … makes provision for an administrative decision in terminology which does not confer an unfettered discretion on the decision-maker, the courts should approach the construction of the statute … with a presumption that the parliament … intended the decision-maker to reach a decision by a process of logical reasoning and a contrary interpretation would require clear and unambiguous words."

128 This was the way the appellant mounted his attack on the Tribunal's "decision" in his case. A conclusion that a process of reasoning is perverse, or illogical, or irrational, ordinarily would not, and in any case should not, be based upon mere disagreement with the outcome reached by the administrator. The disagreement of a judge with the merits or conclusions of the decision reviewed is, at least in theory, immaterial. Rather, attributes such as "perverse", or "illogical", or "irrational" must be properly linked to the applicable statutory and decision-making context in order to be informative about the nature of the error identified.

129 In some cases it may be possible to latch onto the outcome or conclusion reached and to impugn it as perverse in and of itself. One such example is where *all* the evidence points in one direction, and a decision-maker, for no given or identifiable reason, decides the other way[105]. Such a decision would be seen as equivalent to an arbitrary one. It would result in the inevitable conclusion that the decision-maker acted without jurisdiction. However, such an error is ordinarily difficult to establish because it is rare that *all* the evidence speaks with a unified voice[106].

130 In the present proceedings, the appellant could have argued that much of the evidence adduced in his application pointed towards the conclusion that he

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104 *Hill v Green* (1999) 48 NSWLR 161 at 174-175 [72].

105 See *Chan* (1989) 169 CLR 379 at 400, 433.

106 *Rajamanikkam* (2002) 76 ALJR 1048 at 1055 [42]; 190 ALR 402 at 411.

was owed protection obligations. The Tribunal's ultimate determination was arguably based on meagre foundations, including the rejection of the plausibility of the appellant's story and the resulting conclusion that he completely lacked credibility. His credibility in the eyes of the Tribunal was further impugned (apart perhaps from any assessment of appearances during the hearing) on the basis of independent country information and alleged inconsistencies in his testimony. Yet independent country information can never be determinative of the outcome of an *individual* case. Were it otherwise this would relieve the Tribunal of the need to consider individual circumstances. Further, as Finkelstein J demonstrated, the alleged weaknesses and inconsistencies in the appellant's evidence, relied upon by the Tribunal, were objectively insignificant, superficial and erroneous[107]. A fair reading of the evidence might indicate to most readers that there was no such inconsistency. The confirmatory evidence adduced to bolster the veracity of the appellant's claims was also disregarded.

131 Would all of the foregoing considerations entitle a court to conclude that there was a total absence of jurisdiction in this particular case? It has been said that it is not the role of a supervising court to form its own view of the weight to be given to different elements of the evidence[108]. That may explain why the appellant did not seek to present his case in that way.

132 However, a court could also be asked to review the *process* by which the Tribunal arrived at its "satisfaction" to determine whether it was consistent with the fact-finding procedure envisaged by the Act for the assessment of applications for a protection visa[109]. The focus in such an inquiry is upon the character of the decision and the fact-finding process necessary for the Tribunal to reach the requisite satisfaction about the person's status. This was the route that the appellant invited this Court to take.

133 Where a person, such as the appellant, applies to the Minister for a protection visa, based on an asserted fear of persecution for a Convention-related reason, such a claim needs to establish a number of elements[110]. In most cases the evidence that will provide the basis for the Minister's (or, on review, the Tribunal's) decision would consist of the applicant's claims of an identity with, or

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107 (2001) 109 FCR 424 at 435-437 [42]-[51]. On this point, I do not take the other members of the Full Court to have disagreed with Finkelstein J, given their expressed concerns about the integrity of the fact-finding process.

108 See *Wu Shan Liang* (1996) 185 CLR 259 at 281-282, 291-292.

109 *Abebe v The Commonwealth* (1999) 197 CLR 510 ("*Abebe*") at 579 [195] per Gummow and Hayne JJ.

110 *Guo* (1997) 191 CLR 559 at 570.

membership of, a particular group or category that puts him or her at risk of persecution if returned to the country of nationality. Claims of past persecution are also commonly asserted. If such episodes of past persecution can be established, they may provide the basis for an inference that there is a real chance that similar persecution will recur in the future[111].

134 In most instances the unsupported claims of an applicant, tested against the available background country information, will provide the only basis upon which the Minister or his delegate (and the Tribunal) can be satisfied as to whether Australia owes any protection obligations[112]. Therefore, most often, the first step in the process of reasoning will involve an assessment of the credibility of the applicant. Much will commonly depend upon that assessment. Yet even if that were the case with the appellant, it affords no foundation for the Tribunal to proceed to a premature evaluation of the "plausibility" of his story. On the contrary, that may be a path fraught with dangers. Claims of extreme persecution may often at first seem to a person far removed from the context in which the events are said to have taken place, to be far-fetched.

135 Where, as here, the appellant sought to adduce independent evidence that corroborated and supported his claim of past persecution in material respects, it was the duty of the Tribunal properly to consider and form a view about such evidence *before* assessing the appellant's credibility. The Tribunal erred because once it made its assessment of the appellant's "credibility" and "plausibility", no amount of available independent, corroborative evidence supporting his claim would even be considered to persuade it otherwise[113].

136 The approach adopted by the Tribunal in effect, denied the appellant an opportunity to make out his case and to establish his status as the Act contemplated. This method of finding facts explains why the appellant sought to rely on the rule against bias. However the approach adopted by the Tribunal could have been the result of incompetence, inexperience or a failure to understand the nature of the fact-finding function that was to be performed, rather than bias. That is the way that I prefer to approach the case.

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111 *Guo* (1997) 191 CLR 559 at 574-575; *Abebe* (1999) 197 CLR 510 at 544 [82], 578 [192].

112 See *Abebe* (1999) 197 CLR 510 at 544 [82], 545 [85].

113 *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 482 per Gibbs J.

137 It follows that, while the Tribunal made an apparent attempt to exercise the jurisdiction conferred, this was not a real exercise[114]. That view is confirmed by the treatment of the dentist's and surgeon's report adduced by the appellant. Rather than focusing on the main probative value of those reports, the Tribunal fixed upon aspects of that evidence that were irrelevant or trivial – namely, the dentist's statement about the appellant's psychological state at the time or the fact that the surgeon's report to some extent relied upon the appellant's history. The true probative value of the reports was that they constituted apparently reliable and independent confirmation of the credibility of the appellant and of his claims of serious and extreme injuries consistent with the asserted official mistreatment.

138 This, without more, indicates that the satisfaction or opinion of the Tribunal as to the appellant's status was not properly formed. It was not supported on logical grounds by reference to the material adduced. Given that the Tribunal's satisfaction provided the foundation for its jurisdiction to make the decision not to grant the protection visa, the illogicality in the fact-finding process was an error that went to jurisdiction. The purported exercise of power miscarried.

Manifest (*Wednesbury*) unreasonableness

139 The appellant has demonstrated a prima facie entitlement to relief, even if the applicable grounds of review be limited to those in s 476(1) of the Act. He has established that the decision-maker did not have jurisdiction to make the impugned decision (par (b)) or that the decision was not authorised by the Act (par (c)). However, the majority in the Full Court also held that the basis for review invoked by the appellant (namely, the irrationality or illogicality of the Tribunal's reasoning) fell within the scope of s 476(2)(b) and was thus excluded from that Court's power to afford relief.

140 In *Eshetu*[115], analysing the relationship between s 476(1) and (2) of the Act, Gummow J said:

> "The application to this Court under s 75(v) of the Constitution was instituted on the footing that the effect of ss 476(2)(b) and 485(1) of the Act was to deny to the Federal Court the jurisdiction it otherwise would have had under s 39B of the *Judiciary Act* 1903 (Cth) in respect of a '*Wednesbury* unreasonableness' ground of review. However, where the question is whether the Minister was obliged by s 65 [of the Act] to grant

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114 *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 483; *Guo* (1997) 191 CLR 559 at 595.

115 (1999) 197 CLR 611 at 658 [154].

> a protection visa upon satisfaction that the applicant met the criterion under s 36(2) for a protection visa, '*Wednesbury* unreasonableness' does not enter the picture. Rather, the question would appear to be whether the Minister did not have jurisdiction to make the decision (s 476(1)(b)), the decision was not authorised by the Act (s 476(1)(c)), the decision involved an error of law (s 476(1)(e)) or there was no evidence or other material to justify the making of the decision (s 476(1)(g) as amplified by s 476(4)). The exclusion by s 476(2)(b) of '*Wednesbury* unreasonableness' would not be material. Upon that footing, the Federal Court would have jurisdiction conferred by both s 486 of the Act and s 39B of the *Judiciary Act*, concurrently with that conferred upon this Court by s 75(v) of the Constitution."

141 The majority in the Full Court declined to follow the foregoing analysis from *Eshetu*. Hill J said that "a case where *Wednesbury* unreasonableness applies cannot be the subject of judicial review" even if it falls within a category of reviewable error under s 476(1)[116]. Similarly, Stone J commented that "it is not appropriate to limit the effect of the restriction imposed by s 476(2) by seeking to graft it onto common law stock"[117].

142 Statutory language should be given its full meaning according to its terms, without importing into the statute every notion derived from the pre-existing common law[118]. However, for the purposes of construing s 476(2)(b), and delimiting its relationship with s 476(1), I am prepared to accept the view in the joint reasons in this case (in turn following Gummow J's analysis in *Eshetu*) that the reference in par (b) of s 476(2) to unreasonable decisions was intended to be limited in its application to discretionary decisions of the kind described in the *Wednesbury* test.

143 The statutory restriction upon the Federal Court's review jurisdiction in s 476(2) was somewhat curious. It proceeded on what is arguably a misconceived assumption that the grounds of judicial review can be neatly compartmentalised into completely separate kinds of error. This cannot always be done. Various types of administrative error may lead to a conclusion that a decision is seriously unreasonable. So much was recognised by Lord Greene MR in *Wednesbury* itself[119]. If the words in par (b) were to be given the full potential

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116 (2001) 109 FCR 424 at 428 [14].

117 (2001) 109 FCR 424 at 446 [92].

118 *Regie National des Usines Renault SA v Zhang* (2002) 76 ALJR 551 at 579 [143]-[147]; 187 ALR 1 at 39-40.

119 [1948] 1 KB 223 at 229.

breadth that they might carry, that paragraph could eclipse all of the grounds of review in s 476(1) and give that sub-section little or no work to do. Such an interpretation would defeat the manifest purpose of s 476, read as a whole. It ought therefore to be rejected. Succeeding provisions should normally be given an interpretation that allows them to work together harmoniously and in a way that promotes the legislative purpose[120]. In light of that approach, and given that the Parliament in par (b) used the precise formulation of what has come to be known as *Wednesbury* unreasonableness, the operation of that paragraph was limited to discretionary decisions.

144 In so far as there is any ambiguity or uncertainty in the construction of the Act in this respect, it is appropriate to give effect to the words of Dixon J in *Magrath v Goldsbrough Mort & Co Ltd*[121]:

> "The general rule is that statutes are not to be interpreted as depriving superior Courts of power to prevent an unauthorized assumption of jurisdiction unless an intention to do so appears clearly and unmistakably."

145 That approach has been repeatedly applied by the Court[122]. It continues to command doctrinal support. It strengthens the conclusion that par (b) s 476(2) of the Act did not deprive the Federal Court of the power to afford the appellant relief, given that the Tribunal's flawed process of fact-finding in forming its opinion about the appellant's status resulted in jurisdictional error that would attract the grounds of relief stated in s 476(1)(b) and (c)[123] of the Act.

146 The appellant did not argue that the decision of the Tribunal was so unreasonable that no reasonable Tribunal would have reached it. Presumably this was because, on a proper approach to the fact-finding function, a reasonable Tribunal might have reached the same decision. Instead, he sought to attack the irrational and illogical process of attaining the Tribunal's satisfaction. In my view, he succeeded in this attack. Paragraph (b) of s 476(2) had no bearing on

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120 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71].

121 (1932) 47 CLR 121 at 134.

122 eg *Plaintiff S157/2002* (2003) 77 ALJR 454 at 474-475 [104]; 195 ALR 24 at 52; cf *Shergold v Tanner* (2002) 209 CLR 126 at 136-137 [33]-[34].

123 cf *Bond* (1990) 170 CLR 321 at 367-368; *Yusuf* (2001) 206 CLR 323 at 349 [76], 352 [85]; *Rajamanikkam* (2002) 76 ALJR 1048 at 1064 [100], 1066-1067 [113]; 190 ALR 402 at 423, 426-427; *Mahon v Air New Zealand* [1984] AC 808 at 820-821.

the impugned decision. This conclusion requires that his appeal to this Court must succeed.

The rule of restraint

147 While an obligation for an administrator to provide reasons does aid the process of curial review, the reasons must be read fairly and as a whole[124]. In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* this Court warned against the over-zealous judicial review of decisions of the Tribunal. In recognition of the fact that there is a range of legitimate approaches to decision-making and fact-finding, it was said that the reasons recorded ought not to be inspected with a fine tooth-comb attuned to identifying error[125]. I support that approach. I have been careful to observe it. However, where, as here, the reasons disclose that the Tribunal misconceived the fact-finding function in a fundamental way, and denied an opportunity for the applicant to establish to the Tribunal's satisfaction his status that enlivened its powers, any such strictures fall away. Once this point is reached, it would be inappropriate to strain over-zealously to confirm the decision[126]. Furthermore, if the Tribunal openly acknowledges that it ignored such key parts of the appellant's evidence without good reason, such an acknowledgment, on the face of its reasons, cannot be cured by solecisms about "consider[ing] the evidence as a whole". I would reject the belated suggestion that the error identified was no more than a juxtaposition of the steps in the Tribunal's reasons[127]. This is not the way the reasons were expressed. It is not the way the judges in the Federal Court read them.

148 Adopting the foregoing approach in the circumstances of the present case is not an endorsement of unrestrained judicial review of the evidentiary and factual basis of administrative decisions on the grounds of minor infelicities or trivial lapses in logic in cases where an administrator's satisfaction as to a factual state provides the jurisdictional foundation for the exercise of power. In that respect, I remain of the view that I expressed in *Wu Shan Liang*[128]. As Iacobucci J pointed out in the Supreme Court of Canada, "[j]udicial restraint is

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124 *Wu Shan Liang* (1996) 185 CLR 259 at 291.

125 (1996) 185 CLR 259 at 272, 281-282, 291.

126 cf Joint reasons at [45]-[52].

127 cf Reasons of Gleeson CJ at [13]-[14].

128 (1996) 185 CLR 259 at 291-292.

needed if a cohesive, rational, and … sensible system of judicial review is to be fashioned"[129].

149 The degree of restraint that a court will exercise in circumstances where the fact-finding process is said to have miscarried to a significant degree, so as to amount to jurisdictional error, will to a considerable extent depend upon the nature of the applicable power, the statutory context and the effect of the impugned decision. For instance, where an assessment and evaluation of complex evidence is required by an expert administrative agency, a greater degree of restraint may be called for[130]. Similarly greater caution is appropriate where the subject matter of the decision involves a significant element of governmental policy or allocative determinations, making it more remote "from ordinary judicial experience"[131].

150 On the other hand, where, as here, the decision relates to simple fact-finding and has the potential to affect, in a significant way, the right to life and liberty of a vulnerable individual, and where it is apparent that the Tribunal has failed to consider the appellant's case properly because its reasoning or fact-finding was apparently marred by manifest defects in the treatment of the evidence and was not based on logical grounds, a court has an obligation to be more vigilant. In the words of Lord Tempelman[132]:

> "[W]here the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process."

In the same case, Lord Bridge of Harwich commented that such decisions were to be subjected to a "more rigorous examination" and their foundation to "the most anxious scrutiny"[133]. I endorse their Lordships' approach. It reinforces the appellant's entitlement to relief.

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129 *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 at 788 [80].

130 eg *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 151-155 [39]-[49].

131 *R v Ministry of Defence, Ex parte Smith* [1996] QB 517 at 556 per Sir Thomas Bingham MR. See also *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 411.

132 *R v Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] AC 514 at 537.

133 [1987] AC 514 at 531. See also *Yusuf* (2001) 206 CLR 323 at 373 [157].

Judicial review and the Constitution

151 *Constitutional writs and appellate relief*: In *Eshetu*[134], Gaudron J and I remarked that a constitutional writ may be refused if an alternative remedy is available by way of appeal. We went on to say that where, as in that case, "there are separate proceedings by way of appeal and an application under s 75(v) of the Constitution, it is appropriate to refuse relief under s 75(v) unless that relief would serve some purpose beyond that which is achieved by the order disposing of the appeal"[135]. Because I have concluded that the appellant is entitled to relief in the appeal and because his application for constitutional relief would not enlarge the essential remedy he seeks (namely re-determination of the matter by the Tribunal according to law), it is not strictly necessary for me to consider his alternative application.

152 However, the other members of this Court have concluded that the appellant's appeal fails. The appellant's application pursuant to s 75(v) of the Constitution was fully argued. It raises important and separate questions. I will therefore add some comments of my own in relation to the claim for constitutional relief. I offer them particularly in light of the intervening repeal of s 476, and the added significance of the principles that govern relief pursuant to that constitutional provision following this Court's decision in *Plaintiff S157/2002*[136].

153 *The cardinal importance of s 75(v)*: In *Plaintiff S157/2002*[137] five members of this Court said that the entrenched minimum provision of judicial review in s 75(v) "exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction". That provision, in my view, also affords an important constitutional protection for the people affected by such administrative action. When invoked in this Court, it must be given effect, subject only to any disqualifying discretionary considerations.

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134 (1999) 197 CLR 611 at 641 [103]. See also *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 30, 34; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 193-194, 204, 214-215, 218-219, 225; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 375-376, 382, 384.

135 (1999) 197 CLR 611 at 641 [103].

136 (2003) 77 ALJR 454; 195 ALR 24.

137 (2003) 77 ALJR 454 at 474-475 [104]; 195 ALR 24 at 52.

154 Constitutional relief in this Court is unrestricted by the statutory limitations imposed by the Act on the Federal Court[138]. The constitutional writs are available where jurisdictional error is shown[139]. In their joint reasons, McHugh and Gummow JJ suggest that a "stricter view perhaps should be taken of what must be shown to make out a case of error grounding relief under s 75(v) of the Constitution"[140]. Such an approach would add another layer of obscurity to what are already elusive distinctions. The correctness of that proposition may also depend upon what is taken as the relevant comparator[141]. It is better left for another day. At this stage, I am unconvinced.

155 Where a decision is reviewed on grounds that are contained in an enactment, such as the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"), or s 476 of the Act, determining the content of those grounds and the availability of relief requires an interpretation of the statutory language and purpose, read against the background of administrative law principles that have developed (and that continue to develop) under the common law.

156 Twenty years ago Lord Diplock famously observed that the development of the principles of administrative review, occurring largely during the latter part of the last century, constituted one of the most important legal advances of his lifetime[142]. That development reflected the inherent capacity of the common law for progress and relevancy. Growing experience with the application of particular rules leads to greater understanding about the legal principles and the policies that underlie them. In the area of judicial review, this has led to the elaboration of more specific grounds of review and closer identification of the types of reviewable error, as well as of the circumstances in which judicial review is appropriate and ought to be provided.

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138 Notably the provisions of s 476 of the Act as it stood before the 2001 amending Act.

139 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243; *R v Bowen; Ex parte Federated Clerks Union* (1984) 154 CLR 207 at 209-210; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 209 [32], 227 [81]-[82]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 81-82 [81], 122-123 [211].

140 Joint reasons at [36].

141 cf *Abebe* (1999) 197 CLR 510 at 552 [107] per Gaudron J.

142 *R v Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 641.

157 To some extent the development of the common law of judicial review in Australia was retarded by the enactment of the ADJR Act in 1977. That Act sought to codify the grounds of review in the federal context . The effects of the ADJR Act were overwhelmingly beneficial and review of federal administrative action was more commonly pursued under that Act than had been the case under the earlier common law. However, in areas where the ADJR Act or the common law are, for whatever reason, inapplicable or no longer available, the rules governing the provision of the constitutional writs, and their relationship to the larger common law developments in administrative review, assume a greater significance.

158 *The ambit of the constitutional writs*: It is my opinion that the principles governing the availability of the constitutional writs in Australia are not divorced from the general elaboration of the common law. I will not repeat my view about the interpretation of constitutional words[143]. Those words are not prisoners to the understanding of their meaning in 1900 or at any other time. In each case, the words must be understood and applied so as to fulfil their constitutional purposes. Perceptions of those purposes, and hence of the meaning of the constitutional language, vary over time.

159 The context within which s 75(v) of the Constitution operates today includes the vast growth of the number and variety of officers of the Commonwealth that has occurred in the century since the Constitution was adopted. Within that century, in response to the growth in the size, importance and functions of government, judicial review in Australia, as elsewhere, has changed remarkably. In part, this is due to the increased prescriptiveness with which the Parliament has sought to control the exercise of administrative power. In part, it is because of a recognition that administrative action can have a significant effect on the rights and legitimate expectations of individuals. Because what is afforded by the Constitution is a beneficial remedy of the greatest importance and utility, it would be astonishing if the common law in other places could adapt similar remedies – even those identically named – yet the Constitution of the Australian Commonwealth was confined to the rigidities and technical limitations of a bygone age.

160 In practice, without always saying so, this Court has adapted the ambit of the constitutional writs. It has done so in harmony with the elaboration of the

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143 cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 599-600 [186]-[187]; *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 515 [90], 522-525 [110]-[118]; *Cheng v The Queen* (2000) 203 CLR 248 at 321-322 [218]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 ("*Aala*") at 132-133 [136].

common law. Some of the technical and procedural rules pertaining to the "prerogative writs" of the same name have been discarded. This was done, at least in part, out of a recognition that the writs identified in s 75(v) of the Constitution are always discretionary[144]. Similarly, the availability of "prerogative" relief for administrative decisions deemed manifestly unreasonable (in the *Wednesbury* sense), or that disclose a breach of the rules of procedural fairness, would not in 1900 generally have been regarded as within the purview of the writs named in s 75(v) of the Constitution[145]. Yet from a contemporary perspective, that is certainly not so[146]. Recent decisions of this Court have proceeded upon the assumption that the common law developments in this regard have influenced, and been adopted for, the development of constitutional doctrine[147]. Where a purported "decision" is flawed in a critical way by arbitrary, capricious, irrational, or illogical reasoning or otherwise marred by patent factual error, it may be said that it does not conform to the requirements express or implied in the applicable statute[148].

161 Our legal system commonly rejects absolute or rigid categories. It does so out of a recognition of the requirement to secure justice in the particular case wherever possible. The residual category of unidentified error in discretionary decisions is such a case[149]. Appellate correction of factual findings that are "glaringly improbable" or "inconsistent with facts incontrovertibly established"[150] or "contrary to the compelling inferences"[151] is another. In administrative law, extreme irrationality and serious illogicality represent yet further examples of the

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144 *Aala* (2000) 204 CLR 82 at 106-108 [53]-[55], 136-137 [146]-[148].

145 cf *Sharp v Wakefield* [1891] AC 173 at 179, 181.

146 *Aala* (2000) 204 CLR 82 at 100-101 [40] per Gaudron and Gummow JJ.

147 cf *Eshetu* (1999) 197 CLR 611 at 628 [45] per Gleeson CJ and McHugh J.

148 *Bond* (1990) 170 CLR 321 at 359 per Mason CJ (Brennan J agreeing), 367-369 per Deane J; cf *Rajamanikkam* (2002) 76 ALJR 1048 at 1067 [114]; 190 ALR 402 at 427.

149 *House v The King* (1936) 55 CLR 499 at 505; *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 155, 174.

150 *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842 at 844; 62 ALR 53 at 57.

151 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 332 [93.7]; 160 ALR 588 at 621-622; *Fox v Percy* (2003) 197 ALR 201 at 209 [28]-[29], 225 [96]-[97].

same *genus*. The primary rule remains intact. Courts of appeal and review do not generally disturb discretionary decisions, factual conclusions at trial and administrative evaluations of the facts and merits of a case. But, subject to the Constitution or the applicable legislation, they reserve to themselves the jurisdiction and power to intervene in extreme circumstances. They do this to uphold the rule of law itself, the maintenance of minimum standards of decision-making and the correction of clear injustices where what has occurred does not truly answer to the description of the legal process that the Parliament has laid down[152].

162 *Developments in the common law*: In England, in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*, Lord Wilberforce considered statutory provisions that conditioned an official's power upon satisfaction as to the existence of certain matters. He said[153]:

> "Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary … alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment … becomes capable of challenge."

163 I do not take Lord Wilberforce's statement to mean that in every proceeding by way of judicial review, a court should engage in a detailed re-evaluation of the factual basis upon which the official acted. It simply reflects the general proposition that an administrative decision-maker may not assume authority or jurisdiction to act based on a process of fact-finding that is fundamentally flawed.

164 Sir Anthony Mason has recently pointed out that in England the *dictum* of Lord Wilberforce in *Tameside* has been taken further[154]. For instance, in *Reid v Secretary of State for Scotland*[155], Lord Clyde explained:

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152 cf *De Gruchy v The Queen* (2002) 76 ALJR 1078 at 1088-1089 [65]-[66]; 190 ALR 441 at 456.

153 [1977] AC 1014 ("*Tameside*") at 1047.

154 Mason, "The Scope of Judicial Review", (2001) 31 *AIAL Forum* 21 at 34.

155 [1999] 2 AC 512 at 541-542 (emphasis added).

> "[T]he decision … may be found to be *perverse, or irrational, or grossly disproportionate* to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the *absence of evidence, or of sufficient evidence*, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision … [W]hile the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence."

165 In *R v Criminal Injuries Compensation Board, Ex parte A*[156], Lord Slynn of Hadley commented that misunderstanding or ignorance of an established and relevant fact is a ground of judicial review. His Lordship went on to refer with approval to the following observations in Wade and Forsyth[157]:

> "Mere factual mistake has become a ground of judicial review … This ground of review … is no less needed in this country, since decisions based upon wrong facts are a cause of injustice which the courts should be able to remedy. If a 'wrong factual basis' doctrine should become established, it would apparently be a new branch of the ultra vires doctrine, analogous to finding facts based upon no evidence or acting upon a misapprehension of law."

166 The common law in Australia might have developed along similar lines. However, it was at about the time of Lord Wilberforce's exposition in *Tameside* that the ADJR Act was enacted in relation to federal administrative decisions[158]. The somewhat arrested development of Australian common law doctrine that followed reflects the large impact of the federal legislation on the direction and content of Australian administrative law more generally.

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156 [1999] 2 AC 330 at 344-345. Lord Slynn has also suggested that the principle of proportionality was part of English administrative law that ought to be linked with the *Wednesbury* unreasonableness doctrine: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1406-1407 [51]-[52]; [2001] 2 All ER 929 at 976.

157 *Administrative Law*, 7th ed (1994) at 316-318. See also de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed (1995) at 288.

158 *Rajamanikkam* (2002) 76 ALJR 1048 at 1053 [29]; 190 ALR 402 at 408.

167 Constitutional judicial review need not be stuck in understandings of the past law. There is no reason why the principles governing the nature and availability of the constitutional writs, should be cut off from the general advances in administrative law that have taken place in jurisdictions not controlled by the Australian federal enactments. There is every reason why the constitutional writs should adapt to afford protection as comprehensive as that now regarded as elementary in England and other jurisdictions where no equivalent constitutional charter exists.

168 The adoption of developments elsewhere in the common law of judicial review must, of course, be adapted to this country's peculiar constitutional arrangements. These will require closer attention in future cases. They include the constitutional principle of the separation of powers that defends the entitlement of the repository of the relevant power to decide conclusively the merits of the case, though does not permit it to make conclusive determinations of the law or questions upon which its jurisdiction depends. Further, as Dixon J recognised more than 50 years ago[159], our Constitution is also framed to give effect to the traditional conception of the rule of law as one of its fundamental assumptions. The full significance of that notion for the availability of the constitutional writs remains to be explored.

Conclusion: vigilance and administrative justice

169 The flaws disclosed in the Tribunal's reasons in the present case indicate that it fell short of the standards postulated for a decision-maker exercising the powers conferred on the Tribunal by the Act. So to conclude is not to intrude impermissibly into the merits or the process of fact-finding. Still less is it to substitute a court's own view of the facts for that of the statutory repository of the power in the Tribunal. It is simply to insist that the legal foundation for the Tribunal's exercise of jurisdiction is established properly, as envisaged by the Act. In this case, simply disbelieving the appellant was not enough. And, in any event, that conclusion could not logically be reached without first giving proper and realistic consideration to the three elements of corroborative evidence that he tendered.

170 It has been said that the attainment of administrative justice is not the object of judicial review[160]. At the same time, this Court should not shut its eyes and compound the potential for serious administrative injustice demonstrated by the appellant. It should always take into account the potential impact of the

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159 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; *Plaintiff S157/2002* (2003) 77 ALJR 454 at 474 [103]; 195 ALR 24 at 51-52.

160 *Quin* (1990) 170 CLR 1 at 36 per Brennan J.

decision upon the life, liberty and means of the person affected[161]. By such standards, claims by refugee applicants will often attract a high degree of vigilance from the courts. Pernickety curial tooth-combing of the Tribunal's language is not appropriate. But fundamental flaws of logic and reasoning on the part of the Tribunal go far beyond this.

Orders

171 In Matter No S106 of 2002, the appeal should be allowed. The judgment of the Full Court of the Federal Court of Australia should be set aside. In place thereof, it should be ordered that the appeal to that Court from the order of the primary judge be allowed. In lieu of that order, it should be ordered that the "appeal" to the Federal Court be allowed. The decision of the Refugee Review Tribunal of 30 September 1999 should be set aside. The matter should be remitted to the Tribunal for reconsideration according to law. The respondent should pay the appellant's costs in this Court and in the Federal Court of Australia.

172 In Matter No S20 of 2002, the application should be dismissed. There should be no order as to costs.

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161 cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 101-102 [146], 114 [186].

173 CALLINAN J. I agree with McHugh and Gummow JJ that, on a proper construction of the Tribunal's reasons, the applicant is unable to show any jurisdictional error on its part, whether by acting unreasonably in any relevant sense or otherwise, sufficient to entitle him to relief under s 75(v) of the Constitution. The application should be dismissed with costs, including reserved costs.

174 I would also dismiss the appeal from the Full Court of the Federal Court with costs, including reserved costs, on the basis that the appellant has not shown the respondent's decision to be unreasonable in any event as the reasoning of McHugh and Gummow JJ in the constitutional proceedings demonstrates, and there has been no relevant error on the part of the respondent within s 476 of the *Migration Act* 1958 (Cth).