HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HEYDON JJ

WACB APPELLANT

AND

MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

WACB v Minister for Immigration and Multicultural and Indigenous Affairs
[2004] HCA 50
7 October 2004
P92/2003

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 21 August 2002 and, in place thereof, order that:*

   a) *the appeal to the Full Court be allowed with costs, and*

   b) *order 2 of the orders of French J made on 26 October 2001 be set aside.*

On appeal from the Federal Court of Australia

Representation:

J L Cameron for the appellant (instructed by Freehills)

D M J Bennett QC, Solicitor-General of the Commonwealth with P R Macliver for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

WACB v Minister for Immigration and Multicultural and Indigenous Affairs

Immigration – Refugees – Non-citizen – Illiterate and unaccompanied minor in immigration detention – Application for review by the Federal Court of decision of Refugee Review Tribunal – Whether under s 478(1)(b) of the *Migration Act* 1958 (Cth) the application for review was lodged within 28 days of the applicant being notified of the decision – Whether applicant "notified of the decision" under s 478(1)(b) by being told of outcome of decision – Whether giving to the applicant the written statement under s 430 is required for notification under s 478(1)(b).

Statutes – Construction – Whether under s 478(1)(b) of the *Migration Act* 1958 (Cth) the application for review was lodged within 28 days of the applicant being notified of the decision – Whether the Minister's obligations as statutory guardian under s 6 of the *Immigration (Guardianship of Children) Act* 1946 (Cth) are relevant to the construction of s 478(1)(b).

Words and phrases – "Notified of the decision", "decision", "give".

Migration Act 1958 (Cth), ss 430, 430A, 430B, 430C, 430D, 478.
Immigration (Guardianship of Children) Act 1946 (Cth), ss 5, 6, 6A.

1 GLEESON CJ, McHUGH, GUMMOW AND HEYDON JJ. This appeal from the Full Court of the Federal Court (Whitlam, North and Stone JJ)[1] arises out of an objection to competency taken by the respondent ("the Minister") before the Federal Court. French J upheld that objection and dismissed the application[2]. The Full Court agreed. The objection[3] was that the appellant's application for judicial review of a decision by the Refugee Review Tribunal ("the RRT") had been lodged out of time. At first instance, in the Full Court, and in this Court, the appellant's case has been presented by counsel appearing *pro bono*. As will become readily apparent, without that assistance the appellant would have lacked any means effectively to utilise his access to the exercise of the judicial power of the Commonwealth. The legal issues are of a highly technical nature.

2 Of central importance is the construction of s 478 of the *Migration Act* 1958 (Cth) ("the Act") as it stood before the commencement of the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth) (the privative clause amendment), but after the commencement of the *Migration Legislation Amendment Act (No 1)* 1998 (Cth) ("the 1998 Act"). The importance of the changes introduced by the 1998 Act will become apparent later in these reasons. At the relevant time, Pt 8 of the Act, headed "Review of decisions by Federal Court", included s 478 which stated:

> "(1) An application under section 476 or 477 must:
>
> (a) be made in such manner as is specified in the Rules of Court made under the *Federal Court of Australia Act 1976*; and
>
> (b) be lodged with the Registry of the Federal Court within 28 days of the applicant being notified of the decision.
>
> (2) The Federal Court must not make an order allowing, or which has the effect of allowing, an applicant to lodge an application outside the period specified in paragraph (1)(b)."

Sections 476 and 477 provided the grounds under which an application for judicial review might have been made to the Federal Court.

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1 *WACB v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 469.

2 (2001) 113 FCR 524.

3 Taken pursuant to O 54B r 3 of the Federal Court Rules ("the Rules") made under the *Federal Court of Australia Act* 1976 (Cth).

3 The task on this appeal is to construe the phrase "notified of the decision" in s 478(1)(b), in light of the subject, scope and purpose of the relevant provisions of the Act.

The facts

4 The appellant is a male who alleges that he was born in Afghanistan in 1985. He arrived in Australia by boat on 17 December 2000 and is an unlawful non-citizen within the meaning of the Act. At the time of his arrival, and at all relevant times, the appellant was an unaccompanied minor who allegedly could neither read nor write in either English or his native language, and had received no education in Afghanistan other than lessons in the *Koran* at his local mosque. On 1 January 2001, he applied for a protection visa. The application was prepared by a migration agent.

5 On 25 January 2001, a delegate of the Minister refused the appellant's application. The appellant applied for review of the delegate's decision by the RRT. On 15 March 2001, the RRT affirmed the delegate's decision. The substantive reasons given by the RRT for affirming the delegate's decision are not relevant to the issues in this appeal.

6 At all material times for the purposes of this appeal, the appellant was in immigration detention at the Curtin immigration reception and processing centre ("the Curtin centre") near Derby in Western Australia. On 16 March 2001, a facsimile transmission was sent to the Curtin centre from the Melbourne Registry of the RRT. The facsimile comprised 18 pages. The coversheet was addressed to the Manager of the Curtin centre and requested that the Manager "immediately pass the accompanying correspondence and decision" to the appellant. It was followed by a two page letter from the Deputy Registrar in the Melbourne Registry of the RRT and addressed to the appellant at the Curtin centre, a debit note for a "RRT $1,000 Post Decision Fee", and 14 pages of reasons of the RRT, all in English. The letter informed the appellant that the RRT had decided that he was not entitled to a protection visa. It also told him that he had the right to seek review of the decision by the Federal Court, and that an application for review must be lodged with that Court within 28 days of notification of the decision. The letter included the statement "I strongly advise you to seek legal advice if you wish to seek review by the Court". If the appellant had "any questions about [his] current residency status in Australia", he was told to "contact [his] regional office" of the Minister's Department.

7 There was an address for service (a firm of migration agents in Melbourne[4]) provided by the appellant to the RRT that differed from that of the Curtin centre. However, at the relevant time, the provisions of the Act respecting review by the RRT did not provide for delivery of the decision to a representative if the applicant was in immigration detention.

8 What then was communicated to the appellant was the subject of disputed evidence before the primary judge. The primary judge found that the appellant had been told by the Manager, speaking through an interpreter whose name the appellant did not remember, that the RRT had refused his application for a protection visa and that he had 28 days within which to apply for judicial review by the Federal Court[5]. According to the appellant, the documents were then handed to Ms Alamar, a counsellor employed by the company managing the Curtin centre, who took him into another room and told him, it would appear in the Dari language, that the RRT had refused his application because they did not believe he was an Afghan.

9 The primary judge did not resolve whether, contrary to what the Manager of the Curtin centre said was his recollection, but consistent with the appellant's evidence, the reasons for the RRT's decision had not been handed to the appellant on 16 March 2001. According to the appellant, the documentation was handed to Ms Alamar and remained with her until requested by the appellant "some" weeks later. Ms Alamar did not give evidence and neither the appellant nor the Manager of the Curtin centre, both of whom gave evidence on affidavit, was cross-examined. Accordingly, on this aspect of the matter, the appellant's account was not challenged by the Minister. Nor, in the Full Court, did the Minister by notice of contention or cross-appeal complain of the absence of a finding in the Minister's favour on any factual issue. On the construction of the Act advanced by the Minister, the date upon which the documentation was given to the appellant was irrelevant. However, as will appear, upon the proper construction of the statute the ascertainment of that date indeed was critical for a successful objection to the competency of the Federal Court proceeding and the Minister had the burden of establishing lack of competency.

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4 See Pt 3, Div 3 of the Act.

5 (2001) 113 FCR 524 at 538.

Notification provisions

10 The appellant submitted that s 478 should be read by reference to, or as picking up, the provisions in Pt 7, Div 5 of the Act, headed "Decisions of Refugee Review Tribunal". Part of this Division (ss 430A-430D) was described as a "code" for the delivery, or notification, of decisions by the RRT to the applicant and the Secretary of the Minister's Department ("the Secretary"). The term "code" is usually employed to describe a statute replacing the common law on a particular subject, such as bills of exchange and sale of goods[6], but may conveniently be used here.

11 An integral element of the code is the stipulation that a written statement containing inter alia the reasons for the RRT's decision to be "given" to the applicant, putting it shortly, either at the time the decision is handed down, or within 14 days of the date on which the decision is handed down. The appellant submitted first that, by reading s 478 together with the code, time does not begin to run until the written statement is given to the applicant. In oral argument, the appellant went further and submitted that the written statement must be translated and communicated to him orally (given he was illiterate) in order to qualify as notification of the decision under s 478. As will appear, the first of these submissions should succeed. Further reference to the second submission is made in the penultimate paragraph of these reasons, under the heading "Other matters".

12 Sub-section (1) of s 430, which is headed "Refugee Review Tribunal to record its decisions etc", provides:

> "Where the [RRT] makes its decision on a review, the [RRT] must prepare a written statement that:
>
> (a) sets out the decision of the [RRT] on the review; and
>
> (b) sets out the reasons for the decision; and
>
> (c) sets out the findings on any material questions of fact; and
>
> (d) refers to the evidence or any other material on which the findings of fact were based."

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6 *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236 at 243-244.

Sub-section (3), which is not presently relevant, provides that the RRT must return to the Secretary certain documents after preparing the written statement in sub-s (1). Sub-section (2) was repealed by the 1998 Act and replaced with ss 430A-430D ("the code"). It had provided:

> "The [RRT] must give the applicant and the Secretary a copy of the statement prepared under subsection (1) within 14 days after the decision concerned is made."

13 Section 430A, headed "Tribunal must invite parties to handing down of decision", is self-explanatory. It indicates that one rationale of the code may be to ensure that applicants are informed of RRT decisions so as to minimise the scope for complaints of lack of procedural fairness[7]. Sections 430B-430D provide five methods by which the applicant may be notified of the decision, each depending on the individual circumstances of the applicant. The decision may be notified orally. It may be notified in writing (a) to an applicant in immigration detention; (b) to an applicant present at the handing down of the decision (ie, not in immigration detention); (c) to an applicant's representative present at the handing down; or (d) to an applicant's representative who is not present at the handing down of the decision. These methods of notification will be considered later in these reasons.

14 This code is also mirrored in Pt 5, Div 6 of the Act, which contains the equivalent provisions in relation to proceedings before the Migration Review Tribunal ("the MRT"). The written statement provision in s 430(1) in respect of the RRT is mirrored in s 368(1) in respect of the MRT. (The present case did not involve any decision reviewable by the MRT rather than the RRT.)

15 When regard is had to the legislative history of the notification provisions, their subsequent amendment, the operation and function of the code, and the purpose of s 478, it will be apparent that what is required to constitute notification of the decision under s 478(1)(b) is a fulfilment of the code. This requires, in a case such as the present where a written rather than oral decision was given by the RRT, the giving of the written statement provided for in s 430(1). We turn first to the legislative history.

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7 Both the Explanatory Memorandum and Second Reading Speech of the Minister on the Bill for the 1998 Act are silent as to the rationale of the code.

Legislative history of the notification provisions: the 1989 amendments

16 The notification provisions, including the code in Pt 7, Div 5 of the Act, have a provenance. The progenitor of s 478(1)(b) is s 138(3) of the Act. This was inserted by s 26 of the *Migration Legislation Amendment Act* 1989 (Cth) and remained in the Act until 1992[8]. Sub-section (1) of s 138, which was headed "Appeal to Federal Court on question of law", provided that an appeal lay to the Federal Court on a question of law from any decision of the Immigration Review Tribunal ("the IRT"). Section 138(3) provided:

> "An appeal shall be instituted within 28 days after the appellant is notified under section 135 of the decision concerned."

As it then stood, the Act did not contain a provision equivalent to s 478(2), requiring the Federal Court not to make an order allowing an applicant to lodge an application outside the time limit.

17 Section 135 of the Act[9], headed "Tribunal to record its decisions etc *and to notify parties*"[10], relevantly provided:

> "(1) Where the Tribunal makes its decision on a review, the Tribunal shall prepare a written statement that:
>
> (a) sets out the decision of the Tribunal on the review;
>
> (b) sets out the reasons for the decision;
>
> (c) sets out the findings on any material questions of fact; and
>
> (d) refers to the evidence or any other material on which the findings of fact were based.

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8 Originally inserted as s 64V(3), and later renumbered s 138(3) by s 83 of the *Migration Legislation Amendment Act* 1994 (Cth) ("the 1994 Act").

9 Originally inserted as s 64S, and later renumbered s 135 by s 83 of the 1994 Act.

10 The emphasised part of the heading was repealed by the 1998 Act; notification is now dealt with by the code inserted by that Act, rather than s 430(2).

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

Reading s 138(3) together with s 135, it is apparent that time began to run only when notification under s 135 was complete, ie, once the written statement was given to the applicant within 14 days of the decision being made. Section 135(1) of the Act is now mirrored in s 430(1) (for the RRT) and s 368(1) (for the MRT).

18 At the time that ss 135 and 138 were in force, the Act contained a two-tier system of review. Following an adverse decision by the Minister or his or her delegate, the applicant was able to seek internal review through the Migration Internal Review Office ("the MIRO")[11]. A further adverse decision entitled the applicant to seek external review through the IRT[12]. The applicant's entitlement to "appeal" to the Federal Court on a question of law arose upon an adverse decision by the IRT.

The 1992 amendments

19 The *Migration Reform Act* 1992 (Cth) expanded the system of review by splitting external review over two bodies. The RRT was created to review protection visa decisions, whilst the IRT retained the residual jurisdiction. The MIRO was also retained. These changes necessarily caused the legislative structure of the Act to change. The Federal Court review jurisdiction was no longer limited to decisions made by the IRT. It was expanded to cover decisions by the RRT[13]. Accordingly, s 138 was repealed and s 478 was inserted[14], together with a new Pt 8 dealing with which decisions were reviewable by the Federal Court. A new Pt 4A, later renumbered Pt 7[15], was inserted establishing the RRT. Section 166E headed "Refugee Review Tribunal to record its decisions etc and to notify parties", mirrored s 135, and relevantly provided:

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11 See s 115 of the Act as it then stood and the Migration (Review) Regulations (Cth) (repealed).

12 See s 116 of the Act as it then stood and the Migration (Review) Regulations (repealed).

13 See s 166LA of the Act, and later renumbered s 475 by s 83 of the 1994 Act.

14 Inserted as s 166LD, and later renumbered by s 83 of the 1994 Act.

15 See s 83 of the 1994 Act.

"(1) Where the [RRT] makes its decision on a review, the [RRT] must prepare a written statement that:

(a) sets out the decision of the [RRT] on the review; and

(b) sets out the reasons for the decision; and

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

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

(2) The [RRT] must give the applicant and the Secretary a copy of the statement prepared under subsection (1) within 14 days after the decision concerned is made."

This was later renumbered s 430[16]. Thus, as it stood following the 1992 amendments, the only substantive changes (the relocation of the review entitlement to a new Part of the Act, and the establishment of the RRT) did not appear to effect a change in what constituted notification of the decision. Section 478(1)(b) now required that an application be lodged with the Registry of the Federal Court within 28 days of the applicant being "notified of the decision", rather than within 28 days of the applicant being "notified under section 135 of the decision concerned". The change was necessary to reflect the expansion in the review regime, but the provisions concerned with notification (the former s 135(2)) were not altered. Both provisions now required that the written statement be given to the applicant within 14 days after the decision concerned was made (s 430(2) (the RRT) and s 368(2) (the MRT)). Accordingly, the relevant act of notification of the decision was still the giving of the written statement.

20 It may be observed that the ss 135 and 138 scheme for judicial review created by the 1989 amendments is reflected in ss 500(6B) and 501G(1) of the Act as it currently stands. These provisions deal with appeals to the Administrative Appeals Tribunal ("the AAT") from character related decisions. Section 500(6B) provides:

"If a decision under section 501 of this Act relates to a person in the migration zone, *an application to the [AAT] for a review of the decision*

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16 See s 83 of the 1994 Act.

> *must be lodged with the [AAT] within 9 days after the day on which the person was notified of the decision in accordance with subsection 501G(1)*". (emphasis added)

Section 501 of the Act empowers the Minister (s 501(3)) or his or her delegate (ss 501(1) and 501(2)) to refuse to grant or cancel a person's visa if satisfied that the person does not "pass the character test" (or some variation on this criterion)[17]. Section 501G(1), headed "Refusal or cancellation of visa – notification of decision" relevantly provides:

> "If a decision is made under subsection 501(1) or (2) or 501A(2) or section 501B or 501F to:
>
> (a) refuse to grant a visa to a person; or
>
> (b) cancel a visa that has been granted to a person;
>
> *the Minister must give the person a written notice that:*
>
> *(c) sets out the decision*; and
>
> (d) specifies the provision under which the decision was made and sets out the effect of that provision; and
>
> *(e) sets out the reasons (other than non-disclosable information) for the decision*". (emphasis added)

The 1998 amendments

21 In 1998, ss 430 and 368 were further amended by the repeal of sub-s (2), the 14 day period for delivery of the written statement, and the insertion into Pts 7 and 5 of more detailed provisions that have been described as the code.

22 As indicated above, there are five methods by which a tribunal decision may be delivered to the applicant, each depending on the individual circumstances of the applicant.

23 First, a decision may be delivered orally[18]. The relevant provisions provide that the tribunal must give the applicant and the Secretary a copy of the

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17 See s 501(6) of the Act.

18 Sections 430D(1) and 368D(1).

written statement (under s 430(1) (the RRT) or s 368(1) (the MRT)) within 14 days after the decision is made; the applicant "is taken to be notified of the decision" on the day on which the decision is made.

24 Secondly, where an applicant is in immigration detention (as was the appellant here) the tribunal must give the applicant and the Secretary a copy of the written statement within 14 days after the decision is made[19]. Unlike an oral decision, an applicant in immigration detention is not taken to be notified of the decision on the day on which the decision is made.

25 If the decision is not an oral decision and if the applicant is not in immigration detention, then the date of the decision is taken to be the date on which the decision is handed down[20]. A tribunal's decision, in these circumstances, may be handed down by reading the outcome of the decision, despite whether or not either or both the applicant and the Secretary are present[21]. These provisions apply to the third, fourth and fifth methods of delivery, to which we turn.

26 Thirdly, where an applicant is present at the handing down, the tribunal must give the applicant a copy of the written statement[22]. The same applies to the Secretary[23].

27 Fourthly, if the applicant is not present at the handing down of the decision, the tribunal must "notify the applicant of the decision by giving the applicant a copy" of the written statement within 14 days after the day on which the decision is handed down[24]. The same applies to the Secretary[25].

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19 Sections 430D(2) and 368D(2).

20 Sections 430B(4) and 368B(4).

21 Sections 430B(3) and 368B(3).

22 Sections 430B(5) and 368B(5).

23 Sections 430B(5) and 368B(5).

24 Sections 430B(6) and 368B(6).

25 Sections 430B(7) and 368B(7).

28 The fifth method of delivery is to a representative of the applicant. The relevant provisions (ss 430C and 368C) are headed "Applicant taken to be notified when representative notified". Section 430C provides:

> "(1) If a representative of the applicant is present at the handing down of a decision under section 430B, the applicant is taken to be notified of the decision on the day on which the decision is handed down.
>
> (2) If a representative of the applicant is notified of a decision under subsection 430B(6), the applicant is taken to be notified of the decision on the day on which the representative is so notified."

29 This brief description reveals that an element common to four of the five methods is the giving of the written statement. Other than the first method (oral decision), which deems the applicant to be notified upon handing down (and for which ordinarily there would then be no written reasons), the code is fulfilled only when the written statement is given to the applicant or to the applicant's representative. Thus, in the present case (the second method above), notification of the decision under the Act and thus under s 478(1)(b) did not occur until the written statement was given to the appellant.

30 Accordingly, an examination of the legislative history of the notification provisions, and the various methods of notification inserted by the 1998 amendments, reinforces the importance of the written statement as the medium of notification.

Conclusions as to construction

31 As remarked earlier in these reasons, Pt 8, which includes s 478, is headed "Review of decisions by Federal Court". These provisions confer upon certain unsuccessful visa applicants (and in some circumstances the Minister[26]) an entitlement, limited in scope, to seek judicial review in the Federal Court. Section 478 is facilitative of that entitlement, not destructive of it. While an applicant must lodge the application within 28 days from the date of notification and the Court may not extend that period, nevertheless the Act confers an entitlement to review, albeit one with a limited threshold. This state of affairs may be contrasted with the power given to the Federal Court by s 11(1)(c) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) to extend the time limit which otherwise applies to the institution of applications for judicial review.

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26 See s 479 of the Act.

32 The restriction in s 478 is of a different character to that of typical statutes of limitation which operate to impose a limit of time upon an existing right of action. They operate to bar the prosecution of actions otherwise not subject to such a time limit. In that sense, statutes of limitation are preventative. However, s 478 does not "bar an existing cause of action"; rather, "[i]t imposes a condition which is of the essence of a new right"[27]. Thus, s 478(1)(b) and s 478(2) restrict what otherwise would be the conferral upon the Federal Court of jurisdiction by the Parliament under ss 76(ii) and 77(i) of the Constitution. The new jurisdiction so conferred is remedial in nature, although the remedy is confined by the time restriction upon the institution of the proceeding. The provision of information to the unsuccessful visa applicant by the RRT is a necessary step to equip the applicant with the wherewithal to institute such a proceeding in the Federal Court.

33 Paragraph (a) of s 478(1) stipulates that an application to the Federal Court be made in the manner specified by the Rules. At the relevant time, those Rules[28] required that an application be in accordance with Form 56. This required the applicant to describe how he or she was aggrieved by the decision, the grounds for the application, and the orders sought. That information may be acquired for use in this way by an examination of the reasons of the RRT indicated in the written statement.

34 In oral argument, the Minister referred to various matters said to be of a practical nature, and bearing upon the lodgment of applications in the Federal Court. It was said that an applicant armed with the written statement would be in no better position than if he or she had merely been told of the outcome in the RRT. This was said to be because most applicants (like the appellant in this case) do not have the appropriate skills to frame an application which complies with the Rules. No doubt it was with that in mind that the RRT in its letter to the appellant urged him to seek legal advice if he wished to seek review by the Federal Court. However that may be, the inquiry before the Court is one of statutory construction and it does not assist to consider whether this particular appellant could, unaided, have understood the reasons even if they had been provided to him on 16 March 2001.

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27 *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471 at 488; *Rudolphy v Lightfoot* (1999) 197 CLR 500 at 507-508 [10]-[11].

28 O 54B r 2(1).

35 The Minister also submitted that the Act draws a distinction between "the decision" and the "reasons for the decision" such that, where s 478(1)(b) refers to an applicant being notified of "the decision", it does not require the written statement (which includes the reasons for the decision) to be given. The distinction was the basis upon which, in its joint judgment, the Full Court dismissed the appeal[29]. The Minister argued that the distinction is most notably seen in s 430(1) (and also s 368(1)). The written statement provided for includes, inter alia, (a) *the decision* of the tribunal and (b) *the reasons for the decision*.

36 If this submission were correct it would leave open the issue of that which constitutes notification in s 478(1)(b), presumably to be filled by reference to its ordinary meaning, and it would ignore the structure and historical development of the Act. However, the construction of s 478(1)(b) is apparent from the text and structure of the Act itself. Hence, such a submission, which at first blush may appear to have merit due to the equivalent language in s 478(1)(b) and s 430(1)(a), should be rejected. Notification of the decision under s 478(1)(b) requires that the code in Pt 7, Div 5 (the RRT) or in Pt 5, Div 6 (the MRT) be observed. In all cases, other than where the tribunal decision is given orally, notification of the decision for the purposes of s 478 occurs when the written statement is given to the applicant for review by the Federal Court.

37 At the relevant time, the word "give" used in s 430D(2), the applicable provision in this case, was not defined. Accordingly, it is the ordinary meaning of the word, understood in its context, that must be considered. The context is that the RRT must give the applicant a copy of the written statement. In that setting, to give a document ordinarily requires its physical delivery, not some act of constructive delivery of possession which, at general law, may suffice to transfer property in a chattel[30]. It will not be enough to communicate to the applicant orally that the document has arrived, or to communicate the gist of the document, or even to read the document to the applicant. What is required is that the written statement be physically given to the applicant. Only once this has occurred can it be said that s 478(1)(b) is enlivened and time begins to run. The appellant's evidence that the written statement was not "given" until requested by him from Ms Alamar "some" weeks after he was told of the adverse decision by the RRT has not been controverted by the Minister who had the burden of establishing the objection to competency.

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29 (2002) 122 FCR 469 at 473-474.

30 See *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236 at 255.

Misdescription and subsequent amendments to the code

38 Although the word "give" in s 430D(2) was not defined, it was defined for the purposes of s 430B(6) (and s 368B(6)). Section 430B(6) dealt with the third method of notification described earlier in these reasons. It provided that, if the applicant was not present at the handing down of the decision, then a copy of the written statement was to be given to the applicant within 14 days by one of the methods specified in s 441A. Section 441A was provided for by Sched 3, Item 12 of the 1998 Act. However, Item 12 may have been ineffective because the amendment was misdescribed. The amendment sought to insert s 441A "[a]t the end of Division 7 of Part 6". No such Division existed. Presumably the Parliament intended to insert s 441A at the end of Div 7 of Pt 7, which is concerned with the RRT.

39 In *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[31], Gibbs CJ said that the canons of construction should not be treated so rigidly as to prevent the implementation of a realistic solution in the case of a drafting mistake[32]. However, his Honour went on to say that, where the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, it must be given its ordinary and grammatical meaning[33]. In this case it is unclear how this would be resolved. In any case, the applicable provision for this appeal is s 430D(2) (which deals with the second method), not s 430B(6).

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31 (1981) 147 CLR 297.

32 (1981) 147 CLR 297 at 304. See also *Maxwell on the Interpretation of Statutes*, 12th ed (1969) at 228; *Craies on Statute Law*, 7th ed (1971) at 520-521. In *R v Wilcock* (1845) 7 QB 317 [115 ER 509] the *Payment of Workmen's Wages Act* 1818 (UK) (58 Geo III c 51) repealed several Acts described by their titles and dates, including an Act said to have been passed in 13 Geo III. However, the title of the Act described did not agree with any title enacted in that period, but did agree with a title enacted in 17 Geo III. Recognising that a drafting error had been made, Lord Denman CJ said ((1845) 7 QB 317 at 338 [115 ER 509 at 518]): "A mistake has been committed by the Legislature; but, having regard to the subject matter, and looking to the mere contents of the Act itself, we cannot doubt that the intention was to repeal the 17 G 3, and that the incorrect year must be rejected."

33 (1981) 147 CLR 297 at 305.

40 Since the misdescription in the 1998 Act, the Parliament has, by the enactment of the *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act* 2001 (Cth), provided for deeming provisions for all forms of communications from both the MRT and the RRT to applicants, including the delivery of written statements. By reason of the time of their commencement, these provisions do not apply in this case. They provide that documents delivered by a variety of methods (including facsimile and email) are taken to be received by an applicant at a certain time. For example, an applicant in immigration detention is deemed by s 441C(5) of the Act to have been given the written statement provided under s 430(1) at the end of the day on which it is faxed to the immigration detention centre.

Other matters

41 The appellant submitted that it was relevant to the determination of what constituted notification of the decision in s 478(1)(b) to consider the obligations of the Minister as the guardian of unaccompanied minors under the *Immigration (Guardianship of Children) Act* 1946 (Cth) ("the Guardianship Act"). In *R v Director-General of Social Welfare (Vict); Ex parte Henry*[34], this Court held that the Guardianship Act was a valid exercise of the immigration power in s 51(xxvii) of the Constitution. Since then, the Act has been amended such that the criterion of operation is no longer an "immigrant child" but a "non-citizen child". The validity of the Act was not challenged in this appeal.

42 The appellant submitted that for the Minister, as statutory guardian, the interests of the minor were paramount and took precedence over the Minister's statutory obligations under the Act as the opposing litigant in the Federal Court and this Court. This submission is ill-founded. Any role the Minister may have as guardian is not altogether clear given the language of the relevant sections of the Guardianship Act[35]. However, any such role is irrelevant to the question of construction raised by this appeal. The question is how to construe the phrase

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34 (1975) 133 CLR 369.

35 Section 6 provides that the Minister shall be the guardian of every "non-citizen child" who arrives in Australia. The expression "non-citizen child" is defined in s 4AAA as a child who (a) has not turned 18; (b) enters Australia as a non-citizen; and (c) intends, or is intended, to become a permanent resident of Australia. A question may arise as to whether a person who enters Australia unlawfully and who has no entitlement to remain in Australia without permission can meet s 4AAA(b) and (c).

"notified of the decision" in s 478(1)(b) of the Act. Any obligation of the Minister under a different enactment can have no effect on that construction. In any event, although s 6A(1) of the Guardianship Act provides that a non-citizen child shall not leave Australia except with the consent in writing of the Minister, s 6A(4) qualifies this, stating:

> "This section shall not affect the operation of any other law regulating the departure of persons from Australia."

43 The appellant also submitted that the fact that he had little or no education and was illiterate was also relevant to the construction of s 478(1)(b). He contended that, whilst what was required was delivery of the written statement under s 430(1), it was also necessary that it be translated into a language understandable to the appellant (either orally or in writing). As discussed, s 478 is construed by reference to the provisions of the Act. The Act provides a complete answer. The Act does not distinguish between notification given to a person in the position of the appellant and any other visa applicant. Nor does it distinguish between applicants with differing levels of education or literacy.

Order

44 The appeal should be allowed with costs, and the orders of the Full Court set aside. In place thereof, it should be ordered that the appeal to the Full Court be allowed with costs, and order 2 of the orders of French J made on 26 October 2001 be set aside. The result is that the appellant's substantive application for review will proceed for hearing and determination in the ordinary course.

45 KIRBY J. This appeal comes from a judgment of the Full Court of the Federal Court of Australia[36]. That court confirmed the orders of the primary judge (French J)[37]. The result upheld a conclusion that a purported application for judicial review brought by a claimant for protection as a refugee, WACB (the appellant), was incompetent because out of time.

46 In this Court, the appellant challenges the construction placed by the Federal Court upon the *Migration Act* 1958 (Cth) ("the Migration Act")[38]. He also argues that the result below may be overcome because the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") is his "guardian", pursuant to s 6 of the *Immigration (Guardianship of Children) Act* 1946 (Cth) ("the Guardianship Act"). In such circumstances, the appellant submits that the Minister failed to comply with relevant duties as his guardian and that this affected the Minister's right to obtain relief under the Migration Act on the ground of the appellant's time default.

The facts

47 *The appellant's refugee claim*: The appellant claims that he was born in Afghanistan in 1985 of Hazara ethnicity. His exact birth date is unknown. However, it was accepted that at all material times he was a minor[39]. On 17 December 2000, the appellant arrived in Australia by boat without authority. At the time of his arrival, he was an unaccompanied non-citizen child. On 2 February 2001, he applied for a protection visa under the Migration Act[40].

48 At the time of the appellant's application, the Taliban regime was in control of that part of Afghanistan from which the appellant said he derived. The appellant claimed that he could neither read nor write; nor could he tell the time. He had spent his life in a mountainous area as a shepherd tending to three sheep. He had no education apart from lessons in the *Koran* at the local mosque. Although he had visited a nearby "sub-village", he had never been to the larger village closest to his home[41]. His father, who had supported an opposition group

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36 *WACB v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 469.

37 (2001) 113 FCR 524.

38 See reasons of Gleeson CJ, McHugh, Gummow and Heydon JJ ("joint reasons") at [2]-[3].

39 (2001) 113 FCR 524 at 526 [4].

40 (2001) 113 FCR 524 at 526 [2].

41 Refugee Review Tribunal, Decision and Reasons for Decision, ref V01/12237, 15 March 2001 at 6.

opposed to the Taliban, had disappeared about nine months before his application, presumably taken into custody or killed. His mother had arranged for him to escape Afghanistan in order to avoid either the same fate or being sent to fight in the Taliban's war. The appellant escaped through Pakistan. Under the control of a smuggler, he travelled on false documents to Singapore and Indonesia and thence to Australia. If the foregoing facts had been believed, the appellant had an arguable case that he was entitled to a protection visa as a refugee within the definition in the Refugees Convention[42], given effect by the Migration Act[43].

49 *Notification of the Tribunal's ruling*: At all material times, the appellant was in immigration detention at the Curtin immigration detention centre ("Curtin") at Derby on the northern coast of Western Australia. On 25 January 2001, a delegate of the Minister refused the appellant's application[44]. The appellant applied for review of the delegate's decision by the Refugee Review Tribunal ("the Tribunal"). On 15 March 2001, the Tribunal affirmed the delegate's decision. The Tribunal concluded that the appellant had fabricated the claims he had advanced. It reached this view on the basis of discrepancies that it found in the appellant's testimony. Because there was "no other material on which the Tribunal [could] be satisfied that he [had] a well founded fear of persecution for reasons of a Convention ground", the Tribunal dismissed the claim that the appellant was entitled to a protection visa as a refugee[45]. The Tribunal's decision had been reserved. It was handed down in Melbourne. There then followed the events critical to the first point argued in this appeal.

50 On 16 March 2001, by facsimile, confirmed by an affirmative transmission report that was proved, eighteen pages of documentation were sent to the Manager of Curtin. The reasons of the Tribunal comprise fourteen pages. A coversheet, a two page letter in English addressed to the appellant and a debit note for an "RRT $1,000 Post Decision Fee" make up the balance of the eighteen pages. The letter to the appellant, apparently in standard form, includes the following statement:

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42 Convention relating to the Status of Refugees done at Geneva on 28 July 1951, [1954] *Australian Treaty Series* No 5, and Protocol relating to the Status of Refugees done at New York on 31 January 1967, [1973] *Australian Treaty Series* No 37.

43 Section 36(2).

44 (2001) 113 FCR 524 at 526 [2].

45 Refugee Review Tribunal, Decision and Reasons for Decision, ref V01/12237, 15 March 2001 at 13.

> "The Tribunal has decided that you are not entitled to a Protection Visa. I enclose a copy of the Tribunal's decision and reasons. … The Tribunal's file on your application is now closed.
>
> You have the right to seek review of this decision by the Federal Court. An application for review must be filed with the Court within twenty-eight (28) days of notification of the decision. … I strongly advise you to seek legal advice if you wish to seek review by the Court."

51 The letter contains a translation neither of its essential contents nor of the Tribunal's reasons. Nor does it indicate that the appellant could request the person responsible for his detention to afford reasonable facilities to him for obtaining legal advice or taking legal proceedings[46]. Instead, much of the communication is concerned with a demand that the appellant pay to the federal Collector of Public Moneys the sum of $1,000 stated to be a "debt to the Commonwealth of Australia". If the debt remained unpaid, the notification warns, "you will be unable to obtain a visa in the future".

52 *Resolution of conflicts of evidence*: A conflict of evidence arose concerning what happened when the foregoing facsimile transmission was received at Curtin. That conflict was explored before the primary judge in the Federal Court. The appellant filed an application for review of the Tribunal's decision in that court on 3 May 2001. On 21 May 2001, the then Minister caused a notice of objection to the competency of that application to be filed. He asked for summary relief, namely dismissal of the application on the footing that the Federal Court lacked jurisdiction to hear it because it had not been lodged within the 28 day period then prescribed by the Migration Act[47]. It was the Minister's motion that directed attention to the obligations imposed by law, including on the Minister, to ensure that the appellant was notified of the decision of the Tribunal in such a way as to commence the running of time in the Federal Court applicable to such a case.

53 Before the primary judge, the Manager of Curtin, Mr Greg Wallis, gave evidence by affidavit that a meeting had taken place at Curtin on 16 March 2001, attended by the appellant. Based on his "standard practice" and a confirmatory note that he had written on the facsimile cover sheet, Mr Wallis stated that he "personally handed the Tribunal decision in this matter to the applicant on 16 March 2001". The handwritten note, bearing that date, was in evidence and is

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46 Migration Act, s 256.

47 Section 478(1)(b). This provision of the Act was repealed and replaced by the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth), s 3, Sched 1, Pt 1, cl 7; Pt 2, cl 8 (1). It was common ground that s 478 continued to apply to the appellant's entitlements.

in confirmatory terms. It includes the hand-written note stating "Advised of 28 day appeal period for Federal Court".

54 The appellant also swore an affidavit deposing to the circumstances of the meeting on 16 March 2001. He stated that Mr Wallis was present with an Afghan interpreter and a "Ms El Ham". This is a reference to Ms Elham Alamar, a counsellor with qualifications in psychology employed by the company managing Curtin. According to the appellant, Mr Wallis told him that he had been rejected by the Tribunal. He was upset and began crying. Mr Wallis did not give the appellant any papers. Rather, he gave them to Ms Alamar "and said that she would explain what had happened". The appellant stated that Ms Alamar took him to another room "and told me that I had not been able to prove that I was Afghan, and that the witnesses had said that they did not know me". The last statement is an apparent reference to a conclusion of the Tribunal that certain Afghan witnesses, tendered at the hearing, did not prove that they knew the appellant and his family.

55 According to the appellant, Mr Wallis did not tell him anything about applying for review to the Federal Court. He only learned about this at Curtin "about three weeks later". He denied that Mr Wallace had told him that he had 28 days to apply to the Federal Court. He stated that Ms Alamar did not give him the Tribunal decision on the day of the meeting but only when he asked for it weeks later. He said that she did not interpret the decision for him and that "the decision has never been translated for me by anyone" from the Minister's Department.

56 Neither Mr Wallis nor the appellant was cross-examined on his affidavit. The primary judge generally preferred the evidence of Mr Wallis[48]. For the appellant, it was accepted, properly, that this conclusion was open to the judge. The matter must therefore be approached on the footing that, for whatever legal consequences follow, the appellant was advised of the outcome of his application to the Tribunal and of the 28 day time limit.

57 The primary judge concluded, as a possibility, that "the [appellant] was so distressed at hearing that he was not to receive a visa, that he did not register the other things he was told"[49]. The primary judge did not resolve the other contested issue of fact, namely whether the documents themselves, including the Tribunal decision and reasons, were given to the appellant or to Ms Alamar. Having regard to the appellant's age, apparent illiteracy and background, it seems reasonable to accept that the documents were handed to Ms Alamar and remained

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48 (2001) 113 FCR 524 at 536 [34].

49 (2001) 113 FCR 524 at 536 [34].

with her until requested by the appellant some weeks later. The fact that the Minister was seeking summary relief and that counsel did not cross-examine the appellant on his version of events makes such a conclusion one that is appropriate for this Court to accept. However, the Minister argued that, having regard to the provisions of the Migration Act, these considerations were irrelevant. It is therefore necessary to examine the requirements of that Act.

The applicable legislation

58 *Provisions of the Migration Act*: The critical provisions of the Migration Act, upon which the Minister relied, are to be found in s 478, as it stood at the material time. Although the Minister relied only on s 478(1)(b), it is useful to examine that paragraph in the context of the entire section:

> "(1) An application under section 476 or 477 must:
>
> (a) be made in such manner as is specified in the Rules of Court made under the *Federal Court of Australia Act 1976*; and
>
> (b) be lodged with a Registry of the Federal Court within 28 days of the applicant being notified of the decision.
>
> (2) The Federal Court must not make an order allowing, or which has the effect of allowing, an applicant to lodge an application outside the period specified in paragraph (1)(b)."

59 The appellant's application for judicial review was one that sought to engage ss 476 or 477 of the Migration Act. Those sections provide the grounds under which applications might be made for judicial review by the Federal Court. Accordingly, the precondition for the application of s 478 was satisfied. No provision was made in the section, or elsewhere in the Migration Act, for an extension of the time specified in s 478(1)(b). In this respect, s 478 is different – and by inference deliberately different – from other provisions for judicial review of administrative decisions in the Federal Court[50]. Section 478(2) makes it abundantly clear that no such extension could be permitted whether under other general powers belonging to the Federal Court or otherwise. The difficulty of, and potential injustices flowing from, this situation have been noted in the past by the Federal Court[51] and by this Court[52]. However, at the material time, the

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50 See *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 11(1)(c).

51 *Barzideh v Minister for Immigration and Ethnic Affairs* (1997) 72 FCR 337 at 341.

52 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 88 [107], 126-127 [223]-[224].

Act imposed an inflexible time constraint upon the exercise of the Federal Court's jurisdiction to provide judicial review on the application of persons such as the appellant[53]. The validity of such provisions was upheld by this Court in *Abebe v The Commonwealth*[54]. Such validity was not contested in this appeal. The constitutional issues that arise for legislative attempts to impose constraints on the judicial review jurisdiction of this Court, afforded by s 75 of the Constitution, were not raised in this case[55].

60 In 1998, the *Migration Legislation Amendment Act (No 1)* 1998 (Cth) introduced a new and more detailed Div 5 into Pt 7 of the Migration Act governing decisions of the Tribunal. According to the Explanatory Memorandum distributed with the Bill that became the 1998 Act, the provisions of the Division were intended to constitute a "code" governing the making, handing down and notification of the decisions of the Tribunal[56]. By s 430(1) of the Migration Act, the Tribunal was required to prepare a written statement of identified content:

> "(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:
>
> (a) sets out the decision of the Tribunal on the review; and
>
> (b) sets out the reasons for the decision; and
>
> (c) sets out the findings on any material questions of fact; and
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> (d) refers to the evidence or any other material on which the findings of fact were based."

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53 cf *Miah* (2001) 206 CLR 57 at 126-127 [223]-[224]; *Re Minister for Immigration and Multicultural Affairs; Ex parte "A"* (2001) 185 ALR 489 at 496 [31]-[34].

54 (1999) 197 CLR 510 at 534 [50], 593 [237], 605 [279]-[281].

55 Campbell and Groves, "Time Limitations on Applications for Judicial Review", (2004) 32 *Federal Law Review* 29 at 36-41.

56 Australia, Senate, Migration Legislation Amendment Bill (No 1) 1998 (Cth), Explanatory Memorandum, (1998) at [3]; see Migration Act, s 422B(1), inserted after the relevant time by the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth), Sched 1, cl 6.

61 This provision follows a template common in federal legislation[57]. The procedures to be followed in delivering the Tribunal's decisions were spelt out by the new sections inserted in 1998.

62 Section 430A of the Migration Act provides that certain persons (by inference, those at liberty) are to be invited to attend the handing down of decisions by the Tribunal. However, the section has no application to the appellant because it expressly excludes "a decision on the application of a person who is in immigration detention."[58] Such was the case of the appellant at the time the decision of the Tribunal concerning him was handed down.

63 Similarly, s 430B has no application to a "person who is in immigration detention."[59] Nevertheless, that section is notable because, in the procedures for which it provides, it draws a distinction between a "decision" of the Tribunal and "the outcome of the decision". By s 430B(3) it is provided:

> "(3) The Tribunal's *decision* may be handed down:
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> (a) by reading the *outcome* of the decision; and
>
> (b) whether or not either or both the applicant and the Secretary are present."[60]

The section goes on to provide[61] that:

> "(4) The date of the *decision* is the date on which the decision is handed down."

64 If the applicant and the Secretary of the Minister's Department are present at the handing down, the Tribunal must give each a copy of the statement prepared under s 430(1)[62]. However, s 430B(6) provides:

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57 It was earlier inserted in the Migration Act as s 166E by s 32 of the *Migration Reform Act* 1992 (Cth) and was later renumbered as s 430 by the *Migration Legislation Amendment Act* 1994 (Cth), s 83.

58 Migration Act, s 430A(1)(b).

59 Migration Act, s 430B(1)(b).

60 Emphasis added.

61 Migration Act, s 430B(4) (emphasis added).

62 Migration Act, s 430B(5).

> "(6) If the applicant is not present at the handing down of the decision, the Tribunal must notify the applicant of the decision by giving the applicant a copy of the statement prepared under subsection 430(1). The copy must be given to the applicant:
>
> (a) within 14 days after the day on which the decision is handed down; and
>
> (b) by one of the methods specified in section 441A."

Although s 430B also has no application to the appellant's case, the appellant argued that it afforded a contextual guide to the way in which s 430D (which did apply to his case) was intended to operate.

65 By s 430C of the Migration Act, provision is made for deemed notification to the applicant where a representative of the applicant is present at the handing down of the decision under s 430B. As s 430B had no application to the appellant's case, neither does s 430C. The appellant did have a "representative" before the primary judge, apparently acting *pro bono*. It does appear that some, at least, of the information sent by facsimile transmission to Curtin was also transmitted on 16 March 2001 by that means to the appellant's representative. However, such notification did not engage s 430C. There was no suggestion that the representative was present when the Tribunal's decision was handed down.

66 The final provision in the series, inserted into the Migration Act in 1998, is s 430D. That is the section governing the case of a person, like the appellant, "in immigration detention". It appears under the heading "Tribunal must notify parties (parties not invited to handing down of decision)". Section 430D states:

> "(1) If the Tribunal gives an oral decision on an application for review, the Tribunal must give the applicant and the Secretary a copy of the statement prepared under subsection 430(1) within 14 days after the decision concerned is made. The applicant is taken to be notified of the decision on the day on which the decision is made.
>
> (2) If the applicant is in immigration detention, the Tribunal must give the applicant and the Secretary a copy of the statement prepared under subsection 430(1) within 14 days after the decision concerned is made."

67 The reference in s 430D(1) to the giving of an "oral decision" does not appear referable to the appellant's case. The added sections in Div 5 of Pt 7 of the Migration Act draw a distinction between the giving of "oral" decisions (that

is, *ex tempore*) and the giving of decisions apt to be "handed down" (that is, in written form)[63]. In the appellant's case the decision was in written form. It was therefore "handed down". Accordingly, on the assumption that s 430D(1) applies to a person in immigration detention, it was not engaged in this instance. The provisions of the Migration Act that governed the procedures to be followed by the Tribunal in the giving of its decisions in respect of an applicant in immigration detention (such as the appellant) were contained in s 430D(2).

68 *Provisions of the Guardianship Act*: In this review of relevant legislation it is appropriate also to notice provisions of the Guardianship Act relevant to the appellant's second argument. The constitutional validity of that Act was not challenged in this appeal. The Guardianship Act provides for the guardianship of "non-citizen children" as defined[64]. Such children include a person who "has not turned 18" and who "enters Australia as a non-citizen" and "intends, or is intended, to become a permanent resident of Australia."[65]

69 By s 6 of the Guardianship Act, it is provided:

> "The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the father and mother and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens."

70 By the Guardianship Act[66], provision is made forbidding a "non-citizen child" from leaving Australia "except with the consent in writing of the Minister" and making it an offence for any other person to aid, abet, counsel or procure a non-citizen child to leave Australia contrary to the provisions of s 6A of the Guardianship Act. Provision is also made in that Act[67] for the Minister, "in relation to any matters or class of matters, or in relation to any non-citizen child or class of non-citizen children, by writing under his hand, [to] delegate to any officer or authority of the Commonwealth or of any State or Territory all or any of his powers and functions under this Act".

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63 See s 430A(1).

64 Section 4AAA.

65 Guardianship Act, s 4AAA.

66 Section 6A.

67 Section 5.

71 Although it appeared from argument that certain delegations of powers have been made under s 5 of the Guardianship Act to State and Territory welfare authorities (without, it seems, accompanying State laws authorising the exercise of such powers delegated under federal law[68]), at the times material to the present case the Minister had not delegated his powers under the Guardianship Act to federal officials or anyone else in respect of the appellant or non-citizen children of the same class as the appellant. Specifically, no delegation has been made so as to avoid any conflict of duty said to arise with respect to the appellant (or children in the same class) by reason of the Minister's duties under the Migration Act and the Guardianship Act respectively.

The decisional history

72 *Decision of the primary judge*: In the Federal Court, the primary judge dealt first with the objection to competency of the appellant's application for judicial review[69]. He questioned whether the Guardianship Act was intended to apply to non-citizen children arriving in Australia, as the appellant had, without authority and not as an immigrant under the auspices of either a government or any non-governmental migration organisation[70]. However that might be, he concluded that the Guardianship Act did not render ineffective the notification which the appellant had received under the Migration Act. In the primary judge's view, whatever might be the case for a child of tender years incapable of comprehending the nature of the proceedings[71], the capacity of the appellant to pursue his entitlements under the Migration Act could not be doubted[72]. It was not affected by the Guardianship Act, assuming that Act to be applicable to such a case.

73 This took the primary judge to the question whether the appellant had been "notified of the decision" under s 478(1)(b) of the Migration Act on 16 March 2001. If he had been, it was common ground that his application for

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68 See *R v Hughes* (2000) 202 CLR 535 at 549 [18]-[19], 552 [29], 568 [74], 569 [77].

69 (2001) 113 FCR 524 at 536 [35].

70 (2001) 113 FCR 524 at 536-537 [35]-[36] by reference to Australia, House of Representatives, *Parliamentary Debates* (Hansard), 31 July 1946 at 3369.

71 (2001) 113 FCR 524 at 537 [37].

72 See *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 at 188 per Lord Scarman; *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's case*) (1992) 175 CLR 218.

judicial review to the Federal Court was out of time. By reference to previous authority of the Federal Court[73], the primary judge decided that being "notified" in this context meant the giving of notice or information in circumstances that the receiver "can understand what it is that he or she has been told"[74]. On the basis of the facts as he found them, the primary judge concluded that the appellant had been notified of the "decision". By inference, he distinguished notification of the "reasons" for decision and the "statement" provided for in s 430(1) of the Migration Act. For the primary judge, it was enough that the appellant had been notified of the "decision" and he found that this had happened on 16 March 2001 as evident from the appellant's affidavit and on the common ground that he had been distressed on hearing of the Tribunal's "decision" (by inference upon learning that the "decision" was adverse to him).

74 The primary judge drew attention, in his concluding remarks, to apparent departures in the practices concerned from the guidelines published by the United Nations High Commissioner for Refugees concerning the way that claims to refugee status by unaccompanied children, such as the appellant, should be handled[75]. Amongst other things, the procedures in these guidelines call, in effect, for an adult guardian to look after the interests of such a child[76]:

> "8.3 Not being legally independent, an asylum-seeking child should be represented by an adult who is familiar with the child's background and who would protect his/her interests. Access should also be given to a qualified legal representative. This principle should apply to all children, including those between sixteen and eighteen, even where application for refugee status is processed under the normal procedures for adults."

The appellant's case was dealt with on the footing that the appellant had not reached his sixteenth year when the contested events occurred.

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73 *Long v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 65 FCR 164; *Salehi v Minister for Immigration and Multicultural Affairs* [2001] FCA 995. See (2001) 113 FCR 524 at 538 [41].

74 (2001) 113 FCR 524 at 537 [40].

75 (2001) 113 FCR 524 at 538-539 [43]-[44].

76 (2001) 113 FCR 524 at 539 [44], quoting Office of the United Nations High Commissioner for Refugees, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, (1997) at 12. See also Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, (1992) at 50 [213]-[219].

75 *Decision of the Full Court*: The Full Court of the Federal Court unanimously confirmed the orders of the primary judge[77]. At the hearing of the appeal to that court, counsel for the appellant informed the Full Court that the only ground on which the appellant wished to rely was that the primary judge had erred in holding that the appellant had been "notified" of the Tribunal's "decision" for the purposes of s 478(1)(b) of the Migration Act.

76 Upon that issue, the Full Court rejected the suggestion that previous authority of the Federal Court was inapplicable by reason of amendments to the Migration Act[78]. In accordance with that authority, the Full Court rejected the submission that the appellant had not been "notified" of the "decision" of the Tribunal until the statement provided for in s 430 of the Migration Act had been given to the appellant in a language that was comprehensible to him. For the Full Court, it was critical that the Migration Act (as expressed in the provisions applicable to the appellant's case) now drew a distinction between the Tribunal's "decision" and the "statement" setting out its "reasons" and "findings"[79].

77 The Full Court went on to reject the appellant's complaint about the effectiveness of the Tribunal's "decision" based on the appellant's status as a "non-citizen child" under the Guardianship Act. That issue was addressed by reference only to its suggested relevance to the "notification issue"[80]. However, it was rejected having regard to the primary judge's conclusion that the appellant had understood the "decision" when it was "notified" to him.

78 *Appeal to the High Court*: By special leave, the appellant now appeals to this Court. Special leave was granted upon the two grounds foreshadowed. The first raised a suggested jurisdictional error on the part of the Tribunal, such that no "decision" under the Migration Act had occurred engaging the time limits provided by s 478(1)(b). The second involved the appellant's argument concerning the meaning of being "notified" in the context. However, when the appeal was heard, the appellant sought to enlarge the grounds of appeal to include a third challenge to the decision of the Full Court with respect to the application and relevance of the point raised under the Guardianship Act. The Minister objected to this enlargement, asserting that it would permit questions to be addressed by this Court that had not been the subject of evidence at trial or

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77 *WACB* (2002) 122 FCR 469.

78 *WACB* (2002) 122 FCR 469 at 472-474 [11]-[15], applying *WACA v Minister for Immigration and Multicultural Affairs* (2002) 121 FCR 463.

79 *WACB* (2002) 122 FCR 469 at 473-474 [15].

80 *WACB* (2002) 122 FCR 469 at 475 [22].

determination in the Full Court[81]. The appellant was allowed to argue the added ground, subject to later consideration of any questions of procedural unfairness.

The appellant's arguments on notification

79 *Troubling procedures in the case*: The primary thrust of the appellant's case, as presented, concerned the notification point. The appellant was out of time for prosecuting his application for judicial review in the Federal Court by about three weeks. Reference was made both to the practical difficulties that he faced and to the unresolved finding of fact said to be important for the proper application of the Act.

80 The problems facing a person in the position of the appellant are obvious. He was a minor, accepted to be under sixteen years of age. He was in detention in a foreign country without parents, family or friends. He was confined in a remote part of Australia. He was unable to secure employment so as to pay for interpreters and legal advice of his choosing. Although he had assistance from an immigration service (presumably without charge) details of that assistance were not proved. Certainly, at Curtin, the appellant would not have had full access to legal advice. By s 256 of the Migration Act, the Parliament has provided that the person responsible for his immigration detention must afford him all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to his detention. However, this provision is enlivened by "the request of the person in immigration detention". Even at the time of notification of the outcome of his application to the Tribunal, there is no indication that the appellant was informed of this provision. No mention is made of it in the correspondence. Instead, that correspondence contains detailed notification of the appellant's debt to the Commonwealth of $1,000 and the consequences of non-payment. How a person in the appellant's predicament could be expected, realistically, to make such a payment is not revealed. To say the least, there are aspects of the procedure affecting the appellant that are very troubling.

81 Whether the appellant was of Afghan origin or not, it appears clear that his command of the English language was minimal. From the record it is clear that his education and experience were severely confined. He was substantially illiterate. Even providing him with a written statement of the Tribunal's decision, reasons and findings in the English language would have meant nothing to him. Providing it in his own language would also have been of no immediate use to him, except as it could be read to him by any literate detainees fluent in that language who happened to be at Curtin. According to the evidence, no adult was appointed by the Minister, or anyone else, to assist the appellant during his

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81 See *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Louinder v Leis* (1982) 149 CLR 509 at 529.

minority or, in effect, to act as his guardian. At the very most, he had access to Ms Alamar. However, she was an employee of the organisation contracted to conduct the detention facility on behalf of the Minister. She was not in a position to act independently as the appellant's assistant and adviser.

82 In such circumstances, and having regard to the comparative brevity of the time default, it is difficult for a court of justice not to look most closely at the statutory language to see whether any ambiguity might properly be resolved so as to ensure that a person, such as the appellant, is afforded a real opportunity to engage the judicial branch of Australian government. The Act provides for such engagement, in this case of the Federal Court. In default of an effective engagement of the Federal Court, a possible consequence could be an increase in applications to this Court for discretionary relief under the Constitution[82] – an outcome not immediately appealing.

83 *The appellant's submissions*: Against this background, it was argued for the appellant that he had not been "notified of the decision" as s 478(1)(b) of the Migration Act required. Hence, it was submitted that the time limit of 28 days for the lodgment of an application to the Federal Court had not commenced. At least, it was submitted, it had not commenced until the appellant had received from Ms Alamar the "statement" under s 430 of the Migration Act. It would appear that this may have occurred three weeks after the conversation with Ms Alamar on 16 March 2001. For the appellant, it was said that this Court should resolve any undetermined issue of fact in his favour. This was because he had not been cross-examined on his testimony; Ms Alamar had not been called to deny it; the testimony was consistent with the appellant's apparent illiteracy; and, in case of doubt, the issue should be so decided because it was the Minister who was seeking summary relief in the Federal Court based on affidavit evidence alone.

84 The appellant disputed the conclusions of the Federal Court that being "notified of the decision" meant no more than being notified of the result of the Tribunal's hearing. To construct this argument, the appellant relied on four steps.

85 First, he said that the word "notified" connoted something more than mere provision of information. From the meaning of the word[83] and from its context in

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82 Constitution, ss 75(iii) and 75(v). See *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

83 In the *Encarta World English Dictionary* (1999) at 1294 the first given meaning is "Tell officially: to inform or warn …". In the *Macquarie Dictionary*, 3rd ed (rev) (2001) at 1311 and the *Shorter Oxford English Dictionary*, 5th ed (2002) at 1947 the connotation of official signification is not stated, although in the examples

(Footnote continues on next page)

s 478 of the Migration Act, it implied a formal or official notification for a particular purpose[84]. That purpose was to set in train proceedings of considerable importance to persons, such as himself, claiming refugee status. It engaged the jurisdiction of the Federal Court, a court established under Ch III of the Constitution. Moreover, as s 478(1) of the Migration Act indicated, the notification of the decision was to be such as to permit an "application" to the Federal Court to be made as specified under the Rules of that Court. Those Rules[85] contemplate appropriate particularity in the identification of the grounds of an application for judicial review. In the context, therefore, the requirement to "notify" the appellant of the "decision" had to be one that involved a notification apt for its purpose, namely the initiation with appropriate specificity of an application to the Federal Court.

86 Secondly, the appellant argued that s 478 had to be read as an integral part of the "code" provided by the Migration Act for the delivery of "decisions" of the Tribunal. That "code" included s 430(1) of the Act, which contemplated the provision of a "written statement" that would afford precisely the material upon which a person (such as the appellant) in immigration detention could effectively initiate judicial review of the kind envisaged by ss 476 and 477 of the Migration Act. The obligation to provide copy of that "statement" to a potential applicant for judicial review, within a brief time, indicated the intended interaction of notification of the "decision" and provision of the "statement". In the case of a person (such as the appellant) in immigration detention, the "code" required the Tribunal to give an applicant (and the Secretary) a copy of the "statement" within fourteen days after the "decision" concerned was made[86]. Where this was not done, the appellant submitted, time would not run because the provision of the statement as well as a notification of the "decision" was part of the inter-related scheme of the Migration Act.

87 Thirdly, the appellant pointed out that the amendments to the Migration Act, enacted in 1998, drew an express distinction between the provision of "the outcome of the decision"[87] and "being notified of a decision"[88]. By inference,

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given in the *Shorter Oxford English Dictionary* the connotations are of official notifications.

84 See *Antico v C E Heath Casualty and General Insurance Ltd* (1996) 38 NSWLR 681 at 697.

85 Federal Court Rules (Cth), O 54B, rr 1, 2(1), Form 56A.

86 Migration Act, s 430D(2).

87 Section 430B(3)(a).

88 Section 478(1)(b).

after 1998, "being notified of a decision" meant more than mere notification of the "outcome of the decision". It followed, according to the appellant, that the notification by Mr Wallis of the result of the appellant's application to the Tribunal was not enough to notify the appellant of the decision. Nor did Ms Alamar's oral elaboration immediately thereafter amount to such a notification.

88 Fourthly, the appellant emphasised the need to construe the Migration Act with its purpose in mind, namely to facilitate effective engagement of the Federal Court by an application under s 476 or s 477 of that Act. In the case of illiterate unaccompanied minors (but also in many other cases) it was of the nature of the "applications" for which the Parliament has provided that they were of great importance to the persons affected and to the fulfilment of Australia's national protection obligations under the Refugees Convention. In such circumstances, the words "notified of the decision" should be construed to amount to a real and effective notification – one that would fulfil the purpose of engaging the jurisdiction of the Federal Court. It was not sufficient, in the case of a blind applicant, to provide such a person silently with a document typed in the ordinary way in the English language. Similarly, in the case of an illiterate minor, it was not sufficient to "notify … the decision" by telling him of its "outcome". It was essential to provide him with the statement envisaged by s 430(1) and indeed a translation of that statement or its main part into the language that could be read to (and understood by) him, as constituting the essential "reasons" and "findings" of the Tribunal. Nothing less was sufficient to render the statutory right to judicial review a substantive reality. Because it was common ground that no such translation had been provided, the appellant had not been "notified of the decision". The time limit in s 478 of the Migration Act was not engaged. The Federal Court had jurisdiction to hear the application.

The appellant was "notified" of the "decision"

89 *Duty of fidelity to the Act*: It will be apparent that I have much sympathy for the appellant's predicament. On the factual merits it would be impossible to feel otherwise. If I could properly find in his favour, I would. If I could join with the other members of the Court in their analysis and conclusions, I would gladly do so. However, I cannot. I must therefore explain why the appellant's arguments should not be accepted. A natural feeling of sympathy may not distort the application of the Migration Act to achieve the purpose of the Parliament, however rigid and unjust that purpose may appear[89]. That Act applies to a wide range of applicants. So long as it is valid in this respect (a matter not contested), the Migration Act must be given effect according to the terms enacted by the

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89 See *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737 at 768-769 [171]-[176] of my own reasons; 206 ALR 130 at 173-174.

Parliament. It is no part of this Court's function to adopt a strained interpretation in order to cure or avoid the apparent injustice of the particular case.

90 *Critical notification of a "decision"*: The essential problem for the appellant's construction is that the time limit fixed by the Migration Act for applications for judicial review to the Federal Court is expressed by reference to being "notified" of the "decision". That is how s 478(1)(b) is worded. When regard is had to s 430 of the Migration Act, it is clear from its language that it draws a sharp distinction between the "decision on a review" and the "reasons for the decision", "findings on any material questions of fact" and reference "to the evidence or any other material"[90]. The "written statement", to which s 430 of the Migration Act refers, is also differentiated from the "decision of the Tribunal". In such a context, the reference to being "notified of the decision"[91] must be taken to be a reference to notification of the result of the Tribunal's review. Separate provision is made for the "written statement". That separate provision is also reflected in the sections that were added to the Migration Act in 1998[92].

91 *History of legislative changes*: With all respect, the course of the legislative history strongly tells against the conclusion now embraced by the majority of this Court. The former provisions of s 138(3) of the Migration Act, described as the "progenitor"[93] of s 478(1)(b), made its command perfectly clear. An appeal was to be instituted "within 28 days after the appellant is *notified under section 135* of the decision concerned."[94] Section 135 was the provision requiring the relevant tribunal "to record its decisions etc *and to notify parties*"[95]. As the majority in this Court point out[96], the italicised words were repealed by the amendment inserted into the "code" introduced in 1998. The Parliament deliberately deleted not only the provision in the heading to the section referring to notification to the parties (a matter of itself not, perhaps, determinative). It also deleted the cross-reference to the "statement" provisions – so that this explanation of the mode of notification by the "statement" (now under s 430 for such cases) was specifically withdrawn. The change in the heading was accurate.

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90 Migration Act, s 430(1).

91 Migration Act, s 430D(1).

92 See ss 430A(4)(a), 430B(5), 430B(6), 430B(7), 430D(2).

93 Joint reasons at [16].

94 Migration Act, s 138(3) (emphasis added).

95 Migration Act, heading (emphasis added).

96 Joint reasons at [17], fn 10.

The special statutory form of notification was repealed. Thereafter, notification was to assume its ordinary meaning. Such was the will of the Parliament.

92 *"Decision" means result*: Whilst it is true that s 430B of the Migration Act refers to the reading of the "outcome of the decision", that provision cannot affect the appellant's case or the meaning, as applicable to his case, of s 478 of the Migration Act. This is because s 430B(1)(b) of that Act makes it clear that the section in which reference is made to "the outcome of the decision" has no application to a person, like the appellant, "who is in immigration detention". The reference to "outcome" in that section cannot therefore distort the meaning of "the decision" throughout the entirety of that Part of the Migration Act. The "decision" is the result of the review undertaken by the Tribunal. Both in its ordinary meaning, and in the differentiations drawn by the Migration Act, the "decision" is thus separate from, and different to, the reasons, findings and reference to material and the "written statement" for which the Migration Act specifically provides. In my respectful opinion, it would involve an artificial and contra-textual interpretation of the Migration Act to adopt a different view.

93 In the case of a person in detention, like the appellant, s 430D of the Migration Act applies. That section is poorly worded. Section 430D(2) is the only subsection specifically addressed to an applicant "in immigration detention" when the decision is made other than as an "oral decision", to which s 430D(1) applies. Such wording is curious because, although the heading appears to relate to all parties not invited to the handing down of the decision[97], only s 430D(2) is expressed to apply to an applicant in immigration detention. Section 430D(1) applies where the Tribunal delivers an "oral decision" and not one that is in writing and suitable to be "handed down", as the decision in the appellant's case was[98].

94 If s 430D applies in its totality to an "applicant … in immigration detention", it is expressly stated in s 430D(1) that "the applicant is taken to be notified of the decision on the day on which the decision is made". By a statutory fiction, that provision reinforces the commencement of the running of time for the purpose of s 478 of the Migration Act so that time starts running on the day on which the "decision" was made, whether or not (and whenever) the applicant was made aware of it.

95 *The context of rigid time limits*: A careful reading of s 430D of the Migration Act will dispel any lingering belief that a court might have entertained that the Parliament was here endeavouring (although in a cumbersome way) to

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97 Migration Act, s 430D, heading.

98 Migration Act, s 430D(2).

make sure that time would not run against a person such as the appellant until he received the "written statement" provided for in s 430 of that Act. That requirement, which once expressly applied, was expressly repealed. This Court has no authority to put it back again. It follows that, once again, this Court is faced with an inflexible, unyielding provision of the Migration Act, passed into law by the Parliament of the Commonwealth. Whatever may be thought of such provisions, courts are bound by the Constitution to give effect to them when valid. We have done so before[99]. In this case, in my view, we should do so again.

96 Assuming, as I would hold, that s 430D(1) does not apply to the appellant's case so as to fix him with deemed notice even before he was informed of the result of the Tribunal's review, but that only s 430D(2) applies to him, the terms of s 430D(1) indicate clearly enough the deliberate rigidity of the time provisions of the Migration Act in respect of cases such as the appellant's. That sub-section shows that it would not be correct to read the Migration Act on an assumption, apparently accepted by the majority in this Court, that its purpose was to protect and facilitate the right to judicial review provided in that Act[100].

97 An analysis of the object of the time provisions in the Migration Act indicates that, to the contrary, those provisions were intended by the Parliament to impose extremely severe limitations which are very short and rendered expressly unyielding even to special circumstances[101]. Concern about delays in the conclusion of determinations of refugee status in the four-tiered processes available in Australia is notorious. In such circumstances, the legislative imposition of a brief, inflexible time limit upon applications for judicial review of Tribunal decisions can cause no real surprise. At least this is so, viewing the Migration Act wholly within an Australian context[102].

98 *There was no duty to translate*: In the provisions of the Migration Act for the preparation of a written statement by the Tribunal, no requirement for translation of the reasons, findings, evidence or any shorter summary is spelt out. A general obligation of translation would involve significant public costs. Had translation been the purpose of the Parliament, it would therefore have been

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99 *B* (2004) 78 ALJR 737; 206 ALR 130; *Singh v Commonwealth of Australia* [2004] HCA 43.

100 *B* (2004) 78 ALJR 737 at 768 [171]; 206 ALR 130 at 173.

101 See also s 478(2).

102 See *B* (2004) 78 ALJR 737 at 768 [171]; 206 ALR 130 at 173.

expected that express provision would be made in that regard. Other federal[103], State[104] and Territory[105] legislation in Australia makes express provision for translation of specified documents and other matters. The Migration Act does not. In the face of statutory silence, and especially in this Act, this Court could not introduce obligations of translation on the false hypothesis that such a purpose should be attributed to the Parliament by techniques of statutory construction. In the case of this Act, the revealed purposes of the Parliament were quite the opposite.

99 When the requirements of s 478(1)(b) of the Migration Act are read against the background of the foregoing considerations, it is clear that the appellant was "notified" of the "decision" of the Tribunal on 16 March 2001. The duty of the Tribunal to give an applicant a copy of the statement under s 430(1) of the Migration Act was a separate and distinct obligation[106]. Originally, it was integrated with notification but that integration was deliberately repealed. In the appellant's case, the time when that statement was provided was therefore distinct from the time of being "notified" of the "decision".

100 However desirable it might be to afford to persons in the position of the appellant a notification, in a language in which they are fluent, of the "decision", the substance of the s 430(1) "statement" and a warning about the strict time limit for commencing proceedings in the Federal Court, the Migration Act makes no provision in that respect. It would not be a valid performance of this Court's duty of interpretation of s 478(1)(b) for it to import a precondition of the supply of the "statement" (still less a translation of the whole or some unspecified part thereof) into the clear language of that paragraph.

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103 See *Australian Security Intelligence Organisation Act* 1979 (Cth), s 34H; *Crimes Act* 1914 (Cth), ss 23F(2), 23N, 23YDA; *Defence Force Discipline Act* 1982 (Cth), ss 101C(2A), 101U(2)(a), 101U(3); *International Transfer of Prisoners Act* 1997 (Cth), s 6(3).

104 See *Mental Health Act* 1990 (NSW), s 292; *Crimes (Forensic Procedures) Act* 2000 (NSW), s 98; *Crimes Act* 1958 (Vic), s 464D; *Occupational Health, Safety and Welfare Act* 1986 (SA), s 21(2); *Environment, Resources and Development Court Act* 1993 (SA), s 46; *Summary Offences Act* 1953 (SA), s 81(3)(c); *Evidence Act* 1929 (SA), s 14; *Mental Health Act* 1996 (WA), s 97(4)(a); *Criminal Law (Detention and Interrogation) Act* 1995 (Tas), s 5; *Forensic Procedures Act* 2000 (Tas), s 60.

105 *Human Rights Act* 2004 (ACT), s 22(2)(a).

106 Section 430D(2).

101 *Conclusion: the decision was "notified"*: By the clear language of s 478(1)(b) of the Migration Act and the equally clear purpose of the Parliament, the time for the lodgment of the application for judicial review in the Federal Court began to run from the moment the appellant was notified of the "decision". Whatever problem might arise where an applicant had no ability at all to understand the limited information to be contained in such notification[107], it does not arise in this case. The notification was given orally. The appellant was told that he had lost. That much was not contested. That much was translated into the appellant's language. His awareness of it is confirmed by his immediate emotional response which was common ground. He broke down and sobbed. The primary judge and the Full Court were correct as a matter of law to decide as they did. They were doing no more than the Constitution requires[108]. They were giving effect to the language and purpose of a valid enactment of the Federal Parliament according to its terms. That is also the duty of this Court.

The Minister's alleged obligations as guardian

102 *The appellant's arguments*: Before the Full Court, the only way that the appellant argued the application of the Guardianship Act was as that Act affected the appellant's being "notified" of the decision. This argument suggested that, because under the Guardianship Act the Minister was the statutory guardian of the appellant as a "non-citizen child" and because the Minister had not delegated his functions as such guardian, he was bound to ensure, in the appellant's case, that the appellant was "notified of the decision" in a meaningful way. In short, it was complained that the Minister had failed in his duties as statutory guardian of the appellant by omitting to provide the appellant, a minor under his protection, with such assistance as was necessary so that the notification of the "decision" and its significance for the appellant would be brought home to him in order that his legal rights might be effectively and promptly safeguarded[109].

103 Having regard to the meaning that I would adopt of the expression "the applicant being notified of the decision" in s 478(1)(b) of the Migration Act as it then stood, the omissions (if any) of the Minister under the Guardianship Act are irrelevant to the commencement of the running of time against the appellant for

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107 cf *Felts v Murphy* 201 US 123 at 128 (1906). See La Vigne and Vernon, "An Interpreter Isn't Enough: Deafness, Language and Due Process", (2003) *Wisconsin Law Review* 843 at 886-892.

108 Constitution, covering cl 5.

109 Creyke, "Current and Future Challenges in Judicial Review Jurisdiction: A Comment", (2003) *AIAL Forum* 42 at 49, where the anomaly and apparent conflict of interest and duty in the Minister's position are called to notice.

the bringing of an application to the Federal Court for judicial review. By specific provision, the Migration Act has chosen as its trigger for the running of time a particular and clearly identified event. So long as the person who wished to apply to the Federal Court had been "notified of the decision", duties (if any) arising under other legislation were irrelevant for this purpose. At least they were irrelevant in a case such as the present where there is no question that the "decision", understood as explained above, was "notified" in the sense of formally signified to the appellant in terms that he could understand.

104 *The issue does not arise*: Once one accepts (as I would) that "the decision", in this context, means the result of the Tribunal's review, rather than its reasons and findings, the ambit of the understanding necessary to be "notified" under the Migration Act is very limited. On the findings made by the primary judge in this case, confirmed by the Full Court, such notification was fulfilled in the case of the appellant. He understood the result of the decision.

105 This being so, it is unnecessary for this Court, in these proceedings, to consider the defects (if any) in the Minister's performance of the guardianship function provided for in s 6 of the Guardianship Act. During argument, a question arose as to whether the Guardianship Act applies at all to alien children, such as the appellant, arriving in Australia as an "unlawful non-citizen"[110]. The Solicitor-General of the Commonwealth took instructions and affirmed that the Minister's position was that the Guardianship Act applied to the Minister in respect of a person such as the appellant.

106 *Specific provisions exclude any general ones*: Assuming (without deciding) that this is the case, it does not alter the operation of the Migration Act in the express terms in which s 478 was enacted[111]. Any *general* powers and obligations of the Minister under the Guardianship Act would have to be read as subject to the more *specific* provisions of the Migration Act, enacted to apply with respect to all applications for judicial review of decisions of the Tribunal created by the latter Act. By its specific terms, s 478 of the Migration Act was enlivened in the appellant's case by "being notified of the decision" of the Tribunal. Such explicit provisions take priority over any general duties owed by the Minister under the Guardianship Act. The Migration Act accepts the hypothesis that persons notified of adverse decisions, even if not explicitly so informed, would know that they have to pursue any rights to challenge or question such decisions very quickly. Whether or not that is a correct hypothesis to accept in the case of persons in immigration detention, such as the appellant, it is the one adopted by the Parliament and reflected in s 478. Courts must give effect to such provisions.

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110 Migration Act, ss 189, 196.

111 See *B* (2004) 78 ALJR 737 at 769 [176]; 206 ALR 130 at 174.

107 *Requirements of procedural fairness*: If, as was asserted, the Minister was indeed the guardian of the appellant as a "non-citizen child" within the Guardianship Act, questions might arise as to whether the Minister fulfilled his duties as guardian in the present case. For several reasons, however, any such questions would have to be left to such separate proceedings as might be brought in respect of them. First, there is a threshold question, not yet finally determined, as to whether the Guardianship Act applies to a case such as the appellant's. Secondly, there is an issue as to what the incidents of such a statutory guardianship would be in such a case. Thirdly, because of the limited way in which this point was argued in the courts below, evidence was not specifically addressed to it and the only point about it, decided by the Full Court, related to the notification point upon which that Court held against the appellant. Fourthly, if the issue arises at all, it is outside the grounds upon which special leave was initially granted to the appellant. It is only raised by motion in a challenge to an earlier ruling of the Federal Court that does not bind this Court[112]. In these circumstances, it would be necessary, in the view that I take, for consideration of the requirements of the Guardianship Act to await other proceedings in which the issue had been litigated from the start and refined by the decision of an intermediate court.

The complaint of no "decision" by the Tribunal

108 Finally, the appellant's grounds of appeal complained that the Full Court erred when, before dismissing the appellant's appeal, it failed to consider whether there had been jurisdictional error on the part of the Tribunal with the effect that there had been no "decision" under the Migration Act that could engage the time limit fixed by s 478(1)(b).

109 I am prepared to assume that the "decision" referred to in s 478(1)(b) of the Migration Act must be read so as to refer to a "decision" which involved neither a failure to exercise jurisdiction nor an excess of jurisdiction conferred by the Act[113]. However, the substantive complaints of the appellant related to what happened after the "decision" of the Tribunal was made, as that word was to be construed in the context. Having regard to the preceding conclusion and to the way this appeal was argued, there is no separate merit in the jurisdictional point. The Tribunal made its decision and handed it down. It was notified to the

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112 The appellant's motion sought to add a ground complaining that the Full Court of the Federal Court had erred "when it applied the decision … in *Odhiambo v Minister for Immigration and Multicultural Affairs* which is distinguishable both on its facts and by the manner in which the appeal was conducted."

113 *Plaintiff S157/2002* (2003) 211 CLR 476 at 495 [41], 506 [76].

appellant. The appellant belatedly sought judicial review of that decision. Before the Federal Court, upon the Minister's preliminary objection as to the competency of the application, the appellant's complaint concerned how the decision was communicated to him. It did not complain that no true "decision" was ever made by the Tribunal.

Conclusion and order

110 The Minister is entitled to succeed. That is because of the inflexible time limitation deliberately enacted by the Parliament in respect of all cases of judicial review by the Federal Court directed to this particular Tribunal concerning persons such as the appellant. So long as such provisions are valid under the Constitution (and they were not challenged in this appeal), this Court must give effect to them in an appeal such as this[114]. It must do so whatever views might be held about the operation of the Migration Act in the circumstances of the particular case. Whilst I would gladly have come to the opposite view out of sympathy to the appellant, I cannot do so upon my analysis of the Migration Act. There is no relevant ambiguity. The purpose of the Migration Act is clear. The judicial duty is to give effect to the law.

111 It follows that the appeal must be dismissed.

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114 See *Plaintiff S157/2002* (2003) 211 CLR 476 at 535-536 [165]-[166].