HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

RE MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS — RESPONDENT

EX PARTE HIEU TRUNG LAM — APPLICANT/PROSECUTOR

Re Minister for Immigration and Multicultural Affairs;
Ex parte Lam
[2003] HCA 6
12 February 2003
B33/2001

ORDER

Application dismissed with costs.

Representation:

B W Walker SC for the applicant/prosecutor (instructed by Boe Callaghan)

S J Gageler SC with S J Lee for the respondent (instructed by Blake Dawson Waldron)

CATCHWORDS

Re Minister for Immigration and Multicultural Affairs; Ex parte Lam

Administrative Law – Application for certiorari and prohibition – Procedural fairness – Cancellation of applicant's visa for failure to pass character test under s 501(6) of *Migration Act* 1958 (Cth) – Decision maker informed applicant that it would seek information from third party but then did not do so – Whether applicant denied procedural fairness – Legitimate expectation.

Words and phrases – "legitimate expectation".

Constitution, s 75(v).
Judiciary Act 1903 (Cth), s 32.
Migration Act 1958 (Cth), ss 499, 501(2), (5), (6), (7).

1 GLEESON CJ. The applicant, who was born in 1970 in the Republic of Vietnam, arrived in Australia as a refugee at the age of 13. He was granted a Transitional (Permanent) visa. He later committed a number of criminal offences, the most serious of which was trafficking in heroin, for which he was sentenced to imprisonment for eight years.

2 Section 501(2) of the *Migration Act* 1958 (Cth), in its form at the relevant time, empowered the respondent Minister to cancel a person's visa if the Minister reasonably suspected that the person did not pass the character test and the person did not satisfy the Minister that the person passed the character test. The character test was formulated in s 501(6). The applicant could not pass the test by reason of his criminal history. On 23 January 2001, the respondent made a decision to cancel the applicant's visa. As a result, the applicant became liable to deportation.

3 The applicant seeks orders of certiorari and prohibition to quash the decision to cancel his visa and to prevent the respondent from taking steps to deport him. The proceedings were commenced in this Court because the applicant was out of time to proceed in the Federal Court. The jurisdiction invoked is that conferred by s 75(v) of the Constitution and s 32 of the *Judiciary Act* 1903 (Cth). The grounds upon which the orders are sought are as follows:

> "1. The Respondent failed to accord procedural fairness/natural justice to the Applicant in that, after notifying the Applicant that contact was being sought with the carers of the Applicant's children to assess the possible effects upon them of the cancellation of the Applicant's visa, the Respondent made no attempt to contact the carers.
>
> 2. By reason of the failure of the Respondent to carry out [his] announced intentions, as specified in Ground 1, a relevant, primary consideration, namely the best interests of the Applicant's children, was not properly taken into account."

The facts

4 The case for the applicant rests upon a very narrow factual basis.

5 The applicant is unmarried. However, he has two children who were both born in Australia, and are Australian citizens. They were born in 1989 and 1993 respectively. The applicant is estranged from the mother of the children. She has had no recent contact with the applicant, or the children, and has formed a relationship with another man. The children are living with relatives. The applicant has entered into a relationship with another woman, and is engaged to be married to her.

6 On 19 September 2000, Mr Holthouse, an officer of the Department of Immigration and Multicultural Affairs, wrote to the applicant saying that it had come to the attention of the Department that the applicant's visa may be liable to cancellation under s 501. The applicant was given details of the relevant legislation. The letter stated that, before the Minister considered whether to cancel the visa, the applicant was being provided with an opportunity to comment. The matters to be taken into account were then set out. They included "the best interests of any children with whom you have an involvement".

7 On 30 October 2000, the applicant wrote to Mr Holthouse enclosing a lengthy submission for consideration. The submission was obviously prepared with skilled assistance. It covered a number of issues that are not presently relevant. It referred to the circumstances in which the applicant came to be involved in heroin trafficking. He was a gambler, and had incurred large gambling debts. In order to attempt to pay them, he had to perform services for his creditors. That involved distributing heroin. The submission implied that the debts had not been fully discharged; a matter bearing on the possibility of recidivism. Under the heading "Submissions as to the Children", the applicant gave information about his two children and their current situation, and advanced arguments as to why their interests required that he should not be deported. He referred to his bond with the children. He said that they had no contact with people in Vietnam, that they were settled, that he planned to marry upon his release from prison, and that, if he were to be deported, the children, (who, by implication, would not accompany him to Vietnam), would have to be cared for by the State. The submission was accompanied by various reports and certificates concerning the applicant's custodial situation, his progress in prison, and the possibility of rehabilitation.

8 Annexed to the submission of 30 October 2000 was a letter from the applicant's fiancée, which dealt, among other things, with the position of the children. Also annexed was a letter described as a "[l]etter from the carers of the children." That letter was signed by Ms Huyen Cam Thi Tran. It was dated 17 October 2000. It gave details of the current circumstances of the children, and supported the information given, and arguments advanced, about the children by the applicant. In particular it addressed the issue of their welfare, and advocated that, in the long term, they be cared for by the applicant and his new fiancée. It provided Ms Tran's telephone number.

9 Mr Collins, an officer of the "Character Assessment Unit" of the Department, wrote to the applicant on 7 November 2000. The letter included the following:

> "The United Nations Convention on the Rights of the Child provides that in all actions concerning children, the best interests of the children shall be a primary consideration.

> Would you therefore kindly provide the full name, address and telephone number of the children's carers. The Department wishes to contact them in order to assess your relationship with the children, and the possible effects on them of a decision to cancel your visa.
>
> Would you please provide the full contact details of the mother of the children as well."

10 The applicant replied, by letter dated 14 November 2000. He gave the names and dates of birth of his children. He identified Ms Tran as the carer, and gave her address and telephone number. As to the mother of the children, he said that he did not know where she was living, and had no contact with her.

11 It is possible that, when Mr Collins wrote his letter of 7 November, he had failed to notice that, annexed to the applicant's lengthy submission of 30 October, was the letter from Ms Tran, which gave information about the relationship of the applicant with the children and canvassed the possible effects on the children of a decision to cancel the applicant's visa. As was noted, the applicant's submission appears to have been prepared with skilled assistance, and those assisting the applicant evidently anticipated that the Department would seek to make an assessment of those issues. The possibility that Mr Collins might not have adverted to the annexure is supported by his request for the telephone number of "the carers". The submission and annexure had referred to only one carer, and had provided her name and telephone number. However, it is neither possible nor necessary to make any finding about the state of mind of Mr Collins.

12 In the event, the Department did not take any further steps by way of contacting Ms Tran. The reason does not appear. It may simply be that the officers of the Department realised that, prior to 7 November 2000, Ms Tran had already contacted the Department, by writing the letter that was annexed to the applicant's submission of 30 October. They may have taken the view that everything they needed to know was set out in that letter, and that there was no point in any further communication. The letter of 7 November did not specify the form of contact that was in contemplation; if, indeed, any specific form of contact was then in contemplation.

13 On 7 November 2000, the applicant was interviewed by an officer of the Queensland Department of Corrective Services for the purpose of reporting to the Department of Immigration and Multicultural Affairs. A report, comprising some 13 pages, was prepared and submitted. The report included the following:

> "Mr Lam stated that all of his family, including his children, reside in Australia. Mr Lam stated that should he be deported, his children will remain in Australia so that they can look forward to a 'good future'. He

> stated that he does not wish to return to Vietnam, and that he has no family support living there.
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> According to Mr Lam, he commenced a new relationship with Kim Trinh in January 1999. He stated that they recently became engaged, and that Ms Trinh shares a good relationship with both of his children."

14 As to the applicant's criminal history, the report concluded that there was "a high risk of reoffending". It is unnecessary to go into the reasons given for that conclusion, but it was relevant to the respondent's ultimate decision.

15 On 20 November 2000, a letter was written to the Department by the applicant's father. It referred to, and emphasised, the position of the children.

16 On 17 December 2000, Mr Collins and Mr Holthouse prepared for the consideration of the respondent a Minute seeking a decision as to whether the applicant's visa should be cancelled. The document comprised 18 pages, and canvassed all issues of potential relevance to the Minister's decision. No complaint is made as to how those issues were treated. The Minute made no recommendation, but informed the Minister of the alternatives available to him. As it is only the matter of the applicant's children that is in issue, reference to the contents of the Minute may be confined to that subject. Discussion of the interests of the children commenced on page 10 and continued over to the end of page 15. The information and submissions that had been provided by the applicant were recorded. The information was supplemented by further material concerning the position of the children. There was an extract of the letter of 20 November 2000 from the applicant's father. Reference was made to the letter from Ms Tran that had been annexed to the submission of 30 October, and the critical parts were quoted. There was nothing in the Minute to suggest that there was any doubt about the accuracy of the information that had been provided to the Department concerning the children. The authors appear to have accepted at face value the representations that were made in that respect by the applicant, his father, his fiancée and Ms Tran. The Minute stated that it was open to the Minister to find that the cancellation of the applicant's visa and his removal from Australia may have a detrimental effect on his children.

17 On 23 January 2001, the respondent signed the Minute, recording that he had decided to cancel the applicant's visa.

The challenge to the decision

18 The applicant's complaint is based entirely upon the fact that the Department did not contact Ms Tran after 7 November 2000. The procedural unfairness is said to arise from the fact that the decision to cancel the visa was made without the applicant having been told that it had been decided not to contact Ms Tran, and that the Department intended to rely, for the purposes of its

assessment of the applicant's relationship with the children, and the possible effects on them of a decision to cancel the applicant's visa, on the information in the applicant's submission and the annexures, including the letter from Ms Tran, and the other material that appeared in the Minute, including the letter from the applicant's father of 20 November.

19 That being what is involved in the complaint, it is also important to note what is not involved. There is no suggestion that the applicant in any way relied to his disadvantage upon the representation that Ms Tran would be contacted after 7 November 2000. In argument, any such suggestion was disclaimed. The applicant does not seek, either by evidence or by argument, to make out a case that he was deprived of an opportunity to put any further information or submissions to the respondent, or that he did, or failed to do, anything, because of any belief or understanding that was engendered in his mind by the letter of 7 November.

20 It is difficult to understand how such a contention could have been made with any degree of plausibility. We do not know what the applicant thought about the letter of 7 November when he read it. He, or his advisers, would have realised that the Department had already received a letter from Ms Tran, and had been informed of her name and telephone number. There is no evidence that the applicant had any particular state of mind following his receipt of the letter of 7 November, and there is no evidence that he was misled into taking or failing to take some step, or deprived of an opportunity to advance his case in some way. It may be inferred that, between 7 November 2000 and 23 January 2001, the applicant knew there had been no further communication between the Department and Ms Tran. He did not complain about that, or ask for anything further to be done. He must also have known that, in addition to the letter from Ms Tran annexed to the 30 October submission, the Department had received a letter from his father, concerning the children, dated 20 November 2000.

21 Little argument was advanced in support of ground 2. This is not surprising. The evidence shows that the subject of the interests of the children was canvassed at considerable length in the decision-making process. All that was said in argument, was that, in some way, the applicant was deprived of the benefit of corroboration by Ms Tran of what the applicant put in his submission. But that is factually incorrect. What the applicant told the Department about his children was corroborated by Ms Tran, by the applicant's father, and by the assessment of 7 November 2000. Furthermore, there is no suggestion that it was ever doubted.

22 The applicant was unable to point to any additional information, or any argument, that might have been put before the respondent if there had been contact between the Department and Ms Tran following 7 November 2000, or if the applicant had been told that there would be no such contact. There is nothing

to justify a view that, considered objectively, proper decision-making required further contact with Ms Tran.

23 The applicant claims to have been denied procedural fairness. He says that he had a legitimate expectation that was created by the letter of 7 November, and that was not fulfilled.

24 The applicant rests his case upon the proposition that, if an administrative decision-maker states to a person affected an intention to take a certain procedural step, and fails to do so without warning the person affected of the change of intention, then the result is procedural unfairness warranting certiorari and prohibition.

25 Such a proposition is far too broad. There are undoubtedly circumstances in which the failure of an administrative decision-maker to adhere to a statement of intention as to the procedure to be followed will result in unfairness and will justify judicial intervention to quash the decision; but for the present applicant to succeed it would be necessary to conclude that such a result will follow in all circumstances. That cannot be correct. To begin with, it overlooks the discretionary nature of the remedies of certiorari and prohibition[1]. And, in any event, it requires the concept of legitimate expectation to carry more weight than it will bear. If such a proposition were accepted, it would elevate judicial review of administrative action to a level of high and arid technicality.

Procedural fairness

26 In considering the applicant's claim that he was denied procedural fairness, and the role of legitimate expectation in assessing that claim, two preliminary matters should be noted.

27 First, the representation as to the procedure that would be followed, whatever exactly it amounted to in the circumstances of the case, was not inconsistent with a statutory duty of the Department or the respondent. It did not involve, for example, an impermissible attempt to fetter discretion. That potential obstacle to the capacity of a representation to bind a public authority is not invoked by the respondent, and requires no further consideration[2].

28 Secondly, the applicant did not, explicitly, attempt to import into the setting of s 75(v) of the Constitution the principles as to substantive expectations expounded by the English Court of Appeal in *R v North and East Devon Health*

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

2 cf *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 23-24.

Authority; Ex parte Coughlan[3]. The jurisdiction which the applicant invokes is that conferred by s 75(v). That jurisdiction exists to ensure that exercises of power by officers of the Commonwealth conform to law. The scope of the concept of abuse of power, insofar as it may embrace substantive unfairness of the kind considered in *Coughlan*, and its relation to s 75(v) of the Constitution, was not the subject of argument, and does not arise for decision. It is a subject that may involve large questions as to the relations between the executive and judicial branches of government. Nevertheless, it should be observed that, although the argument was not put in this way, and although the distinction between substantive and procedural expectations is not clear-cut, there is a sense in which it can be said that the applicant's argument approaches an attempt to convert a procedural expectation into something substantive. If, by stating an intention to take a certain course, a decision-maker becomes bound to take that course, regardless of whether any disadvantage to a person affected results from a failure to take the course, then an expectation appears to become a right. The applicant's case was not acknowledged to go so far. It was qualified by saying that it would have been sufficient for the Departmental officers to have notified the applicant of their proposed change of intention. However, the outcome for which the applicant contends comes very near to converting a matter of procedure into a matter of substance, and a matter of expectation into a matter of right. As was pointed out by Mason CJ and Deane J in *Minister for Immigration and Ethnic Affairs v Teoh*[4], to treat a legitimate expectation as requiring a decision-maker to act in a particular way is tantamount to treating it as a rule of law.

29 Any procedural unfairness of which the applicant may be entitled to complain is said to result from the alleged failure to comply with a representation made on 7 November 2000 about a procedural step that would be taken before the respondent made a decision as to whether to cancel the applicant's visa. There is no evidence as to what the applicant personally expected in consequence of what was said in the letter of 7 November. The argument is that, nevertheless, the letter created a legitimate expectation that a certain course would be followed, that such a course was not followed, and, although the applicant cannot demonstrate that he was hereby deprived of any opportunity to advance his case, that there was unfairness. It is acknowledged that if, after 7 November, the officers of the Department had told the applicant that they had no longer intended to contact Ms Tran, and the applicant had been given an opportunity to seek to persuade them to change their minds, the applicant would have no case. The unfairness is said to lie in failing to notify the applicant that the officers had

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3 [2001] QB 213.

4 (1995) 183 CLR 273 at 291.

changed, or were considering changing, their minds about contacting Ms Tran. It is also acknowledged that, if the officers had not told the applicant, in the first place, that they intended to contact Ms Tran, he would have no case.

30 There is a decision of the Privy Council which would have supported the applicant if the facts of the case had in certain respects been different. As things stand, the decision serves mainly to highlight what is missing from the present case.

31 In *Attorney-General (Hong Kong) v Ng Yuen Shiu*[5], the respondent was a person who had entered Hong Kong illegally, and who was caught up in a programme to deport illegal immigrants. The government publicly announced the policy to be applied. It said that people such as the respondent would be interviewed, and each case would be treated on its merits. The representation that each case would be treated on its merits was said to be "at the root of [the respondent's] argument"[6]. That statement came to the notice of the respondent. He was made the subject of a deportation order without any consideration of the individual merits of his case. The Privy Council said[7]:

> "The basis of the [respondent's] complaint [was] that, when he was interviewed by an official of the Immigration Department who recommended to the director that a removal order against him should be made, he was not able to explain the humanitarian grounds for the discretion to be exercised in his favour. In particular he had no opportunity of explaining that he was not an employee but a partner in a business which employed several workers. The evidence of the [respondent] … was that at the interview he was not allowed to say anything except to answer the questions put to him by the official who was interviewing him."

32 The Privy Council quashed the removal order. The importance of the case is that their Lordships left open the wider question whether as a matter of general principle a person in the position of the respondent had a right to a fair hearing before a removal order was made[8]. They based their decision on the narrower ground that, in the particular circumstances of the case, including the representation that each case would be considered on its individual merits, the respondent had a right to a fair hearing, which he had been denied. He had a

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5 [1983] 2 AC 629.

6 [1983] 2 AC 629 at 635.

7 [1983] 2 AC 629 at 638-639.

8 [1983] 2 AC 629 at 636.

legitimate expectation of being given such a hearing. "Legitimate" meant "reasonable". Their Lordships said that, in the circumstances, it was unfair that the respondent had been denied an inquiry into the individual merits of his case[9]. They also said it was inconsistent with good administration[10]. If that were intended as a separate and independent ground for quashing the removal order, as distinct from a reason in legal policy for binding the authorities to the requirement of fairness, it would not relate easily to the exercise by this Court of its jurisdiction under s 75(v) of the Constitution. The constitutional jurisdiction does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration.

33 The decision of the Privy Council stands for the proposition that, when a public authority promises that a particular procedure will be followed in making a decision, fairness *may* require that the public authority be held to its promise. That was the basis on which it was explained by Dawson J in *Attorney-General (NSW) v Quin*[11]. Expectations created by a decision-maker may affect the practical content of the requirements of fairness in a particular case[12].

34 The applicant seeks to establish that he was denied procedural fairness. He does not claim that any unfairness exists apart from that created by the statement of 7 November 2000 and the subsequent change of intention without notification to him. The argument is that the letter created an expectation, and fairness required that the procedure foreshadowed in the letter (contacting Ms Tran) should not be departed from without the applicant being informed of the intention to do so. It is not in dispute that, regardless of the letter of 7 November, the respondent was obliged to extend procedural fairness to the applicant. And it is clear that the content of the requirements of fairness may be affected by what is said or done during the process of decision-making, and by developments in the course of that process, including representations made as to the procedure to be followed. So, for example, if a decision-maker informs a person affected that he or she will hear further argument upon a certain point, and then delivers a decision without doing so, it may be easy to demonstrate that unfairness is involved. But what must be demonstrated is unfairness, not merely departure from a representation. Not every departure from a stated intention

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9 [1983] 2 AC 629 at 637.

10 [1983] 2 AC 629 at 637.

11 (1990) 170 CLR 1 at 56-57. See also *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 660.

12 See Aronson & Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000), at 322-336.

necessarily involves unfairness, even if it defeats an expectation. In some contexts, the existence of a legitimate expectation may enliven an obligation to extend procedural fairness. In a context such as the present, where there is already an obligation to extend procedural fairness, the creation of an expectation may bear upon the practical content of that obligation[13]. But it does not supplant the obligation. The ultimate question remains whether there has been unfairness; not whether an expectation has been disappointed.

35 The applicant relies upon *Minister for Immigration and Ethnic Affairs v Teoh*[14] in support of the proposition that it is unnecessary for him to show that, following the letter of 7 November 2000, he had any particular expectation; he may base his case upon what he was reasonably entitled to expect[15]. That, however, depends on the nature of the unfairness said to be involved. In any event, what was the applicant reasonably entitled to expect? It is said on his behalf that he was reasonably entitled to expect that the Departmental officers would not change their plans about contacting Ms Tran without first letting him know. But there could have been a number of reasons why they might change their plans, without necessarily having to inform the applicant. Let it be supposed, as may well be the case, that they changed their minds because they realised that they had already heard from Ms Tran, they did not doubt what she had to say, and it was unlikely that there was anything she could usefully add to what had already been said. Such a view may have been reinforced by the receipt of the letter from the applicant's father. The applicant does not seek to show that such a view was not reasonably open. I do not accept that it would have been reasonable to expect the Department to write to the applicant if for any reason there was a change of plan about contacting Ms Tran.

36 The more fundamental problem facing the applicant, however, relates to the matter of unfairness. A statement of intention, made in the course of decision-making, as to a procedural step to be taken, is said to give rise to an expectation of such a kind that the decision-maker, in fairness, must either take that step or give notice of a change in intention. Yet no attempt is made to show that the applicant held any subjective expectation in consequence of which he did, or omitted to do, anything. Nor is it shown that he lost an opportunity to put any information or argument to the decision-maker, or otherwise suffered any detriment.

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13 See *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 672 per Gaudron J.

14 (1995) 183 CLR 273.

15 See also *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 670 per Toohey J.

37 A common form of detriment suffered where a decision-maker has failed to take a procedural step is loss of an opportunity to make representations. *Attorney-General (Hong Kong) v Ng Yuen Shiu*[16] was such a case. So, according to the majority, was *Haoucher v Minister for Immigration and Ethnic Affairs*[17]. A particular example of such detriment is a case where the statement of intention has been relied upon and, acting on the faith of it, a person has refrained from putting material before a decision-maker. In a case of that particular kind, it is the existence of a subjective expectation, and reliance, that results in unfairness. Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.

38 No practical injustice has been shown. The applicant lost no opportunity to advance his case. He did not rely to his disadvantage on the statement of intention. It has not been shown that there was procedural unfairness. And, as I have already indicated, there is no warrant for a conclusion that there was a failure properly to take into account the interests of the applicant's children.

Conclusion

39 The application should be dismissed with costs.

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16 [1983] 2 AC 629 at 638-639.

17 (1990) 169 CLR 648 at 655 per Deane J, 665 per Toohey J, 684 per McHugh J.

40 McHUGH AND GUMMOW JJ. The applicant moves the Full Court for orders for certiorari to quash a decision of the respondent ("the Minister") communicated by letter dated 5 February 2001 ("the Decision") and for prohibition directing the Minister not to take steps to deport the applicant. The ground of relief which was pressed at the hearing is that the Minister, in making his decision, failed to accord natural justice to the applicant. The applicant developed submissions putting this ground in several ways, which nevertheless appeared to be related. They fixed upon the importance of the interests of the infant children of the applicant and what was said to be a "legitimate expectation" raised by a communication to the applicant by officers of the Minister's Department. The applicant first approached this Court on 4 May 2001 seeking orders nisi. In respect of various grounds, a Justice of this Court dismissed the application and directed that, in respect of the remainder, the present motion be returned before the Full Court.

Jurisdiction

41 The proceeding was instituted in this Court because the applicant fell outside the immovable time barrier which stood in the path of any exercise of jurisdiction by the Federal Court of Australia. Paragraph (b) of s 478(1) of the *Migration Act* 1958 (Cth) ("the Act")[18] required an application to the Federal Court of Australia for review under s 476 to be lodged within 28 days of the notification to the applicant of the decision. The applicant was notified on 9 February 2001. Section 478(2) directed the Federal Court not to make an order allowing lodgment of an application outside the 28 day period. An application had been lodged in the Federal Court four days after the 28 day deadline but the Minister had invited the applicant to discontinue that application because the Federal Court lacked jurisdiction to entertain it.

42 The applicant invokes the jurisdiction of this Court, to which the limitation period laid down by s 478(1) does not apply. Denial of natural justice may attract a remedy under s 75(v) of the Constitution for excess of jurisdiction[19]. In *Re Refugee Review Tribunal; Ex parte Aala*, Gaudron and Gummow JJ concluded that[20]:

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18 As it stood before repeal of Pt 8 (ss 474-486) by the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth).

19 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5], 101 [41], 135 [142], 143 [170], 153 [210].

20 (2000) 204 CLR 82 at 101 [41].

> "if an officer of the Commonwealth exercising power conferred by statute does not accord procedural fairness and if that statute has not, on its proper construction, relevantly (and validly) limited or extinguished any obligation to accord procedural fairness, the officer exceeds jurisdiction in a sense necessary to attract prohibition under s 75(v) of the Constitution".

Here the applicant seeks prohibition under s 75(v) and, as appurtenant thereto, certiorari under s 32 of the *Judiciary Act* 1903 (Cth)[21].

The facts

43 The applicant was born on 20 February 1970 in Vietnam and is a citizen of that country. He entered Australia on 26 July 1984 on a transitional (permanent) visa. He has two children born in Australia in 1989 and 1993 respectively, both of whom are Australian citizens. The applicant and their mother are estranged and for some time the children have been cared for by others.

44 The applicant has an extensive record of criminal offences, beginning in 1986. On 22 August 1995, the applicant was sentenced by Derrington J in the Supreme Court of Queensland after he had pleaded guilty to the offence of trafficking in heroin. He was sentenced to eight years' imprisonment with an eligibility for release on parole after serving 2½ years.

Section 501

45 The provision of the Act of central importance to this case is s 501, dealing with the cancellation of visas on "character grounds", in the form it was introduced in 1998[22].

46 Section 501(2) of the Act empowers the Minister to cancel a visa that has been granted to a person if 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 in fact passes the "character test". The effect of par (a) of s 501(6) is that a person does not pass the "character test" if possessed of a "substantial criminal record". That expression is defined in sub-s (7) of s 501. A person is deemed to

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21 *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 651-652; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 76 ALJR 694; 188 ALR 1.

22 By the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act* 1998 (Cth).

have a substantial criminal record if he or she has been sentenced to a term of imprisonment of 12 months or more (s 501(7)(c)). A further power of cancellation is conferred by s 501(3). The rules of natural justice do not apply to a decision thereunder (s 501(5)).

Natural justice

47 However, that exclusion of the operation of the rules of natural justice is not expressed as applying to the exercise of power under s 501(2), the power exercised in this present case. The section, in addressing the power under s 501(3), assumes the operation of those rules where what is at stake is a decision made under s 501(2). The contrary was not suggested in submissions. Plainly, the exercise of the power to cancel the applicant's visa which founded his continued entitlement lawfully to remain in Australia would affect his rights and interests in the sense required to attract the operation of the rules of natural justice. That being so, to say that the applicant had a "legitimate expectation" that his visa would be cancelled only according to law and that, for this reason, the rules of natural justice applied would not add anything useful and might serve only to confuse. The notion of legitimate expectations was introduced in England when its courts were developing the modern law with respect to standing and the range of circumstances which attracted the rules of natural justice. The notion has served this purpose but, as will appear, remains of limited utility elsewhere.

48 It often has been remarked in this Court that the particular requirements of compliance with the rules of natural justice will depend upon the circumstances. Different procedures may be required, even of the same repository of power, from one situation to the next, a point made by Aickin J in *Heatley v Tasmanian Racing and Gaming Commission*[23]. Further, the expectations of a particular party as to the exercise of the power in question may be relevant to the way in which the repository of the power is to exercise it in the particular case. In *Attorney-General (NSW) v Quin*, Brennan J observed[24]:

> "[I]f an express promise be given or a regular practice be adopted by a public authority, and the promise or practice is the source of a legitimate expectation, the repository is bound to have regard to the promise or practice in exercising the power, and it is unnecessary to enquire whether

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23 (1977) 137 CLR 487 at 514.

24 (1990) 170 CLR 1 at 40. See also Brennan J's remarks in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 412; *Kioa v West* (1985) 159 CLR 550 at 626-627; *Annetts v McCann* (1990) 170 CLR 596 at 606.

> those factors give rise to a legitimate expectation. But the court must stop short of compelling fulfilment of the promise or practice unless the statute so requires or the statute permits the repository of the power to bind itself as to the manner of the future exercise of the power."

The reference to "express promise" puts the matter too narrowly in the light of later decisions, but in other respects this statement should be accepted.

49 Section 499 of the Act empowers the Minister to give routine directions to a person or body having functions or powers under the Act with respect to the performance of those functions or the exercise of those powers. Direction No 17(2), issued by the Minister on 16 June 1999 and with effect from that date, is concerned with the making of decisions to refuse or cancel a visa under s 501. It contains detailed provisions with respect to the application of the "character test". However, whilst the direction binds the exercise of authority by delegates of the Minister (s 499(2A)), it does not bind the Minister in the personal exercise of his powers of cancellation conferred by s 501(2). The decision in the present case was made by the Minister personally.

The decision-making process

50 The steps leading up to the taking by the Minister of his decision commenced with a letter dated 19 September 2000 from a delegate of the Minister to the applicant. This referred to the criminal history of the applicant, including his sentence imposed by the Supreme Court on 22 August 1995, and stating that, before the Minister considered whether to cancel the visa, in exercise of the power conferred by s 501(2) of the Act, the applicant was provided with an opportunity to comment. The letter itemised various matters to be taken into account. These included "the best interests of any children with whom you have an involvement", "the degree of hardship which would be caused to immediate family members lawfully resident in Australia" and "the composition of your family, both in Australia and overseas". The applicant responded with a detailed submission on 30 October 2000. Under the heading "Submissions as to the Children", the applicant stated:

> "1. The children were born in Australia and are therefore Australian citizens. They have no contact with people from Vietnam. They have a strong bond with me and have suffered greatly as a result of my crime and their mother abandoning them.
>
> 2. They only have my release from custody to look forward to. My friends will not care for them indefinitely. If I am to be deported they will have to be cared for by the State.

3. The life that I made for my children and myself during my Home Detention was an adequate one and they were happy.

4. They are settled in school and if they were to be cared for by the State no doubt they would be taken out of the school they attend and taken away from their friends. They have already suffered greatly as a result of my conduct. I very much wish to improve their current situation and give them some happiness. I would never again involve myself in any conduct that would directly or indirectly adversely affect them. I hope that I would [not] be a 'significant risk' as outlined in the Ministers Guidelines.

5. I am currently in a relationship with [KT]. We have been involved since January 1999. She now knows the children well and is developing a strong bond with them. We have plans to marry upon my release. She is an Australian citizen."

51 The applicant concluded with a statement:

"I request that the Minister have regard to the welfare of my children. If I am to be deported they will have [no] parental care and will be left to the State to look after their welfare and schooling."

Attached to the submission was a letter dated 17 October 2000 from a member of the applicant's extended family, who was involved in caring for the children. The letter gave details of the care of the two children and gave a contact telephone number should the reader require more information.

52 On 7 November 2000, an officer of the Department responded to the applicant's letter of 30 October. The letter contained the following passage:

"The United Nations Convention on the Rights of the Child provides that in all actions concerning children, the best interests of the children shall be a primary consideration.

Would you therefore kindly provide the full name, address and telephone number of the children's carers. The Department wishes to contact them in order to assess your relationship with the children, and the possible effects on them of a decision to cancel your visa.

Would you please provide the full contact details of the mother of the children as well." (emphasis added)

53 The applicant responded by letter dated 14 November giving the full names and dates of birth of his children, repeating the contact details of their carer and stating with respect to their mother:

> "After she left me, she started living with someone else. She now has another two children by this relationship. I do not have any contact with her, as I am only interested in the welfare of my two children. She has little if any contact with our two children and I don't even know where she now lives."

54 Thereafter, a detailed submission was made to the Minister by his Department and it was upon this that the Minister acted in making his decision on 23 January 2001 (subsequently communicated to the applicant by letter dated 5 February 2001). In particular, under the heading "The Best Interests of the Children", extracts were made in the submission from the applicant's statements in earlier correspondence. It was pointed out in the submission to the Minister that, if the children accompanied the applicant from Australia were his visa cancelled, it was open to the Minister to find that the standard of educational and health facilities might be of a lower standard than could be expected in Australia, and that, while it was not known if the children currently speak any Vietnamese, "it could be expected that they would adapt to a new culture with relative ease".

55 It is common ground that, despite the statement in the letter to the applicant of 7 November 2000 that the Department wished to contact the children's carers in order to assess the applicant's relationship with the children and the possible effects on them of a decision to cancel his visa, no such contact was made. It is upon that circumstance that the applicant fixes to base his case respecting failure by the Minister to observe the rules of natural justice.

The applicant's submissions

56 In argument, counsel for the applicant conceded that, in the absence of the statement in the letter of 7 November 2000, procedural fairness would not have required that officers of the Department interview the carers. Counsel also accepted that if, after the notification in the letter of 7 November the Department had changed its mind and decided against interviewing the carers and notified the applicant accordingly, the rules of procedural fairness would not have obliged the Department to conduct such an interview.

57 This was said to be a case of "actual expectation by inference from the correspondence". However, it was not suggested that the applicant, in reliance upon the representation contained in the letter of 7 November, had failed to put material before the Department which otherwise would have been put had he known that the Department was not going ahead with the proposal to contact the carers.

58 This is not a case where procedural fairness was denied because the decision in question was made upon material obtained by the decision-maker

from another source, without affording the applicant the opportunity to deal with that material. *Kioa v West*[25] is the paradigm example of such a situation.

59 However, it was submitted that one prejudice flowing from the failure by the Department to contact the carers was that the applicant had not been given an opportunity to deal with what then possibly would have been scepticism by officers of the Department concerning matters which the applicant put to them in his submissions. That assumes a need for the applicant to counter some adverse reaction, the existence of which is entirely speculative. There has been no denial of the opportunity to make representations, or further representations, to the decision-maker which has deprived the applicant of the possibility of a successful outcome[26].

60 Rather, as the oral argument developed, the applicant submitted that the requirement of procedural fairness involved a "legitimate expectation" of a "fair procedure". This invites attention to the doctrine of "legitimate expectation".

Legitimate expectation

61 Used in some strict sense, or as an antonym to "illegitimate", the term "legitimate" is apt to suggest entitlement in law to some final outcome. However, the term has been used in the authorities not in that sense, but with a lesser meaning of "reasonable"[27]. Here too care is needed. Not every expectation or hope which might be entertained by a "reasonable man" will necessarily attract the doctrine. This qualification was noted by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*[28].

62 The term "expectation" also has its uncertainties. It is used in various senses in the law. A beneficiary may be said, as an aspect of the trust institution, to be entitled to expect that the trustee will observe the terms of the trust and otherwise act in the interests of the beneficiary. The reasonable expectation of a purchaser of the benefit from the increase in value of land the subject of an uncompleted instalment contract may support the intervention of equity to relieve

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25 (1985) 159 CLR 550. See also *South Australia v O'Shea* (1987) 163 CLR 378 at 389, 403, 409.

26 cf *Stead v State Government Insurance Commission* (1986) 161 CLR 141; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

27 *Kioa v West* (1985) 159 CLR 550 at 563, 583.

28 [1985] AC 374 at 408-409.

against forfeiture of the contract[29]. These expectations are founded in legal, particularly equitable, precepts and principles rather than in individual aspirations shown by the evidence in any case. Expectations of reliance also inform the importance of a duty of care in utterance by way of information or advice[30]. In the field of estoppel, notions of expectation are often linked to reliance and detriment[31]. Here the emphasis is upon the state of mind of the individual.

63 In the field of public law, to speak of an expectation placed in a decision-maker invites the questions (i) who entertains the expectation; (ii) how does it come to arise; and (iii) to what outcome is it addressed? All these issues arise to some degree in the present case. It is convenient to begin with further consideration of (iii).

64 The present applicant does not seek from relief under s 75(v) of the Constitution a substantive outcome which would insulate his visa from further exercise of the power of cancellation conferred by s 501(2) of the Act. Rather, he seeks relief which would put aside the particular decision of the Minister communicated by letter dated 5 February 2001.

Substantive benefits

65 However, in argument there was some discussion of the limited scope in Australia for the assuming of outcomes by a "legitimate expectation". To the extent that such a doctrine has any place outside the procedural requirements of natural justice, for example, by assuring substantive benefits or final outcomes, a question would arise respecting the attraction of s 75(v). Would disappointment of a substantive legitimate expectation give rise to jurisdictional error for the constitutional writs, or, in any event, attract the constitutional injunction? As will become apparent, it is unnecessary to answer these questions because the limited utility and scope of "legitimate expectations" means that they do not arise.

66 The doctrine of "legitimate expectation" has been developed in England so as to extend to an expectation that the benefit in question will be provided or, if already conferred, will not be withdrawn or that a threatened disadvantage or

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29 *Stern v McArthur* (1988) 165 CLR 489 at 529.

30 *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at 16-17 [47].

31 *Giumelli v Giumelli* (1999) 196 CLR 101 at 120-125 [34]-[48]. See also Finn and Smith, "The Citizen, the Government and 'Reasonable Expectations'", (1992) 66 *Australian Law Journal* 139 at 140-144.

disability will not be imposed. This gives the doctrine a substantive, as distinct from procedural, operation.

67 The earlier English decisions with respect to "legitimate expectations" were discussed by Mason CJ in *Attorney-General (NSW) v Quin*[32] and by McHugh J in *Minister for Immigration and Ethnic Affairs v Teoh*[33]. In *Quin*, Mason CJ observed[34]:

> "In the cases in this Court in which a legitimate expectation has been held entitled to protection, protection has taken the form of procedural protection, by insisting that the decision-maker apply the rules of natural justice. In none of the cases was the individual held to be entitled to substantive protection in the form of an order requiring the decision-maker to exercise his or her discretion in a particular way. The prevailing view in this Court has been, as Stephen J observed in *Salemi* [*v MacKellar [No 2]*][35], that: '[t]he rules of natural justice are "in a broad sense a procedural matter"', echoing the words of Dixon CJ and Webb J in *Commissioner of Police v Tanos*[36]."

That remains the position in this Court and nothing in this judgment should be taken as encouragement to disturb it by adoption of recent developments in English law with respect to substantive benefits or outcomes.

68 Reference was made in argument to the recent decision of the English Court of Appeal in *R v North and East Devon Health Authority; Ex parte Coughlan*[37]. Lord Woolf MR, delivering the judgment of the Court, observed that "in the common law of the European Union" it is "well established" that there is "a uniform standard of full review for fairness" in respect of legitimate

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32 (1990) 170 CLR 1 at 22-23.

33 (1995) 183 CLR 273 at 310-311.

34 (1990) 170 CLR 1 at 22.

35 (1977) 137 CLR 396 at 442.

36 (1958) 98 CLR 383 at 396.

37 [2001] QB 213. See also the remarks of Lord Steyn and Lord Hobhouse of Woodborough in *R v Home Secretary; Ex parte Hindley* [2001] 1 AC 410 at 419, 421 respectively.

expectations of substantive as well as procedural benefits[38]. His Lordship referred[39] also to an earlier decision of the English Court of Appeal in which it had been said that in its application to substantive benefits the doctrine of legitimate expectations is "akin to an estoppel"[40].

69 As the judgments in *Quin* illustrate, in Australia "[n]o doctrine of administrative estoppel has emerged"[41]. It has been likewise in the Supreme Court of the United States. The position there has been shortly put as follows[42]:

> "The Court has come close to saying that the government can never be equitably estopped based on a false or misleading statement of one of its agents no matter how much an individual has relied on that statement to her detriment or how reasonable her reliance. Each time it seems tempted to take this step, however, the Court stops just short of saying 'never'. Occasionally, the Court even uses language in dicta that seems to invite lower courts to identify situations in which equitable estoppel is appropriate. Many lower courts have accepted that apparent invitation. Each time the Court granted certiorari in such a case, however, it reversed, often summarily."

70 In England, any necessary connection between the outcomes of legitimate expectation and notions underlying estoppel in private law recently has been disavowed by the statements by the English Court of Appeal[43] to the effect that

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38 [2001] QB 213 at 243. See further as to the influence of the European Union doctrine of legitimate expectations and its greater scope than *Wednesbury* unreasonableness: Craig and Schonberg, "Substantive Legitimate Expectations after *Coughlan*", (2000) *Public Law* 684 at 697-698.

39 [2001] QB 213 at 247-248.

40 *R v Devon County Council; Ex parte Baker* [1995] 1 All ER 73 at 88.

41 *Annetts v McCann* (1990) 170 CLR 596 at 605.

42 Pierce, *Administrative Law Treatise*, 4th ed (2002), vol 2, §13.1. The Supreme Court of Canada appears to have gone further in allowing such a doctrine, but emphasises the importance of "a public law dimension to the law of estoppel which must be sensitive to the factual and legal context": *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at 312; cf Stewart, "Substantive Unfairness: A New Species of Abuse of Power?", (2000) 28 *Federal Law Review* 617 at 627-631.

43 *R v Secretary of State for Education and Employment; Ex parte Begbie* [2000] 1 WLR 1115 at 1123; *R v Newham London Borough Council* [2002] 1 WLR 237 at

(Footnote continues on next page)

detrimental reliance is a factual not a legal matter and will not always be present when the court finds unfairness in the defeat of a legitimate expectation, and by the decision of the House of Lords in *R v East Sussex County Council, ex p Reprotech (Pebsham) Ltd*[44].

71 In *Coughlan*, the Court of Appeal appears to have linked the doctrine of legitimate expectation with respect to substantive benefits to unfairness amounting to an "abuse of power"[45]. In *R v Inland Revenue Commissioners; Ex parte Preston*[46], Lord Templeman had placed "abuse of power", beside breach of natural justice, in a list of the distinct grounds for the remedy of judicial review under s 31(3) of the *Supreme Court Act* 1981 (UK).

72 Nevertheless, in England, the course of decisions has not stopped there. In *R v Secretary of State for Education and Employment; Ex parte Begbie*[47], Laws LJ spoke of "abuse of power" as the rationale alike of all the "general principles of public law", including both legitimate expectations and procedural fairness as well as *Wednesbury* unreasonableness, "proportionality"[48] and "illegality". In Australia, the observance by decision-makers of the limits within which they are constrained by the Constitution and by statutes and subsidiary laws validly made is an aspect of the rule of law under the Constitution. It may be said that the rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying the Constitution. The considerations which have informed the development of principle in Australia are considered in the joint judgment of four

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245-247. See also in Hong Kong *Ng Siu Tung v The Director of Immigration* unreported, Court of Final Appeal, 10 January 2002 at [87]-[99].

44 [2002] 4 All ER 58 at 66.

45 [2001] QB 213 at 245, 250.

46 [1985] AC 835 at 862. See Craig, *Administrative Law*, 3rd ed (1994) at 667-669; Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 121-123, 332-333.

47 [2000] 1 WLR 1115 at 1129.

48 The debate as to the existence of such a ground of judicial review of administrative action in Australia is usefully described in Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 289-292.

members of this Court in *City of Enfield v Development Assessment Commission*[49].

73 The notion of "abuse of power" applied in *Coughlan* appears to be concerned with the judicial supervision of administrative decision-making by the application of certain minimum standards now identified by the English common law. These standards fix upon the quality of the decision-making and thus the merits of the outcome. As was indicated in *Coughlan* itself, this represents an attempted assimilation into the English common law of doctrines derived from European civilian systems.

74 However, it has been observed, for example, of the French system of administrative law that it depends upon the close connection between the administrative and judicial functions. It was put by a President of the Conseil d'Etat[50]:

> "If administrative judges were isolated from the active administration, if they ceased to be in constant contact with the needs and constraints of administrative life, they would lose their specific character. Instead of building a law adapted to the necessities of the public service, they would be inspired by a fossilized law bearing no relationship to the realities of the active administration. Administrative judges must have an administrative training, and they have to sustain it to retain an understanding of administrative life."

On the other hand, as was pointed out in *Sue v Hill*[51], there has been lacking an understanding in the United Kingdom of the "state" as a body politic. In Australia, the federal system of government requires such an understanding[52].

75 The point is well made[53]:

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49 (2000) 199 CLR 135 at 152-154 [43]-[44].

50 Odent, *Contentieux administratif*, (1981) at 746-747, translated in Brown and Bell, *French Administrative Law*, 5th ed (1998) at 288.

51 (1999) 199 CLR 462 at 497-503 [83]-[94].

52 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 546.

53 Thomas, "Continental Principles in English Public Law", in Harding and Örücü (eds), *Comparative Law in the 21st Century*, (2002), 121 at 133.

> "The significance of the absence of a state tradition in England is apparent. Without a distinct legal concept of the state to which distinct principles could be attached, English law has experienced a proliferation of statute law complemented by the empirical development of the common law from accumulated precedents and the artificial reasoning of the judges. English law therefore has no tradition whereby distinct legal principles are created specifically for the purpose of structuring and regulating the achievement of public objectives."

76 In Australia, the existence of a basic law which is a written federal constitution, with separation of the judicial power, necessarily presents a frame of reference which differs from both the English and other European systems referred to above. Considerations of the nature and scope of judicial review, whether by this Court under s 75 of the Constitution or otherwise, inevitably involves attention to the text and structure of the document in which s 75 appears. An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.

77 This demarcation is manifested in the distinction between jurisdictional and non-jurisdictional error which informs s 75(v). Justice Selway has accurately written of that distinction[54]:

> "Notwithstanding the difficulty, indeed often apparent artificiality, of the distinction, it is a distinction between errors that are authorised and errors that are not; between acts that are unauthorised by law and acts that are authorised. Such a distinction is inherent in any analysis based upon separation of powers principles."

New Zealand and Canada

78 In New Zealand it was observed in 1993 that "the concept of legitimate expectations … is directed primarily to procedure not outcome"[55]. Thereafter, in *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd*[56], Cooke P said

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54 Selway, "The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues", (2002) 30 *Federal Law Review* 217 at 234 (footnote omitted).

55 *Travis Holdings Ltd v Christchurch City Council* [1993] 3 NZLR 32 at 50; cf *Singh v Auckland District Law Society* [2000] 2 NZLR 604 at 621-622.

56 [1994] 2 NZLR 641 at 652, 653.

that there was no lack of authority that "substantive unfairness" was "a legitimate ground of judicial review, shading into but not identical with unreasonableness", and that "the limits or categories of substantive fairness will never be defined with exhaustive precision". In the same case, McKay J referred with approval[57] to Lord Templeman's speech in *Preston*, but Fisher J stated[58]:

> "[O]n each occasion that the expression 'substantive unfairness' is applied to a case it will continue to be necessary to identify a more specific and principled administrative law basis for intervention. Otherwise, as I think this case illustrates, the distinction between judicial review and appeals on the merits will become dangerously blurred."

79 Moreover, the Supreme Court of Canada has stopped short of giving the doctrine of legitimate expectation a substantive operation. Indeed, in *Baker v Minister of Citizenship and Immigration*, in a judgment with which four other members of the Supreme Court agreed, L'Heureux-Dubé J said[59]:

> "[T]he doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights."

80 The subject was further considered by McLachlin CJ and Binnie J in their judgment in *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*[60]. Binnie J (who delivered the judgment) discussed *Coughlan* and continued[61]:

> "It thus appears that the English doctrine of legitimate expectation has developed into a comprehensive code that embraces the full gamut of administrative relief from procedural fairness at the low end through

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57 [1994] 2 NZLR 641 at 654.

58 [1994] 2 NZLR 641 at 654.

59 (1999) 174 DLR (4th) 193 at 213.

60 [2001] 2 SCR 281.

61 [2001] 2 SCR 281 at 302.

> 'enhanced' procedural fairness based on conduct, thence onwards to estoppel (though it is not to be called that) including substantive relief at the high end, ie, the end representing the greatest intrusion by the courts into public administration. The intrusion is said to be justified by the multiplicity of conflicting decisions by a public authority on the same point directed to the same individual(s)".

With the reasoning then developed by Binnie J in the succeeding passages, we would respectfully agree. He writes[62]:

> "In ranging over such a vast territory under the banner of 'fairness', it is inevitable that sub-classifications must be made to differentiate the situations which warrant highly intrusive relief from those which do not. Many of the English cases on legitimate expectations relied on by the respondents, at the low end, would fit comfortably within our principles of procedural fairness. At the high end they represent a level of judicial intervention in government policy that our courts, to date, have considered inappropriate in the absence of a successful challenge under the *Canadian Charter of Rights and Freedoms*.
>
> Canadian cases tend to differentiate for analytical purposes the related concepts of procedural fairness and the doctrine of legitimate expectation. There is, on the one hand, a concern that treating procedural fairness as a subset of legitimate expectations may unnecessarily complicate and indeed inhibit rather than encourage the development of the highly flexible rules of procedural fairness[63]. On the other hand, there is a countervailing concern that using a Minister's prior conduct against him as a launching pad for substantive relief may strike the wrong balance between private and public interests, and blur the role of the court with the role of the Minister."

The point also is made by Binnie J that it is difficult to support the lowering of the evidentiary bar to the application of the doctrine of legitimate expectations accompanied by the expansion of its scope to overrule administrative decisions on matters of substantive policy; rather[64],

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62 [2001] 2 SCR 281 at 303. See also Stewart, "Substantive Unfairness: A New Species of Abuse of Power?", (2000) 28 *Federal Law Review* 617 at 631-634.

63 Wright, "Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law", (1997) 35 *Osgoode Hall Law Journal* 139.

64 [2001] 2 SCR 281 at 305.

"[o]ne would normally expect *more* intrusive forms of relief to be accompanied by *more* demanding evidentiary requirements."

The role of the doctrine of legitimate expectation

81 In his dissenting judgment in *Teoh*, McHugh J questioned whether, given the development in Australian case law of the requirements of procedural fairness, the doctrine of legitimate expectations was left with any distinct role. His Honour said[65]:

> "I think that the rational development of this branch of the law requires acceptance of the view that the rules of procedural fairness are presumptively applicable to administrative and similar decisions made by public tribunals and officials. In the absence of a clear contrary legislative intention, those rules require a decision-maker 'to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it'[66]. If that approach is adopted, there is no need for any doctrine of legitimate expectations. The question becomes, what does fairness require in all the circumstances of the case?"

82 Earlier, in *Quin*, Brennan J had said[67]:

> "So long as the notion of legitimate expectation is seen merely as indicating 'the factors and kinds of factors which are relevant to any consideration of what are the things which must be done or afforded' to accord procedural fairness to an applicant for the exercise of an administrative power[68], the notion can, with one important proviso, be useful. If, but only if, the power is so created that the according of natural justice conditions its exercise, the notion of legitimate expectation may usefully focus attention on the content of natural justice in a particular case; that is, on what must be done to give procedural fairness to a person whose interests might be affected by an exercise of the power. But if the according of natural justice does not condition the exercise of the power,

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65 (1995) 183 CLR 273 at 311-312. See also Allars, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government", (1995) 17 *Sydney Law Review* 204 at 222-224.

66 *Kioa v West* (1985) 159 CLR 550 at 587.

67 (1990) 170 CLR 1 at 39.

68 *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268 at 285 per Mahoney JA.

> the notion of legitimate expectation can have no role to play. If it were otherwise, the notion would become a stalking horse for excesses of judicial power."

83 These statements by McHugh J and Brennan J should be accepted as representing the law in Australia. The decision in *Teoh* does not require any contrary or other understanding of the law.

The decision in *Teoh*

84 Counsel for the Minister disclaimed any direct attack on *Teoh* because, as he understood it, the applicant did not rely upon that case. The applicant submitted that his legitimate expectation of a fair procedure included an obligation on the Department to go ahead and contact the carers as indicated in the letter of 7 November 2000 unless, before deciding to desist from that course, reasonable notice of that intention was given to the applicant. The precept given normative effect in this way was the observance of what counsel identified as "a minimum standard of decent dealing in [the] eventual decision making which may be breached by failing to carry through something [which the decision-maker] said [it] would do".

85 Nevertheless, the applicant's submissions invited comparison with what was decided in *Teoh*[69]. In particular, the applicant relied upon a strand in the reasoning of Mason CJ and Deane J, and Toohey J. This was that the absence of any particular "psychological effect" on the affected person or any other individual of knowledge of Australia's adherence to the international obligations under the treaty in question was no impediment to the decision that there was a want of procedural fairness.

86 The effect of the orders in *Teoh* was to leave undisturbed the orders of the Full Federal Court[70]. The Full Court allowed an appeal against the dismissal of an application for judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)[71]. The availability of the constitutional writs was not an issue. The Full Court set aside the decision of the delegate of the Minister refusing the grant of resident status, referred the appellant's application for reconsideration according to law, and stayed the decision for deportation until the determination upon that reconsideration.

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69 (1995) 183 CLR 273.

70 *Teoh v Minister for Immigration and Ethnic Affairs* (1994) 49 FCR 409 at 441.

71 See (1994) 49 FCR 409 at 415.

87 The reasons given in this Court in *Teoh* contain responses to the first and second questions flagged earlier in these reasons, viz who is it who must be shown to entertain the expectation of the particular aspect of procedural fairness that is in issue, and, secondly, how is it to be shown that the expectation has arisen? The judgments are authority for several propositions. The second and third are particularly important for the case put by the present applicant, but in *Teoh* itself they were sequential to the first proposition. This was put by Mason CJ and Deane J, as follows[72]:

> "[R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the [convention]. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the [convention]". (footnotes omitted)

88 The second proposition, was expressed by Toohey J, as being that[73]:

> "[i]t is not necessary for a person in the position of [the applicant] to show that he was aware of the ratification of the [convention]; *legitimate expectation in this context does not depend upon the knowledge and state of mind of the individual concerned.* The matter is to be assessed objectively, in terms of what expectation might reasonably be engendered by any undertaking that the authority in question has given, whether itself or, as in the present case, by the government of which it is a part." (footnotes omitted) (emphasis added)

89 The third proposition, as expressed by Mason CJ and Deane J, states[74]:

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72 (1995) 183 CLR 273 at 291; see also at 301 per Toohey J.

73 (1995) 183 CLR 273 at 301; see also at 291 per Mason CJ and Deane J.

74 (1995) 183 CLR 273 at 291-292; see also at 302 per Toohey J. There was disagreement as to what was involved in the application of that proposition to the facts considered by the Privy Council in *Fisher v Minister of Public Safety and Immigration (No 2)* [2000] 1 AC 434 at 446-447, 454. In the event, the appellants failed in their reliance upon *Teoh* both in *Fisher* and in *Thomas v Baptiste* [2000] 2 AC 1 at 25, 31-32.

> "[I]f a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course. So, here, if the delegate proposed to give a decision which did not accord with the principle that the best interests of the children were to be a primary consideration, procedural fairness called for the delegate to take the steps just indicated."

Gaudron J, the other member of the majority in *Teoh*, considered that the convention in question was only of subsidiary significance[75].

90 In his dissenting judgment in *Teoh*, McHugh J disfavoured what he saw as the extension of the doctrine of legitimate expectation. The term "expectation" was treated in the first and second propositions as a fiction; the state of mind of the person concerned was regarded as irrelevant[76]. His Honour added[77]:

> "If a person does not have an expectation that he or she will enjoy a benefit or privilege or that a particular state of affairs will continue, no disappointment or injustice is suffered by that person if that benefit or privilege is discontinued. A person cannot lose an expectation that he or she does not hold. Fairness does not require that a person be informed about something to which the person has no right or about which that person has no expectation."

91 It has been pointed out, with respect correctly, that what his Honour said should not be understood as meaning that the only expectations which bear upon procedural fairness are those involving what one might call an actual or conscious appreciation that a benefit or privilege is to be conferred or a particular state of affairs will continue[78]. It was not suggested in *FAI Insurances Ltd v Winneke*[79] that the insurers had to show that they expected that their applications for renewal of their 12 month approval as insurers would be granted. Rather, as

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75 (1995) 183 CLR 273 at 304.

76 (1995) 183 CLR 273 at 314.

77 (1995) 183 CLR 273 at 314. See also his Honour's earlier remarks in *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 681-682.

78 Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 326-327.

79 (1982) 151 CLR 342.

Gibbs CJ put it[80], a company does not set up business as an insurer in the expectation that the business will last only one year; the "natural expectation" is that it will continue so long as it is properly conducted and is successful. Again, the respondent in *Sanders v Snell*[81] was treated as having a legitimate expectation that his contract would continue until terminated in accordance with a two months' notice provision; it was not suggested that the subjective beliefs of the respondent had to be established.

92 It is appropriate to treat the term "expectation" as coloured by the adjective "legitimate", meaning, as indicated above, "reasonable". What is "reasonable" may properly involve the attribution or inferring of states of mind, thereby reflecting an understanding of what is usual in human affairs. This is illustrated by the treatment of the subject by Aickin J in *Heatley v Tasmanian Racing and Gaming Commission*[82]. His Honour observed[83]:

> "What we are concerned with is an expectation on the part of members of the public that they will continue to receive the customary permission to go on to racecourses upon the payment of a stated fee to the racecourse owner. Members of the public do, it seems to me, expect that if they present themselves at the gate of a football ground or a racecourse or a dog-racing course and tender the stated entrance fee that they will be admitted, because generally speaking it is in the interests of the owner or occupier that they should in fact attend the relevant game or meeting, and upon receiving such permission they then have what is properly called a right as against all the world (save the owner) to remain there for the duration of the relevant event.
>
> The statutory power which s 39(3) [of the *Racing and Gaming Act* 1952 (Tas)] gives to the Commission is one which enables the Commission to destroy that right, as well as to destroy the expectation that they will on future occasions be granted the like right in respect of subsequent race meetings."

93 Accordingly, in the present case, it was not incumbent upon the applicant to show that he had turned his mind to the matter and believed that he could rely upon the subsistence of his visa until it was cancelled according to law.

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80 (1982) 151 CLR 342 at 348.

81 (1998) 196 CLR 329 at 347-348 [45].

82 (1977) 137 CLR 487.

83 (1977) 137 CLR 487 at 509.

94 In the pre-*Teoh* decision in *Haoucher v Minister for Immigration and Ethnic Affairs*[84], McHugh J had referred to authorities including *FAI Insurances* and *Heatley*. The latter he described as an illustration of a course of conduct creating a legitimate expectation. The former concerned an expectation founded in the nature of the privilege or benefit required for continued conduct of a particular business. In *Haoucher* itself, the expectation was founded in the detailed policy statement by the Minister to the House of Representatives as to what would guide the exercise by the Minister of the statutory power of deportation.

95 It is here that some difficulty does arise with the first and third propositions drawn from *Teoh* and set out earlier in these reasons. It is one thing for a court in an application for judicial review to form a view as to the expectations of Australians presenting themselves at the gates of football grounds and racecourses. It is quite another to take ratification of any convention as a "positive statement" made "to the Australian people" that the executive government will act in accordance with the convention and to treat the question of the extent to which such matters impinge upon the popular consciousness as beside the point.

96 *Haoucher* does not stand beside *Teoh*. In the former case there was a statement made in the Parliament bearing immediately upon the exercise of the particular power in question. In *Teoh* there were in the Convention various general statements and there was no expression of intention by the executive government that they be given effect in the exercise of any powers conferred by the Act. The decision-maker in *Teoh* had acted in accordance with a specific policy which made "good character" requirements the primary consideration[85], yet the result was reviewable error.

The significance of *Teoh*

97 It may be, as Callinan J indicated in *Sanders v Snell*[86], with reference to the judgment of Gaudron J in *Teoh*[87], that that case does not lay down any universal requirement as to what is necessary to support a legitimate expectation;

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84 (1990) 169 CLR 648 at 681.

85 (1995) 183 CLR 273 at 292, 303.

86 (1998) 196 CLR 329 at 351 [53].

87 (1995) 183 CLR 273 at 304-305.

the interests of infant children were in issue in *Teoh*, matters, as Callinan J put it, "in respect of which any civilised person would hold expectations"[88].

98 If *Teoh* is to have continued significance at a general level for the principles which inform the relationship between international obligations and the domestic constitutional structure, then further attention will be required to the basis upon which *Teoh* rests. The case involved ratification by the Executive of a treaty which had not been followed by any relevant exercise of legislative power to make laws with respect to external affairs. It was remarked in the *Industrial Relations Act Case*[89] that there may be some treaties with a subject-matter identified in terms of aspiration which cannot enliven the power conferred by s 51(xxix) of the Constitution. But that does not necessarily mean that the executive act of ratification is to be dismissed as platitudinous; an international responsibility to the contracting state parties or other international institutions has been created.

99 In any event, it was not suggested that *Teoh* concerned a treaty of this limited nature. However, in general, ratification, as an executive act, did not in the domestic constitutional structure thereby confer rights upon citizens or impose liabilities upon them[90]. In that sense the ratified treaty was not "self-executing" and lacked "direct application" in that domestic system.

100 Nevertheless, in various respects, an unincorporated treaty, left in that state, may be invoked in various ways in the conduct of domestic affairs. For example, a peace treaty will, without legislation, change the status of enemy aliens in Australian courts[91]. Further, the taking of a step by the executive government in the conduct of external affairs, whilst of itself neither creating rights nor imposing liabilities, may supply a step in a broader process of resolution of justiciable disputes[92]. The so-called "disguised extradition" cases

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88 (1998) 196 CLR 329 at 351 [53]; cf Taggart, "Legitimate Expectation and Treaties in the High Court of Australia", (1996) 112 *Law Quarterly Review* 50 at 54.

89 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 486.

90 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 480-482.

91 *Porter v Freudenberg* [1915] 1 KB 857 at 871, 880; cf *Schering AG v Pharmedica Pty Ltd* (1950) 52 SR (NSW) 16.

92 *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 370.

are an example[93]. The treatment of public policy objections in the conflict of laws may be another[94]. More frequently encountered are the rules of statutory interpretation which favour construction which is in conformity and not in conflict with Australia's international obligations; this matter was discussed by Mason CJ and Deane J in *Teoh*[95]. It is with such influences as these in domestic law that American scholars have been concerned in distinguishing, under the United States system, between "self-executing" treaties and their "invocability" without direct application[96].

101 However, in the case law a line has been drawn which limits the normative effect of what are unenacted international obligations upon discretionary decision-making under powers conferred by statute and without specification of those obligations. The judgments in *Teoh* accepted the established doctrine that such obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error. The curiosity is that, nevertheless, such matters are to be treated, if *Teoh* be taken as establishing any general proposition in this area, as mandatory relevant considerations for that species of judicial review concerned with procedural fairness.

102 The reasoning which as a matter of principle would sustain such an erratic application of "invocation" doctrine remains for analysis and decision. Basic questions of the interaction between the three branches of government are involved. One consideration is that, under the Constitution (s 61), the task of the Executive is to execute and maintain statute law which confers discretionary powers upon the Executive. It is not for the judicial branch to add to or vary the content of those powers by taking a particular view of the conduct by the

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93 See *Schlieske v Minister for Immigration and Ethnic Affairs* (1988) 84 ALR 719. Other examples are given in Leeming, "Federal Treaty Jurisdiction", (1999) 10 *Public Law Review* 173; see also *Cowen and Zines's Federal Jurisdiction in Australia*, 3rd ed (2002) at 29-30.

94 See, for example, *Regie National des Usines Renault SA v Zhang* (2002) 76 ALJR 551 at 562 [56]-[57]; 187 ALR 1 at 16; *Kuwait Airways Corporation v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 WLR 1353 at 1363 [29], 1383-1384 [114], 1390 [137], 1393 [148]; [2002] 3 All ER 209 at 219, 238, 245, 247.

95 (1995) 183 CLR 273 at 287-288.

96 Riesenfeld, "International Agreements", (1989) 14 *Yale Journal of International Law* 455 at 462-467; Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis", (1992) 86 *American Journal of International Law* 310 at 315-319.

Executive of external affairs[97]. Rather, it is for the judicial branch to declare and enforce the limits of the power conferred by statute upon administrative decision-makers, but not, by reference to the conduct of external affairs, to supplement the criteria for the exercise of that power.

Conclusions

103 In the present case the ultimate issues are (a) whether, by failing, as the applicant puts it, to carry through something which an officer of the decision-maker said would be done before reaching a decision, there was a failure to observe an expectation reasonably attributable to the applicant and (b) if so, whether that failure gave rise to a decision flawed for denial of natural justice.

104 The first issue should be answered in the applicant's favour. On one view of the facts the preferable answer may be that there could be no reasonable expectation because the decision-maker already had been supplied with the information concerning the care of the two children by the letter of 17 October 2000 which was attached to the applicant's submission of 30 October 2000. Yet the statement that the Department wished to contact the carers of the children followed in the letter of 7 November 2000. The better view is that this was a case of an expectation arising from the conduct of the person proposing to make recommendations to the Minister. It is a case stronger than *Haoucher* in this respect.

105 But the failure to meet that expectation does not reasonably found a case of denial of natural justice. The notion of legitimate expectation serves only to focus attention on the content of the requirement of natural justice in this particular case. The ends sought to be attained by the requirement of natural justice may be variously identified. But at least in a case such as this the concern is with the fairness of the procedure adopted rather than the fairness of the outcome. It is with the decision-making process not the decision, as Lord Brightman put it[98]. What is delivered by the requirement of natural justice is the right to a hearing, a technical expression in law, before action is taken.

106 The applicant by the statement in the letter to him of 7 November 2000 did not acquire any vested right to oblige the Department to act as it indicated, at peril of the ultimate decision by the Minister exceeding his jurisdiction under the Act. It was not suggested that in reliance upon that letter the applicant had failed

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97 cf *Simsek v Macphee* (1982) 148 CLR 636 at 641-642.

98 *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at 1173; [1982] 3 All ER 141 at 154.

to put to the Department any material he otherwise would have urged upon it. Nor was it suggested that, if contacted, the carers would have supplemented to any significant degree what had been put already in the letter of 17 October 2000. The submission that the applicant, before the making by the Minister of his decision, should have been told that the carers were not to be contacted, thus lacks any probative force for a conclusion that the procedures so miscarried as to occasion a denial of natural justice.

Order

107 The application should be dismissed with costs.

108 HAYNE J. The facts and circumstances which give rise to this application are described in the reasons of other members of the Court. I do not repeat them except to the extent necessary to explain my conclusions.

109 A delegate of the Minister wrote to the applicant giving him notice of the Minister's intention to cancel his visa, under the then provisions of s 501(2) of the *Migration Act* 1958 (Cth), and invited the applicant to comment. The applicant responded by making detailed written submissions in which he referred to his two children and to the fact that the children then lived, not with their mother, but with friends. The Department replied, asking for the name, address and telephone number of the carers and telling the applicant that "[t]he Department wishes to contact them in order to assess [the applicant's] relationship with the children, and the possible effects on them of a decision to cancel [his] visa". In fact, at the time this letter was sent, the Department had the details it sought about the person who cared for the children. The carer had written a letter which the applicant had attached to his written submission. The applicant sent the information which the Department sought.

110 The Department did not contact the children's carer before the Minister decided to cancel the applicant's visa. The material put before the Minister for him to consider in making his decision included detailed material about the children and the effect on them that cancelling the applicant's visa would have.

111 The applicant contends that, because the Department told him that it wished to contact the children's carer, but neither contacted the carer nor told the applicant that it would not, he was denied procedural fairness. It was said that he had been denied a "legitimate expectation" of a fair procedure: the expectation being that the Department would do what it said it would do. But the focus of inquiry must remain on the fairness of the procedures adopted by the Department. That is the ground which the applicant advanced as the basis for the relief sought. If the procedure was fair, reference to expectations, legitimate or not, is unhelpful, even distracting.

112 Confining the description of the events and circumstances to those I have mentioned omits reference to two critical matters. First, the applicant accepted that, but for what the Department *said* it would do, procedural fairness would not have required the Department to interview the carer. Secondly, he did not suggest that, had he known that the Department would not contact his children's carer, he would have submitted any additional material or argument.

113 What the applicant's submission amounts to, then, is that there was a want of procedural fairness because the Department *said* it would do something, which it was not bound to do, and which, done or undone, did not affect what he did or what representations he made to the Minister. This does not demonstrate a denial of procedural fairness and reference to legitimate expectation does not alter that conclusion.

114 If, in making a decision, a decision-maker is obliged to act with procedural fairness, the decision-maker must give a sufficient opportunity to those directly affected by the decision to present material and argument before the decision is made. The Minister did that in this case and the applicant did not contend otherwise. The applicant was given the opportunity to submit, and did submit, all the material and all the arguments that he wanted to submit before the decision was made. The Department's statement that it intended to contact the children's carer did not cause the applicant to alter his conduct in any way. In particular, it did not cause him to refrain from substituting for, or adding to, the material and argument he had already submitted.

115 It is apparent, therefore, that the applicant's argument seeks to shift attention away from the sufficiency of the opportunity given to him to place material and arguments before the Minister about why the Minister should not cancel his visa. He seeks to shift it to a different area for inquiry, identified only as the legitimate expectation of the applicant engendered by the Department's statement of intention. Analysis reveals that any expectation which the letter engendered did not affect the fairness of the procedures that were followed.

116 Legitimate expectation is a phrase which, although used in administrative law for more than 30 years, has been used in several different ways. In *Schmidt v Secretary of State for Home Affairs*[99], itself a case about a Minister's refusal to extend an alien's residence permit, Lord Denning MR used legitimate expectation to identify cases in which a decision-maker should give a person an opportunity to make representations – distinguishing, in that case, between aliens whose permit was to be cancelled before expiry and those whose permit was not to be renewed. The former were said[100] to have a legitimate expectation of being allowed to stay in the country, and therefore a right to make representations before cancellation; the latter were said to have neither a right to remain nor a legitimate expectation of being allowed to remain, and therefore no right to make representations.

117 Later, legitimate expectation was said to explain why a decision-maker might be required to receive representations before departing from some policy or intended course of conduct which it had announced[101]. Those affected by the

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99 [1969] 2 Ch 149 at 170-171.

100 [1969] 2 Ch 149 at 171.

101 *R v Liverpool Corporation; Ex parte Liverpool Taxi Fleet Operators' Assoc* [1972] 2 QB 299; *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 at 637.

policy or intended course of conduct were said[102] to have a legitimate expectation of having a hearing before the decision-maker decided whether to alter that policy or course of conduct.

118 Still later, however, the phrase legitimate expectation has come to be used in very different ways. Instead of being used to describe *why* procedural fairness should be afforded to a person it has sometimes been used to refer to what matters the decision-maker should take into account in making a decision or, in England, to what decision the decision-maker should reach. This last development, said[103] to engage concepts of abuse of power, directs attention to whether a person has a legitimate expectation of a benefit which is substantive rather than merely procedural and to whether to frustrate that expectation is unfair[104].

119 It was not suggested that principles of this last-mentioned kind had any application in this case. It is, therefore, not necessary to consider any of the many questions which such a submission would raise: such as what is meant by "abuse of power" and "unfair" in a context where, by hypothesis, the relevant statute gives power to make the decision which is impugned, and could any relief of the kinds enumerated in s 75(v) be granted? I mention this use of the phrase legitimate expectation in connection with substantive rather than procedural benefits only to emphasise the dangers of using the phrase without careful articulation of the content of the principle which is said to be engaged in the particular case.

120 Here, attention was given in argument to the use of the phrase in connection with the identification of what matters a decision-maker should take into account in making a decision. Particular reference was made to *Minister for Immigration and Ethnic Affairs v Teoh*[105] and the discussion there[106] about legitimate expectation. What *Teoh* held[107] was that a convention ratified by

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102 *Ng Yuen Shiu* [1983] 2 AC 629 at 636-637.

103 *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213 at 242 [57] per Lord Woolf MR.

104 See also *R v Home Secretary; Ex parte Hindley* [2001] 1 AC 410 at 419 per Lord Steyn, 421 per Lord Hobhouse of Woodborough.

105 (1995) 183 CLR 273.

106 (1995) 183 CLR 273 at 291-292 per Mason CJ and Deane J, 302 per Toohey J, 305 per Gaudron J, 310-314 per McHugh J.

107 (1995) 183 CLR 273 at 291 per Mason CJ and Deane J, 302 per Toohey J, 305 per Gaudron J.

Australia, but not incorporated into Australian municipal law, could, absent statutory or executive indications to the contrary, found a legitimate expectation that administrative decision-makers would act in conformity with it. It further held[108] that if a decision-maker proposed to make a decision inconsistent with that expectation, procedural fairness required that the persons affected be given notice and an adequate opportunity of presenting a case against the taking of such a course. The legitimate expectation identified was an expectation about what would be taken into account in reaching a decision.

121 Used in this way, legitimate expectation is a phrase which poses more questions than it answers. What is meant by "legitimate"? Is "expectation" a reference to some subjective state of mind or to a legally required standard of behaviour? If it is a reference to a state of mind, whose state of mind is relevant? How is it established? These are questions that invite close attention to what is meant by legitimate expectation and what exactly is its doctrinal purpose or basis. Not all are dealt with explicitly in *Teoh*. At the least they are questions which invite attention to the more fundamental question, posed by McHugh J in *Teoh*[109], of whether legitimate expectation still has a useful role to play in this field of discourse now that it has served its purpose in identifying those to whom procedural fairness must be given as including more than persons whose rights are affected[110].

122 It may be that, for the reasons given by McHugh and Gummow JJ in this matter, *Teoh* cannot stand with the Court's earlier decision in *Haoucher v Minister for Immigration and Ethnic Affairs*[111]. It may also be that further consideration may have to be given to what was said in *Teoh* about the consequences which follow for domestic administrative decision-making from the ratification (but not enactment) of an international instrument. Those questions need not be answered in this case. For present purposes, it is enough to say that even if the Department's letter engendered some relevant legitimate expectation, departure from it, where it is accepted that neither the expectation nor departure from it affected the course which the applicant pursued, gives no ground for relief. He was afforded a full opportunity to be heard. The Department's letter raised no new matter to be taken into account in making the impugned decision, and it did not divert attention in any way from the relevance of, or weight to be given to, the effect that cancellation of the applicant's visa

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108 (1995) 183 CLR 273 per 291-292 per Mason CJ and Deane J, 302 per Toohey J, 305 per Gaudron J.

109 (1995) 183 CLR 273 at 311.

110 *Kioa v West* (1985) 159 CLR 550; *Annetts v McCann* (1990) 170 CLR 596.

111 (1990) 169 CLR 648.

would have on his children. Unlike *Teoh*, this was not a case where the course of decision-making could be said to have diverged from any announced policy to be taken to account in making the relevant decision.

123 The application should be dismissed with costs.

124 CALLINAN J. This appeal is concerned with the obligations of the respondent Minister in the making of a decision whether to deport a person from Australia who has failed a statutory character test.

The facts

125 On 22 August 1995, the applicant, who already had a criminal record, was convicted by the Supreme Court of Queensland of the indictable offence of trafficking in a dangerous drug. He was sentenced to eight years imprisonment. In February 2001, following his decision of 23 January 2001, the respondent informed the applicant in writing that his Transitional (Permanent) Visa had been cancelled pursuant to s 501(2) of the *Migration Act* 1958 (Cth) ("the Act") because he had failed the "character test" prescribed by s 501(6)[112] of the Act. Sub-section 501(5) of the Act excludes the operation of statutory rules of natural justice to a decision of the respondent under s 501(3) of the Act but not the sub-section under which he acted here.

126 The applicant filed an application in the Brisbane registry of the Court pursuant to s 75(v) of the Constitution. On 17 May 2001 I made an order under O 55 r 2 of the High Court Rules directing that a Notice of Motion be filed for the hearing of the applicant's application by the Full Court. The Notice of Motion was filed on 14 December 2001.

127 The applicant, who was born in Vietnam, has two children who are citizens of Australia by a woman to whom he was not married. They were seven and 11 years old respectively at the time of the respondent's decision. Their mother is now in a relationship with another person and has no current role in caring for the children. Officials in the department administered by the respondent were at all material times aware of the existence of the children and their ages.

128 Before cancelling the applicant's visa the respondent (by his delegate) gave him a notice of intention to do so and invited him to make comments about it. The notice informed the applicant that matters that could be taken into

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112 Section 501(6)(a) provides:

"*Character test*

(6) For the purposes of this section, a person does not pass the ***character test*** if:

(a) the person has a substantial criminal record (as defined by subsection (7)) …"

account by the respondent included the best interests of any children with whom the applicant had an involvement. The delegate added that other considerations, one of which was the composition of the applicant' s family both in Australia and overseas, might be relevant.

129 The applicant made a detailed submission in response to the notice. He referred in it to his children and to the failure of his relationship following his imprisonment. In a separate section of his response he provided detailed information with respect to the children which is repeated in substance in a report made by an official of the respondent's department to which I later refer.

130 On 7 November 2000 the respondent wrote the following letter to the applicant who was then in prison.

> "Dear Mr Lam
>
> Thank you for your letter dated 30 October 2000, in which you advised, amongst other things, that you are the father of two children, who currently reside with carers.
>
> The United Nations Convention on the Rights of the Child provides that in all actions concerning children, the best interests of the children shall be a primary consideration.
>
> Would you therefore kindly provide the full name, address and telephone number of the children's carers. The Department wishes to contact them in order to assess your relationship with the children, and the possible effects on them of a decision to cancel your visa.
>
> Would you please provide the full contact details of the mother of the children as well.
>
> I am also writing to inform you, in line with natural justice principles, that the Minister may decide to personally consider your case. Where the Minister has personally made a visa cancellation decision under section 501 of the Migration Act 1958, merits based review through the Administrative Appeals Tribunal (AAT) is not available. However, you may have the option of pursuing judicial review through the Federal Court.
>
> In light of the above, please ensure that any comments you wish to be taken into account as part of the consideration process, are received in this office by 21 November 2000.
>
> If I do not hear from you by that date, I will complete the submission and a decision may be made on your case without the benefit of the further information that you may be intending to provide.

Please telephone me on 3*** **** or send a fax on 3*** **** if you have any queries."

131 The applicant sent a letter to the respondent on 14 November 2000 as follows.

"Dear Sir,

Re: your letter dated 7th November 2000: your ref 1999/19544

I refer to the above and provide the following.

• My two daughters are named –

[names and dates of birth provided]

• Their carer is as follows –

[name, address and phone numbers provided]

• Mother of the children –

[name and date of birth provided]

After she left me, she started living with someone else. She now has another two children by this relationship. I do not have any contact with her, as I am only interested in the welfare of my two children. She has little if any contact with our two children and I don't even know where she now lives.

If I am given the chance to prove myself to them, my children are all I have. I can better myself for my sake and that of my children."

132 It is not disputed that neither the respondent nor any officials thereafter contacted the children or the carer or informed the applicant that they had not done so.

133 Following an interview of the applicant on 7 November 2000 by a senior community correctional officer, the latter made a detailed report in which it was recorded that the applicant said that should he be deported, his children would remain in Australia so that they could look forward to a "good future". The community correctional officer noted that the applicant claimed that he had formed a relationship with another woman to whom he had become engaged, and that they currently shared a good relationship with both of his children which he wished to strengthen. The applicant also told the officer that he wanted the children to reside with him.

134 The report concluded with a summary repeating the relevant facts regarding the children. The final paragraph of the report stated that there was a real risk of recidivism on the part of the applicant. The existence of that risk naturally raised three questions bearing on the welfare of the children: as to the influence that their father's conduct might have on them; his suitability as a custodial parent; and, in any event his long term capacity to participate in their upbringing. The report recorded:

> "It appears that Mr Lam's commitment to raising his children is his motivation for maintaining [sic] a gambling/crime free lifestyle. However, it is unknown as to whether Mr Lam will succeed in his commitment without him being subject to stringent community-based supervision and a strong support network.
>
> Mr Lam scored 28 points on the Community Risk/Need Inventory, which indicates that he is a high risk of re-offending. Risk factors included his past criminal history, addiction problems and peer group."

135 Subsequently, on 6 December 2000, the applicant took issue with the correctional officer's conclusion that he was a likely re-offender.

136 The respondent made his decision to cancel the applicant's visa by the adoption, in substance, of a further report prepared for his consideration by a case officer with the Character Assessment Unit. That report dealt in detail with the applicant's criminal history, the nature and extent of the respondent's discretion under the Act, the applicant's criminal record, the likelihood of his re-offending, general deterrence, the expectations of the Australian community, other considerations, and, comprehensively with the interests of the children.

137 This is the section of the report that deals with the children's situation.

> "Article 3.1 of the Convention on the Rights of the Child (CROC) states:
>
> *'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'*
>
> Mr Lam has 2 children. Mr Lam stated in his submission received 02 November 2000 that these children would be affected by a decision under s 501(2).
>
> Paragraph 2.16 of the Minister's Direction sets out the factors to which the decision maker should have resort when considering the best interests of the child:
>
> *(a) the nature of the relationship between the child and the non-citizen;*

Mr Lam's submission received on 02 November 2000 states in part:

> *'**Submissions as to the Children***
>
> 1. *The children were born in Australia and are therefore Australian citizens. They have no contact with people from Vietnam. They have a strong bond with me and have suffered greatly as a result of my crime and their mother abandoning them.*
>
> 2. *They only have my release from custody to look forward to. My friends will not care for them indefinitely. If I am to be deported they will have to be cared for by the State.*
>
> 3. *The life that I made for my children and myself during my Home Detention was an adequate one and they were happy.*
>
> 4. *They are settled in school and if they were to be cared for by the State no doubt they would be taken out of the school they attend and taken away from their friends. They have already suffered greatly as a result of my conduct. I very much wish to improve their current situation and give them some happiness. I would never again involve myself in conduct that would directly or indirectly adversely affect them. I hope that I would be a 'significant risk' as outlined in the Minister['s] Guidelines.*
>
> 5. *I am currently in a relationship with [KT]. We have been involved since January 1999. She now knows the children well and is developing a strong bond with them. We have plans to marry upon my release. She is an Australian citizen.'*

Mr Lam further states in part under the heading of Submissions as to Character:

> *'I have been a caring father for my children and I have a close bond with them.*
>
> *My children visit me regularly and I take a great interest in their welfare and schooling. They are very much looking forward to me coming home for good.'*

Mr Lam further states in his submission:

> *'My children are being cared for by close friends of mine at Forrest Lake whilst I am in custody.*
>
> *My wife has moved in with another man and has no interest in either the children or myself.*

> *My parole date is the 19th October 2000 and I hope to be granted parole.*
>
> *If I am not granted parole my Remitted Sentence date is March 2001. My friends have agreed to care for my children until my release.'*

Mr Lam was sent a letter dated 07 November 2000 asking for details of the children's carer and contact details for their mother. Mr Lam responded by letter received 20 November 2000 which states in part:

> *'… After she left me, she started living with someone else. She now has another two children by this relationship. I do not have any contact with her, as I am only interested in the welfare of my two children. She has little if any contact with our two children and I don't even know where she now lives.*
>
> *If I am given the chance to prove myself to them, my children are all I have. I can better myself for my sake and that of my children.'*

(b) the duration of the relationship, including the number and length of any separations and reason/s for separation; the hypothetical prospect for developing a better/stronger relationship in the future (whether or not there has been significant recent contact) would normally be given less weight than the proven history of the relationship based on past conduct.

Mr Lam's period of incarceration is the only known period of separation from his children.

(c) the age of the children

Mr Lam's daughters are:

> [names and dates of birth provided]

(d) whether the children are Australian citizens or permanent residents

Movement database records confirm both children are Australian citizens.

(e) the likely effect that any separation from the non-citizen would have had on the children

As previously stated Mr Lam has indicated that he has a strong bond with his children and that their mother no longer has any interest in them. He has also indicated that should his visa be cancelled and he is removed the children may not accompany him and it may be left to the State to care for them.

(f) the impact of the non-citizen's prior conduct on the children

As previously stated Mr Lam has stated that his children have suffered greatly from his conduct and that he wishes to improve their current situation. He has also stated that he will never again involve himself in conduct that would directly or indirectly adversely affect them.

(g) the time, if any, that the children have spent in Australia.

According to Departmental records both children have departed Australia on one occasion each. [details of time spent out of Australia provided].

(h) the circumstances of the probable receiving country, including the educational facilities and standard of health support system of the country to which the child may have to go, or return to should the non-citizen not be permitted to remain in Australia

Mr Lam has indicated in his submission that the children do not have contact with people from Vietnam. He has however indicated that his children are currently in the care of [HT] who, from the name details, appears to be from a Vietnamese background. He has also stated that should his visa be cancelled and he is removed from Australia his children will have to be cared for by the State indicating that should his visa be cancelled his children may not accompany him. However, should the children accompany Mr Lam if his visa were cancelled it is open for you to find that the standard of educational and health facilities may be of a lower standard than can be expected in Australia.

(i) any language barriers for the children in the probable country of future residence, taking into account the relative ease with which younger children acquire new languages

It is not known if the children currently speak any Vietnamese however given their relatively young ages and the fact that Mr Lam was born and raised in Vietnam until the age of 14 they could be expected to acquire a new language with relative ease.

(j) any cultural barriers for the children in the probable country of future residence, but taking into account the relative ease with which younger children adapt to new circumstances

Given the relatively young ages of the children and the fact that their father was born and raised in Vietnam until he was 14 it could be expected that they would adapt to a new culture with relative ease.

> It is open to you to find from the information given that the cancellation of Mr Lam's visa and his removal from Australia may have a detrimental effect on his children."

138 The applicant's argument is this, that the respondent failed to accord natural justice to him: in that, notwithstanding the respondent's contrary intimation, he failed to inform the applicant that he did not intend to contact the children and their carer, in consequence of which the applicant was denied an opportunity, or a further opportunity, not only to make submissions about the children's situation, but also to submit that the respondent should in fact investigate the children's situation for himself as he earlier had represented that he would. The applicant submits, not entirely convincingly, that he does not need to rely on the doctrine of "legitimate expectation" applied in *Minister for Immigration and Ethnic Affairs v Teoh*[113] an immigration case in this Court (Mason CJ, Deane, Toohey and Gaudron JJ; McHugh J dissenting).

139 In *Teoh* the Court held that ratification of a Convention, the Convention on the Rights of the Child, by the Executive gave rise to a legitimate expectation, not there fulfilled, that the Minister would act in conformity with it, by treating the best interests of a convicted drug offender's children as a primary consideration in determining whether to order the removal of that person from the country. It followed, it was held, that the latter had been denied procedural fairness in that he was not afforded an opportunity to present a case on the basis of that legitimate expectation. This was so, even though the Convention had not been incorporated into Australian law by enactment. Furthermore, the majority held, the legitimate expectation existed even though neither the convicted criminal nor the children had the slightest knowledge of the Convention or its ratification by the Executive: that none of them could, in those circumstances in fact have possibly held any expectation, legitimate or otherwise was irrelevant.

140 In my opinion, the expression "legitimate expectation" is an unfortunate one, and apt to mislead. In the case of *Teoh*, it was, with respect, a complete misnomer. I am not the only one to question its utility in discourse with respect to rights and obligations of applicants and administrators[114]. Moreover, the necessity for the invention of the doctrine is questionable. The law of natural justice has evolved without the need for recourse to any fiction of "legitimate expectation". As de Smith, Woolf & Jowell point out[115] a duty to accord natural

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113 (1995) 183 CLR 273.

114 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 681-682 per McHugh J. See also *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 404 per Barwick CJ .

115 *Judicial Review of Administrative Action*, 5th ed (1995) at 378-379.

justice by giving a right to be heard has long been the law of many civilised societies.

> "That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden." (footnotes omitted)

141 The expression "legitimate expectation" seems to have been first articulated by Lord Denning MR in *Schmidt v Secretary of State for Home Affairs*[116]. His Lordship, in my opinion was there doing no more than using the words "legitimate expectation" as a synonym for a right or interest. This is the sense in which Barwick CJ also appears to have understood the expression. In *Salemi v MacKellar [No 2]*[117] his Honour, after saying that he appreciated the literary quality of the expression better than he perceived its precise meaning and perimeter of application, added[118]:

> "I cannot attribute any other meaning in the language of a lawyer to the word 'legitimate' than a meaning which expresses the concept of entitlement or recognition by law. So understood, the expression probably adds little, if anything, to the concept of a right."

In *Teoh*, however, which probably represents the high water mark of the application of the doctrine, the majority (Mason CJ, Deane, Toohey and Gaudron JJ) seem to have regarded the legitimate expectation there as a separate, freestanding or further, indeed a new right altogether, the existence of which in no way depended upon the inescapable reality to which I have already referred, that nobody concerned held any relevant expectation of any kind.

142 In *Teoh*, some members of the Court at least seemed to think it necessary at one point to identify a person actually able to make a claim of a legitimate expectation, that is to say, that there be some person or persons truly holding such an expectation, for Mason CJ and Deane J said this[119]:

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116 [1969] 2 Ch 149 at 170.

117 (1977) 137 CLR 396.

118 (1977) 137 CLR 396 at 404.

119 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291.

> "Although it would be preferable for the children to make the claim directly, we can see no objection to a parent or guardian making the claim on behalf of a child."

143 On the other hand, Toohey J clearly took the view which has subsequently prevailed, that an "objective assessment" of an expectation reasonably held, however that is to be made in the context of a non-existent expectation in fact, would suffice. His Honour said this[120]:

> "It is not necessary for a person in the position of the respondent to show that he was aware of the ratification of the Convention; legitimate expectation in this context does not depend upon the knowledge and state of mind of the individual concerned[121]. The matter is to be assessed objectively, in terms of what expectation might reasonably be engendered by any undertaking that the authority in question has given, whether itself or, as in the present case, by the government of which it is a part.[122]"

144 I would observe with respect, that an "undertaking" presupposes a recipient of it, just as an "engendering" will be meaningless unless it has an effect upon the mind of someone.

145 It seems to me, with respect, that if a doctrine of "legitimate expectation" is to remain part of Australian law, it would be better if it were applied only in cases in which there is an actual expectation, or that at the very least a reasonable inference is available that had a party turned his or her mind consciously to the matter in circumstances only in which that person was likely to have done so, he or she would reasonably have believed and expected that certain procedures would be followed. As Gibbs CJ pointed out in *FAI Insurances Ltd v Winneke*[123], the insurer licensee there could readily be assumed to have taken a long term view of the insurance business that it had established, and for the conduct of which it required an annual licence and renewals.

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120 (1995) 183 CLR 273 at 301.

121 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 670.

122 cf *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629 at 638 where the Privy Council said that "when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and implement its promise, so long as implementation does not interfere with its statutory duty."

123 (1982) 151 CLR 342 at 348.

146 The doctrine was last applied in this Court in *Sanders v Snell*[124]. Even there, however, their Honours in the majority appear to have expressed some reservations about it. They said[125]:

> "It is not necessary to consider the criticisms that have sometimes been made of the doctrine of legitimate expectations[126]. Whatever may be the content or the continued utility of that doctrine it has long been held that the repository of statutory power should afford procedural fairness to those whose livelihood is affected by the exercise of that statutory power[127]."

147 I cannot help observing before moving to the facts of this case that I have further reservations about the application of the doctrine, particularly in the kind of case that *Teoh* was. There, it was the ratification of an international Convention that was said to give rise to the legitimate expectation. The non-enactment of the Convention into Australian law could well indicate parliamentary resistance to it. It might be that the parliament believed that Australian law already paid sufficient regard to all relevant considerations: that perhaps enactment might distort the fine balance in criminal sentencing generally between deterrence of recidivism by adult criminals many of whom have children, and the impact of the sentence upon those children; and, the disincentive that enactment might produce in relation to abstention from crime by those non-citizens who are minded to commit it. It is unnecessary to speculate about these matters. The fact remains that the Convention is not part of Australian law. It is true that the Executive is both the ratifier of the Convention and the decision maker here, but its obligations and processes owe their existence to, and are defined by, the Act. In consequence, the view is open that for the Court to give the effect to the Convention that it did, was to elevate the Executive above the parliament. This in my opinion is the important question rather than whether the Executive act of ratification is, or is not to be described as platitudinous or ineffectual[128].

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124 (1998) 196 CLR 329. Gleeson CJ, Gaudron, Kirby and Hayne JJ; Callinan J dissenting in part.

125 *Sanders v Snell* (1998) 196 CLR 329 at 348.

126 See, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 310-314 per McHugh J.

127 *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

128 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291 per Mason CJ and Deane J.

148 Whatever may be the current utility or status of the doctrine of "legitimate expectation", I agree with McHugh and Gummow JJ, for the reasons that their Honours give, that on no view can it give rise to substantive rights rather than to procedural rights. It is also unnecessary in this case, to attempt to resolve any remaining controversy whether a right to natural justice is conditioned entirely by the common law, or by the language of the relevant statute, or a combination of them.

149 I return now to the facts of this case. In my opinion, what is fatal to the applicant's claim here is that he was unable to demonstrate that there was any material that he could have put before the respondent which was either not already in the respondent's hands, or which might have influenced the respondent to decide his case differently. That he might have liked to have had a further opportunity to repeat what he had already said, or to advance the same argument differently or more emphatically is not to the point and cannot avail him.

150 These aspects make the case distinguishable from *Re Refugee Review Tribunal; Ex parte Aala*[129] in which the applicant was deprived of an opportunity to present a full case and in which I said (and quoted McHugh J in *Teoh*) as follows[130]:

> "In some respects this case is also similar to *R v Muir; Ex parte Joyce*[131] which was decided before the doctrine of legitimate expectation had evolved to the extent that it now has. In *Muir* the respondent Board had, by its actions, led the prosecutor to believe that certain measures might be adopted in relation to his application, which in fact it had no intention of adopting. In the circumstances the prosecutor was unable to present his case in full. In a case of such a kind, of which this is an example, it is probably not even necessary to invoke and apply a principle of legitimate expectations. McHugh J was in dissent in *Teoh*, but his Honour's observations, regarding procedural fairness, are not, I think, affected by that. His Honour said[132]:
>
> > 'I think that the rational development of this branch of the law requires acceptance of the view that the rules of procedural

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129 (2000) 204 CLR 82.

130 (2000) 204 CLR 82 at 155 [213].

131 [1980] Qd R 567.

132 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 311-312.

> fairness are presumptively applicable to administrative and similar decisions made by public tribunals and officials. In the absence of a clear contrary legislative intention, those rules require a decision-maker "to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it"[133]. If that approach is adopted, there is no need for any doctrine of legitimate expectations. The question becomes, what does fairness require in all the circumstances of the case?'"

151 The case is also distinguishable from *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal*[134] in which applicants were able to demonstrate, and indeed the respondent accepted, that they were misled and that their conduct affected in much the same way as had occurred in *Aala*.

152 For the reasons that I have stated the applicant's application must be dismissed and none of the matters either apparently or actually in controversy in *Teoh* need be revisited: the true nature of the relationship between the action (the deportation on grounds of bad character) proposed by the respondent and the Convention on the Rights of the Child[135]; the elevation of an Executive ratification of an un-enacted Convention to almost the level of a concrete legal right or at least a springboard therefor; and the recognition of a fiction that a person without any knowledge whatsoever of a matter should be treated as having a legitimate expectation in respect of it.

153 I would dismiss the application with costs.

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133 *Kioa v West* (1985) 159 CLR 550 at 587.

134 (2002) 76 ALJR 966; 190 ALR 601.

135 See in particular Arts 3, 5, 9 and 12.