HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HEYDON JJ

RE MINISTER FOR IMMIGRATION AND
MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

EX PARTE THOMAS PALME PROSECUTOR/APPLICANT

Re Minister for Immigration and Multicultural and Indigenous Affairs;
Ex parte Palme [2003] HCA 56
2 October 2003
S258/2002

ORDER

1. *Order nisi, granted on 28 October 2002, discharged.*

2. *Application for declaration that the decision of the respondent made on 27 June 2002 is invalid and void, dismissed.*

3. *Prosecutor to pay the respondent's costs.*

Representation:

P L G Brereton SC with D P M Ash for the prosecutor/applicant (instructed by Christopher Levingston & Associates)

J Basten QC with G R Kennett for the respondent (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme

Immigration – Refugees – Minister – Decision to cancel visa – Whether decision affected by jurisdictional error – Whether prosecutor denied procedural fairness – Whether constructive failure to exercise jurisdiction – Whether decision affected by "*Wednesbury* unreasonableness" – Whether alleged failure by Minister to notify prosecutor in writing of reasons for decision infected decision with jurisdictional error – *Migration Act* 1958 (Cth), s 501G.

Constitution, s 75(v).
Migration Act 1958 (Cth), ss 69, 501, 501G.

1 GLEESON CJ, GUMMOW AND HEYDON JJ. On 28 October 2002, a Justice of this Court (Gaudron J) ordered that the respondent ("the Minister") show cause why certiorari should not issue removing into this Court to be quashed a decision of the Minister made on 27 June 2002 ("the Decision") and prohibition should not issue prohibiting the Minister from proceeding further with any action in respect of the Decision. An application also was made for a declaration that the Decision "is invalid and void".

2 The Decision was to cancel the visa pursuant to which the prosecutor had been entitled to remain in Australia. That cancellation effected an immediate change of his status. He thereupon became an unlawful non-citizen within s 15 of the *Migration Act* 1958 (Cth) ("the Act"), who was to be detained forthwith (s 189) and removed from Australia as soon as practicable (s 198). The prosecutor presently is in immigration detention.

3 Not all of the grounds in the order nisi were pressed before the Full Court. Grounds raising issues of validity of certain provisions of the Act were not argued. The grounds remaining assert jurisdictional error, in particular *(a)* by the denial to the prosecutor of the necessary measure of procedural fairness in the making of the Decision and *(b)* in the alleged failure to observe what are said to be the mandatory requirements in s 501G of the Act respecting the giving by the Minister of written notification of the decision to cancel the prosecutor's visa.

4 It is common ground that if the Decision is not a privative clause decision within the meaning of s 474 of the Act there is no legislative impediment to the exercise by this Court of the jurisdiction conferred in this matter by s 75(v) of the Constitution, supplemented by the powers conferred by ss 32 and 33 of the *Judiciary Act* 1903 (Cth). The reasoning in *Plaintiff S157/2002 v Commonwealth*[1] supports that stance.

The facts

5 The prosecutor was born in Germany on 28 January 1961 and is a German citizen. He has never acquired Australian citizenship. When an infant, he was removed by the relevant authorities in Germany from his biological parents and was brought up in Germany by a foster family. The prosecutor entered Australia on 6 March 1971 with his foster parents. Members of the prosecutor's biological family, including his biological mother and some half-siblings, live in Germany. However, the prosecutor has had no contact or involvement of substance with those persons. He has two children, born in 1985 and 1988, who are Australian

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1 (2003) 77 ALJR 454; 195 ALR 24.

citizens. He is divorced and the children have been in the custody of their mother.

6 On 9 December 1992, the prosecutor pleaded guilty before the Criminal Division of the Supreme Court of New South Wales to a charge of murdering one David Roberts on 2 April 1989. In her remarks on sentence, which later were before the Minister, the sentencing judge (Mathews J) said:

> "The prisoner is entitled to the leniency which flows from his expression of remorse and his plea of guilty. He also benefits from the fact of his prior unblemished record. I accept also in his favour that his dominant motive in killing Mr Roberts was to protect Mrs Roberts from her husband's continued violence and cruelty.
>
> This was nevertheless a terrible killing. Mr Roberts did not stand a chance when he was pushed into the boiling sea. The prisoner must now accept the consequences – which will involve a long term of imprisonment."

7 Her Honour then sentenced the prosecutor to imprisonment for 16 years, made up of a minimum term of 10 years, to commence on 9 December 1992 and thus to expire on 8 December 2002, and an additional term of six years.

The legislation

8 The Decision made by the Minister on 27 June 2002 was to exercise his discretion under s 501(2) of the Act to cancel the prosecutor's visa. Section 501(2) empowers the Minister to cancel a visa granted to a person if the Minister reasonably suspects that the person does not pass "the character test" and that person does not satisfy the Minister that he or she passes "the character test". Section 501(6) indicates the circumstances in which a person does not pass "the character test". One such circumstance applies if the person has a "substantial criminal record", a term defined in s 501(7). A person has a substantial criminal record in the necessary sense if, among other things, that person has been sentenced to a term of imprisonment of 12 months or more (s 501(7)(c)). It followed that the prosecutor had a substantial criminal record within the meaning of par (c) of s 501(7). Accordingly, it was open for the Minister reasonably to suspect that the prosecutor did not pass "the character test" (s 501(2)(a)).

9 Section 501G(1), so far as relevant, provides that if a decision, such as the present, is made under s 501(2) to cancel a visa:

> "the Minister must give the person a written notice that:

(c) sets out the decision; and

(d) specifies the provision under which the decision was made and sets out the effect of that provision; and

(e) sets out the reasons (other than non-disclosable information) for the decision".

No attention was given in submissions to the extent to which the requirement of par (e) may be expanded by s 25D of the *Acts Interpretation Act* 1901 (Cth). This states:

> "Where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, whether the expression 'reasons', 'grounds' or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based",

but, given the course of argument, it may be put to one side for this case.

10 However, s 501G(4) is an important provision for this case. It states:

> "A failure to comply with this section in relation to a decision does not affect the validity of the decision."

Steps taken before the Decision

11 Before turning further to consider the submissions made by the prosecutor, it is convenient to look more closely at some of the events leading up to the making of the Decision.

12 On 27 February 2002, whilst the prosecutor was serving his sentence, two steps of present importance occurred. First, he acknowledged receipt of a "Notice of Intention to Consider Cancelling a Visa" ("the Notice") pursuant to s 501 of the Act, the text of s 501 and the Minister's Direction No 21 titled "Direction under Section 499 – Visa Refusal and Cancellation under Section 501 [of the Act]" ("the Direction"). Section 499 empowered the giving by the Minister of written directions, among other things, concerning the exercise of powers under s 501. The first document referred to was dated 27 February 2002. It stated that the prosecutor's visa might be liable for cancellation under s 501 and that the Minister himself would personally be making the decision whether to cancel the visa under s 501(2). It was pointed out that, if the decision was to cancel the visa, the prosecutor would not be entitled to have the decision reviewed by the Administrative Appeals Tribunal.

13 The Notice went on to state that in reaching a decision the Minister was to have regard to the prosecutor's criminal record and the Direction. The Notice continued:

> "In preparing any comments please read fully and carefully the contents of the Minister's Direction. You should address each and every topic that you feel applies to you or is relevant to your circumstances. You may also wish to provide any further information that you feel the Minister ought to be aware of and take into account."

The Notice concluded with an address in the Minister's Department to which the prosecutor should direct any questions or send any written response.

14 Also on 27 February 2002, an officer of the Minister's Department interviewed the prosecutor at the prison where he was confined. A written set of notes of that interview later were signed by the prosecutor on 27 March 2002. On that latter date, the prosecutor took up the invitation in the Notice to respond in writing. He did so by letter with annexures comprising more than 40 pages.

15 In making the Decision, the Minister had before him a document prepared by three officers of his Department and headed "ISSUES FOR CONSIDERATION OF POSSIBLE CANCELLATION OF TRANSITIONAL (PERMANENT) VISA UNDER S 501(2) OF THE [ACT]". This document of 14 pages ("the Submission") had annexed to it Annexures A-J. Annexure G was the notes of the interview of 27 February 2002 with the prosecutor; Annexure H was the letter from the prosecutor dated 27 March 2002; Annexure I was the notes of the interview with the prosecutor's foster brother, Mr Zimmermann, conducted on 7 May 2002; and Annexure J was a copy of the transcript of 11 pages containing the remarks on sentencing by Mathews J on 26 February 1993.

Procedural fairness

16 In oral argument, counsel for the prosecutor eschewed the submission attributed to him by the Minister that the requirements of procedural fairness had obliged the Minister to afford him the opportunity to make submissions personally to the Minister rather than merely rely upon written communications. Rather, the complaint was that the prosecutor had been denied the opportunity to see, comment on and answer the Submission before the Minister had acted upon it. In particular, the prosecutor contended that he had not had the opportunity to see how the authors of the Submission had "distilled" the relevant material and commented on it.

17 In that latter regard, it was said that the text of the Submission set out selective portions of the remarks on sentence by Mathews J and had omitted portions which indicated that, in the view of the judge, expressed in 1993, the chances of the prosecutor committing further offences of violence were "so low as to be virtually non-existent".

18 Under the heading "[L]ikelihood that the conduct may be repeated (including any risk of recidivism)", the Submission dealt in detail with materials relevant to the assessment of that issue. In particular, it referred to detailed written submissions made by the prosecutor and the interview with his foster brother, Mr Zimmermann. The conclusion reached in the Submission was expressed as follows:

> "In consideration of the above factors, it is open for you to find that [the prosecutor] is at a low risk of recidivism."

19 On the other hand, under the next heading "General deterrence", the conclusion was expressed:

> "The offence committed by [the prosecutor] was *murder*. It is open for you to find that cancellation of [the prosecutor's] visa would serve as a deterrence factor against others committing similar offences. The Government has a strong interest in deterring others from committing offences of this nature." (original emphasis)

20 The Submission thus presented the Minister with a balanced picture on topics, including likely recidivism, which was based upon contemporary material. The conclusion reached was that it was open for the Minister that there was a low risk of recidivism. In that setting, the complaint of a failure to set out in the body of the Submission a particular portion of the sentencing comments made nine years before is fanciful.

21 Further, it does not readily appear how the principles of procedural fairness could be engaged in the manner contended for by the prosecutor. It may be accepted, as the prosecutor submitted, that his entitlement extended to the rebuttal of, and comment by way of submission upon, adverse material received by the decision-maker from other sources. That stops short of supporting a complaint of the nature essentially involved here of the "pitch" or "balance" in the statement of relevant considerations in the Submission. Further, as indicated above, there is no substance in any complaint of unfair or prejudicial "lack of balance".

22 Reference was made by the prosecutor to the decision of the Full Court of the Federal Court in *Commissioner for Australian Capital Territory Revenue v*

Alphaone Pty Ltd[2]. Nothing there said supports any different conclusion to that just expressed. The Full Court's statement of principle was as follows[3]:

> "Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question."

23 The prosecutor also pointed to the material in the Submission under the heading "The Expectations of the Australian Community". After referring to par 2.12 of the Direction, which included the statement that visa cancellation and removal of a non-citizen may be appropriate because the offences are such that the Australian community would expect the person to be removed from this country, the Submission continued:

> "The offence committed by [the prosecutor] is considered by the Government to be very serious. The Australian community expects non-citizens to obey Australian laws while in Australia and therefore it is open for you to find that the character concerns or offence are such that the Australian community may expect that [the prosecutor] should be removed from Australia."

The reader was then referred to Annexures B and C, being copies of the prosecutor's certificate of conviction and his criminal history.

24 It was submitted that the submission, as it was put, that the Australian community would expect the prosecutor to have his visa cancelled was "adverse material" within the meaning of the authorities. However, what was said in this portion of the Submission was expressly related to the terms of the Direction.

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2 (1994) 49 FCR 576.

3 (1994) 49 FCR 576 at 591-592.

The Direction had been supplied to the prosecutor with the letter of 27 February 2002 and detailed written submissions had followed by way of response. There was no fresh "adverse material" put forward to the Minister in the Submission.

25 The prosecutor relied upon *Re Refugee Review Tribunal; Ex parte Aala*[4]. But, in that case, the decision-maker, the Tribunal, had so conducted the matter that the prosecutor was deprived of a fair opportunity to correct an erroneous and factual assumption relevant to his credibility and the majority of the Court held that it could not be predicted that, had the Tribunal been alerted to the situation, the result inevitably would have been unchanged. That is far from the facts of the present case.

26 The submissions respecting a denial of procedural fairness have not been made out.

Other grounds of complaint

27 The prosecutor also contended that there had been a constructive failure to exercise jurisdiction because the Minister had been led by the terms of the Submission to misconstrue the nature of the power under s 501(2). A sentence in the Submission speaks of the exercise of a discretion "to decide whether [the prosecutor] should be permitted to remain in Australia". That may suggest, incorrectly, that, in the absence of an exercise of discretion favourable to the prosecutor, his visa would be cancelled. The discretion was one to cancel, not to relieve from cancellation.

28 However, counsel for the Minister pointed to other passages in the Submission where the issue was posed in correct terms. The Submission is to be read as a whole. In particular, the decision which the Minister did make was presented to him in the terms "I have decided TO EXERCISE MY DISCRETION UNDER SUBSECTION 501(2) OF THE ACT TO CANCEL THE VISA, so I hereby cancel the visa". There was no constructive failure to exercise jurisdiction.

29 In addition, but somewhat faintly, the prosecutor relied upon what was said to be an inadequate consideration in the Submission of the importance of the impact upon the children of the prosecutor of his removal from Australia. There is no substance in that point.

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4 (2000) 204 CLR 82.

30 The prosecutor also relied upon what was identified as "*Wednesbury* unreasonableness"[5] for an additional or alternative ground of jurisdictional error. For the proposition that "*Wednesbury* unreasonableness", if established, brought a case within jurisdictional error under s 75(v) of the Constitution, the prosecutor relied upon what was said in the joint judgment of Gaudron and Gummow JJ in *Aala*[6]. However, the Minister had before him the matters presented in a balanced fashion in the Submission. There is no weight in any complaint that, in acting upon the Submission, the Minister reached a decision so unreasonable "that it might almost be described as being done in bad faith" or "so absurd that no sensible person could ever dream that it lay within the powers of [the Minister]"[7].

Section 501G of the Act

31 There remains for consideration the submissions that orders absolute should be made for prohibition and certiorari by reason of what is said to be a failure by the Minister to meet the requirements of s 501G of the Act to give the prosecutor a written notice setting out his decision, specifying the provision under which the decision was made, with the effect of that provision, and setting out reasons for the decision.

32 Section 501G(3) states:

"A notice under subsection (1) must be given in the prescribed manner."

Regulation 2.16(3) of the Migration Regulations made under the Act provides for notification of decisions to grant or to refuse visas but does not deal with cancellations. The Court was not referred to any other regulation implementing s 501G(3). There is no legislative stipulation of any particular period of time within which notice is to be given.

33 Two further matters should be noted immediately. The first is that the submission is that the alleged failure, although it goes to a step posterior to the making of the Decision, nevertheless, on the proper construction of the

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5 After *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

6 (2000) 204 CLR 82 at 100-101 [40]. See now *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1169-1170 [20], 1177-1178 [67]-[69], 1194 [174]; 198 ALR 59 at 64, 75-76, 97-98.

7 [1948] 1 KB 223 at 229.

legislation, involves jurisdictional error tainting the Decision. The second is that it appeared to be accepted, correctly, by both sides in argument that *(a)* s 501G imposed upon the Minister a duty or obligation which, in a properly constituted proceeding, was susceptible to enforcement by order for mandamus[8], and *(b)* s 501G(4) did not operate as an attempted privative clause to achieve the impossible by ousting the jurisdiction with respect to mandamus conferred on this Court by s 75(v) of the Constitution. However, no application for mandamus is made by the prosecutor.

34 The prosecutor relied upon the construction given to s 69(1) of the Act in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[9]. However, what was said in *Miah* is of no immediate assistance in applying s 501G to the present case. The latter provision is one of a number in the Act concerned with the notification of decisions to cancel visas. They include s 127 and s 129. Section 500A(10) deals with notification of refusal or cancellation of temporary safe haven visas. In each case[10], it is said that failure to give notification does not affect the validity of the decision which has not been notified as required.

35 Section 69(1) deals with broader questions. It states:

> "(1) Non-compliance by the Minister with Subdivision AA or AB or section 494D in relation to a visa application does not mean that a decision to grant or refuse to grant the visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed.
>
> (2) If the Minister deals with a visa application in a way that complies with Subdivision AA, AB and this Subdivision, the Minister is not required to take any other action in dealing with it."

The subdivisions referred to are part of Pt 2, Div 3 which deals with the grant of visas for non-citizens. The prosecutor in *Miah* was, by virtue of s 65 of the Act, entitled to the grant of a visa if the Minister or his delegate was satisfied that the

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8 cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 77 ALJR 437 at 445 [48], 452-453 [98]-[100]; 195 ALR 1 at 12, 22-23.

9 (2001) 206 CLR 57.

10 Sections 127(3), 129(3), 500A(10).

prosecutor met the relevant criterion respecting his character as a refugee[11]. The Court rejected the Minister's submission that, within Div 3, there was prescribed a code of procedure which contained a comprehensive and exhaustive statement of the requirements of procedural fairness.

36 One issue in *Miah* was whether s 69(1) was effective to bar from review in the Court under s 75(v) of the Constitution a decision to deny a protection visa which was impeached for jurisdictional error by reason of failure to observe the rules of natural justice. It was held that, on its proper construction, s 69(1) did not attempt to achieve that result. Gleeson CJ and Hayne J[12], Gaudron J[13], with whom McHugh J agreed in this respect[14], and Kirby J[15] construed s 69(1) as providing, not that the decision in question was valid, but that it might be set aside on review, so that it did not excuse, in this Court, the denial of procedural fairness which was established on the evidence.

37 The point presently at issue in this case is rather different. Section 501G assumes the making of a decision (here, under s 501(2)) and imposes a duty with respect to notification of that decision. Section 501G(4) emphasises that the failure of the Minister to discharge that duty does not affect the validity of the decision.

38 The first question that then arises is whether, as the prosecutor contends, the Minister failed to discharge the duty in question, in particular, by failing to give the prosecutor a written statement setting out the reasons for the decision (s 501G(1)(e)). The prosecutor, it appears, received the Submission with p 16 thereof completed by the Minister on 27 June 2002. Page 16 was headed:

"MINISTERS [sic] DECISION ON CANCELLATION UNDER S 501(2)

PART E: DECISION",

and continued, above the Minister's statement that he reasonably suspected the prosecutor did not pass the character test and that the prosecutor had not satisfied

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11 (2001) 206 CLR 57 at 60 [1].

12 (2001) 206 CLR 57 at 74 [47].

13 (2001) 206 CLR 57 at 86-88 [100]-[104].

14 (2001) 206 CLR 57 at 98 [144].

15 (2001) 206 CLR 57 at 120 [204].

him that he passed that test, and that he had decided to exercise his discretion under s 501(2) to cancel, and did cancel, the prosecutor's visa:

> "I have considered all relevant matters including (1) an assessment of the Character Test as defined by s 501(6) of [the Act], (2) [the Direction] and [the prosecutor's] comments, and have decided ...".

39 It was decided by this Court in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*[16], where an order for prohibition under s 75(v) of the Constitution was made, that the "inadequacy" of the material on which the decision-maker acted may support the inference that the decision-maker had applied the wrong test or was not "in reality" satisfied of the requisite matters. Given the detail supplied in the Submission (including the annexures) and the statement by the Minister set out above, and not challenged, that he had considered all relevant matters, the decision in *Melbourne Stevedoring* is of no assistance to the prosecutor. Nor, for the same reasons, is the statement by Gibbs CJ in *Public Service Board of NSW v Osmond*[17], made with reference to *Padfield v Minister of Agriculture, Fisheries and Food*[18], that "if the decision-maker does not give any reason for his decision, the court may be able to infer that he had no good reason". That inference is not open here.

40 But that does not answer the allied but conceptually distinct point that what appears on p 16 of the Submission does not "set[] out the reasons ... for the decision". There are some issues for decision which are of such a nature that, as Kitto J put it[19], with reference to the statements by Lord Herschell and Eve J:

> "[I]t is not to be expected that [the judge] will be able, at any rate satisfactorily to the litigants or to one of the litigants, to indicate in detail the grounds which have led him to the conclusion."

The question for decision by the Minister here was not of that order. In any event, the Parliament obliged the Minister, having reached a conclusion, to set out his reasons and, in order to discharge that duty, it was at least necessary for him to express the essential ground or grounds for his conclusion that the

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16 (1953) 88 CLR 100 at 120.

17 (1986) 159 CLR 656 at 663-664.

18 [1968] AC 997 at 1053. See also *Wu v The Queen* (1999) 199 CLR 99 at 124 [71].

19 *In re Wolanski's Registered Design* (1953) 88 CLR 278 at 281. See also *Dinsdale v The Queen* (2000) 202 CLR 321 at 326 [9]-[10].

prosecutor had not satisfied him that he passed the character test and that the prosecutor's visa should be cancelled[20]. That was not done.

41 What then are the consequences? The duty imposed upon the Minister was not, as was suggested in argument, a duty of imperfect obligation. That mandamus may lie to compel performance of the duty denies such a contention. Once that duty is performed, the reasons set out by the Minister may disclose error of a kind which attracts prohibition under s 75(v) of the Constitution[21]. Yet, as has been remarked earlier in these reasons, the prosecutor does not seek mandamus, perhaps from a prudent apprehension of what may be the product of the proper discharge of the statutory duty.

42 Rather, the prosecutor fixes upon those cases concerned with breach of an essential *preliminary* to the exercise of a statutory power (here, that of visa cancellation under s 501(2)). Those cases, as it was put in *Project Blue Sky Inc v Australian Broadcasting Authority*[22]:

> "are regarded as going to the jurisdiction of the person or body exercising the power or authority".

43 It was decided by Lee J in *W157/00A v Minister for Immigration and Multicultural Affairs*[23] that the failure by the respondent to give a written notice setting out the reasons for the decision as required by s 501G(1)(e) attracted review by the Federal Court under what was then s 476 of the Act. This was because there had been a failure to observe "procedures that were required by [the] Act ... to be observed *in connection with* the making of the decision"[24] (emphasis added). That may be conceded, but it does not address the submission that such a failure also taints that decision with jurisdictional error so as to attract s 75(v) of the Constitution.

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20 cf *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 280; *Fleming v The Queen* (1998) 197 CLR 250 at 252-253 [2], 260 [22]; *Dinsdale v The Queen* (2000) 202 CLR 321 at 329 [21].

21 cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 331-332 [10], 346 [69].

22 (1998) 194 CLR 355 at 389 [92].

23 (2001) 190 ALR 55 at 66-67. His Honour's treatment of the subject was not challenged on appeal: *Minister for Immigration and Multicultural Affairs v W157/00A* (2002) 72 ALD 49 at 56.

24 (2001) 190 ALR 55 at 67.

44 Here, the question is whether the step under s 501G which logically and temporally succeeds the making of a decision in exercise of a power is a condition precedent to that exercise. The possibility that this is so may be conceded. But, as *Project Blue Sky* emphasised[25], the answer depends upon the construction of the Act to determine whether it was a purpose of the Act that an act done or not done, in breach of the provision, should be invalid. This gives rise to several immediate difficulties for the prosecutor.

45 First, "the act" upon which the prosecutor fixes for relief by way of certiorari and prohibition is not the failure to give the written notice required by s 501G, but the exercise of the power of visa cancellation conferred by s 501(2). Secondly, the Act deals expressly in s 501G(4) with the interrelation between cancellation and notification. The stipulation it makes is that a failure in notification does not of itself affect the validity of the cancellation.

46 The cancellation decision may still be reviewed under s 75(v) of the Constitution for jurisdictional error otherwise arising. The prosecutor's attack, albeit unsuccessful, for denial of natural justice is an immediate example. But failure in the notification required by s 501G does not impeach the cancellation decision for jurisdictional error.

47 The prosecutor urged the Court to have regard to the decision-making process as a whole and to the importance manifested in other (and earlier) federal law, notably the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), of the giving of reasons by administrative decision-makers, including Ministers. However, when these points are conceded and regard is had to the overall scheme of the Act as it applies to this case, the result does not assist the prosecutor.

48 The visa cancellation decision may be reviewed in this Court for jurisdictional error. Such error may be found from what is disclosed by reasons provided under s 501G(1)(e). Failure to provide reasons may also be reviewed in this Court and compliance by the Minister with the statutory duty may be ordered. The reasons then provided may furnish grounds for prohibition under s 75(v) in respect of the visa cancellation decision. But what is not provided for is for a prosecutor, as in this case, to bypass that earlier step utilising mandamus, and to impeach the visa cancellation decision itself for want of discharge of the duty to provide reasons. There is, as was pointed out in argument, a critical distinction between failure to comply with s 501G(1)(e) and using that failure to conclude that the visa cancellation decision is flawed by jurisdictional error.

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25 (1998) 194 CLR 355 at 390-391 [93].

Conclusion

49 The order nisi should be discharged and the application dismissed with costs.

50 McHUGH J. The prosecutor seeks writs of prohibition and certiorari in relation to a decision made by the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") on 27 June 2002 to cancel the prosecutor's residence visa.

51 In October 2002, Gaudron J granted an order nisi requiring the Minister to show cause why certiorari should not issue to remove the decision into this Court for the purpose of quashing it. The prosecutor alleges that the Minister exceeded or, alternatively, failed to exercise his jurisdiction in making the decision. In the forefront of the prosecutor's claims are the submissions that the prosecutor was denied procedural fairness in the making of this decision and that the Minister failed to observe the requirements of s 501G of the *Migration Act* 1958 (Cth) ("the Act"). That section requires the Minister to give written notification of his decision to cancel the visa.

52 The prosecutor is a German national who has never acquired Australian citizenship. He was born in Germany in 1961, and was brought to Australia in 1971 with his foster parents. In December 1992, the prosecutor pleaded guilty before the Supreme Court of New South Wales to a charge of murder. He was sentenced to imprisonment for 16 years, with a minimum term of 10 years. The minimum term expired on 8 December 2002.

53 Section 501(2) of the Act confers on the Minister a discretionary power to cancel a visa granted to a person where the Minister reasonably suspects that the person does not pass "the character test" and the person does not satisfy the Minister that he or she passes this test. Section 501(6) outlines the circumstances in which a person does not pass "the character test". One of these circumstances is that the visa holder has a "substantial criminal record" which s 501(7)(c) defines to include the case of a person having been sentenced to a term of imprisonment of 12 months or more. Plainly, the prosecutor's sentence for murder authorised the Minister to cancel his visa.

Failure to give reasons to the prosecutor

54 Section 501G(1) of the Act relevantly provides that, if the Minister makes a decision to cancel a visa, the Minister must give the person written notice that sets out the decision, specifies the provision under which the decision was made, and sets out the reasons for the decision. The Minister failed to comply with this section. What he provided to the prosecutor did not constitute "reasons" for the purpose of s 501G(1)(e). What the Minister did was to provide the prosecutor with a copy of the Departmental brief to the Minister discussing the issues in the case neutrally. The brief did not argue for any particular conclusion. It also contained an attachment that listed the options open to the Minister. One option was to cancel the visa. The Minister took that option, which he indicated by crossing out the other options. The copy sent to the prosecutor showed that the Minister had exercised this option and cancelled the visa. But it is impossible to

deduce from the selection of the option and the brief's discussion of the issues, what were the Minister's reasons for cancelling the visa.

55 The prosecutor contends that the Minister's failure to give reasons constitutes jurisdictional error with the result that the Minister had no jurisdiction or power to cancel the visa. Jurisdiction is the authority to decide. It is not easy to accept the notion that a decision is made without authority because subsequently the decision-maker fails to give reasons for the decision. Nevertheless, it is always possible that a statutory scheme has made the giving of reasons a condition precedent to the validity of a decision. If it has, a decision that does not give reasons will be made without authority. Whether a scheme has that effect is determined by applying the principles stated by this Court in *Project Blue Sky Inc v Australian Broadcasting Authority*[26]. In *Project Blue Sky*, the majority Justices rejected[27] the traditional distinction between "mandatory" and "directory" requirements, saying that "[a] better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid." In determining the purpose of the legislation, regard has to be had to "the language of the relevant provision and the scope and object of the whole statute". In this case, it is beyond argument that the Act did not intend that failure to comply with s 501G should invalidate the decision to cancel a visa. Section 501G(4) of the Act states that "[a] failure to comply with this section in relation to a decision does not affect the validity of the decision."

56 Nothing in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[28] supports the claim that the failure to give reasons constituted jurisdictional error. *Miah* concerned the effect of s 69 of the Act. That section dealt with decisions to grant or refuse to grant visas. It declared that the failure of such a decision to comply with certain provisions of the Act did not mean that the decision was not a valid decision. Section 69 declared that it only meant that the decision might be set aside if reviewed. Members of the Court held[29] in *Miah* that, properly construed, s 69 did not purport to validate the Minister's decision with the result that, if the prosecutor established a denial of natural justice, the prosecutor could obtain relief in this Court under s 75(v) of the Constitution. *Miah* does not assist in determining whether the Minister's decision in this case was made without authority.

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26 (1998) 194 CLR 355.

27 (1998) 194 CLR 355 at 389-391 [92]-[93].

28 (2001) 206 CLR 57.

29 (2001) 206 CLR 57 at 74 [47], 86-88 [100]-[104], 98 [144], 120 [204].

57 The Minister's failure to give reasons did not leave the prosecutor without remedy. It was open to the prosecutor to seek a writ of mandamus to compel the Minister to provide reasons for the decision. If reasons *were* provided as the result of the issue of the mandamus, they might demonstrate an error of a kind that would attract prohibition under s 75(v) of the Constitution. But the prosecutor has not sought to obtain a writ of mandamus.

58 Nor is any assistance obtained from the decision in *W157/00A v Minister for Immigration and Multicultural Affairs*[30], a case concerned with the kind of error that was necessary to attract review under what was then s 476 of the Act. The decision concerning the issue of judicial review in that case does not assist in determining whether there was error sufficient to attract review under s 75(v) of the Constitution.

Procedural fairness

59 The prosecutor also contended that he had been denied procedural fairness because he had not been given the opportunity to comment on the relevant material put before the Minister. For the reasons given in the joint judgment of Gleeson CJ and Gummow and Heydon JJ, there is no substance in this submission.

Interests of the children

60 Nor is there any substance in the contention that the Minister failed to have due regard to the interests of the prosecutor's children because they were not given an adequate opportunity to make submissions in relation to their separate interests. The brief that was submitted to the Minister made it clear that he had to take the interests of the prosecutor's children into account as a primary consideration in making his decision. It also described accurately the nature of the prosecutor's relationship with his children. At all events, the prosecutor did not suggest that the brief contained any false statements.

The material question

61 Nor is there any substance in the contention that the Minister misunderstood the nature of the decision that he had to make. The prosecutor contended that the brief led the Minister to address an irrelevant question instead of the question that he was required to decide. The prosecutor based this submission on a statement in the brief to the effect that the Minister had a discretion "to decide whether [the prosecutor] should be permitted to remain in Australia." It is true that the discretion was whether or not to cancel the visa and

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30 (2001) 190 ALR 55.

not a discretion to permit the prosecutor to remain in Australia. But the correct issue was formulated on four occasions in the brief. Quite apart from that consideration, however, the decision itself showed that the Minister asked the correct question. In making his decision, the Minister stated that he had decided to exercise his discretion under s 501(2) of the Act to cancel the visa and that he thereby cancelled the visa.

Wednesbury unreasonableness

62 Finally, there is no basis for the claim that the Minister's decision was so unreasonable that no Minister could properly have made it. The prosecutor's conviction and sentence for murder entitled the Minister to cancel the visa. Although the brief fairly mentioned matters that might have caused the Minister to refuse to cancel the visa, they were not so overpowering that the Minister's decision could even arguably be said to be unreasonable.

Order

63 The order nisi should be discharged with costs.

64 KIRBY J. The issue in this appeal concerns the duty of a designated administrator to give reasons for his decision and the consequences of his failure to do so for the validity of the decision. In other common law countries, the law has moved in recent times, with general consistency, to insist on the importance of the giving of reasons for valid and just decisions, not only by judges but also by administrators[31]. The more serious the context, the clearer the obligation. As Lord Steyn said in *R (Daly) v Secretary of State for the Home Department*[32]: "[I]n law context is everything." The more significant the decision, the clearer the duty may be, the clearer the reasons should be and the clearer the consequences will be for the breach[33]. Some decisions cry out for a clear explanation[34]. Especially is this so where the legislature has recognised the need and imposed a duty to give reasons and where the decision is very important for the person affected and for others close to that person. In such a case, the duty to give reasons is one which this Court should uphold. The just, rational and lawful administration of the law is at stake.

65 This Court has before it the return of an order nisi for writs of prohibition and certiorari, and associated relief[35]. Prohibition is sought pursuant to s 75(v) of the Constitution. At issue is whether the decision impugned discloses jurisdictional error on the part of the decision-maker in his failure to afford a fair hearing, to give reasons as required by law, to address correctly the matter to be decided and to have regard to the considerations relevant to the decision. The decision-maker was the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister"). The decision was one to cancel the visa of Mr Thomas Palme ("the prosecutor"), a long-time permanent resident of Australia who is an alien.

66 The record shows that no reasons as required by law were given. In the circumstances, that failure indicates that the decision was an arbitrary one made outside the decision-maker's jurisdiction. On that ground the application succeeds. No legislative exception precludes it. The order nisi should be made

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31 See eg *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817; *R v Sheppard* [2002] 1 SCR 869.

32 [2001] 2 AC 532 at 548 [28]; cf *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 at 847-848 [18].

33 cf *A, B & C (a family of Peru) v Chief Executive Department of Labour* [2001] NZAR 981; Taggart, "Administrative Law: Reasons for Decision", (2003) *New Zealand Law Review* 118 at 119-120.

34 cf *R v Director of Public Prosecutions; Ex parte Manning* [2001] QB 330.

35 The order nisi was granted by Gaudron J on 28 October 2002.

absolute. Where great power over human lives is given to a single person, even a Minister, it should cause no surprise that the exercise of that power is subjected by the courts to strict scrutiny[36].

The background facts

67 *Migration and early life*: The prosecutor is a national of the Federal Republic of Germany. He is now aged 42 years. He came to Australia as a child aged ten years in the care of his foster family. He grew up with his foster family and was the youngest of their four children. He attended primary and secondary school in Australia, and had a stable education and employment record with no relevant criminal involvement before the crime that has resulted in the present proceedings.

68 The prosecutor married and has two children now aged respectively 18 and 14 years. By inference, both children are Australian citizens. The prosecutor's principal language is English. Although he speaks some German his written German is poor. Whilst some members of the prosecutor's biological family still live in Germany, he has had no substantial contact with them since he was fostered to the couple who brought him to Australia. The prosecutor's marriage broke down and he separated from his wife with whom his children continue to reside. It was at about the time of the separation that the prosecutor became involved in the life of Mr David Roberts ("the deceased") and Mr Roberts' wife.

69 The deceased disappeared on 1 April 1989 when on a fishing trip with the prosecutor. His body was never found. A coronial inquiry determined that he had drowned accidentally. However, soon after the disappearance, the prosecutor told two friends that he had smashed a rock over the deceased's head and thrown him into the water. In due course, one of the friends informed the police of this conversation. When detectives called on the prosecutor he admitted the crime, expressed remorse and cooperated with the police.

70 *Conviction of murder*: The prosecutor was charged with murder. At his trial in the Supreme Court of New South Wales before Mathews J he pleaded guilty. Her Honour accepted the plea, convicted him, treated the case as involving "special circumstances"[37] and sentenced him to a minimum term of imprisonment of ten years commencing in December 1992, together with an

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36 *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002* (2003) 77 ALJR 1165 at 1194 [170]; 198 ALR 59 at 98.

37 *Sentencing Act* 1989 (NSW), s 5 (superseded by *Crimes (Sentencing Procedure) Act* 1999 (NSW)).

additional term of six years. The prosecutor has served the minimum term sentence. He was an exemplary prisoner. Had he become an Australian citizen before these events, he would presumably by now have been released into the community. But the prosecutor never changed his nationality.

71 Upon his conviction of murder the prosecutor would ordinarily have been liable to be sentenced to life imprisonment[38]. Given that the prosecutor admitted that the killing of the deceased was premeditated and deliberate, the explanation of the sentence imposed in the circumstances must be found in the reasons for sentence of Mathews J. Her Honour described the case as "quite extraordinary". The sentencing judge recorded various matters of extenuation concerned with the circumstances of the homicide and the life of the prosecutor.

72 The prosecutor alleged that he had committed the killing to extricate the deceased's wife from a situation of intolerable abuse to which she and her children had been subjected by the deceased. The wife supported the prosecutor's evidence in this respect. At the time of the trial a de facto married relationship existed between the prosecutor and the deceased's wife. A question arose as to whether this intimate association had pre-existed the murder and explained the prosecutor's real motive for the killing. The sentencing judge did not so hold. However, she concluded that the prosecutor had become obsessed with the plight of the deceased's wife, in part because of his attraction to her. She rejected the contention that the homicide had been a "spur of the moment or unpremeditated killing".

73 Against the background of these serious findings it is plain that the considerations personal to the prosecutor weighed heavily with Mathews J in reaching the sentence that she imposed on him. She concluded that the killing was uncharacteristic of the prosecutor's behaviour and that there was no chance of the recurrence of violence. The prosecutor's relationship with the wife of the deceased and her children did not survive his incarceration. Furthermore, his own wife divorced him. However, according to the record, the prosecutor maintained his links by telephone with his daughter although not with his son. The prosecutor's former wife maintained the contact between the children and the prosecutor's foster family. The prosecutor claimed that the daughter was very attached to him and that she would suffer greatly should they be separated.

74 *Links to children and Australia*: In these circumstances, when the question of the prosecutor's migration status arose, it was his contention that he had effectively been absorbed into the Australian community. That contention

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38 *Crimes Act* 1900 (NSW), s 19A(1). See also *Crimes Act* 1900 (NSW), s 441A (repealed); *Sentencing Act* 1989 (NSW), s 13A (repealed) discussed in *R v Purdey* (1993) 31 NSWLR 668.

was not contested by the Minister. However, this was only because it was treated as legally irrelevant, the prosecutor being an alien under Australian law and liable, as such, to deportation in accordance with law[39].

75 No argument was advanced to the contrary of this last proposition[40]. However, the prosecutor asserted that, overwhelmingly, his personal links since early childhood had been with Australia where his children, family and friends all lived. The prosecutor claimed that to return him to Germany, where he had no real family or personal links and few employment skills, would have grave consequences. As a matter of practicality, it would be likely to sever his contact with his children. Although his crime was a most serious one, the prosecutor submitted that the assessment of it, and of his background, by the sentencing judge, as well as the sentence that she imposed, showed that his was not the worst type of case. He submitted that his good record in Australia, apart from the crime, was objectively relevant to the migration decision to be made in his case. In effect, the prosecutor said that he had paid the price fixed by Australian law for the crime, knew no other country than Australia and should have had such considerations taken fully into account in the decision made on whether to expel him.

76 It was not for a court, exercising powers of judicial review, to reconsider the decision to remove the prosecutor from Australia on its merits[41]. However, the prosecutor submitted that the foregoing considerations were relevant to the evaluation of his claims that he had been denied a fair hearing and deprived of proper reasons, and otherwise suffered a decision with profound consequences for him and his children, made without due compliance with law.

The ministerial decision

77 *Liability to visa cancellation*: The subject of these proceedings is a decision made by the Minister on 27 June 2002. That decision purported to exercise the power granted to the Minister by the *Migration Act* 1958 (Cth) ("the Act"). By s 501(2) of the Act, the Minister was empowered to cancel the visa that afforded the prosecutor the right to remain in Australia as an alien. The precise status of the prosecutor when he arrived in Australia in 1971 is not disclosed. It is possible that he was allowed to enter on his foster father's

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39 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 77 ALJR 1; 193 ALR 37.

40 cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 77 ALJR 1 at 31 [195], 39 [229]; 193 ALR 37 at 79, 89.

41 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42.

passport[42]. However that may be, as a result of changes to the Act in 1994[43], the prosecutor's status became that of an alien granted a transitional (permanent) visa.

78 At the time that the prosecutor committed the crime, and at the time of his sentence, he was not liable to visa cancellation under the Act on that ground. The relevant provision of the Act was then s 55. That section provided for deportation of non-citizens present in Australia for less than ten years who were convicted of specified crimes. Because by such times the prosecutor had been present in Australia as a permanent resident for considerably more than ten years, he was not then so liable[44]. However, his position was altered by amendments to the Act enacted whilst the prosecutor was serving his sentence. No separate argument was presented concerning the validity of such retrospective legislation or the procedures followed in giving it effect in the prosecutor's case.

79 In 1998, pursuant to the supervening amendments, the Minister's department informed the prosecutor that he was liable to visa cancellation pursuant to s 501 of the Act (as it then stood). The prosecutor was invited to provide material to demonstrate why his visa should not be cancelled. From prison, the prosecutor responded and asked to be interviewed. No further steps were taken until 27 February 2002. At that time, the department informed the prosecutor again of his liability to visa cancellation pursuant to s 501 of the Act in the form in which, by further amending legislation[45], s 501 had been altered to its present terms. The departmental letter to the prosecutor in February 2002 enclosed the full text of s 501 together with copy of the Minister's Direction No 21.

80 The Direction[46] is a 14 page, closely typed document setting out a large amount of general information concerning the operation of s 501. To a lawyer's eye much of the information could be seen to be irrelevant to the case of the

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42 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 421-422 [92] per McHugh J referring to the Act, s 6(8) as in force at the relevant time.

43 *Migration Legislation Amendment Act* 1994 (Cth), s 7; Migration Reform (Transitional Provisions) Regulations (Cth), reg 4. See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 421-422 [92].

44 The Act, s 55(b)(ii) as it stood before 1994.

45 *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act* 1998 (Cth), Sched 1, item 23.

46 Pursuant to s 499 of the Act the Minister gave "Direction – Visa Refusal and Cancellation under section 501 – No 21".

prosecutor (for example descriptions of "past and present *general* conduct", references to the risks that the alien might "harass, molest, intimidate or stalk another person in Australia", "vilify a segment of the community" or "incite discord", and the provision of lists of crimes other than murder, extending over two pages, given as "examples of offences which are considered by the Government to be very serious"). The Direction was obviously designed to cover every possible case. It was not particular to the prosecutor's case. For many of its recipients, it would be quite difficult to understand, even for those (like the prosecutor) with a proficiency in the English language which many recipients would not enjoy.

81 This notwithstanding, the departmental letter of February 2002 instructed the prosecutor to "read fully and carefully the contents of the Minister's Direction". It told him that he "should address each and every topic that you feel applies to you or is relevant to your circumstances". Subsequently, the prosecutor was interviewed in person by an officer of the department. A typed transcript of that interview was later given to him. By letter in March 2002, the prosecutor sent the Minister personal references from people who knew him. These references included one from his foster brother who spoke highly of him as a family member and one from a former work colleague who expressed willingness to employ him when he became eligible for work release.

82 *The Minister's decision*: As the date for release from prison approached, the Minister's department prepared a submission for the Minister in the form of a brief. This document, the substantive part of which comprised 16 pages, concluded with a section in the following terms:

> "MINISTERS [sic] DECISION ON CANCELLATION UNDER S 501(2)
>
> PART E: DECISION
>
> [63] I have considered all relevant matters including (1) an assessment of the Character Test as defined by s 501(6) of the *Migration Act 1958*, (2) my Direction under s 499 of that Act and Mr Palme's comments, and have decided that:
>
> Please delete whichever is NOT applicable:
>
> (a) I am satisfied that Mr Palme passes the character test;
>
> OR
>
> (b) I reasonably suspect that Mr Palme does not pass the character test and Mr Palme has not satisfied me that he passes the character test BUT I have decided NOT to exercise my discretion under subsection 501(2) of the Act to cancel the visa;

OR

(c) I reasonably suspect Mr Palme does not pass the character test and Mr Palme has not satisfied me that he passes the character test BUT I have decided NOT to exercise my discretion under subsection 501(2) of the Act to cancel the visa BUT Mr Palme is to be WARNED that a fresh assessment will be made with a view to consider [sic] cancelling his visa if he is convicted of any further offences;

OR

(d) I reasonably suspect that Mr Palme does not pass the character test and Mr Palme has not satisfied me that he passes the character test AND I have decided TO EXERCISE MY DISCRETION UNDER SUBSECTION 501(2) OF THE ACT TO CANCEL THE VISA, so I hereby cancel the visa."

83 The departmental record placed before this Court included a photocopy of the original brief. From this it emerges that par (d) of the decision was initially deleted by the Minister who placed lines through the paragraph apparently signifying disagreement with its conclusion. Initially it seems that pars (a) and (b) were likewise crossed through, consistent with the adoption of a decision in terms of par (c). However, further deletions were marked on the document extending to par (c). Beside par (d) was placed the word "stet" above the Minister's signature. From this it is clear that the ultimate decision of the Minister was to cancel the prosecutor's visa in terms of par (d). However, the face of the document suggests either that the Minister changed his mind in the course of reaching his decision or that a mistake had been made when initially recording the decision. The record of the Minister's "decision" is certainly consistent with a conclusion that the case for the discretionary decision of the Minister was finely balanced as, in any event, the foregoing facts arguably show. In such a case, the provision of reasons that identified sufficiently and accurately the bases for the decision, where that was required by law, became all the more important.

84 *The purported reasons*: No reasons, as such, were appended to the Minister's conclusion after the record of his decision to cancel the prosecutor's visa signified by his restoration of par (d). When the deleted paragraphs are put aside (in compliance with the departmental request to delete "whichever is NOT applicable") all that remains on that page to explain the reasons for the Minister's decision is an assertion that he has "considered all relevant matters"; that he reasonably suspects that the prosecutor does not pass the "character test" provided by the Act; and that "I have decided TO EXERCISE MY DISCRETION UNDER SUBSECTION 501(2)".

85 The departmental brief preceding the statement of the Minister's decision purported to be a neutral presentation by the department to the Minister of the relevant considerations of fact and law necessary for the Minister to make his decision. The brief contained no recommendation one way or the other. It drew the Minister's attention to the provisions of s 501 of the Act applicable to the circumstances. It set out extracts from the Minister's Direction. These included the statement that "[i]t is the Government's view that the following are examples of offences which are considered by the Government to be very serious". Unsurprisingly, murder was amongst such offences. Correctly, the brief informed the Minister that it was open to him to find that the prosecutor's conduct against the community was serious.

86 To provide more detail for the Minister's assessment, the brief contained extracts from the reasons on sentence of Mathews J. Those extracts set out her Honour's findings about the circumstances of the offence and the prosecutor's motive for the crime and conclusions about premeditation. The brief then itemised statements of the prosecutor and his foster brother and information concerning his past record, employment history and prison assessments. On the basis of this material, the brief concluded that it was open to the Minister to find that the prosecutor was "at a low risk of recidivism".

87 The brief next turned to the issue of "[g]eneral deterrence". It concluded that it was open to the Minister to find that cancellation of the prosecutor's visa would serve as a "deterrence factor against others committing similar offences". It then addressed the issue of the suggested expectations of the Australian community set out in the Minister's Direction. It concluded in words that the prosecutor claimed were critical:

> "The offence committed by Mr Palme is considered by the Government to be very serious. The Australian community expects non-citizens to obey Australian laws while in Australia and therefore it is open for you to find that the character concerns or offence are such that the Australian community may expect that Mr Palme should be removed from Australia."

88 Finally, the brief concluded with references to the consideration of the best interests of the prosecutor's children. It mentioned his relationship with his children and that it was open to the Minister to find that cancellation of his visa and removal from Australia "would have a detrimental effect on his children". Likewise, the brief included a summary of the prosecutor's good relationship with his foster family and the fact that it was open to the Minister to find that his removal from Australia "would impose significant hardship" on that family.

89 At the conclusion of this statement of matters that it was open to the Minister to take into account in reaching his decision appeared a schedule of "evidence or other material on which facts/background information is based".

That schedule opened with the statement: "In support of the above findings I had regard to the following material". After this statement is listed a series of annexures, being the original documents in the departmental file, including confirmation of the prosecutor's immigration status, his criminal conviction, correspondence, letters and references tendered by him and the judge's comments on sentence.

90 The last page of the departmental brief, immediately following the signed statement of the Minister's decision, described above, contained the names and signatures of three departmental officers who had "prepared" or "cleared" the brief for the Minister. It is not entirely clear whether the statement "I had regard to the following material" is a certification by those officers of what *they* had regard to or is intended to amount to an assertion by the Minister that *he* had had such regard, without specifying to what degree. I will assume that the latter is the proper interpretation.

The issues

91 The prosecutor's arguments presented four issues to this Court:

(1) *The procedural fairness issue*: Whether the Minister had failed to accord the prosecutor procedural fairness by reason of the Minister's omission to provide the prosecutor with a fair hearing, and specifically a fair opportunity to respond to the matters set out in the departmental brief before the Minister made his decision in reliance upon it;

(2) *The reasons issue*: Whether the Minister had failed to give any, or adequate, reasons for his decision in accordance with the Act and, if he did fail, whether any such failure constituted jurisdictional error on the footing (a) that it indicated that the "decision" made was an arbitrary one and not a "decision" as contemplated by the Act; or (b) that it otherwise failed to accord the prosecutor procedural fairness;

(3) *The material question issue*: Whether the Minister had misunderstood the nature of the decision that he had to make, being led by the terms of the brief to address an immaterial question rather than the question required by the Act, and thereby committed jurisdictional error; and

(4) *The interests of the children issue*: Whether the Minister had failed to have proper regard to the interests of the prosecutor's children, whose separate interests would be affected by the decision whether or not to cancel their father's visa[47].

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47 cf *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-289, 290-292, 304-305; cf *Re Minister for Immigration and Multicultural Affairs;*

(Footnote continues on next page)

Two insubstantial grounds should be rejected

92 *The material question issue*: The third and fourth issues may be quickly disposed of. Assuming, for these purposes, that the departmental brief is incorporated as evidence of the reasons for the Minister's decision, it is true that at one stage, early in that document, the question for the Minister's decision is stated loosely. The Minister is there invited to decide "whether [the prosecutor] should be permitted to remain in Australia". The prosecutor submitted that the correct question was whether the Minister should cancel the visa and not, as such, whether he should remain in this country. He argued that the correct formulation concentrated attention on the serious step of cancellation.

93 This point is without legal merit. Repeatedly in the brief the question for decision was correctly stated to be that of cancellation of the visa. That is the form in which the question is posed in the text of the brief on at least four occasions. Most importantly, it is the form in which it appears in the final section labelled "Decision" where the Minister's actual exercise of discretion and decision are recorded. The claim based on the third issue is therefore rejected.

94 *The interests of the children issue*: Nor is there a proper criticism of the brief in the presentation of references to the interests of the prosecutor's children. To the contrary, the brief, by reference to the Minister's own Direction expressed in terms of the conventional understanding of the decision of this Court in *Minister for Immigration and Ethnic Affairs v Teoh*[48], made it clear that the Minister was to take the interests of the prosecutor's children into account as a "primary consideration". The brief made express reference to the Convention on the Rights of the Child to which Australia is a party[49]. The circumstances of the prosecutor's relationship with his children were then described. Neither in this nor in any other respect was it alleged by the prosecutor that the brief contained any misstatement of the facts. Whilst it is true that the brief did not expressly identify the children as Australian citizens, that status was left to inference which was overwhelming. Further, the terms of the brief concerning the interests of the children were sufficient in the circumstances to direct the mind of the Minister to those interests. There is no merit in the fourth point. The claim based on it is also rejected.

Ex parte Lam (2003) 77 ALJR 699 at 716-717 [95]-[102], 720 [122], 724-726 [140]-[147]; 195 ALR 502 at 525-527, 531, 536-539.

48 (1995) 183 CLR 273.

49 Done at New York on 20 November 1989, 1991 *Australia Treaty Series* 4.

95 *Confining the issues*: It was common ground that the Minister's decision, at the time it was made, was a "privative decision" in terms of the recent amendments to the Act[50]. The order nisi that was granted to the prosecutor included a ground permitting him to challenge the constitutional validity of the provisions of the Act so far as they purported to constrain the jurisdiction of this Court to issue the constitutional writ that the prosecutor sought. After the order nisi was granted, this Court decided that the "privative" provisions of the Act did not, in terms, purport to oust this Court's jurisdiction under s 75(v) of the Constitution[51]. Accordingly, the prosecutor submitted that this ground in the order nisi had become redundant. No submission was advanced for the Minister to challenge that proposition. It is therefore appropriate to proceed upon that basis.

96 It follows from the foregoing that the issues in the proceedings are confined to the first two raised by the prosecutor. Although in terms of the temporal sequence of events, and perhaps logically, the challenge asserting that the decision was made without according the prosecutor procedural fairness might be thought to come first, it is convenient to give priority to the second issue challenging the Minister's alleged failure to provide reasons. The resolution of that issue may have a larger significance for the administration of the Act. As well, it is susceptible to easier resolution. I will therefore address it immediately.

The relevant legislation

97 *Natural justice requirements*: The following provisions of the Act need to be noticed:

> "501 Refusal or cancellation of visa on character grounds
>
> *Decision of Minister or delegate – natural justice applies*
>
> …
>
> (2) The Minister may cancel a visa that has been granted to a person if:
>
> (a) the Minister reasonably suspects that the person does not pass the character test; and

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50 The Act, s 474.

51 *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454 at 464 [43], [45], 475 [106], 489 [177]; 195 ALR 24 at 37, 52, 72.

(b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister – natural justice does not apply

(3) The Minister may:

…

(b) cancel a visa that has been granted to a person;

if

(c) the Minister reasonably suspects that the person does not pass the character test; and

(d) the Minister is satisfied that the … cancellation is in the national interest.

(4) The power under subsection (3) may only be exercised by the Minister personally.

(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3)."

98 There follows in s 501 a definition of the "character test". By s 501(6)(a) a person does not pass the character test if the person has a "substantial criminal record", as defined. By s 501(7) a "substantial criminal record" is defined to include, in par (c), the case where a person "has been sentenced to a term of imprisonment of 12 months or more". By this definition, it was clearly open to the Minister to decide that the prosecutor did not pass the "character test" in accordance with s 501(2). So much was not contested before this Court.

99 Because the Minister did not purport to treat the case as one involving cancellation of the prosecutor's visa "in the national interest" it is clear that, having decided to proceed with the decision of whether to cancel the prosecutor's visa personally (and not by delegation), the Minister was empowered to cancel the visa himself. However, the decision was discretionary. To its exercise, by the terms of s 501(5) of the Act, the rules of natural justice and the statutory code of procedure applied.

100 Where, under the Act, a decision whether to cancel a visa is delegated by the Minister to his delegate[52] and a cancellation decision is made by such

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52 The Act, s 496.

delegate, the person affected has the right to have such decision reviewed by the Administrative Appeals Tribunal[53] ("the AAT"). In such a case, that person has a full opportunity in a public hearing to adduce evidence and argument to resist a decision cancelling the visa, including on the ground that although the person does not pass the "character test" as defined the discretion to cancel the visa should not be exercised in all the circumstances. Had the Minister decided to delegate the decision in that way, the prosecutor would have had that facility. Nevertheless, it was open to the Minister to proceed as he did by personal decision. Proceeding in that way, he became the repository of the statutory power of decision. He was then obliged to exercise his power as any other repository must do in like circumstances. He was required to observe the provisions of the Act and specifically the obligation to accord natural justice to the person affected by the decision, relevantly for this argument, the prosecutor.

101 *Requirement of reasons*: A common feature of much federal legislation concerned with public administration in recent years has been the enactment of an obligation to provide reasons for administrative decisions[54]. In respect of a decision made by the Minister personally to cancel a visa under s 501(2), s 501G enacts duties that the Minister must observe. Relevantly, s 501G provides in such a case:

> "(1) …
>
> the Minister must give the person a written notice that:
>
> (c) sets out the decision; and
>
> (d) specifies the provision under which the decision was made and sets out the effect of that provision; and
>
> (e) sets out the reasons (other than non-disclosable information) for the decision …
>
> (3) A notice under subsection (1) must be given in the prescribed manner.
>
> (4) A failure to comply with this section in relation to a decision does not affect the validity of the decision."

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53 The Act, s 500(1)(b).

54 eg *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 13.

The omission to state reasons and its consequences

102 *The purported reasons*: After the Minister made the decision in the manner described, by indicating that he deleted pars (a), (b) and (c) of the form provided to him on the penultimate page of the departmental brief and endorsed par (d), a copy of that decision was sent to the prosecutor on 4 July 2002. A copy of the brief was enclosed in the letter notifying the prosecutor of the Minister's action; informing him of the cancellation of his visa; telling him that he was excluded from appealing to the AAT; and warning him that he was liable to be maintained in immigration detention, following completion of the custodial portion of his sentence, prior to his removal from Australia[55]. Until that time, the prosecutor had no knowledge of the precise contents of the departmental brief. So much was not contested. All other avenues of judicial and administrative review of the Minister's decision being excluded by the Act, the prosecutor promptly applied to this Court and obtained the order nisi.

103 Clearly enough, by the written notice given to the prosecutor in the departmental letter, the Minister gave him a notice that set out the decision and sufficiently specified the provision of the Act under which the decision was made and the effect of that provision. To that extent the requirements of s 501G(1) were complied with. The question in these proceedings is whether such notice set out the "reasons … for the decision" as s 501G(1)(e) requires. If not, the consequential question is, what follows?

104 Even giving the departmental letter, the Minister's decision and the attached brief the most beneficial construction possible, I am unconvinced that the written notice to the prosecutor set out the reasons for the decision as the Parliament required. The starting point in giving meaning to the obligation in s 501G(1)(e) is an appreciation of the importance of reasons in administrative decisions generally and in the Minister's decision in this case in particular.

105 *Rationale for reasons*: The rationale of the obligation to provide reasons for administrative decisions is that they amount to a "salutary discipline for those who have to decide anything that adversely affects others"[56]. They encourage "a careful examination of the relevant issues, the elimination of extraneous

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55 According to the Minister, he was granted a bridging visa to allow him to remain in Australia to complete his custodial sentence.

56 de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed (1995) at 459 citing *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 2 All ER 870 at 872.

considerations, and consistency in decision-making"[57]. They provide guidance for future like decisions. In many cases they promote the acceptance of decisions once made[58]. They facilitate the work of the courts in performing their supervisory functions where they have jurisdiction to do so[59]. They encourage good administration generally by ensuring that a decision is properly considered by the repository of the power[60]. They promote real consideration of the issues and discourage the decision-maker from merely going through the motions[61]. Where the decision effects the redefinition of the status of a person by the agencies of the State, they guard against the arbitrariness that would be involved in such a redefinition without proper reasons[62]. By giving reasons, the repository of public power increases "public confidence in, and the legitimacy of, the administrative process"[63].

106 In the context of more general developments in Australian administrative law, facilitated by legislative provisions enacted by the Parliament requiring the giving of reasons, the foregoing explanations and justifications are reinforced

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57 de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed (1995) at 459.

58 de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed (1995) at 459 citing *R v Secretary of State for the Home Department; Ex parte Singh* (*The Times*, 8 June 1987 per Woolf LJ).

59 Craig, "The Common Law, Reasons and Administrative Justice", (1994) *Cambridge Law Journal* 282 at 283.

60 de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed (1995) at 472.

61 de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed (1995) at 472.

62 Craig, "The Common Law, Reasons and Administrative Justice", (1994) *Cambridge Law Journal* 282 at 283 citing Rabin, "Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement", (1976) 44 *University of Chicago Law Review* 60 at 77-78.

63 Craig, "The Common Law, Reasons and Administrative Justice", (1994) *Cambridge Law Journal* 282 at 283.

both by Australian judicial authority[64] and by expert administrative agencies[65]. Similar points have been made in academic writing both in Australia and overseas[66].

107 *Reasons in migration cases*: In the context of a decision by the Minister made under the Act, such as that affecting the prosecutor in this case, there are particular features that reinforce the significance of reasons and which help to explain why the Parliament enacted as it did in s 501G(1)(e) of the Act. Without exhausting the list the relevant considerations include:

(1) The immediate consequences of the decision for the liberty of the person affected by it, given that, if not otherwise in custody, the person must be taken into immigration detention and held there pending execution of the decision;

(2) The drastic consequences of such a decision for the person concerned, the person's family and commonly (as in this case) other Australian citizens having close relationships with the person;

(3) The fact that the making of the decision by the Minister personally deprives the person affected of a right to have the decision reviewed by the AAT, such as would otherwise apply if the decision were made by the delegate of the Minister; and

(4) The fact that the Minister is not obliged in such a case to report to the Parliament on the making of such a decision. In other cases where the Minister makes a decision personally under the Act having similarly drastic consequences, he is obliged to cause notice of his decision to be

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64 eg *Hatfield v Health Insurance Commission* (1987) 15 FCR 487 at 489-490; *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465 at 482-483.

65 eg Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions*, Report No 33 (1991). See also Administrative Review Council, *Practical Guidelines for Preparing Statements of Reasons*, (November 2002).

66 eg Macdonald and Lametti, "Reasons for Decision in Administrative Law", (1990) 3 *Canadian Journal of Administrative Law and Practice* 123; Wade and Forsyth, *Administrative Law*, 8th ed (2000) at 516-520; Mason, "Australian Administrative Law Compared with Overseas Models of Administrative Law", (2001) 31 *AIAL Forum* 45 at 60-62; Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed (2001) at 871-873.

laid before each House of Parliament within a given time[67]. No such obligation applies to a decision such as that made in the present case. In so far as the procedure of parliamentary tabling represents a form of political accountability for the Minister's decision[68], it is an accountability missing from cases such as the present.

108 The foregoing considerations reinforce an impression which the language of s 501G(1) would in any case occasion, namely that, when the Parliament enacted the obligation for the Minister to give a person such as the prosecutor a written notice setting out the reasons for the decision, it meant that instruction to be taken seriously and to be properly complied with. It was not a trifle.

109 *Failure to provide reasons*: Can it therefore be said that the letter notifying the prosecutor of the Minister's decision, attaching the departmental brief, sufficiently conformed to the requirements stated in the Act? In my view, it cannot.

110 First, the "reasons" required in the notice are "the reasons … for the decision". (There is no suggestion in the present case that there was any "non-disclosable information" that could be omitted from the reasons.) Because of the use of the definite article, the reference to "the reasons" suggests that the reasons provided have to be the true and sufficient reasons that caused the Minister to decide as he did in the circumstances. As the "decision" is in law one to be made by the Minister, the reasons must be those of the Minister personally not just the reasons, if any, held by others[69]. Only the Minister's reasons will be "the reasons … for the decision". There is no indication in the Minister's hand or otherwise, following the record of his decision (signified on the penultimate page of the brief), of the reasons that actually led the Minister to the decision that he made. The selection of the Minister's "reasons" is left to inference. They must be deduced from the terms of the brief. There are few clear indications of how that process is to be carried out. In fact, at least in this case, it is left to guesswork and speculation.

111 Secondly, in so far as the opening sentence of the Minister's "decision" is said to constitute the "reasons" required, it is inadequate. To state "I have considered all relevant matters" is an all-embracing and self-serving statement of

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67 See eg the Act, ss 500A(7), 501C(8), (9) and (10).

68 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 502-503 [331], 519 [381].

69 *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at 1161, 1164-1165; [1982] 3 All ER 141 at 144, 147. See also *Kioa v West* (1985) 159 CLR 550 at 588, 602, 628, 634.

conclusion not of the reasons for that conclusion. It does not identify the matters in the brief that the Minister ultimately considered to be relevant to the exercise of his discretion and those that he regarded as irrelevant or insubstantial. It does not reveal the reasons why the Minister opted for one rather than any of the three other possibilities offered to him at the conclusion of the brief. A greater specificity than simple reference to "all relevant matters" is envisaged by the language of s 501G(1). Otherwise, the general and particular objectives that lie behind the legislative requirement for the provision of the "reasons" will not be attained.

112 Thirdly, the statement of the decision to cancel the visa, with its reference to the reason that the Minister "reasonably suspect[s] that [the prosecutor] does not pass the character test and [he] has not satisfied me that he passes the character test", is also a statement of conclusion. It is not a statement of "reasons" that address the various arguments elaborated in the brief as pertinent to the ultimate discretion afforded to the Minister by s 501(2) of the Act. Given that there was no real contest that the prosecutor did not pass the "character test", as defined by the Act, it remained for the Minister's "reasons" to explain why, in the circumstances, the discretion to *cancel* the visa was exercised rather than the discretion not to do so in light of the countervailing factual considerations relevant to the case, many of which were set out in the brief. In the statement of the conclusion in terms of par (d), which the Minister adopted, there is no hint of "the reasons" for preferring the option of cancellation to that of non-cancellation. Yet in accordance with the Act, a statement of the *decision* alone is not sufficient. For such a serious decision the Parliament has required that the notice should go further and set out the *reasons*.

113 Fourthly, the format of the departmental brief could scarcely serve as an indication of "the reasons" for the Minister's decision. The departmental brief in this case studiously refrained from making a recommendation to the Minister as to the decision that he should reach. In so far as it offered various suggestions as to what was "open for the Minister to find", such suggestions were expressed in terms that pulled in opposite directions.

114 Thus, whilst the brief stated that it was open to the Minister to find that the prosecutor's conduct against the community was "serious", as it obviously was, and such that "the Australian community may expect [him to] be removed from Australia", it was also stated that it was open to the Minister to conclude that the prosecutor was "at a low risk of recidivism" and that his removal from Australia would have a detrimental effect on his children and on his foster family many or all of whom, inferentially, were Australian citizens. Therefore, simply to treat the brief as incorporated by reference by way of the Minister's consideration of "all relevant matters" gives no clue as to the way the Minister resolved the tension critical to the decision in the prosecutor's case between those factors favouring cancellation and those factors favouring non-cancellation.

115 The very fact that the design of the brief in its concluding section permitted the Minister to reach opposite decisions, indicates that provision of the brief without some elaboration and explanation by the Minister would not constitute notification of "the reasons" for the decision. The same briefing material could not logically constitute "the reasons" for *cancellation* and also *non-cancellation* without a ministerial indication of a preference for one view of the matters contained in the brief over another or an assignment of greater weight to one or more considerations than to others.

116 *Reasons from the decision-maker*: It follows that, in so far as the Minister's stated "decision" left "the reasons" for the decision to guesswork and speculation, transmission of the departmental brief did not resolve the ambiguities. It did not set out "the reasons" as the Parliament enacted[70].

117 My conclusion in this regard is consistent with that reached by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*[71]. There, in reviewing under the *Canadian Charter of Rights and Freedoms* a ministerial decision to declare that an asylum seeker was a danger to the security of Canada, that Court said[72]:

> "The Minister must provide written reasons for her decision … The reasons must … articulate why, subject to privilege or valid legal reasons for not disclosing detailed information, the Minister believes the individual to be a danger to the security of Canada as required by the Act. In addition, the reasons must also emanate from the person making the decision, in this case the Minister, rather than take the form of advice or suggestion, such as the memorandum of [the departmental official]. [The official's] report, explaining to the Minister the position of [the department], is more like a prosecutor's brief than a statement of reasons for a decision."

118 Although, in the present case, the departmental brief was more even-handed than was found to be the case in *Suresh*, and although the legal context is not the same, the documents in the two cases were equally inadequate as a statement of the Minister's reasons for decision. Here, the brief remained a statement of ministerial options. Without more, its very purpose prevented its

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70 cf *W157/00A v Minister for Immigration and Multicultural Affairs* (2001) 190 ALR 55; *Minister for Immigration and Multicultural Affairs v W157/00A* (2002) 72 ALD 49 at 69 [85], [87].

71 [2002] 1 SCR 3.

72 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at 66-67 [126].

fulfilling the requirement of providing "the reasons" for a decision that opted for one of three possible decisions on cancellation.

119 *Conclusion – factors but no reasons*: In the Full Court of the Federal Court, in explaining a similar conclusion by reference to what appears to have been a similar document, Branson J correctly said[73]:

> "[T]he idea that the one document can be characterised as a notice that sets out the reasons for diametrically opposed decisions depending on whether the expression 'agreed' or 'not agreed' at the conclusion of the document is crossed out runs contrary to logic. In truth, as in the Canadian case of *Suresh*, the document here sought to be characterised as a notice which sets out the minister's reasons for decision is a document provided to the minister to assist him in reaching his decision. It does not tell the respondent why his visa was cancelled; at best it sets out facts and other material relevant to the exercise of the minister's discretion to cancel or not to cancel the respondent's visa. [The notice] may set out the findings of fact which gave rise to the decision but it does not set out the reasons for the decision."

The omission to give reasons indicates a failure of the process

120 *The provisions of s 501G*: To overcome this reasoning, the Minister invoked the provision in s 501G(4) to the effect that a failure to comply with the section "in relation to a decision" did not affect the validity of the decision[74]. In other proceedings, an enactment to such effect might raise a question about the constitutional validity of a legislative attempt in undiscriminating terms to uphold a decision made by a Minister in apparent non-compliance with requirements stated in some detail by the Parliament. No notices having been given as required by s 78B of the *Judiciary Act* 1903 (Cth) to attack the constitutional validity of s 501G(4), that question cannot be considered in these proceedings. Similarly, because no application was made on behalf of the prosecutor for the constitutional writ of mandamus to compel the Minister to give the prosecutor a written notice, setting out the reasons for his decision to cancel the visa, no question arises here as to whether such relief would be available[75].

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73 *Minister for Immigration and Multicultural Affairs v W157/00A* (2002) 72 ALD 49 at 63 [54].

74 cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-390 [91]-[92].

75 cf *Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 196 ALR 332 at 333-334 [4].

121 Nevertheless, the requirements of s 501G(1) should be approached on the footing that the obligation expressed by the Parliament, including to provide written notice of the reasons for such decisions, was intended to be taken seriously and complied with[76]. The provisions of sub-s (4) of the section are to be read with that assumption in mind. It should not therefore be assumed that the obligations imposed on the Minister in sub-s (1) of s 501G are to be ignored or avoided simply because of the presence of sub-s (4). Reading the latter in the context of the former, it is necessary to give sub-s (4) a meaning that preserves the obligations imposed on the Minister by s 501G(1). Particularly by reference to this Court's powers under s 75(v) of the Constitution, recently given fresh emphasis[77], it is proper to read s 501G(4) so that it does not purport to exempt a ministerial decision to which s 501G applies from compliance with s 501G(1) as if it did not exist. This Court would not readily infer that the detailed requirements of s 501G(1) were to be treated as mere legislative surplusage to be complied with or not at the whim of the Minister.

122 The Minister accepted that, notwithstanding s 501G(4), within its powers under s 75(v) of the Constitution, this Court could consider his suggested non-compliance with s 501G(1) to ascertain whether, on some ground other than non-compliance with the requirements of s 501G(1), the prosecutor was entitled to relief in the form of prohibition. This was a correct concession. It is supported by a long line of judicial authority.

123 *Indications of no decision*: In *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*[78], this Court considered a privative provision in federal legislation[79]. It drew a distinction between a case where the decision-maker was said to have had inadequate materials before it to make the decision and a case where the inadequacy of the materials suggested that *no decision* as contemplated by the legislation had been made. Four members of the Court said[80]:

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76 In the Explanatory Memorandum circulated with the 1998 Bill which introduced s 501G into the Act it is stated that under s 501G(1) the Minister "must give the person written notice that … sets out the reasons for the decision": Australia, Senate, Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998 (Cth), Explanatory Memorandum at 19 [90].

77 *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454 at 464 [43], [45], 475 [106], 489 [177]; 195 ALR 24 at 37, 52, 72.

78 (1953) 88 CLR 100.

79 *Stevedoring Industry Act* 1949 (Cth), s 52.

80 (1953) 88 CLR 100 at 120 per Dixon CJ, Williams, Webb and Fullagar JJ. At 122 Taylor J expressed substantial agreement with the reasons in the joint judgment.

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> "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."

124 A similar point was made by Gibbs CJ (writing with the concurrence of Brennan J) in *Public Service Board of NSW v Osmond*[81]. In that case, unlike this, there was no express statutory obligation on the decision-maker to provide the person affected by its decision with a written notice setting out the reasons for the decision. This Court reversed a conclusion of the New South Wales Court of Appeal in which a majority had held that the common law would fill the gap left by the statutory omission to require reasons. Because of the express requirement in this case of s 501G(1)(e) of the Act to provide reasons, these proceedings do not afford an opportunity to reconsider the general principle stated in *Osmond* in the light of later legal developments. However, in *Osmond*, Gibbs CJ pointed out that, in some circumstances, the omission of a decision-maker to give reasons will have collateral consequences[82]:

> "[T]he fact that no reasons are given for a decision does not mean that it cannot be questioned; indeed, if the decision-maker does not give any reason for his decision, the court may be able to infer that he had no good reason."

As his Honour explained, the approach of Australian authority in this respect runs in parallel with a line of authority in England[83].

125 *Legislative relief from invalidity*: More recently, addressing the operation of s 69 of the Act (which, like s 501G(4), was designed to exempt from invalidity a ministerial decision that did not comply with statutory requirements)

See also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360.

81 (1986) 159 CLR 656.

82 (1986) 159 CLR 656 at 663-664.

83 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1033, 1049, 1058.

Gaudron J[84] (writing with the concurrence of McHugh J[85] on this point) emphasised the necessarily limited ambit of provisions such as s 69 in the face of this Court's jurisdiction under s 75(v) of the Constitution. Her Honour said[86]:

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

These comments are clearly correct. They apply equally to the operation of s 501G(4) of the Act.

126 Once this point is reached, in proceedings such as the present it is necessary to examine the entirety of the Minister's decision-making process, including the omission to afford a written notice setting out the reasons for the decision. Such examination is carried out to determine whether a "decision", as contemplated by the Act, has been made *at all*. It is useful to remember, as Branson J recently did in similar circumstances[87], the observation of McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd*[88]:

> "[W]ithout the articulation of reasons, a judicial decision cannot be distinguished from an arbitrary decision. In my opinion the giving of reasons is correctly perceived as 'a necessary incident of the judicial process' because it enables the basis of the decision to be seen and understood both for the instant case and for the future direction of the law."

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84 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 87-88 [103].

85 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 98 [144].

86 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 88 [104].

87 *Minister for Immigration and Multicultural Affairs v W157/00A* (2002) 72 ALD 49 at 65 [65].

88 (1987) 10 NSWLR 247 at 279.

127 At least in this respect, the same principle applies to administrative decisions of the Minister of the kind in question here[89]. Without the provision of reasons, as the Act required, it is but a small step to conclude that the Minister failed to take into account the considerations necessary for the making of a lawful decision[90]. An unreasoned decision-making process in a case of this kind is the antithesis of the process for which the Parliament provided when it enacted s 501G(1). The Minister's decision was arbitrary. Contrary to the paragraph preceding the selection of the decision, there were no "findings" in the departmental brief. The brief, by its language and purpose, could apply equally to any of the ultimate decisions which the Minister was invited to make.

128 *No relief from fundamental non-compliance*: It follows from this conclusion that, as in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[91] and other cases, jurisdictional error in the form of a constructive failure to exercise jurisdiction has been demonstrated. This conclusion entitles the prosecutor to constitutional relief. In any exercise of the power to cancel the prosecutor's visa it may be expected that, in accordance with the Act, written reasons will accompany and give focus to the Minister's decision and be provided to the prosecutor in accordance with s 501G(1) of the Act. This was not done in the prosector's case. There is no discretionary ground to withhold the issue of the writ.

129 The exemption in s 501G postulates an otherwise real but defective compliance with the requirements of s 501G(1). It cannot avail the Minister in this case. A fundamental failure to comply with s 501G(1) leaves nothing upon which s 501G(4) can operate to rescue a resulting "decision" made without observance of the rules as to reasons laid down by the Parliament[92]. Were it

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89 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 330 [4], 338-339 [37]-[38], 348-349 [75]. See also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 626 [40]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 532 [73].

90 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 663-664; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 81-82 [80]-[81].

91 (2001) 206 CLR 57 at 81-83 [80]-[86].

92 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 632; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615 [51], 646-

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otherwise, by a simple *statutory* device such as s 501G(4), the Parliament could render every protective statutory procedure that has not been complied with by the decision-maker effectively immune from this Court's *constitutional* scrutiny under s 75(v)[93]. That is not the law. It would be a sorry day for the rule of law in this country if it were.

Natural justice

130 In the light of the foregoing conclusion, it is unnecessary to consider in detail the alternative way that the prosecutor sought to argue that the failure of the Minister to provide him with reasons in accordance with s 501G(1) of the Act demonstrated jurisdictional error[94]. It was his contention that such failure amounted to a breach of the rules of natural justice, governing the Minister in the making of his decision. Certainly, if such a breach were established it would amount to jurisdictional error[95]. The Minister sought to draw a distinction between the manner in which a decision affecting a person's rights or interests is made and the way in which such a decision is communicated. It is unnecessary, in light of the conclusion already expressed, to consider this additional argument.

131 The prosecutor had further arguments to support the suggested departure from the requirements of procedural fairness, apart from the omission to provide reasons as required by the Act. He did not contend that, before making his decision, the Minister was obliged to afford him an oral hearing such as he could have secured if the decision had been made by a delegate of the Minister and thereafter reviewed by the AAT[96]. Nor did he dispute that the Minister would, of necessity, have to rely upon departmental officers to summarise and present

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647 [152]; *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454 at 470 [76]-[77], 474-475 [103]-[104]; 195 ALR 24 at 45-46, 51-52.

93 *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454 at 474-475 [103]-[104]; 195 ALR 24 at 51-52.

94 cf *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 676. See *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531; *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

95 *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454 at 464 [45]; 195 ALR 24 at 37.

96 *Local Government Board v Arlidge* [1915] AC 120; *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 214-215, 217, 221, 224-225, 226; *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at 1161; [1982] 3 All ER 141 at 144; *Kioa v West* (1985) 159 CLR 550 at 588, 602, 628, 634; *South Australia v O'Shea* (1987) 163 CLR 378 at 409.

relevant materials[97]. However, he did argue that, in two residual respects, the procedures adopted by the Minister fell short of meeting the requirements of natural justice. These were (a) that the departmental brief, in summarising the facts, had omitted important factual considerations favourable to him, specifically sections of the sentencing remarks of Mathews J which emphasised his good qualities and explained the comparatively light sentence that her Honour had imposed; and (b) the failure of the Minister to provide a copy of the departmental brief until after the decision was made, thereby depriving him of the chance to comment effectively by focussing his submissions upon the issues for decision and targeting them in a way that the lengthy, generally expressed and substantially irrelevant Direction No 21 did not facilitate[98].

132 There are various difficulties with these arguments. Because I have already decided that the prosecutor is entitled to relief it is unnecessary for me to resolve them. I therefore refrain from doing so.

Orders

133 The order nisi should be made absolute. Writs of prohibition and certiorari should be issued. The Minister should pay the prosecutor's costs.

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97 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 30-31, 46, 65-66.

98 cf *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551; *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at 1165; [1982] 3 All ER 141 at 147.