HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No S10/2011

PLAINTIFF S10/2011 — PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR — DEFENDANTS

Matter No S43/2011

JASVIR KAUR — PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR — DEFENDANTS

Matter No S49/2011

PLAINTIFF S49/2011 — PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR — DEFENDANTS

Matter No S51/2011

PLAINTIFF S51/2011 — PLAINTIFF

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP & ANOR — DEFENDANTS

Plaintiff S10/2011 v Minister for Immigration and Citizenship
Kaur v Minister for Immigration and Citizenship
Plaintiff S49/2011 v Minister for Immigration and Citizenship
Plaintiff S51/2011 v Minister for Immigration and Citizenship
[2012] HCA 31
7 September 2012
S10/2011, S43/2011, S49/2011 & S51/2011

ORDER

In each matter, application dismissed with costs.

Representation

S B Lloyd SC with S E J Prince, G J D del Villar and J B King for the plaintiffs (instructed by Parish Patience Immigration Lawyers)

S J Gageler SC, Solicitor-General of the Commonwealth with G R Kennett SC and A M Mitchelmore for the defendants (instructed by Australian Government Solicitor)

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

CATCHWORDS

Plaintiff S10/2011 v Minister for Immigration and Citizenship
Kaur v Minister for Immigration and Citizenship
Plaintiff S49/2011 v Minister for Immigration and Citizenship
Plaintiff S51/2011 v Minister for Immigration and Citizenship

Administrative law – Procedural fairness – Migration – Refugees – Review by Refugee Review Tribunal and Migration Review Tribunal – Ministerial discretion – *Migration Act* 1958 (Cth) confers powers upon Minister to dispense with statutory requirements for visa if "in the public interest to do so" – Dispensing powers must be exercised personally and are non-compellable – Plaintiffs refused visas and unsuccessfully sought merits review of those refusals – Plaintiffs requested Minister to consider exercising and to exercise dispensing powers – Requests by three plaintiffs refused by departmental officers pursuant to guidelines issued by Minister not forwarded to Minister – Request by one plaintiff refused by Minister – Whether statutory provisions conferring dispensing powers apt to affect adversely the sufficient interest of a party seeking exercise of those powers – Whether statutory provisions conferring dispensing powers excluded any obligation of Minister to accord plaintiffs procedural fairness.

Words and phrases – "dispensing provision", "guidelines", "legitimate expectation", "procedural fairness", "public interest", "sufficient interest".

Migration Act 1958 (Cth), ss 48B, 195A, 351, 417.

FRENCH CJ AND KIEFEL J.

Introduction

1 Four plaintiffs, each of them non-citizens who tried and failed to obtain visas to remain in Australia, apply to this Court for declaratory relief and the issue of certiorari and constitutional writs against the Minister for Immigration and Citizenship ("the Minister") and the Secretary for the Department of Immigration and Citizenship ("the Secretary"). The applications, referred for hearing to a Full Court by Gummow J, arise out of the failure of each of the plaintiffs to attract the exercise by the Minister of his or her non-compellable, non-delegable personal discretion to make decisions in favour of unsuccessful visa applicants and persons in detention under the *Migration Act* 1958 (Cth) ("the Act"). That discretion operates outside the regular statutory process for determination of visa applications and administrative review of such determinations by the Migration Review Tribunal ("the MRT") and the Refugee Review Tribunal ("the RRT"). It is conferred by a number of sections of the Act. Four of those sections are relevant to these proceedings. Under s 48B of the Act, the Minister may grant a protection visa to a person whose application for a protection visa has already been refused. Under s 195A, the Minister may grant a visa to a person in immigration detention. Sections 351 and 417 authorise the Minister to substitute for a decision of the MRT or the RRT a decision which is more favourable to the applicant. Each of the sections provides that the Minister is under no duty even to consider the exercise of the discretions they confer[1].

2 The Minister has issued or adopted previously issued ministerial guidelines in the form of directions to the Secretary and his or her officers setting out the circumstances in which the Minister may wish to consider exercising the discretionary powers under the four sections. The plaintiffs assert, as part of their respective grounds for relief, that the issue of the guidelines in relation to each section involved "a decision by [the Minister] to decide to consider the exercise of those statutory powers." As a premise for the claims for relief, that proposition should be rejected for the reasons set out below. The plaintiffs further assert that, having decided to consider the exercise of his or her powers, the steps taken under the guidelines to inform that consideration were steps towards the exercise of those powers. That proposition too should be rejected. The plaintiffs say that their rights and interests were directly affected by that consideration and that the valid exercise of the powers conferred by ss 48B, 195A, 351 and 417, to consider whether to exercise the powers conferred by those sections, is conditioned upon compliance with the requirements of procedural fairness. That proposition too should be rejected.

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1 Act, ss 48B(6), 195A(4), 351(7), 417 (7).

3 Each of the applications is said to raise a matter arising under the Constitution or involving its interpretation, namely, whether the executive power of the Commonwealth is constrained by a requirement that procedural fairness be afforded to a person whose rights, interests or legitimate expectations may be destroyed, defeated or prejudiced by its exercise. That question arises if the plaintiffs were to establish that the inquiries made, and the submissions prepared, by officers of the Department of Immigration and Citizenship ("the Department") pursuant to the ministerial guidelines were themselves capable of affecting, defeating or prejudicing rights, interests or legitimate expectations. They were not.

4 For the reasons that follow, the consideration by officers of the Department of the requests by the plaintiffs for the Minister to consider exercising non-compellable powers under the Act did not attract the requirements of procedural fairness. Further, the Minister is not obliged to accord procedural fairness, in the form of the so-called hearing rule, in personally considering whether to exercise the Minister's discretion under ss 48B, 195A, 351 or 417. Each of the applications should be dismissed.

The plaintiffs' histories

5 The plaintiffs' histories have some common elements. Each of them applied for a visa and was refused on the merits, was unsuccessful in administrative review by the MRT or the RRT, and was unsuccessful in judicial review applications. Each submitted at least one request that the Minister exercise his or her discretion under one or more of ss 48B, 195A, 351 and 417. Each had his or her case considered personally by the Minister on at least one occasion under s 351 (Ms Kaur) or s 417 (Plaintiffs S10, S49 and S51). A brief outline of their individual histories follows.

Plaintiff S10

6 Plaintiff S10, a citizen of Pakistan, arrived in Australia on 24 August 2007 and on 6 September 2007 applied for a protection visa. He claimed to fear persecution on account of his actual or imputed political opinions and religious beliefs if he were to be returned to Pakistan. On 6 November 2007, a delegate of the Minister refused the visa application. Following an application for merits review, the RRT affirmed that decision on 22 February 2008. An application for judicial review of the RRT decision was dismissed in the Federal Magistrates Court of Australia on 28 July 2008[2], as was a subsequent appeal to the Full Court

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2 *SZMCD v Minister for Immigration and Citizenship* (2008) 219 FLR 141.

of the Federal Court of Australia by a decision delivered on 15 April 2009[3]. Special leave to appeal to this Court was refused on 4 September 2009[4].

7 On 30 October 2009, Plaintiff S10 requested that the Minister exercise his power under s 417 of the Act and, alternatively, under s 48B of the Act. His request in relation to s 48B was not referred to the Minister, a departmental officer having determined that it did not meet the ministerial guidelines relating to s 48B. His request for consideration under s 417 was referred to the Minister who signed a minute indicating that he did not wish to consider the exercise of that power. In these proceedings, Plaintiff S10 complains of a breach of procedural fairness in relation to his s 48B request on the basis that he was not given the opportunity to comment on materials relied upon by the departmental officer, and that the officer failed to address the material and claim before him. That breach of procedural fairness, it is said, also infected the way in which the Minister and his Department dealt with his s 417 request.

Jasvir Kaur

8 Ms Kaur arrived in Australia on a Subclass 573 (Higher Education Sector) visa on 21 July 2005 and on 28 June 2006 was relevantly granted a further student visa valid until 6 June 2008. An application for a further student visa, lodged on 1 September 2008, was refused by a delegate of the Minister on the basis that it had not been lodged within 28 days of her previous substantive visa ceasing to be in effect. The MRT affirmed the delegate's decision and, on 16 October 2009, Ms Kaur requested that the Minister exercise his power under s 351 of the Act. Her request was referred to the Minister who determined that he did not wish to consider the exercise of that power.

9 An application to the Federal Magistrates Court for judicial review of the MRT's decision was dismissed[5]. So too was an appeal against that decision to the Federal Court[6]. Both Barnes FM in the Federal Magistrates Court[7], and Jacobson J in the Federal Court[8], noted that Ms Kaur's visa grant letter was confusing and that she had acted on advice given to her by her migration agent.

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3 *SZMCD v Minister for Immigration and Citizenship* (2009) 174 FCR 415.

4 *SZMCD v Minister for Immigration and Citizenship* [2009] HCATrans 211.

5 *Kaur v Minister for Immigration and Citizenship* [2010] FMCA 634.

6 *Kaur v Minister for Immigration and Citizenship* [2010] FCA 1319.

7 [2010] FMCA 634 at [7]-[12].

8 [2010] FCA 1319 at [7], [62]-[64].

10 On 20 December 2010, Ms Kaur submitted a further request to the Minister seeking the exercise of his power under s 351 of the Act. The relevant departmental officers declined to refer the request to the Minister.

11 In these proceedings, Ms Kaur complains of a breach of procedural fairness in the failure of officers assessing her repeat request to invite her to comment on a statement in an email from an officer of the Department, dated 6 January 2011. That email stated that the repeat request was based almost primarily on a comment which the Federal Court had made in its judgment suggesting that it might be a case that the Minister would look at a second time.

Plaintiff S49

12 Plaintiff S49 arrived in Australia on a visitor visa on 8 June 1998. He applied for a protection visa on 21 July 1998 claiming to be a citizen of India subject to persecution in that country on political grounds. His application was refused in August 1998, and that refusal was affirmed by the RRT on 5 April 2001. An application for judicial review of the RRT decision was withdrawn.

13 In June 2003, Plaintiff S49 was taken into immigration detention and on 25 June 2003 applied to this Court for judicial review of the RRT's decision. He then claimed that he was a citizen of Bangladesh and that he had previously given an incorrect name. The application was remitted to the Federal Court[9] where Plaintiff S49's attempt to seek judicial review was unsuccessful[10].

14 On 6 September 2004, Plaintiff S49 requested that the Minister exercise her discretion "for humanitarian reasons", apparently referring to the Minister's power under s 417 of the Act. On 9 November 2004, the Minister signed a minute indicating that she did not propose to consider the exercise of her power.

15 Plaintiff S49 subsequently informed the Department that his identity was as first claimed and that he wished to return to India. He was granted a "Removal Pending Bridging Visa" pursuant to s 195A of the Act and released from immigration detention on 3 November 2005. His request for the Minister to exercise power under s 48B of the Act was found, on 22 December 2005, not to meet the guidelines. On 3 March 2006, he was issued with a travel document to

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9 Callover of 30 Immigration Matters – Sydney [2003] HCATrans 324 (25 August 2003).

10 *S372 of 2003 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1785.

India and arrangements were made for him to depart Australia on 30 August 2006. The Minister decided to cancel his bridging visa on 26 July 2006 and notified him of that decision by letter dated 15 August 2006. He sought judicial review of the cancellation and obtained an injunction restraining his removal from Australia pending the outcome of that review[11]. He unsuccessfully pursued the matter in the Federal Magistrates Court[12] and the Federal Court[13], renewing his claim that he was a Bangladeshi national.

16 On 15 June 2009, Plaintiff S49 again requested the Minister to exercise his power under s 417 and, alternatively, under s 48B of the Act. Departmental officers subsequently assessed his request as not falling within the ministerial guidelines relating to s 48B. On 25 November 2010, the Minister decided to "not intervene" in respect of the request that he exercise his power under s 417 of the Act. The "not intervene" option in the minute signed by the Minister was an alternative to "begin considering" and may be taken to have been a refusal to consider the exercise of the power.

17 Plaintiff S49 alleges breach of procedural fairness in relation to his repeat requests under ss 48B and 417 of the Act.

Plaintiff S51

18 Plaintiff S51, a citizen of Nigeria, arrived in Australia on a short stay business visa on 29 August 2009. That visa was cancelled upon his arrival on the basis he was not a genuine business entrant and he was taken into immigration detention. He has remained in detention or community detention since his arrival in Australia.

19 Plaintiff S51 lodged an application for a protection visa in September 2009 alleging that he would be subject to persecution in Nigeria because of his Christian religion. His application was refused on 3 November 2009. The RRT affirmed that refusal. An application for judicial review of the RRT's decision was dismissed by the Federal Magistrates Court on 5 July 2010[14] and an appeal from that decision dismissed by the Federal Court on 3 September 2010[15]. In the

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11 *Kumar v Minister for Immigration and Multicultural Affairs* [2006] FMCA 1276.

12 *Kumar v Minister for Immigration and Citizenship* [2008] FMCA 1099.

13 *Kumar v Minister for Immigration and Citizenship* (2009) 176 FCR 401.

14 *SZOET v Minister for Immigration* [2010] FMCA 483.

15 *SZOET v Minister for Immigration and Citizenship* [2010] FCA 968.

meantime, in December 2009, Plaintiff S51 was assessed under the ministerial guidelines relating to s 195A for possible referral to the Minister for the grant of a bridging visa while his protection visa process was ongoing. In the event, although the assessment recorded that he had been diagnosed with post-traumatic stress disorder and was at risk of further deterioration if he remained detained, no referral of the assessment was made to the Minister.

20 On 5 October 2010, Plaintiff S51 sought the exercise by the Minister of his discretion under either s 48B or s 417 of the Act. Departmental officers declined to refer the s 48B request to the Minister. His request under s 417 was referred to the Minister who noted that there was enough evidence to warrant further consideration and ticked a box indicating that a submission was required. After the receipt of further material from Plaintiff S51 and a further departmental submission to the Minister, the Minister signed a record, on 16 December 2010, to the effect that he would "not intervene" in relation to Plaintiff S51's request. The form of the minute signed by the Minister again indicates that he refused to further consider the exercise of his powers.

21 Plaintiff S51 commenced the present proceedings on 1 February 2011. He made a further request for the Minister to exercise his powers under ss 417 and 48B of the Act, but those requests were treated as inappropriate to consider having regard to the pending proceedings. A subsequent departmental submission to the Minister relating to possible intervention under s 195A and s 197AB of the Act led the Minister to sign a record stating that he would "not intervene" in relation to s 195A, but would consider the exercise of his power under s 197AB of the Act to place Plaintiff S51 in community detention. It is common ground that Plaintiff S51 is now in community detention.

22 Plaintiff S51 complains of want of procedural fairness in relation to the Minister's consideration of the exercise of the discretion under s 195A, and the assessment of Plaintiff S51's request that the Minister exercise his powers under ss 48B and 417.

Statutory framework

23 The Act classifies non-citizens, within Australia's migration zone[16], as lawful non-citizens being those who hold a visa[17], and unlawful non-citizens

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16 Section 5 of the Act defines migration zone as "the area consisting of the States, the Territories, Australian resource installations and Australian sea installations".

17 Act, s 13(1).

being those who are not lawful non-citizens[18]. Subject to the Act, the Minister may grant a non-citizen permission, to be known as a visa, to travel to and enter into Australia and/or remain in Australia[19]. There are classes of visas prescribed by the Migration Regulations 1994 (Cth)[20] ("the Regulations"), and provided for by particular sections of the Act[21]. The Regulations may prescribe criteria for classes of visa[22].

24 Three of the plaintiffs had applied for and been refused a protection visa, for which s 36 provides. A criterion for a protection visa is that the applicant is "a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol"[23]. The other plaintiff, Ms Kaur, applied for a student visa designated in the Regulations as a Subclass 573 (Higher Education Sector) visa.

25 Part 5 of the Act provides for administrative review of decisions to refuse the grant of visas (other than protection visas) by the MRT. Part 7 of the Act provides for review by the RRT of decisions to refuse the grant of protection visas. Decisions of those Tribunals are amenable to judicial review for jurisdictional error in the Federal Magistrates Court, subject to appeal to the Federal Court, and, by special leave, to this Court[24]. They are also subject to applications for constitutional writs and for certiorari as an incident of such applications, which are made in the original jurisdiction conferred on this Court by s 75(v) of the Constitution.

26 The provisions of the Act in issue in these proceedings are ss 48B, 195A, 351 and 417. Section 48B authorises the Minister to determine that a statutory bar imposed by s 48A upon a further application for a protection visa, where a

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18 Act, s 14(1).

19 Act, s 29(1).

20 Act, s 31(1).

21 Act, s 31(2).

22 Act, s 31(3).

23 Act, s 36(2)(a). Under s 5 of the Act, the "Refugees Convention" means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, and the "Refugees Protocol" means the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

24 Act, Pt 8, Div 2.

previous application has been refused, does not apply to prevent such an application. Section 195A authorises the Minister to grant to an unlawful non-citizen detained under s 189 "a visa of a particular class (whether or not the person has applied for the visa)."[25] Section 351 empowers the Minister to substitute for a decision of the MRT, reviewing the cancellation of a visa or a refusal to grant a visa, "another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision."[26] Section 417 confers a similar power on the Minister with respect to the decisions of the RRT, which relate to protection visas.

27 Decisions under ss 48B, 195A, 351 and 417 ("the dispensing provisions") attract the application of the privative provision, s 474 of the Act[27], which seeks to preclude judicial review of "privative clause decisions" to which it applies. That preclusion does not extend to decisions affected by jurisdictional error[28].

28 Each of the dispensing provisions has common features affecting the exercise of the power it confers:

- the Minister must think it is in the public interest to exercise the power[29];
- the power may only be exercised by the Minister personally[30];

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25 Act, s 195A(2).

26 Act, s 351(1).

27 Act, s 474(7)(a), which includes in the class "privative clause decision" to which the section applies, decisions of the Minister not to exercise, or not to consider the exercise, of the Minister's power under ss 48B, 195A, 351 and 417.

28 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476; [2003] HCA 2.

29 Act, ss 48B(1), 195A(2), 351(1), 417(1).

30 Act, ss 48B(2), 195A(5), 351(3), 417(3).

- the Minister does not have a duty to consider whether to exercise the power, whether he or she is requested to do so by the applicant or by any other person or in any other circumstance[31];

- in exercising the power the Minister is not bound by subdiv AA or AC of Div 3 of Pt 2 of the Act or by the Regulations, but is bound by all other provisions of the Act[32];

- if the Minister does exercise the power the Minister must cause to be laid before each House of Parliament a statement setting out, inter alia, the Minister's decision and the reasons for the Minister's decision and, in particular, the Minister's reasons for thinking that the decision was in the public interest[33].

29 As was pointed out in the written submissions filed by the Minister and the Secretary, ss 48B and 417 cannot be invoked in favour of a non-citizen unless the non-citizen has applied for a protection visa and had that application determined. A further condition upon the invocation of s 417 is that the non-citizen has applied to and been the subject of a decision by the RRT. Section 351 only applies to a non-citizen who has made an application for a visa, had the application determined, applied for review before the MRT, and had that application determined. The antecedent processes for application and review attract procedural fairness obligations subject to the specific provisions of the Act relating to its content.

30 The dispensing provisions and other like provisions in the Act have a distinctive function in its legislative scheme. The Act creates a range of official powers, duties and discretions, particularly in relation to the grant of visas, which are tightly controlled by the Act itself and, under the Migration Regulations, by conditions and criteria to be satisfied before those powers and discretions can be exercised[34]. The dispensing provisions stand apart from the scheme of tightly controlled powers and discretions. They confer upon the Minister a degree of flexibility allowing him or her to grant visas which might not otherwise be able to be granted because of non-satisfaction of substantive or procedural

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31 Act, ss 48B(6), 195A(4), 351(7), 417(7).

32 Act, ss 195A(3) (which also excludes the operation of subdiv AF of Div 3 of Pt 2), 351(2), 417(2). Section 48B is located in subdiv AA of Div 3 of Pt 2 of the Act.

33 Act, ss 48B(3), 195A(6), 351(4), 417(4).

34 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 494 [36] per Gleeson CJ.

requirements. The powers so conferred are conditioned upon a ministerial judgment of the "public interest". That is a term to which it is difficult to give a precise content[35]. It has been described in this Court as[36]:

> "a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitely extraneous to any object the legislature could have had in view'".

The dispensing provisions require the Minister to be personally accountable to the Parliament for decisions to grant visas made under them. Both the wide purposes for which the powers conferred by the dispensing provisions can be exercised and their non-compellable nature, indicate that they cannot be enlivened by a request for their exercise nor by the existence of circumstances which might be thought, in the public interest, to attract their application.

31 The dispensing provisions do not in terms provide for applications or requests for the exercise of a ministerial discretion. Nevertheless, they are drafted on the assumption, which recognises the practical reality, that requests will be made. They provide that the Minister has no duty to consider whether to exercise the power they confer, whether or not requested to do so. Other provisions of the Act operate upon the assumption that such requests will be made[37] and that representations and communications will be made to the Minister, the Minister's staff or officers of the Department in relation to such requests[38]. The Regulations provide for the grant of Subclass 050 (Bridging (General)) visas which permit a non-citizen to remain in, or travel to, enter and remain in Australia, during a specified period or until a specified event

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35 *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 300 [57] per Gleeson CJ, Gummow, Heydon and Kiefel JJ; [2008] HCA 37.

36 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 per Mason CJ, Brennan, Dawson and Gaurdon JJ; [1989] HCA 61, quoting *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; [1947] HCA 21. See also *Osland v Secretary, Department of Justice (No 2)* (2010) 241 CLR 320 at 329-330 [13]-[14] per French CJ, Gummow and Bell JJ; [2010] HCA 24.

37 "Immigration assistance", regulated by Pt 3 of the Act, is defined to include "preparing, or helping to prepare, a request to the Minister" to exercise the power under ss 195A, 351 and 417: Act, s 276(2A). See also s 277(4)-(5) relating to lawyers providing advice for the purpose of making such requests.

38 Act, s 282(4).

happens[39]. Primary criteria for the grant of a bridging visa include the making of a request to the Minister to make a determination under s 48B of the Act[40] and the making of a request under ss 351 or 417[41].

32 The recognition in the Act of the fact that requests will be made for ministerial consideration of the exercise of the powers under the dispensing provisions does not have any significance for the question whether such requests, when made, enliven a statutory process attended by the requirements of procedural fairness. As appears from these reasons, the answer to that question is in the negative.

Ministerial guidelines

33 Three sets of ministerial guidelines have been issued from time to time with respect to the exercise of the Minister's powers under s 48B, s 195A, and ss 351 and 417. Guidelines relating to the implementation of s 48B were first issued in 1999. Guidelines with respect to s 195A were issued on 18 October 2007 and with respect to ss 351 and 417 with effect from 5 December 2008. Each set of guidelines has been adopted by successive Ministers subject to minor amendments.

34 The ministerial guidelines in effect on 16 November 2010 with respect to the exercise of ministerial powers under ss 351 and 417 of the Act were included in a Centralised Departmental Instruction System. They were cast in the first person as instructions from the Minister. Their stated purposes were to:

> "• explain the circumstances in which I may wish to consider exercising my public interest powers under … s351 …[or] s417 … of the Act to substitute for a decision of a review tribunal a decision which is more favourable to the visa applicant(s)
>
> • explain how a person may request my consideration of the exercise of my public interest powers and
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> • inform departmental officers when to refer a case to me so that I can decide whether to consider exercising such powers in the public interest."

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39 Act, s 73.

40 Regulations, Sched 2, sub-cl 050.212(5B).

41 Regulations, Sched 2, sub-cl 050.212(6).

35 The powers conferred by ss 351 and 417 were designated as "PUBLIC INTEREST POWERS". The guidelines set out types of cases which the Minister considered "inappropriate to consider" and which could be "finalised without further assessment." They included repeat requests where migration-related litigation was pending. Classes of case which were to be brought to the Minister's attention were identified. They comprised cases referred to the Minister by a review tribunal member and cases involving "unique or exceptional circumstances". Categories of circumstances answering the latter description were set out. They included circumstances in which there was a "significant threat" to the personal security, human rights or human dignity of a person and cases in which there were substantial grounds for believing that a person might be in danger of being subject to torture if returned to their country of origin, in contravention of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The guidelines set out information which should be brought to the Minister's attention for consideration where a case was assessed as involving unique or exceptional circumstances. That information included whether the continued presence of the person in Australia would pose a threat to an individual in this country, or to Australian society or security, or might prejudice Australia's international relations. The guidelines concluded with the observation that:

> "A request for me to exercise my public interest powers is not an application for a visa and, unless the request leads to grant of a bridging visa, such a request has no effect on the removal provisions."

36 The purpose of the Minister's guidelines with respect to s 195A of the Act, relating to the discretion to grant a visa to a person in immigration detention, was similar to the stated purpose of the guidelines relating to ss 351 and 417. It was to:

> "• explain the circumstances in which I may wish to consider exercising my public interest power under s 195A …
>
> • inform officers of the Department of Immigration and Citizenship … when to refer a case to me so that I can decide whether to consider exercising this power in the public interest."

37 The guidelines with respect to s 195A, like those issued in connection with the exercise of the powers under ss 351 and 417, set out categories of cases to be referred by the Department to the Minister for consideration of his or her "detention intervention power". Referral was to occur where a person was in immigration detention under s 189 of the Act and one or more additional criteria were met. Officers of the Department were required to assess a detainee's circumstances on an ongoing basis, and bring to the Minister's attention any case falling within the guidelines. Requests for the exercise of the Minister's

detention intervention power could only be made and referred by the Department. The Minister would not consider exercising the power if requested directly by or on behalf of a detainee. If the Minister decided to consider a case under s 195A, the Minister might choose to grant, or not to grant, a visa. Under the guidelines, once the Minister has considered the exercise of the detention intervention power in relation to a particular detainee, any subsequent request was to be assessed by an officer of the Department. However, a subsequent request would only be brought to the Minister's attention for reconsideration if new information was available or circumstances had changed.

38 The structure of the guidelines relating to s 48B was similar to that of the guidelines issued in relation to ss 351 and 417 of the Act. They distinguished between requests for consideration which were to be referred to the Minister and those which were not. If a request for ministerial consideration under s 48B or any purported repeat protection visa application was made which did not fall within the guidelines, it would not be referred to the Minister.

Was there a requirement for procedural fairness?

39 The plaintiffs submitted that their requests and submissions to the Minister and the consideration of those requests by officers of the Department occurred under and for the purposes of the Act and thereby attracted the requirement to afford procedural fairness. They submitted that the nature of the Minister's powers compelled a construction of the guidelines which included an implied requirement of procedural fairness. They also argued that where officers had decided under the guidelines not to refer repeat requests to the Minister, those decisions could not be regarded as decisions of the Minister and were made without jurisdiction.

40 Assuming, contrary to their primary submissions, that the departmental consideration of the plaintiffs' requests occurred outside the statutory framework, the plaintiffs submitted that it could only have occurred pursuant to an exercise of non-statutory executive power under s 61 of the Constitution which was constrained by a requirement to afford procedural fairness. Further, it was argued that, in any event, the officers were exercising public functions which the Court should hold were attended by a requirement to afford procedural fairness.

41 The plaintiffs invoked the decision of this Court in *Plaintiff M61/2010E v The Commonwealth* ("the *Offshore Processing Case*")[42] in support of their submissions. However that case, which concerned the application of procedural fairness in connection with the exercise of ministerial powers under ss 46A and

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42 (2010) 243 CLR 319; [2010] HCA 41.

195A of the Act arose in circumstances quite different from the cases presently before the Court. The Court in that case was concerned with inquiries made after the Minister had decided to consider exercising his powers under those sections. On the other hand, in each of the cases currently before the Court, the Minister had declined to consider exercising the relevant power.

42 The *Offshore Processing Case* applied only to detainees who were offshore entry persons. Section 46A(2) confers upon the Minister a power to lift a statutory bar imposed by s 46A(1) against applications for visas by offshore entry persons who are in Australia and are unlawful non-citizens. The structure of s 46A resembles that of s 48B. It imports the common elements of a public interest criterion[43], a requirement that the Minister exercise the power personally[44] and a provision that the Minister does not have a duty to consider whether to exercise the power[45].

43 In the *Offshore Processing Case* the Minister had announced the establishment of an offshore assessment and review process to determine claims for protection under the Refugees Convention. The effect of the announcement was that the Minister had decided that consideration would be given to exercising the powers under ss 46A and 195A in every case in which an offshore entry person claimed that Australia owed that person protection obligations[46]. On that basis, detention during the conduct of the assessment and review processes was held to be lawful[47]. The Court held that the inquiries in the assessment and review processes in issue in the *Offshore Processing Case*[48]:

> "were inquiries made after a decision to consider exercising the relevant powers and for the purposes of informing the Minister of matters that were relevant to the decision whether to exercise one of those powers in favour of a claimant."

44 As a result of its characterisation of the guidelines in the *Offshore Processing Case*, the Court held that the principles governing the limits to the

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43 Act, s 46A(2).

44 Act, s 46A(3).

45 Act, s 46A(7).

46 (2010) 243 CLR 319 at 350-351 [70].

47 (2010) 243 CLR 319 at 351 [71].

48 (2010) 243 CLR 319 at 351 [73].

way in which assessments and subsequent reviews were conducted were well established[49] and said that[50]:

> "once it is decided that the assessment and review processes were undertaken for the purpose of the Minister considering whether to exercise power under either s 46A or s 195A, it follows from the consequence upon the claimant's liberty that the assessment and review must be procedurally fair and must address the relevant legal question or questions."

There being no clear words in the statute to exclude the application of procedural fairness in the exercise of the powers conferred by ss 46A and 195A, the exercise of those powers, including the power to decide to consider the exercise of power, was to be understood as "conditioned on the observance of the principles of natural justice"[51]. The requirements of procedural fairness were attached, in that case, to the Minister's decision to consider whether to exercise the powers under ss 46A and 195A because that decision directly affected the rights and interests of those the subject of assessment or review. It did so because that decision, with the consequential need to make inquiries, prolonged the detention of those persons for so long as the assessment and any necessary review took to complete.

45 As the Minister and the Secretary pointed out, there has not been, in relation to the cases presently before the Court, any ministerial announcement of the kind which applied to the assessment and review processes considered in the *Offshore Processing Case*. The function of the guidelines in issue in these cases was significantly different from the function of the assessment and review procedures under consideration in the *Offshore Processing Case*. Those were procedures which were undertaken as an incident of the exercise of a statutory power which the Minister had effectively announced was to be undertaken, namely, the power to consider whether to exercise the substantive powers conferred by ss 46A and 195A of the Act.

46 In this case the Minister has taken no statutory step equivalent to that taken in the *Offshore Processing Case*. It was submitted for the Minister and the Secretary that, properly understood, each of the guidelines in this case does no more than facilitate the provision of advice to the Minister in particular cases and otherwise operate as a screening mechanism in relation to any requests which the Minister has decided are not to be brought to his or her attention. The issue of

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49 (2010) 243 CLR 319 at 351-352 [73].

50 (2010) 243 CLR 319 at 353 [77].

51 *Kioa v West* (1985) 159 CLR 550 at 615 per Brennan J; [1985] HCA 81, quoted in the *Offshore Processing Case* (2010) 243 CLR 319 at 354 [78].

the guidelines itself did not involve a decision on the part of the Minister, acting under the relevant section, to consider the exercise of the power conferred by it. That submission should be accepted.

47 There are variants, in public administration, of departmental processes which are anterior to the exercise of statutory powers but do not constitute or evidence their exercise. The assessment and review processes considered in the *Offshore Processing Case* did not fall within that category.

48 An administrative inquiry may be undertaken and an advice prepared for the purposes of the exercise of a statutory power. If the requirements of procedural fairness constrain the exercise of that power, and the decision-maker relies entirely upon advice proffered in disregard of those requirements, then the statutory decision may be infected by jurisdictional error. An example from a time prior to the introduction of the visa system in the Act, was the relationship between the power of the Minister to determine whether a person claiming refugee status should be granted a permit under s 6A of the Act and the function of an interdepartmental committee set up to advise the Minister on the question of whether a particular person was a "refugee" within the meaning of the United Nations Convention relating to the Status of Refugees. In *Minister for Immigration and Ethnic Affairs v Mayer*[52], s 6A of the Act was held by implication to confer on the Minister the function of determining whether a person had the status of a refugee for the purpose of the grant of a permit under that section[53]. The Minister acted upon the advice of the interdepartmental committee. This Court held in *Mayer* that the Minister's determination of refugee status was made under s 6A and thereby "under an enactment" for the purposes of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). So characterised it attracted the obligation under s 13 of that Act for the provision of reasons for the decision. As Gummow J was to point out later in *Re Yaa Akyaa and Rita Kufo v The Minister of Immigration and Ethnic Affairs*[54], if natural justice had been denied in the proceedings of the interdepartmental committee, the decision of the Minister or the Minister's delegate, as one made under the Act, would be in no better position – there would have been a breach of natural justice "in connection" with the making of the delegate's decision[55].

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52 (1985) 157 CLR 290; [1985] HCA 70.

53 (1985) 157 CLR 290 at 301-302 per Mason, Deane and Dawson JJ.

54 [1987] FCA 137.

55 [1987] FCA 137 at [36]. Breach of the rules of natural justice "in connection" with making a decision is a ground of review under s 5(1)(a) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

49 The interdepartmental committee process considered in *Mayer* may be regarded as an ancestral analogue of the assessment and review process considered in the *Offshore Processing Case*. The latter system of assessment and review was knitted by ministerial announcement into the statutory power conferred by s 46A(2).

50 The purpose and nature of the powers conferred by each of the dispensing provisions in these proceedings appears from their respective texts. It is clear from their terms that the Minister is under no duty to respond to a request for his or her consideration of the exercise of those powers. Nor is the Minister under a duty, independent of any such request, to consider any class of case for the exercise of those powers. With no statutory duty to consider the exercise of the Minister's powers being enlivened by a request or by the occurrence of a case to which the power might apply, no question of procedural fairness arises when the Minister declines to embark upon such a consideration. If, on ministerial instructions, certain classes of request or case are not even to be submitted to him or her for consideration, the position in law is unchanged. There is no exercise of a statutory power under the Act conditioned upon compliance with the requirements of procedural fairness.

51 The guidelines under consideration in the present case are directions to departmental officers about the circumstances in which requests for consideration of the exercise of the Minister's powers may be referred to the Minister. The work done by officers, acting under the guidelines, involves the acquisition of information and categorisation of requests or cases. It may be regarded, for the purposes of s 61 of the Constitution, as an executive function incidental to the administration of the Act and thus within that aspect of the executive power which "extends to the execution and maintenance … of the laws of the Commonwealth." There is, however, nothing about the character of the guideline processes, as an exercise of the executive power of the Commonwealth or otherwise, that attracts to them a requirement to observe procedural fairness. In the context of this case that requirement can only have significance if it conditions the exercise of the statutory powers conferred by the dispensing provisions.

52 The plaintiffs' submissions that the issue of ministerial guidelines in relation to the dispensing provisions involved a decision by the Minister to decide to consider the exercise of the powers conferred by those provisions, should be rejected. So too should the proposition that the processes followed under the guidelines were steps towards the exercise of the ministerial powers. There was no implied requirement that the guidelines be applied in such a way as to accord with the hearing rule aspect of procedural fairness.

Conclusion

53 Each of the applicants had access to administrative review procedures under the Act and judicial review of decisions of the MRT or the RRT as the case may be. Each had had his or her case considered personally by the Minister on at least one occasion. Those histories do not of themselves answer the legal question whether procedural fairness applied to the application of the ministerial guidelines to their requests for further consideration under the dispensing provisions of the Act. Those histories, however, involving as they do, the regular legislative scheme for dealing with visa applications, point up the special nature of the discretions created by the dispensing provisions which cannot be enlivened by request or circumstance. The applications in each case should be dismissed with costs.

54 GUMMOW, HAYNE, CRENNAN AND BELL JJ. These four applications in the original jurisdiction of this Court were heard together by the Full Court. The applications each raise questions of construction of cognate provisions of the *Migration Act* 1958 (Cth) ("the Act"). These provisions confer upon the Minister powers (but not duties) which are to be exercised by the Minister personally and, if exercised, dispense with requirements of the Act.

55 Exercise of these powers is attended in each case by the statutory obligation that the Minister cause a statement to be laid before each House of the Parliament. This is a particular manifestation of that aspect of responsible government which renders individual Ministers responsible to the Parliament for the administration of their departments[56]. Thus, to adapt what was said[57] by Gleeson CJ and Gummow J in *Minister for Immigration and Multicultural Affairs v Jia Legeng*[58]:

> "The statutory powers in question have been reposed in a political official, a member of the Executive Government, who not only has general accountability to the electorate and to Parliament, but who, in s 502, is made subject to a specific form of parliamentary accountability."

56 The plaintiffs contend that in deciding whether or not to consider the exercise of the relevant power, and then in deciding whether or not to exercise the power, the Minister is obliged to afford natural justice or procedural fairness to any moving party. The defendants, the Minister and the Secretary, deny this construction.

57 The provisions of the Act which confer dispensing powers of this nature and are in question are ss 48B, 195A, 351 and 417 in their application to persons in Australia who are detained under s 189(1).

58 There is a statement of agreed facts in each application. However, it will be necessary to consider these facts in detail only if the issues of statutory construction be decided adversely to the Minister.

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56 See *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 364; [1982] HCA 26.

57 With respect to s 502 of the Act.

58 (2001) 205 CLR 507 at 539 [102]; [2001] HCA 17. See also at 561 [176] per Hayne J, 584 [246] per Callinan J.

The plaintiffs

59 Each plaintiff is a non-citizen who entered Australia but did not do so at an "excised offshore place"[59]. The result is that none of the plaintiffs is an "offshore entry person", detained under s 189(3) of the Act, to whom there applies the provisions of the Act, in particular s 46A, which were considered in *Plaintiff M61/2010E v The Commonwealth* (*Offshore Processing Case*)[60]. The effect of s 46A(1) was to deny to offshore entry persons, who claimed that Australia owed them protection obligations, the capacity to engage the visa provisions of the Act, including those for merits review, which would oblige the Minister, if satisfied the necessary criteria were met, to grant protection visas[61]. It was in this setting, which thus differs from that in the present cases, that the Court held that procedural fairness must attend the consideration by the Minister of whether to exercise the power under s 46A(2) to determine that s 46A(1) did not apply and the power under s 195A(2) to grant a visa to a person detained under s 189(3). It will be necessary to make further reference to the *Offshore Processing Case* later in these reasons[62].

60 The plaintiffs entered Australia respectively in 2007 (S10 of 2011), 2005 (S43 of 2011), 1998 (S49 of 2011), and 2009 (S51 of 2011). The plaintiff in S51 has remained in detention or "community detention" since his arrival in Australia. He presently is being held in community detention following a favourable determination by the Minister under s 197AB on 29 August 2011. The power conferred by s 197AB is exercisable if the Minister "thinks that it is in the public interest to do so"; no issue presently arises under s 197AB.

61 The agreed facts show that while in Australia, the plaintiffs in S10, S49 and S51 each sought and was refused a protection visa by a delegate of the Minister. Each then sought a merits review by the Refugee Review Tribunal ("the RRT"). In respect of the plaintiffs in S10 and S51, the RRT affirmed the decision of the delegate, and subsequent applications for judicial review of the RRT decisions were unsuccessful. The plaintiffs in S10 and S51 were born in

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59 This expression is defined in s 5(1) of the Act in terms which include the external Territories of Christmas Island, Ashmore and Cartier Islands, and Cocos (Keeling) Islands.

60 (2010) 243 CLR 319; [2010] HCA 41.

61 (2010) 243 CLR 319 at 333 [2].

62 At [79]-[82].

1970 and 1974 and are respectively citizens of Pakistan and Nigeria. The plaintiff in S49 was born in 1971 and claimed to be a citizen of India who feared persecution on political grounds; he later claimed to be a citizen of Bangladesh who feared persecution if returned to that country. His application for review of the decision denying him a protection visa was refused by the RRT on 1 May 2001. There followed repeated requests for ministerial intervention under s 48B and s 417.

62 The plaintiff in S43 was born in 1982 and is a citizen of India. She arrived in Australia on a student visa and thereafter was granted two further student visas. Her further application was refused by a delegate of the Minister on the basis that she had not lodged her application within 28 days of her then current substantive visa ceasing to be in effect. She made an application for review by the Migration Review Tribunal ("the MRT") but on 18 September 2009 the MRT notified her of its decision to affirm the decision of the delegate.

Sufficient interest

63 The "intention" of the Parliament[63], expressed in s 4(2) of the Act, is that the provisions of the Act for visas be the only source of the right of non-citizens to enter or remain in Australia. The visa system thus operates to lift what otherwise would be a prohibition upon the entry of non-citizens into Australia and upon their remaining in Australia. That prohibition is supported by the provisions in the Act for detention and removal of unlawful non-citizens.

64 The defendants' first submission is that the cases may be dismissed on the footing that the relevant dispensing provisions of the Act do not meet the requirement, for attraction of principles of procedural fairness, that the failure to exercise them is not "apt to have a substantial adverse effect on some identifiable right, interest, privilege or legitimate expectation".

65 That submission should not be accepted. It should, however, first be noted that for the reasons given in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*[64] by McHugh and Gummow JJ, Hayne J and Callinan J, the phrase "legitimate expectation" when used in the field of

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63 See *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 591-592 [43]-[44]; [2011] HCA 10.

64 (2003) 214 CLR 1 at 20 [61]-[63], 27-28 [81]-[83], 36-38 [116]-[121], 45-48 [140]-[148]; [2003] HCA 6.

public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded. The phrase, as Brennan J explained in *South Australia v O'Shea*[65], "tends to direct attention on the merits of the particular decision rather than on the character of the interests which any exercise of the power is apt to affect".

66 Rather, the issue presented by the first submission of the defendants is to be considered by asking whether the failure by the Minister to consider the exercise and thus to exercise the dispensing powers in question is apt to affect adversely what is the sufficient interest of a party seeking the exercise of those powers in favour of that party. In *Kioa v West*[66] Brennan J observed and, with respect, we agree:

> "The presumption that the principles of natural justice condition the exercise of a statutory power may apply to any statutory power which is apt to affect any interest possessed by an individual whether or not the interest amounts to a legal right or is a proprietary or financial interest or relates to reputation."

Earlier in those reasons, Brennan J had said[67]:

> "There are interests beyond legal rights that the legislature is presumed to intend to protect by the principles of natural justice. It is hardly to be thought that a modern legislature when it creates regimes for the regulation of social interests – licensing and permit systems, means of securing opportunities for acquiring legal rights, schemes for the provision of privileges and benefits at the discretion of Ministers or public officials – intends that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy should be accorded less protection than legal rights."

Brennan J also made the specific point that the interests which the exercise of a power of deportation are apt to affect are such as tend to attract the protection of the principles of natural justice[68].

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65 (1987) 163 CLR 378 at 411; [1987] HCA 39.

66 (1985) 159 CLR 550 at 619; [1985] HCA 81.

67 (1985) 159 CLR 550 at 616-617.

68 (1985) 159 CLR 550 at 622. See also at 632 per Deane J.

67 The Act in its present form reflects a legislative awareness of what was decided in *Kioa v West*[69]. This is apparent from provisions (eg ss 51A, 357A, 422B) which specify what is said to be an exhaustive statement of the requirements of natural justice, and those (eg ss 500A(11), 501(5), 501A(4)) which specify that the rules of natural justice do not apply to certain decisions.

68 In *Kioa*[70] Brennan J also stated his agreement with the proposition that the interest which tends to attract the protection of the principles of natural justice may be equated with the interest which, if affected, gives "standing" at common law (and, one might add, in equity[71]), to seek a public law remedy. This relationship is illustrated by the point made in the *Offshore Processing Case*[72] that each plaintiff had a real interest in raising the questions to which the declaratory relief went. It may be added that the term "standing" is but "a metaphor to describe the interest required, apart from a cause of action as understood at common law, to obtain various common law, equitable and constitutional remedies"[73]. Further, in federal jurisdiction, questions of standing are subsumed within the constitutional requirement of a "matter"[74]. The present cases, of course, engage the exercise of federal jurisdiction.

69 A non-citizen who is in the position of the plaintiffs and seeks the engagement and favourable exercise of the dispensing powers under the federal statute with which these cases are concerned does so to obtain a measure of relaxation of what otherwise would be the operation upon non-citizens of the visa

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69 (1985) 159 CLR 550.

70 (1985) 159 CLR 550 at 621.

71 See the discussion by Gaudron J in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at 157-158 [57]-[58]; [2000] HCA 5.

72 (2010) 243 CLR 319 at 359 [103]. See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 34-36 [45]-[52], 68-69 [150]-[158]; [2009] HCA 23.

73 *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 174 [15]; [2001] HCA 58.

74 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 35 [50]-[51], 68 [152], 99 [272]-[273]; Stellios, *The Federal Judicature: Chapter III of the Constitution Commentary and Cases* (2010) §7.7.

system; it is the requirements of that system which must be met to lift what otherwise are the prohibitions upon entry and continued presence in Australia. This is sufficient to satisfy the principles just discussed.

70 The defendants cannot succeed solely upon the ground that the failure to engage the exercise in their favour of the dispensing power, is not apt adversely to affect the interests of those seeking to engage the exercise of those powers.

71 There remains the second ground upon which the defendants put their case. This proceeds upon the footing that it is a question of construction whether "a statutory power is conditioned on the observance of the principles of natural justice", so that "[i]t is therefore possible to state … in reference to a given statutory power that its exercise is never conditioned on the observance of the principles of natural justice". The words are those of Brennan J in *Kioa v West*[75].

72 Before further consideration of this branch of the argument, it is necessary to say something more of the structure of the visa system established by the Act and then of the dispensing provisions.

The visa structure

73 Part 2 Div 3 (ss 28-140) of the Act is headed "Visas for non-citizens" and comprises subdivs A-H. Subdivision A (ss 28-43) is headed "General provisions about visas". Section 29(1) is a central provision. It states:

> "*Subject to this Act*, the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following:
>
> (a) travel to and enter Australia;
>
> (b) remain in Australia." (emphasis added)

74 Subdivision AA (ss 44-51) is headed "Applications for visas". Section 45 provides that: "*Subject to this Act* and the regulations, a non-citizen who wants a visa must apply for a visa of a particular class" (emphasis added). The Minister is required by s 47(3) not to consider an application that is not a valid application. Subdivision AC (ss 65-69) is headed "Grant of visas". Section 65 is to be read with s 29(1) and states that if, "[a]fter considering a valid application for a visa", the Minister is satisfied, among other matters, that the criteria

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75 (1985) 159 CLR 550 at 611. Cf at 585 per Mason J.

prescribed by the Act or the regulations have been satisfied, the Minister "is to grant the visa", or, "if not so satisfied, is to refuse to grant the visa".

75 Part 5 (ss 337-393) provides for review by the MRT and Pt 7 (ss 410-473) for review by the RRT of protection visa decisions. It should be emphasised that not all decisions by a delegate of the Minister to refuse to grant a non-citizen a visa will be reviewable by the MRT or the RRT. A decision made in relation to a non-citizen who is not physically present in the "migration zone"[76] when the decision is made will not be reviewable by the RRT (s 411(2)). Decisions refusing other visas which can only be granted if the applicant is outside Australia when the visa is granted will not be reviewable by the MRT[77]. The principles of procedural fairness applicable in such cases which lie outside the RRT and MRT system were considered in *Saeed v Minister for Immigration and Citizenship*[78].

76 However, as will appear, the visa decisions with which the present cases are concerned were within the scope of the RRT or the MRT systems for merits review. Part 5 Div 5 (ss 357A-367), in respect of the MRT, and Pt 7 Div 4 (ss 422B-429A), in respect of the RRT, provided for the procedures for the conduct of reviews by those bodies[79].

The dispensing provisions

Section 48A

77 The effect of s 48A is that a non-citizen who, while in the migration zone has made an application for a protection visa which has been refused, may not make a further application for a protection visa while in the migration zone. However, s 48B confers upon the Minister a power to lift what otherwise would be the bar imposed by s 48A upon a further application by a particular non-citizen. Section 48B states:

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76 Defined in s 5(1) so as primarily to identify the Australian mainland and external Territories.

77 See *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 256-257 [4]-[6]; [2010] HCA 23.

78 (2010) 241 CLR 252.

79 See *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 at 639 [32]; [2009] HCA 37.

"(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 48A does not apply to prevent an application for a protection visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day on which the notice is given.

(2) The power under subsection (1) may only be exercised by the Minister personally.

(3) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(4) A statement under subsection (3) is not to include:

(a) the name of the non-citizen; or

(b) any information that may identify the non-citizen; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned – the name of that other person or any information that may identify that other person."

(5) A statement under subsection (3) is to [be] laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a year – 1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year – 1 January in the following year.

(6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen,

whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances."

Section 195A

78 Division 7 of Pt 2 (ss 188-197AG) is headed "Detention of unlawful non-citizens". An understanding of the scope of s 195A is assisted by the statement in s 195A(1) that the succeeding provisions apply to those in detention under s 189. "Detain" is defined in s 5(1) as meaning to take into "immigration detention" (itself defined in s 5(1)) or to keep or to cause to be kept in such detention.

79 Section 189 is directed to "officers"[80] and lists in sub-ss (1)-(4) four categories of cases where an officer "must", (sub-ss (1) and (2)), or "may", (sub-ss (3) and (4)), detain persons. The *Offshore Processing Case*, as explained earlier in these reasons under the heading "The plaintiffs", dealt with detention of persons found in "an excised off-shore place" (s 189(3)). The present plaintiffs are not such persons. Persons to whom s 189(3) or s 189(4) applies may not apply for a visa. That is the effect of par (c) of s 193(1).

80 These cases concern only unlawful non-citizens detained under s 189(1). Section 189(1) requires an officer who "knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen" (ie a person who does not hold a visa that is in effect[81]), to detain that person. Persons detained under s 189(1) may apply for a visa and engage the review processes in respect of that application. Certain detainees under s 189(1) may apply for a visa which is not a bridging visa or a protection visa only within the periods specified in s 195. However, that temporal restriction is not imposed upon s 189(1) detainees who are identified in pars (a), (b) or (d) of s 193(1). But, there remains the general distinction between s 189(1) and the s 189(3) detainees considered in the *Offshore Processing Case*. This distinction is that of any s 189(1) detainee it can be said that the detainee has or could have applied for a visa and on refusal has engaged or could have engaged the review processes of the Act.

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80 The term "officer" is defined in s 5(1) so as to include certain officers of the Minister's Department, Customs officers, protective service officers and police officers.

81 See ss 13 and 14.

81 Sub-sections (2), (3), (4) and (5) of s 195A state:

"*Minister may grant visa*

(2) If the Minister thinks that it is in the public interest to do so, the Minister may grant a person to whom this section applies a visa of a particular class (whether or not the person has applied for the visa).

(3) In exercising the power under subsection (2), the Minister is not bound by Subdivision AA, AC or AF of Division 3 of this Part or by the regulations, but is bound by all other provisions of this Act.

Minister not under duty to consider whether to exercise power

(4) The Minister does not have a duty to consider whether to exercise the power under subsection (2), whether he or she is requested to do so by any person, or in any other circumstances.

Minister to exercise power personally

(5) The power under subsection (2) may only be exercised by the Minister personally."

82 Sub-section (2) of s 195A is an important provision. It makes it clear that the Minister may grant to any person detained under any branch of s 189 a visa of a particular class, whether or not the detainee has applied for the visa. (Thus, s 195A applies to persons detained under s 189(3), being offshore entry persons whose position was considered in the *Offshore Processing Case*, and who otherwise are denied by s 46A(1) the capacity to engage the visa provisions of the Act.)

83 With respect to s 195A(3), Pt 2 Div 3 subdiv AA deals with the making of applications (and includes s 48A), subdiv AC deals with the granting of visas (and includes s 65), and subdiv AF deals with bridging visas. The Minister is not bound by these subdivisions in exercising the power conferred by s 195A(2). Sub-sections (6), (7) and (8) of s 195A deal with the tabling of statements by the Minister.

Sections 351 and 417

84 The other two cognate provisions whose construction is in issue are ss 351 and 417. They apply respectively to decisions of the MRT and RRT and are in

relevantly indistinguishable terms. Sub-sections (1), (2), (3) and (7) of s 417 state:

> "(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.
>
> (2) In exercising the power under subsection (1) on or after 1 September 1994, the Minister is not bound by Subdivision AA or AC of Division 3 of Part 2 or by the regulations, but is bound by all other provisions of this Act.
>
> (3) The power under subsection (1) may only be exercised by the Minister personally.
>
> ...
>
> (7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any decision, whether he or she is requested to do so by the applicant or by any other person, or in any other circumstances."

Sub-sections (4), (5) and (6) of s 417 deal with tabling requirements and the text need not be set out here.

85 Both ss 351 and 417 empower the substitution of a decision of the relevant Tribunal for a decision more favourable to the applicant, whether or not the Tribunal had the power to make such a decision. Like s 195A, ss 351 and 417 empower the Minister to dispense with the requirements of subdivs AA and AC of Div 5 of Pt 2, and thus with the requirements of a valid visa application to be considered by the Minister. The result is that a visa may be granted to a person who does not satisfy the requirements for the grant of a visa.

86 The powers of the Minister given by these sections differ radically from other powers given by the Minister with respect to the grant of visas. The central difference between these powers and the other powers the Act gives the Minister to deal with visas are that the Act obliges[82] the Minister to consider any valid

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82 Section 47(1).

application for a visa and, if the prescribed conditions are met, the Minister must grant[83] the visa that is sought.

87 These matters of construction are not in dispute. What is in dispute is whether, on the proper construction of the Act, some or all of the dispensing provisions invoked by the plaintiffs excluded any obligation upon the Minister to accord procedural fairness to them.

The plaintiffs' requests

88 The plaintiffs in S10 and S49 sought unsuccessfully the engagement and exercise by the Minister of powers under s 48B and s 417. The plaintiff in S51 unsuccessfully sought the engagement and exercise of the Minister's powers under s 48B and s 195A. The plaintiff in S43 sought unsuccessfully the engagement and exercise of the Minister's power under s 351.

89 In some instances, officers of the Minister's department found that the request made did not meet the criteria in "guidelines" issued by the Minister, and, as stipulated in the guidelines, the request was not referred to the Minister. In the case of the plaintiffs in S10, S49 and S51, the request had been in respect of s 48B, and in the case of the plaintiff in S43 the request had been in respect of s 351. The plaintiffs seek relief quashing those decisions, attributed to the second defendant, the Secretary. In respect of the other requests the Minister himself considered that it would not be in the public interest to intervene and consequently did not exercise the relevant dispensing powers.

The guidelines

90 Three sets of guidelines were material. The first was applicable to the exercise of powers, *inter alia*, under s 351 and s 417, the second to s 48B, and the third to s 195A. The term "guidelines" is apt to mislead; their content is in the form of directions by the Minister. The first and third guidelines state as a purpose the desire of the Minister to inform departmental officers "when to refer a case to me so that I can decide whether to consider exercising such powers in the public interest"; and "to explain the circumstances in which I may wish to consider exercising my public interest powers [under s 351, s 417, s 195A as the case may be]". The s 48B guidelines are said to be for use "when considering whether to forward to the Minister cases that the Minister may wish to consider

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83 Section 65.

when using the ministerial non-compellable and non-delegable power [under s 48B]".

91 The terms of the guidelines provide criteria to distinguish between requests which will not be referred to the Minister and those which may be referred to the Minister for consideration whether to exercise the relevant power. By these directions the Minister has determined in advance the circumstances in which he or she wishes to be put in a position to consider exercise of the discretionary powers by the advice of department officers. It was within the competence of the Minister to do so[84]. The effect, as the Commonwealth Solicitor-General put it in oral argument, is that the adoption of the guidelines by the Minister represents decisions by the Minister that if a case is assessed as not meeting the guidelines, the Minister does not wish to consider the exercise of the dispensing power, and if a case is assessed favourably then the Minister does wish to consider that exercise.

The constitutional issue

92 The plaintiffs made a submission on the footing that the inquiries made in the course of the assessment processes were divorced from any authority conferred by the Act. The effect of the submission was that (a) the only other source of authority was the executive power identified in s 61 of the Constitution, and (b) an obligation to act with procedural fairness attended the exercise of that power in making the inquiries in the course of the assessment processes.

93 The issues which then could arise were adverted to by Gaudron and Gummow JJ in *Re Refugee Tribunal; Ex parte Aala*[85], but it was unnecessary to pursue them further in that case. Likewise in the present cases, because, as indicated above, the assessment processes required by the Minister under the guidelines were not divorced from the exercise of authority conferred by statute. Accordingly, it is unnecessary to embark upon consideration of the submissions in opposition to the plaintiffs which were put by the defendants or upon those of South Australia in its intervention.

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84 *Bedlington v Chong* (1998) 87 FCR 75 at 80-81; *Raikua v Minister for Immigration* (2007) 158 FCR 510 at 522-523 [63]-[66]. No question arises of the application of an "unpublished" Ministerial policy or guidelines inconsistent with "published" policy or guidelines; cf *R (WL (Congo)) v Secretary of State for the Home Department* [2012] 1 AC 245.

85 (2000) 204 CLR 82 at 101 [42]; [2000] HCA 57.

94 However, by means of the guidelines it is not possible to obviate the need to observe any requirements of procedural fairness if, on the proper construction of the Act, such requirements do arise. To that subject we now turn.

The submissions

95 The plaintiffs submit that the content of the obligation to afford procedural fairness in these cases included the provision of an opportunity to be heard in relation to adverse material and in relation to any proposed departure from published guidelines, and on any adverse conclusions not obviously open on the known material, together with a prohibition upon failure to consider clearly articulated claims supported by evidence.

96 As indicated earlier in these reasons[86] under the heading "Sufficient interest", on other grounds the defendants submitted that such questions did not arise. The remaining ground is that the extraordinary nature of the dispensation provisions, with which these cases are concerned, and their exceptional place within the scheme of the Act respecting visas, provide a basis to exclude what otherwise might be an implication of procedural fairness. For the reasons which follow, that submission by the defendants should be accepted.

Procedural fairness

97 The principles and presumptions of statutory construction which are applied by Australian courts, to the extent to which they are not qualified or displaced by an applicable interpretation Act, are part of the common law. In Australia, they are the product of what in *Zheng v Cai*[87] was identified as the interaction between the three branches of government established by the Constitution. These principles and presumptions do not have the rigidity of constitutionally prescribed norms, as is indicated by the operation of interpretation statutes, but they do reflect the operation of the constitutional structure in the sense described above. It is in this sense that one may state that "the common law" usually will imply, as a matter of statutory interpretation, a

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86 At [71].

87 (2009) 239 CLR 446 at 455-456 [28]; [2009] HCA 52. See also *Momcilovic v The Queen* (2011) 85 ALJR 957 at 984 [38], 1009 [146], 1033 [280], 1086 [545]; 280 ALR 221 at 239-240, 274, 306, 378; [2011] HCA 34; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 591-592 [43]-[44].

condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power[88]. If the matter be understood in that way, a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive.

98 It is true, as noted earlier in these reasons[89], that there are some provisions in the Act which explicitly exclude the operation of the rules of natural justice. That is a matter to be taken into account in deciding whether or not, upon their proper construction, the dispensing provisions with which these cases are concerned are conditioned upon observance of the requirements of natural justice in favour of persons in the position of the plaintiffs.

99 However, those dispensing provisions also have the following significant characteristics:

(i) The powers they confer may be exercised by the Minister personally and not otherwise; that is to say, unlike many other decisions respecting the issue of visas, the power may not be delegated by the Minister under s 496 of the Act[90].

(ii) By the tabling requirements the Minister is rendered accountable in an immediate sense to each House of the Parliament for exercises of the dispensing powers.

(iii) The exercise of the powers is not preconditioned by the making of any request by any other person, and, if a request be made there is no requirement to consider it.

(iv) The exercise of the powers is preconditioned by (a) the Minister having decided to consider whether to exercise the power in question, and (b) the

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88 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 100-101 [39]-[41].

89 At [66]-[67].

90 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 448-449 [175]-[176]; [2001] HCA 51.

Minister thinking that: "It is in the public interest" to exercise it; but the Minister is not obliged to take either step[91].

(v) The expression "in the public interest" can have no fixed and precise content and involves a value judgment often to be made by reference to undefined matters[92]. Here the legislative supposition upon which the dispensing powers are conferred is that there will be cases in which the requirements which otherwise control the administration of the Act are not to dictate a particular outcome.

(vi) Further, as to (iv), while the personal circumstances of an individual may be taken into account, they are not a mandatory relevant consideration.

(vii) Rather, as the Commonwealth Solicitor-General submitted, individual interests and rights are dealt with by provisions of the Act regulating applications and providing for review of decisions concerning visas.

(viii) The premise for the operation of s 48B is that there has been the refusal of a protection visa (with attendant RRT engagement) which will be final unless the Minister lifts the bar upon further applications which is lowered by s 48A; the premise for the engagement of either s 351 or s 417 is that on a merits review the relevant tribunal has determined that there is no right to the visa sought; leaving aside the categories of offshore entry persons to whom sub-ss (3) and (4) of s 189 apply, the premise for the engagement of s 195A in present cases was that the person concerned either had unsuccessfully applied for a visa or, at least, while in detention, could have done so.

(ix) Against that background, it is not surprising that the focus of the four dispensation sections is upon the Minister's view of the public interest rather than upon the satisfaction of conditions for the issue of visas.

Conclusions and orders

100 The cumulative significance of the matters referred to above in (i)-(ix) is to disclose a situation akin to that identified by Brennan J in *South Australia v*

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91 *Offshore Processing Case* (2010) 243 CLR 319 at 350 [70].

92 *Osland v Secretary to Department of Justice [No 2]* (2010) 241 CLR 320 at 329 [13], 354 [82], 356 [92]; [2010] HCA 24.

O'Shea[93], namely where a senior official standing at the peak of the administration of the statute is not required to give an opportunity for a hearing in every case affecting an individual who has had an opportunity of a merits review in the course of the administrative process. Upon their proper construction and in their application to the present cases, the dispensing provisions are not conditioned on observance of the principles of procedural fairness. In particular, there was no requirement to provide to the plaintiffs the opportunities to be heard which they assert in their submissions. The use in the provisions of the Act in question here of language emphatic both of the distinctive nature of the powers conferred upon the Minister (as personal, non-compellable, "public interest" powers), and of the availability of access to the exercise of those powers only to persons who have sought or could have sought, but have not established their right to, a visa is of determinative significance. It reveals the "necessary intendment" referred to in the *Offshore Processing Case*[94] that the provisions are not attended by a requirement for the observance of procedural fairness.

101 The result is that each application to this Court should be dismissed. The plaintiffs accept that if, as is the case, they fail upon the statutory construction issue, there is no reason why costs should not follow the event. Accordingly, each application should be dismissed with costs.

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93 (1987) 163 CLR 378 at 410.

94 (2010) 243 CLR 319 at 352 [74].

102 HEYDON J. These cases concern ss 48B, 195A, 351 and 417 of the *Migration Act* 1958 (Cth) ("the Act"). Those sections give certain powers to the first defendant ("the Minister"). Below, those sections will be called the "empowering provisions". The powers they confer concern unsuccessful visa applicants and, in the case of s 195A only, persons who could apply for a visa. The Minister can exercise the powers to grant visas (ss 195A, 351 and 417), or to lift a bar on applying for a visa (s 48B), if the Minister thinks it is in the public interest to do so. It is possible to analyse the exercise of those powers as involving two steps. The first step is a decision by the Minister about whether or not to *consider* exercising the relevant power. If the Minister does decide to consider exercising the power, the second step is a decision by the Minister as to whether or not it should *actually be exercised*.

The crucial question

103 These cases raise one crucial question. That question concerns the role of officers of the Minister's Department in deciding whether or not to refer to the Minister requests for a favourable exercise of the powers conferred by the empowering provisions. In these cases, each plaintiff submitted a request of this kind. Officers of the Minister's Department decided not to forward those requests to the Minister. The crucial question is: were those officers obliged to afford the plaintiffs procedural fairness in conducting their inquiries?

Non-crucial questions

104 There are other questions in these cases. They include the following. Do the empowering provisions involve the exercise of a statutory power that has what the defendants called a "substantial adverse effect on some identifiable right, interest, privilege or legitimate expectation"? Were the inquiries made by the officers of the Minister's Department made under and for the purposes of the Act? Or were they made under s 61 of the Constitution? Did the officers in fact deny procedural fairness to the plaintiffs? It is not necessary to decide these questions in the present cases.

Preconditions to the empowering provisions

105 The plaintiffs accepted that there are statutory preconditions to the exercise by the Minister of the powers that the empowering provisions confer.

106 Under s 48B, it is a precondition that an application for a protection visa had been refused. Under s 195A, it is a precondition that a person to whom a visa may be granted is a person in detention under s 189 (whether or not the person has applied for the visa). Under s 351(1), it is a precondition that an unsuccessful application for merits review had been made to the Migration Review Tribunal. Under s 417(1), it is a precondition that an

unsuccessful application for merits review had been made to the Refugee Review Tribunal.

107 Thus in the circumstances of the four plaintiffs before this Court, no occasion for the Minister to consider exercising the powers conferred by the empowering provisions could arise unless the relevant plaintiff either had unsuccessfully applied for a visa under the Act, or could have applied for a visa but had not done so. The Act enabled each plaintiff to apply for a visa. Each plaintiff did apply for a visa. Each plaintiff's application was considered by departmental officers on its merits. Each application was refused. Each plaintiff applied to either the Migration Review Tribunal or the Refugee Review Tribunal for review of the relevant departmental officer's decision on the merits. Each of those applications failed. Each plaintiff then applied to either the Federal Magistrates Court or the Federal Court of Australia for judicial review. Each of those applications also failed. Each plaintiff then had a right of appeal either to the Federal Court of Australia or to the Full Federal Court of Australia. Three of them did appeal. Their appeals were unsuccessful. One of those three appellants applied for special leave to appeal to this Court. That application failed. Each of the plaintiffs took all or most of the steps they could take before requesting the Minister to exercise the powers conferred by the empowering provisions.

The conventional statutory regime and the empowering provisions

108 There are numerous contrasts between the conventional statutory regime through which each plaintiff initially attempted to gain a visa and the regime created by the empowering provisions which they are now invoking. It is convenient to mention eight of them.

109 *Applications for visas.* First, the Act makes specific provision for a person seeking a visa to apply for one. Indeed, s 45 imposes a duty on a non-citizen seeking a visa to apply for a visa of a particular class. And ss 45A, 45B, 45C and 46 create criteria to be satisfied before an application can be valid. On the other hand, the Act makes no specific provision for persons seeking a favourable exercise of the Minister's powers under the empowering provisions.

110 *Duty to consider and decide applications.* Secondly, s 47(1) of the Act provides that the making of a valid application for a visa creates a duty on the Minister to consider that application. And s 65 creates a duty to accept or reject the application. Thus s 65(1)(a) provides that after "considering a valid application for a visa, the Minister", subject to being satisfied in relation to various positive and negative criteria, "is to grant the visa". Section 65(1)(b) provides that "if not so satisfied", the Minister "is to refuse to grant the visa." On the other hand, the empowering provisions create no duty to make a decision one way or the other. They do not even create a duty to consider whether to make a decision. Thus s 48B(1) begins: "If the Minister thinks that it is in the public interest to do so, the Minister may …". And s 48B(6) provides:

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

Sections 195A(2) and (4), 351(1) and (7) and 417(1) and (7) create similar discretions for the Minister to consider whether to exercise the power.

111 *Delegation.* Thirdly, the Minister's duty under s 65 may be delegated. But the powers conferred by the empowering provisions can only be exercised by the Minister personally: ss 48B(2), 195A(5), 351(3) and 417(3). This suggests that the latter powers are powers of an exceptional, last resort, or residual kind.

112 *Natural justice.* Fourthly, pursuant to s 51A(1), the Minister's decision under s 65 is regulated by "an exhaustive statement of the requirements of the natural justice hearing rule" which was "exhaustive … in relation to the matters it deals with". That statement is found in Pt 2 Div 3 subdiv AB. The Act makes no provision whatsoever for a natural justice hearing rule in relation to either the Minister's decisions under the empowering provisions or the decisions of Departmental officers about referring requests to exercise those powers to the Minister.

113 *Objective fact/public interest.* Fifthly, the statutory regime governing applications for visas, which each plaintiff relied on before seeking a favourable exercise of the powers conferred by the empowering provisions, calls for an assessment of whether, as a matter of objective fact, an applicant meets the criteria for grant of the visa that he or she is seeking. But the empowering provisions do not call for assessments of objective fact in the same way. Instead their exercise or non-exercise turns on whether "the Minister thinks that it is in the public interest" to exercise them. That is in sharp contrast with, for example, the requirement that an applicant for a protection visa have a well-founded fear of persecution for a reason stated in the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees ("the Convention"). There, the question is not whether the ministerial delegates and members of the Refugee Review Tribunal charged with answering that question "think" that an applicant has such a fear. The question is whether that applicant actually has that fear. That is a determinate criterion. The criterion of what the Minister thinks is in the public interest is considerably wider, much more indeterminate and very impressionistic.

114 The emancipation of the Minister in exercising the powers to grant visas under ss 195A, 351 and 417 is made explicit by, respectively, ss 195A(3), 351(2) and 417(2). Those sub-sections provide that in exercising the powers under ss 195A, 351 and 417 the Minister is not bound by the duty created in s 65 to be satisfied of various criteria before granting a visa. Further, the fact that under the

empowering provisions the Minister is to attend to the public interest only means that it is open to the Minister to exclude any consideration of an individual's interests where that interest is not reflected in the public interest. Perhaps the empowering provisions go so far as to require this of the Minister; but however that may be, they do not oblige the Minister to take that type of individual interest into account. Section 65, on the other hand, is centred on a visa applicant's personal position. That contrast points against any requirement that the Minister must afford an applicant procedural fairness in exercising the powers under the empowering provisions. It also points against any requirement that officials deciding whether to refer to the Minister requests to exercise those powers must afford applicants procedural fairness. The empowering provisions do not assume that the Minister or the officials owe any duty to potential beneficiaries of the exercise of the Minister's powers. Section 65, and the provisions dealing with review of s 65 decisions, on the other hand, do.

115 *Merits review.* Sixthly, an applicant for a visa whose application is rejected under s 65 has, as a general rule, a right to seek merits review from the Migration Review Tribunal or the Refugee Review Tribunal. The Act confers no right to merits review of the Minister's decisions under the empowering provisions.

116 *Natural justice on merits review.* Seventhly, in relation to merits review by the Migration Review Tribunal, s 357A(1) provided that Pt 5 Div 5 was to be taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it dealt with. And in relation to merits review by the Refugee Review Tribunal, s 422B(1) provided that Pt 7 Div 4 was to be taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it dealt with. There was obviously no equivalent in relation to merits review of the Minister's decisions under the empowering provisions, for there was no merits review.

117 *Natural justice and the courts.* Eighthly, when judicial review of the decisions of the Migration Review Tribunal and the Refugee Review Tribunal is undertaken by the Federal Magistrates Court or the Federal Court of Australia, it is obvious that those courts, being courts, are obliged to exercise their respective jurisdictions, and are obliged to do so in accordance with procedural fairness. The same position applies to appeals from decisions of the Federal Magistrates Court to the Federal Court of Australia and appeals from decisions of the Federal Court of Australia to the Full Court of the Federal Court of Australia. And it also applies to applications for special leave to appeal to this Court, and to appeals to this Court. There is a sharp contrast with the position of the Minister under the empowering provisions.

Preliminary conclusion

118 In short, there is a gulf between the conventional statutory regime and the empowering provisions. The conventional statutory regime turns on an application which the Minister is obliged to consider and decide, merits review, judicial review and appeal. The empowering provisions turn on the discretionary invocation of power by the Minister, not reviewable under the Act itself. Under the conventional statutory regime, the Act creates a duty to consider, a duty to decide, a duty to afford forms of procedural fairness, and a duty to apply concrete criteria. The empowering provisions create only powers to soften the rigours an adverse outcome of the former regime might create – powers depending on much vaguer and more impressionistic criteria, which are to be invoked when all else has failed. The terms in which the empowering provisions are cast and the circumstances in which the Minister's powers are to be exercised, when compared to s 65 and the provisions giving merits review, suggest that no rights to procedural fairness exist in relation to either the Minister's powers or to the activities of officials of the Minister's Department in advising the Minister whether to consider to exercise those powers, or to exercise those powers. Subject to the matters to be discussed in the next two paragraphs, the plaintiffs must therefore fail.

119 *Statutory power/executive power.* The parties were in controversy about whether the inquiries made on behalf of the Minister preparatory to his decision to consider whether to exercise one of the relevant powers are to be viewed as authorised by the Act, or are instead to be viewed as derivable from the executive power of the Commonwealth, and as operating alongside but not under the Act. That controversy need not be dealt with. The statutory structure excludes any duty to give procedural fairness on the part of those who conduct preliminary inquiries in respect of requests that there be an exercise of ministerial powers under the empowering provisions. The application of such a duty to activities undertaken by officials of the Minister's Department before the Minister considers whether to exercise those powers would sit ill with the powers themselves. The structure of the Act suggests that the powers which the empowering provisions confer on the Minister need not be exercised in compliance with the rules of procedural fairness. It would be strange if the activities of officials of the Minister's Department preparatory to the Minister either deciding whether to consider exercising those powers or deciding to exercise them would have to comply with the rules of procedural fairness. Hence even if the source of the officials' powers lies outside the Act, the terms of the Act point against the application of procedural fairness.

Distinguishable authority

120 The plaintiffs contended that their cases were analogous to *Plaintiff M61/2010E v The Commonwealth*[95].

121 There is no relevant analogy. That case concerned offshore entry persons. This case does not. That case concerned a ministerial power under s 46A of the Act and a ministerial power under s 195A in relation to offshore entry persons. This case does not. Section 46A(1) created a bar on offshore entry persons applying for protection visas in the ordinary course. Section 46A(2), however, gave power to the Minister to lift that bar if it was thought to be in the public interest to do so. In that case, the defendants submitted that Australian legislation and case law was not binding on those who had advised the Minister in relation to s 46A(2). The Court held that Australian law, including rules of procedural fairness, applied to the Minister's decision whether to lift the ban on offshore entry persons applying for protection visas in the ordinary course. If the submission of the defendants in that case had been sound, Australia would have been in breach of international obligations under the Convention. In this case, however, no such problem exists. There is no equivalent to s 46A(1) applying to preclude the plaintiffs from ever applying for protection visas. The plaintiffs not only could but did proceed along the stages of applying for protection visas, merits review, judicial review, and, in some instances, appeal, at all of which stages Australian legislation and case law applied.

Orders

122 The plaintiffs' arguments fail. The applications should be dismissed with costs.

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95 (2010) 243 CLR 319; [2010] HCA 41.