HIGH COURT OF AUSTRALIA

KIEFEL, BELL, GAGELER, KEANE AND GORDON JJ

MINISTER FOR IMMIGRATION AND BORDER PROTECTION APPELLANT

AND

WZARH & ANOR RESPONDENTS

Minister for Immigration and Border Protection v WZARH
[2015] HCA 40
4 November 2015
S85/2015

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

G T Johnson SC with B D Kaplan for the appellant (instructed by Sparke Helmore Lawyers)

S E J Prince with P W Bodisco for the first respondent (instructed by Thomas McLoughlin Solicitor)

Submitting appearance for the second respondent

CATCHWORDS

Minister for Immigration and Border Protection v WZARH

Administrative law – Procedural fairness – Refugee Status Assessment – Independent Merits Review ("IMR") – Where first reviewer conducted interview with first respondent but did not complete IMR – Where second reviewer completed IMR without interview but with regard to transcript and audio recording of first reviewer's interview – Where first respondent not informed of change in identity of reviewer – Where second reviewer formed adverse view of first respondent's credibility – Whether first respondent denied procedural fairness.

Words and phrases – "legitimate expectation", "opportunity to be heard", "oral hearing", "procedural fairness", "unfairness".

1 KIEFEL, BELL AND KEANE JJ. The respondent[1] is a national of Sri Lanka of Tamil ethnicity. On 7 November 2010, he entered Australia by boat arriving at Christmas Island. At that time, Christmas Island was an "excised offshore place" and the respondent was an "offshore entry person", as then defined in s 5(1) of the *Migration Act* 1958 (Cth) ("the Act"). As the respondent did not hold a visa to enter Australia, he was an unlawful non-citizen as defined in s 14 of the Act, and so, upon his arrival at Christmas Island, he was taken into detention pursuant to s 189(3) of the Act.

2 Because the respondent was an offshore entry person, s 46A of the Act as it then stood prevented him from making a valid application for a Protection (Class XA) visa. On 21 January 2011, he requested a Refugee Status Assessment ("RSA") as to whether he was a person to whom Australia owed protection obligations under the Refugees Convention[2]. This process was described in this Court's decision in *Plaintiff M61/2010E v The Commonwealth*[3].

3 In response to the respondent's request, a delegate of the appellant, the Minister for Immigration and Border Protection ("the Minister"), interviewed the respondent in respect of his claim to refugee status. The respondent claimed that he was owed protection as he feared harm at the hands of the Eelam People's Democratic Party and the Sri Lankan authorities because of his Tamil ethnicity, his perceived support of the Liberation Tigers of Tamil Eelam, and his having campaigned in Sri Lanka for a particular politician.

4 On 29 April 2011, the Minister's delegate made an adverse assessment of the respondent's claim to refugee status. On 20 May 2011, the respondent requested an Independent Merits Review ("IMR") of the RSA.

5 On 16 January 2012, the respondent was interviewed by an independent merits reviewer. It will be convenient, though strictly speaking inaccurate[4], to refer to this individual as the First Reviewer. At this interview, the First Reviewer told the respondent that she would "undertake a fresh re-hearing of [his] claims" and "mak[e] a recommendation as to whether [he is] found to be a

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1 The second respondent has filed a submitting appearance. It is, therefore, convenient to refer to the first respondent to the appeal as "the respondent".

2 The Convention relating to the Status of Refugees (1951) as amended by the Protocol relating to the Status of Refugees (1967).

3 (2010) 243 CLR 319 at 343 [41]-[44]; [2010] HCA 41.

4 Because this individual did not complete a review of the RSA.

refugee", and that "this will be given to the Minister … for consideration." She concluded the interview by telling the respondent that she would consider "all the information that [he has] provided" and "any further articles or information", then "make [her] recommendation."

6 For undisclosed reasons, the First Reviewer became unavailable to complete the IMR. At some point after 16 January 2012, and unbeknown to the respondent, another individual assumed responsibility for the completion of the IMR. This individual is the second respondent to this appeal. It will be convenient to refer to him as the Second Reviewer.

7 On 25 July 2012, the Second Reviewer found that the respondent did not meet the criteria for a Protection (Class XA) visa as set out in s 36(2) of the Act and, accordingly, recommended that the respondent not be recognised by the Minister as a person to whom Australia owed protection obligations. The Second Reviewer did not interview the respondent, but based his decision on a consideration of written materials, including the respondent's original applications, a transcript of his interview with the departmental officer on Christmas Island, the submissions made by his advisors on his behalf, country information, and a recording and transcript of his interview with the First Reviewer[5].

8 The Second Reviewer formed an adverse view of the credibility of the respondent. In particular, the Second Reviewer rejected what he described as "a central plank of [the respondent's] fear of persecution", namely his association with the particular politician, on the basis of inconsistencies in his account of his activities in various election campaigns in Sri Lanka. Importantly, the Second Reviewer did not accept "that this kind of error was due to memory lapse or confusion, nor indeed to the effects of detention". Having formed this strong adverse view of the respondent's credibility, the Second Reviewer proceeded to find that:

> "there is not a real chance that [the respondent] would be persecuted, now or in the reasonably foreseeable future for reasons of political opinion … ethnicity or membership of a particular social group … [and] that his fear of persecution for a Convention reason is not well-founded."

9 On 20 September 2012, the respondent filed an application in the Federal Circuit Court for judicial review of the decision of the Second Reviewer. On

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5 *WZARH v Minister for Immigration and Border Protection* [2013] FCCA 1608 at [5].

14 October 2013, the primary judge (Judge Raphael) dismissed the respondent's application[6]. The respondent then appealed to the Full Court of the Federal Court of Australia. On 20 October 2014, the Full Court allowed the appeal and declared that the Second Reviewer arrived at his decision in breach of the rules of procedural fairness.

The reasons of the primary judge

10 Before the primary judge, the respondent argued that the Second Reviewer's failure to conduct an interview with him as part of the IMR meant that he was denied procedural fairness[7]. In support of that argument, the respondent referred to the fact that because the Second Reviewer did not conduct an interview, the Second Reviewer did not sight certain scars that the respondent claimed were evidence of torture to which he had been subjected[8].

11 The Minister relied upon the general proposition, supported by the decision of the Full Federal Court in *Chen v Minister for Immigration and Ethnic Affairs*, that[9]: "It is beyond argument that the rules of natural justice do not mandate in all cases an oral hearing for the person affected." The primary judge upheld the Minister's submission, holding that it was not procedurally unfair for the Second Reviewer to make his recommendation without conducting an interview with the respondent[10].

12 In this regard, the primary judge concluded that questions as to the respondent's credibility could properly be resolved against him by the Second

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6 *WZARH v Minister for Immigration and Border Protection* [2013] FCCA 1608.

7 *WZARH v Minister for Immigration and Border Protection* [2013] FCCA 1608 at [11].

8 *WZARH v Minister for Immigration and Border Protection* [2013] FCCA 1608 at [12].

9 (1994) 48 FCR 591 at 597.

10 *WZARH v Minister for Immigration and Border Protection* [2013] FCCA 1608 at [16].

Reviewer by reference to the documents and audio evidence available to him[11]. The primary judge said[12]:

> "This is not a case that [sic] a matter is considered solely on the papers. There had been a hearing. The [Second Reviewer] had heard the tape of that hearing and read the transcript."

13 The primary judge also rejected the respondent's submission that the IMR process lacked procedural fairness because the Second Reviewer had failed to take into account a relevant consideration, namely the scars on the respondent's arm[13].

The reasons of the Full Court

14 The respondent appealed to the Full Court on the basis that the primary judge erred in failing to hold that the respondent had been denied procedural fairness. The two grounds advanced in support of that contention were that the Second Reviewer did not conduct an interview with the respondent; and that visible scarring on the respondent's arm (a relevant consideration) was not taken into account by the Second Reviewer in making his decision.

15 The Full Court (Flick and Gleeson JJ in a joint judgment, Nicholas J in a separate concurring judgment) rejected the second ground, but upheld the first ground and allowed the appeal[14]. The second ground has not been pursued further, and it is unnecessary to say any more about it.

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11 *WZARH v Minister for Immigration and Border Protection* [2013] FCCA 1608 at [16].

12 *WZARH v Minister for Immigration and Border Protection* [2013] FCCA 1608 at [16].

13 *WZARH v Minister for Immigration and Border Protection* [2013] FCCA 1608 at [20], [21].

14 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 133 [5].

16 Flick and Gleeson JJ accepted that there is no universal requirement for an oral hearing before an administrative decision is made[15]. Their Honours said that[16]:

> "Subject to any statutory provision to the contrary, any conclusion as to whether the rules of natural justice require an oral opportunity to be heard can perhaps be put no more specifically than by inquiring whether a fair opportunity to be heard requires such a hearing."

17 Before pursuing that inquiry, however, their Honours observed that the respondent had a legitimate expectation that the person by whom he had been interviewed would be the person to make the recommendation to the Minister[17]. Their Honours said that, although the notion of "legitimate expectation" as the criterion for an entitlement to procedural fairness from an administrative decision-maker has been criticised, it remains a useful tool when considering "what must be done to give procedural fairness to a person whose interests might be affected by an exercise of power"[18]. In their Honours' view, the respondent had been put in a position where he believed that he would have an opportunity to make oral submissions to the decision-maker, and, without warning or opportunity to object, he was denied that opportunity[19].

18 Flick and Gleeson JJ noted that, in the present case, unlike in *Abujoudeh v Minister for Immigration and Multicultural Affairs*[20] and *MZXDH v Minister for Immigration and Multicultural Affairs*[21], on which the Minister relied, the

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15 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 134 [9].

16 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 136 [14].

17 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 137 [17].

18 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 138 [18] citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 39; [1990] HCA 21.

19 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 141 [25].

20 (2001) 115 FCR 179.

21 [2007] FCA 719.

respondent had not been informed of the change in the identity of the person making the recommendation to the Minister, so that he had no reason to believe that the recommendation would be made by anyone other than the First Reviewer, by whom he had been interviewed[22].

19 Their Honours concluded that[23]:

> "If for whatever reason a person conducting an independent merits review becomes unavailable, a claimant is at the very least entitled to be heard before his legitimate expectation is defeated, by being given an opportunity to make submissions as to how the review process should continue."

20 Their Honours also held that this was not a case in which an opportunity to make submissions was "little more than a formality"[24]. Their Honours said[25]:

> "Listening to a tape recording or reading a transcript is no substitute for extending to [the respondent] the opportunity which he was first given and which he was led to believe he would be given, namely an opportunity to impress upon the person who made the recommendation the merits and genuineness of his claims."

21 Nicholas J held that, because the respondent was not told of the change in the identity of the decision-maker, he was denied an opportunity to make submissions as to how the IMR should proceed; and this was unfair[26]. Nicholas J rejected the Minister's submission that the outcome would not have been different even if the Second Reviewer had conducted an oral hearing with the respondent, because the respondent's demeanour at the interview might have led

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22 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 140 [23].

23 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 141 [24].

24 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 141 [28].

25 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 142 [28].

26 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 146 [48], 148-149 [57].

the Second Reviewer to resolve questions of credibility in the respondent's favour[27].

The appeal to this Court

22 On 17 April 2015, Hayne and Gageler JJ granted the Minister special leave to appeal to this Court.

The Minister's submissions

23 The Minister seized upon the use by Flick and Gleeson JJ of the concept of "legitimate expectation" in the course of their consideration of whether there had been a denial of procedural fairness. The Minister submitted that their Honours treated the notion of "legitimate expectation" as the basis for an entitlement to a particular form of procedure including an interview. In this regard, the Minister placed particular reliance on this Court's decision in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*[28].

24 The Minister submitted that the Full Court erred in concluding that the respondent had been denied procedural fairness without first establishing why the denial of a second interview was procedurally unfair.

The respondent's submissions

25 The respondent submitted that Flick and Gleeson JJ did not apply the concept of "legitimate expectation" as the sole basis for their conclusion that the respondent had been denied procedural fairness[29].

26 The respondent submitted that all members of the Full Court correctly concluded that he was denied the opportunity to advance his case afforded by an interview with the person who actually made the recommendation to the Minister; and that the opportunity was denied without his being heard on the question. This was said to be sufficient reason to conclude that he had been denied procedural fairness.

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27 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 147-148 [51]-[54].

28 (2003) 214 CLR 1; [2003] HCA 6.

29 cf *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 141 [25]-[26].

27 The respondent's submissions should be accepted.

Legitimate expectation

28 The use of the concept of "legitimate expectation" as the criterion of an entitlement to procedural fairness in administrative law has been described in this Court as "apt to mislead"[30], "unsatisfactory"[31] and "superfluous and confusing"[32]. In *Lam*, Hayne J observed that the concept "poses more questions than it answers", such as "[w]hat is meant by 'legitimate'?" and "[i]s 'expectation' a reference to some subjective state of mind or to a legally required standard of behaviour?" and "whose state of mind is relevant?" and "[h]ow is it established?"[33]. Hayne J concluded that "reference to expectations, legitimate or not, is unhelpful"[34].

29 More recently, in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*[35], Gummow, Hayne, Crennan and Bell JJ referred to the discussion of the concept by four members of the Court in *Lam*[36], and said that:

> "the phrase 'legitimate expectation' when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded."

30 The position has been made sufficiently clear that it is not necessary for this Court to engage again in discussion of the concept of "legitimate

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30 *South Australia v O'Shea* (1987) 163 CLR 378 at 411; [1987] HCA 39; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 659; [1990] HCA 22.

31 *South Australia v O'Shea* (1987) 163 CLR 378 at 417.

32 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 55.

33 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 38 [121].

34 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 36 [111].

35 (2012) 246 CLR 636 at 658 [65]; [2012] HCA 31.

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

expectation" in administrative law or to trace its progress from its controversial origins[37], to its tentative acceptance in Australian law[38], to its rejection[39] as a touchstone of the requirement that a decision-maker accord procedural fairness to a person affected by an administrative decision. The "legitimate expectation" of a person affected by an administrative decision does not provide a basis for determining whether procedural fairness should be accorded to that person or for determining the content of such procedural fairness. It is sufficient to say that, in the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions. Recourse to the notion of legitimate expectation is both unnecessary and unhelpful. Indeed, reference to the concept of legitimate expectation may well distract from the real question; namely, what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made.

31 It is to be noted that Flick and Gleeson JJ concluded that the "fundamental change to the administrative process being pursued without [the respondent] being alerted to the change"[40] was a failure by the Second Reviewer to observe the requirements of procedural fairness[41]. This conclusion was a sufficient basis for their Honours' decision, which might have been more readily apparent had

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37 *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 at 170-171; *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 404; [1977] HCA 26; *R v Secretary of State for the Home Department; Ex parte Khan* [1984] 1 WLR 1337; [1985] 1 All ER 40; *R v Inland Revenue Commissioners; Ex parte Preston* [1985] AC 835 at 852, 864-867; *R v Secretary of State for the Home Department; Ex parte Ruddock* [1987] 1 WLR 1482 at 1497; [1987] 2 All ER 518 at 531; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 22-23, 39.

38 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291-292, 301-302, 305; [1995] HCA 20.

39 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 20-23 [61]-[70], 27-28 [81]-[83], 36-38 [116]-[121], 45-48 [140]-[148]; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 658 [65].

40 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 142 [29].

41 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 144 [38].

their Honours not been disposed to deploy the concept of legitimate expectation in their analysis of the issue.

32 The criticism that the Minister made of the reasoning of Flick and Gleeson JJ cannot be made of the reasoning of Nicholas J. His Honour's analysis proceeded on the basis that the issue was whether the respondent had been denied procedural fairness by the alteration in the review process which occurred without his being informed, and as a result of which he lost the possibility of the advantage he may have gained from a consideration of his demeanour at interview[42].

The review process was unfair

33 In considering whether the respondent was denied procedural fairness so as to vitiate the recommendation of the Second Reviewer, two points may be made at the outset. First, it was common ground that the IMR process was required to accord the respondent procedural fairness even though the decision-making process proceeded under administrative guidelines[43]. Secondly, there is no general rule that procedural fairness requires an administrative decision-maker to afford a person affected by the decision an oral hearing in every case. Whether an oral hearing is required in order to accord procedural fairness to a person affected by an administrative decision depends on the practical requirements of procedural fairness in the circumstances of the case[44].

34 In this regard, this Court's decision in *Lam* does not support the Minister's challenge to the decision of the Full Court. In *Lam*, the applicant, who held a transitional visa, was notified that consideration was being given to cancelling his visa. In his response to that notification, he submitted that the best interests of his two children, who were Australian citizens, would be adversely affected if his visa were cancelled. Attached to his submission was a letter from his

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42 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 148-149 [57].

43 cf *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.

44 *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 516; [1977] HCA 39; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 12-13 [34], 14 [38], 34-35 [105]-[106], 36 [113]-[114], 38-39 [122], 45 [140]; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 160-162 [26]-[29]; [2006] HCA 63.

children's carer. A departmental officer then wrote to the applicant requesting the contact details of the carer. The letter stated that the Department wished to contact the carer to assess the impact that cancellation of the applicant's visa would have on his children. The applicant provided the contact details, but no departmental officer made contact with the carer. The Minister cancelled the applicant's visa, and the applicant applied for certiorari to quash the Minister's decision on the basis that he had been denied procedural fairness as a result of the Department's failure to contact the carer and to notify the applicant of that fact. The application for certiorari was refused.

35 In *Lam*, it was held[45] that a failure by the decision-making authority to adhere to a foreshadowed line of inquiry may, but will not necessarily, amount to a denial of procedural fairness. The manner in which any given administrative process is conducted may generate expectations on the part of the person affected as to how he or she should present his or her case; in some cases, fairness may require that such expectations be honoured. In this regard, Gleeson CJ said[46]:

> "when a public authority promises that a particular procedure will be followed in making a decision, fairness *may* require that the public authority be held to its promise. ... Expectations created by a decision-maker may affect the practical content of the requirements of fairness in a particular case." (footnote omitted) (original emphasis)

36 The present case is readily distinguishable from *Lam*. In that case, as Gleeson CJ said[47], "[t]he applicant lost no opportunity to advance his case" and it was for that reason that no practical injustice was held to have occurred. And Hayne J said[48]:

> "[The applicant] was afforded a full opportunity to be heard. The Department's letter raised no new matter to be taken into account in making the impugned decision, and it did not divert attention in any way from the relevance of, or weight to be given to, the effect that cancellation of the applicant's visa would have on his children."

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45 (2003) 214 CLR 1 at 9 [25], 12 [33], 34 [104]-[105].

46 (2003) 214 CLR 1 at 12 [33].

47 (2003) 214 CLR 1 at 14 [38].

48 (2003) 214 CLR 1 at 38-39 [122].

37 In the present case, the respondent had been afforded an interview with the concomitant advantage that the individual responsible for making a recommendation to the Minister in relation to his claim to refugee status would be able to use all the information provided by him, including impressions gained from his demeanour at the interview, in coming to a conclusion as to the genuineness of his account.

38 It may be accepted that, as the Minister argued, the respondent was not entitled to insist upon the observance of a particular form of decision-making process. But that is not to the point. Rather, the questions are whether it was unfair for the Second Reviewer to proceed by reference only to some of the information made available to the First Reviewer and the impressions as to his credibility formed from those materials, and whether it was unfair to deny the respondent the opportunity to be heard on whether the IMR should proceed in that way. We now turn to a consideration of these questions.

39 As to the first of these questions, the Minister accepted that in some circumstances a reasonable opportunity to be heard will involve some form of oral hearing. The Minister also accepted that, in those circumstances, procedural fairness would require the decision-maker to entertain and give consideration to submissions seeking to establish that an oral hearing is required.

40 The fact that the First Reviewer interviewed the respondent affords, at the very least, some practical indication of what procedural fairness required in the circumstances of this case. An interview in the course of the IMR process provides the reviewer with opportunities for direct questioning of the applicant; for clarification of areas of confusion or poor understanding on both sides; and for the observation of the demeanour of the applicant. Impressions formed by a decision-maker from the demeanour of an interviewee may be an important aspect of the information available to the decision-maker. That this is so has long been recognised[49].

41 The opportunity for a decision-maker to clarify areas of confusion or misunderstanding, and to form an impression based on personal observation as to whether an applicant is genuinely confused or seeking deliberately to mislead, may be especially important to a fair assessment of a claim to refugee status

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49 *Dearman v Dearman* (1908) 7 CLR 549 at 564; [1908] HCA 84; *Jones v Hyde* (1989) 63 ALJR 349 at 351-352; 85 ALR 23 at 27-28; [1989] HCA 20; *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179; [1990] HCA 47; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479, 482-483; [1993] HCA 78.

when English is not the applicant's mother tongue and he or she is obliged to seek to communicate through an interpreter. As Nicholas J rightly said[50]:

> "The one situation in which oral hearings are most often thought to be desirable is where questions arise as to a witness's credibility. An oral hearing will often assist in the resolution of credibility issues by allowing the decision-maker to interact directly with the witness by asking the witness questions, considering his or her answers, and having regard to the witness's demeanour."

42 The Full Court was right to conclude that it cannot be said in the present case that the respondent lost no opportunity to advance his case. As was said in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*[51]:

> "It is … not to the point to ask whether the [decision-maker's] factual conclusions were right. The relevant question is about the [decision-maker's] processes, not its actual decision."

43 An interview by the Second Reviewer *might* have made a difference to the outcome of the IMR process[52]. This may be seen from what was involved in any assessment of the respondent's application to be undertaken by the Second Reviewer. The acceptance or rejection of his case was likely to turn, not only upon apparent inconsistencies or uncertainties in his account, but also upon impressions formed about how he had responded to questions about his recollection of events in the recorded interview with the First Reviewer.

44 The benefit to a decision-maker of seeing a witness advance his or her case should not be exaggerated, but for the reasons already mentioned, it cannot be dismissed as illusory[53]. The respondent could not have been in a worse position if the Second Reviewer had not been disposed, after seeing him responding to questions, to take a more favourable view of his credibility. But he may have been in a better position if the Second Reviewer had formed the

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50 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 148 [54].

51 (2006) 228 CLR 152 at 160 [25].

52 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-147; [1986] HCA 54.

53 cf *Fox v Percy* (2003) 214 CLR 118 at 125-127 [23]-[25], 138-145 [65]-[86]; [2003] HCA 22.

impression that he was genuinely doing his best to give truthful evidence in difficult circumstances.

45 As to the second of the questions which arise in this case, for reasons entirely beyond the respondent's control, information available from the interview conducted by the First Reviewer was only partly reflected in the recommendation made to the Minister; and because the respondent was not told of the alteration of the review process, he was denied an opportunity to be heard as to how the changed process might be completed so that he would not be disadvantaged by the change. As Nicholas J rightly said[54], the respondent:

> "was deprived of the opportunity to apply for an oral hearing before the [Second Reviewer], an application which … the Minister would have been hard pressed to resist."

46 It is difficult to identify any reasonable basis on which the Second Reviewer could fairly have refused the respondent an opportunity to be heard on the question of how the review process should proceed once that process was altered by the withdrawal of the First Reviewer[55]. Elementary considerations of fairness required that the respondent be informed that the process explained to him by the First Reviewer would not be completed so that he would have the opportunity to be heard on the question of how the process should now proceed.

47 In *Lam*[56], Gleeson CJ said:

> "There are undoubtedly circumstances in which the failure of an administrative decision-maker to adhere to a statement of intention as to the procedure to be followed will result in unfairness and will justify judicial intervention to quash the decision".

48 The Full Court was right to conclude that the present is an example of such a case.

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54 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130 at 148 [57].

55 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 352 [31], 369 [86], 379-380 [120]-[124]; [2013] HCA 18.

56 (2003) 214 CLR 1 at 9 [25].

Orders

49 The appeal should be dismissed with costs.

50 GAGELER AND GORDON JJ. The facts and procedural history are set out in the reasons for judgment of Kiefel, Bell and Keane JJ. We agree with their Honours that the appeal should be dismissed.

51 *Plaintiff M61/2010E v The Commonwealth*[57] characterised the RSA and IMR processes as processes undertaken to inform the exercise by the Minister of statutory powers to consider whether or not to "lift the bar" to the making of a visa application or to grant a visa in every case where an offshore entry person claims to be a person to whom Australia owes protection obligations under the Refugees Convention. *Plaintiff M61/2010E* held that, because those processes had the practical effect of prolonging detention of an offshore entry person, the exercise by the Minister of his statutory powers was conditioned on the observance of procedural fairness, with the consequence that those processes must themselves be procedurally fair[58].

52 Procedural fairness in the RSA and IMR processes requires that an offshore entry person who invokes either process be given a reasonable opportunity to be heard as to whether or not the bar should be lifted or a visa granted. That entails that the person be given a reasonable opportunity to present an affirmative case that he or she is a person to whom Australia owes protection obligations under the Refugees Convention, and to answer material or information which might be thought to suggest otherwise.

53 That requirement necessitates at least that the opportunity to be heard that is given to an offshore entry person in each process is an opportunity which a reasonable assessor or reviewer ought fairly to give in the totality of the circumstances. That standard for compliance derives from the fundamental obligation of the Minister to afford procedural fairness, which conditions the Minister's exercise of the statutory power which the processes inform. To satisfy the condition of procedural fairness, the Minister is obliged to adopt "a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances"[59].

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57 (2010) 243 CLR 319; [2010] HCA 41.

58 (2010) 243 CLR 319 at 334-335 [9], 350-354 [70]-[78]. See *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 652-653 [43]-[44]; [2012] HCA 31.

59 *Kioa v West* (1985) 159 CLR 550 at 627; [1985] HCA 81.

54 Gaudron and Gummow JJ pointed out in *Re Refugee Review Tribunal; Ex parte Aala*[60]:

> "[T]he conditioning of a statutory power so as to require the provision of procedural fairness has, as its basis, a rationale which differs from that which generally underpins the doctrine of excess of power or jurisdiction. The concern is with observance of fair decision-making procedures rather than with the character of the decision which emerges from the observance of those procedures."

55 The concern of procedural fairness, which here operates as a condition of the exercise of a statutory power, is with procedures rather than with outcomes. It follows that a failure on the part of an assessor or reviewer to give the opportunity to be heard which a reasonable assessor or reviewer ought fairly to give in the totality of the circumstances constitutes, without more, a denial of procedural fairness in breach of the implied condition which governs the exercise of the Minister's statutory powers of consideration.

56 Such a breach of the implied condition which governs the exercise of the Minister's statutory powers of consideration is material, so as to justify the grant of declaratory relief by a court of competent jurisdiction, if it operates to deprive the offshore entry person of "the possibility of a successful outcome"[61].

57 That approach to the determination of the existence and consequence of a breach of an implied condition of procedural fairness governing the exercise of a statutory power is wholly consistent with the often-repeated observation of Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*[62] that the concern of procedural fairness is to "avoid practical injustice", and with his Honour's conclusion in that case that there was no denial of procedural fairness where "[n]o practical injustice ha[d] been shown"[63]. The absence of practical injustice in *Lam* lay in the fact that "[t]he applicant lost no opportunity to advance his case"[64]; it was not "shown that he

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60 (2000) 204 CLR 82 at 109 [59]; [2000] HCA 57.

61 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147; [1986] HCA 54; *Aala* (2000) 204 CLR 82 at 116-117 [80]-[81], 122 [104].

62 (2003) 214 CLR 1 at 14 [37]; [2003] HCA 6.

63 (2003) 214 CLR 1 at 14 [38].

64 (2003) 214 CLR 1 at 14 [38].

lost an opportunity to put any information or argument to the decision-maker, or otherwise suffered any detriment"[65].

58 Contrary to the submission of the Minister in this appeal, and as has repeatedly been recognised in the Full Court of the Federal Court[66], *Lam* is not authority for the proposition that it is incumbent on a person who seeks to establish denial of procedural fairness always to demonstrate what would have occurred if procedural fairness had been observed. What must be shown by a person seeking to establish a denial of procedural fairness will depend upon the precise defect alleged to have occurred in the decision-making process.

59 There are cases in which conduct on the part of an administrator in the course of a hearing can be demonstrated to have misled a person into refraining from taking up an opportunity to be heard that was available to that person in accordance with an applicable procedure which was otherwise fair[67]. To demonstrate that the person would have taken some step if that conduct had not occurred is, in such a case, part of establishing that the person has in fact been denied a reasonable opportunity to be heard.

60 Where, however, the procedure adopted by an administrator can be shown itself to have failed to afford a fair opportunity to be heard, a denial of procedural fairness is established by nothing more than that failure, and the granting of curial relief is justified unless it can be shown that the failure did not deprive the person of the possibility of a successful outcome. The practical injustice in such a case lies in the denial of an opportunity which in fairness ought to have been given[68].

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65 (2003) 214 CLR 1 at 13 [36].

66 Eg *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511 at 524-525 [57]-[58]; *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44 at 46 [4].

67 Eg *Aala* (2000) 204 CLR 82 at 88 [3], 122 [103], 150 [200]; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 979-980 [62]-[68], 1009 [252]-[256], 1018 [309]; 190 ALR 601 at 617-619, 659-660, 672; [2002] HCA 30; *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1 at 15 [43]-[44]; [2004] HCA 62.

68 *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511 at 525 [58].

61 That is to highlight one of the confusions that can be introduced when the concept of "legitimate expectation" is used as a basis for determining the content of procedural fairness. By focussing on the opportunity expected, or legitimately to have been expected, the concept can distract from the true inquiry into the opportunity that a reasonable administrator ought fairly to have given. The former is relevant only in so far as it bears on the latter. As Gleeson CJ put it in *Lam*[69]:

> "[T]he creation of an expectation may bear upon the practical content of that obligation. But it does not supplant the obligation. The ultimate question remains whether there has been unfairness; not whether an expectation has been disappointed."

62 The present case is one in which the procedure adopted in the IMR process undertaken in relation to the respondent can be seen itself to have failed to afford the respondent a reasonable opportunity to be heard. The process as commenced was in accordance with a procedure under which interview and assessment were to be undertaken by the First Reviewer alone. The process as concluded was in accordance with a procedure under which the assessment was undertaken by the Second Reviewer. That change of procedure occurred after the respondent was interviewed by the First Reviewer and after the respondent's advisors made submissions to the First Reviewer. It occurred without notice to the respondent.

63 Had the procedure at the outset been one in accordance with which an interview was to be conducted by the First Reviewer and an assessment was to be made by another administrator, it would be difficult to conclude that the respondent would not have been given a reasonable opportunity to be heard. There is no universal rule that procedural fairness requires the adoption of a procedure which affords an oral hearing to a person who claims to be a person to whom Australia owes protection obligations under the Refugees Convention[70], much less an oral hearing before the administrator who is to make the ultimate assessment and recommendation[71]. The respondent and his advisors, being alerted to the procedure, would have been in a position to tailor their evidence and submissions accordingly.

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69 (2003) 214 CLR 1 at 12-13 [34] (footnote omitted).

70 *Kioa v West* (1985) 159 CLR 550 at 628; *Chen v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591 at 602.

71 *South Australia v O'Shea* (1987) 163 CLR 378 at 409; [1987] HCA 39.

64 The problem is that the change of procedure changed the nature of the opportunity which had previously been given to the respondent. The opportunity that had been given was an opportunity personally to convince an identified individual who was to make the assessment, including by responding to specific questions which that person raised. The opportunity became, in retrospect, an opportunity to present a case to an unknown assessor by way of a record of oral evidence and of written submissions.

65 The significance of that change in procedure is to be gauged by reference to the nature of the assessment which it became the responsibility of the Second Reviewer to perform, rather than by reference to the reasoning which the Second Reviewer came to adopt in the performance of that responsibility. Not only did issues of credit potentially arise in relation to the evidence given by the respondent as to past events, but to undertake the assessment necessarily required consideration of the subjective state of mind of the respondent as a person fearing persecution for a Convention reason.

66 The Second Reviewer ought reasonably to have considered that the evidence and submissions presented to the First Reviewer could reasonably be expected to have differed in their coverage, detail and emphasis had the respondent and his advisors been aware that the First Reviewer would not be making the assessment.

67 In light of the change in procedure that had occurred, fairness required that the Second Reviewer give to the respondent notice of the changed procedure, an opportunity to supplement the written submissions previously made on his behalf, and an opportunity to request supplementation of the record of interview by further oral evidence.

68 If the respondent had made a request to supplement the record of interview by further oral evidence, questions would have arisen as to whether the Second Reviewer ought in fairness to have acceded to that request and as to the form and scope of any further hearing which ought in fairness to have been given. The answers to those questions would turn on considerations reasonably to have been taken into account by the Second Reviewer in considering the request. They would centrally include the strength of the justification advanced in support of the request. They would also potentially include logistical considerations. To explore those issues now would be to engage in a hypothetical inquiry.

69 In failing to give the respondent notice of the changed procedure, the Second Reviewer failed to afford the respondent a reasonable opportunity to be heard. There is no basis on which it can be concluded that the decision made by the Second Reviewer (in the form of a recommendation to the Minister) would inevitably have been the same if the respondent had been given a reasonable

opportunity to be heard. The Full Court of the Federal Court was therefore correct to declare that the decision of the Second Reviewer was made in breach of procedural fairness.