HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, NETTLE, GORDON AND EDELMAN JJ

MINISTER FOR IMMIGRATION AND BORDER PROTECTION APPELLANT

AND

SZVFW & ORS RESPONDENTS

Minister for Immigration and Border Protection v SZVFW
[2018] HCA 30
8 August 2018
S244/2017

ORDER

1. *Appeal allowed.*

2. *The order made in paragraph 1 of the order of the Full Court of the Federal Court of Australia dated 2 March 2017 be set aside and, in its place, order that:*

   (a) *the appeal be allowed; and*

   (b) *the order of the Federal Circuit Court of Australia dated 19 August 2016 be set aside and, in its place, order that the application be dismissed.*

3. *The appellant pay the first and second respondents' costs of this appeal.*

On appeal from the Federal Court of Australia

Representation

N J Williams SC with P D Herzfeld and M T Sherman for the appellant (instructed by Sparke Helmore Lawyers)

K A Stern SC with L Andelman for the first and second respondents (instructed by Kinslor Prince Lawyers)

Submitting appearance for the third respondent

CATCHWORDS

Minister for Immigration and Border Protection v SZVFW

Migration – Refugee Review Tribunal – Review of decisions – Where first and second respondents sought review by Refugee Review Tribunal ("Tribunal") of decision of delegate of appellant to refuse applications for protection visas – Where respondents failed to respond to invitations from Tribunal to appear or provide submissions – Where s 426A(1) of *Migration Act* 1958 (Cth) empowered Tribunal to proceed to make decision on review without taking further action to allow or enable respondents to appear – Where Tribunal made decision to proceed under s 426A(1) – Whether Tribunal's decision to proceed in absence of respondents was legally unreasonable.

Appeal – Rehearing – Where primary judge held decision of Tribunal was legally unreasonable – Where Full Court of Federal Court dismissed appeal from primary judge's decision, holding that appellant was required to demonstrate error in reasoning of primary judge akin to that required in appeals from discretionary judgments – Whether principles stated in *House v The King* (1936) 55 CLR 499 apply to appeal from decision on judicial review that administrative decision is legally unreasonable.

Words and phrases – "appeal by way of rehearing", "appealable error", "discretionary", "discretionary decision", "discretionary power", "evaluative approach", "evaluative judgment", "evaluative process", "legally unreasonable", "standard of appellate review", "unreasonable".

Migration Act 1958 (Cth), ss 425, 425A, 426A, 441A, 441C, 476.

1 KIEFEL CJ. The facts of this case and the statutory provisions relevant to it are set out in the reasons of Nettle and Gordon JJ. I agree with their Honours that this appeal from the Full Court of the Federal Court of Australia should be allowed and with the other orders that their Honours propose.

2 The first and second respondents' ("the respondents") applications for Protection (Class XA) visas were rejected by the Minister's delegate. The respondents sought review of that decision by the Refugee Review Tribunal, but they did not respond to invitations from the Tribunal to appear before it, in order to give evidence and present arguments.

3 Where an applicant has been invited to appear before the Tribunal for those purposes as s 425 of the *Migration Act* 1958 (Cth) ("the Migration Act") requires, in the manner for which s 425A provides, and fails to so appear, s 426A(1) permits the Tribunal to proceed to make a decision on the review without taking any further action to allow or to enable the applicant for review to appear before it. The Tribunal is not bound to take that course. Section 426A(2) provides that the Tribunal is not prevented by the section from rescheduling the hearing or from delaying its decision on the review in order to enable the applicant for review to appear before it.

4 The statutory power given by s 426A is in the nature of a discretion, one which involves a decision by the Tribunal as to the course which it will take. Like any statutory discretionary power, it is subject to the presumption of the law that the legislature intends the power to be exercised reasonably[1]. Section 426A is to be construed accordingly.

5 In its reasons the Tribunal recorded that the respondents had been invited to respond on two occasions, on the first to provide submissions or other written material, and on the second to appear before it for the purposes mentioned above. On the first occasion they neither responded nor sought to make contact with the Tribunal. It observed that the respondents had likewise not attended an interview before the delegate's decision was made, although they had been invited to do so. The second letter from the Tribunal, inviting the respondents to appear, contained advice that if they did not attend the scheduled hearing the Tribunal might proceed to make its decision without further reference to them. It provoked no response. Expressing itself satisfied that the invitation had been sent to the respondents' last known address, the Tribunal decided to make its decision on the review. That decision was adverse to the respondents.

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1 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 362 [63]; [2013] HCA 18.

6 The primary judge in the Federal Circuit Court (Judge Barnes) concluded that the Tribunal's decision was legally unreasonable[2]. Her Honour reasoned that the Tribunal could not have been satisfied that the letter inviting the respondents to attend the hearing had been received by them; the attendance of the respondents at the hearing was important to them; and the Tribunal could have attempted some further communication with them without difficulty. In these circumstances the Tribunal should have taken some other action before proceeding to make its decision on the review.

7 The first aspect of the primary judge's reasoning directs attention to the preconditions to the exercise of the power given by s 426A rather than to the decision which results and whether it may be said to be unreasonable. The reasons overlook that it is the intention of the scheme of the Migration Act that the Tribunal be permitted to consider the exercise of its powers under s 426A if those preconditions are met.

8 In this case those preconditions were met. The invitation required by s 425 was given by one of the methods specified in s 441A, as s 425A requires. Moreover, s 441C has the effect that a person is deemed to have received a document given by one of the methods so specified. There was nothing before the Tribunal to suggest to the contrary of that state of affairs. It was entitled to proceed to consider the exercise of its powers under s 426A.

9 It is difficult to see how it might be concluded that the decision that the Tribunal then made – not to make further contact with the respondents and adjourn its hearing for that purpose – was unreasonable. To the contrary, it was perfectly explicable given the history of the respondents' non-responsiveness. It is to be inferred that a conclusion that it was unreasonable must involve some misapprehension of what is comprehended by the legal standard of unreasonableness.

10 In the joint judgment in *Minister for Immigration and Citizenship v Li*[3] it was explained that a decision made in the exercise of a statutory power is unreasonable in a legal sense when it lacks an evident and intelligible justification. That may be so where a decision is one which no reasonable person could have arrived at[4], although an inference of unreasonableness is not to be

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2 *SZVFW v Minister for Immigration and Border Protection* (2016) 311 FLR 459 at 474 [82].

3 (2013) 249 CLR 332 at 367 [76].

4 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.

drawn only where a decision appears to be irrational[5]. None of these descriptions could be applied to the Tribunal's decision in the present case.

11 Statements such as that made in the *Wednesbury* case[6], that a decision may be regarded as unreasonable if no reasonable person could have made it, may not provide the means by which a conclusion of unreasonableness may be arrived at in every case. But it serves to highlight the fact that the test for unreasonableness is necessarily stringent[7]. And that is because the courts will not lightly interfere with the exercise of a statutory power involving an area of discretion. The question is where that area lies.

12 In *Minister for Immigration and Citizenship v Li*[8] reference was made to what had been said in *Klein v Domus Pty Ltd*[9] regarding the need to look to the purpose of the statute conferring the discretionary power. Where it appears that the dominating, actuating reason for the decision is outside the scope of that purpose, the discretion has not been exercised lawfully. But this is not to deny that within the sphere of the statutory purpose there is scope for a decision-maker to give effect to the power according to his or her view of the justice of a case, without interference by the courts.

13 The Migration Act[10] requires the Tribunal, in carrying out its functions, to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick. In reviewing a decision the Tribunal is required to act according to substantial justice and the merits of the case[11]. Clearly enough s 426A is directed to the aims of efficiency contained within these objectives, although it is not to be exercised in a way which would be contrary to the others. Consistently with what has earlier been discussed, it is to be understood that the Tribunal has a degree of latitude in determining what is fair and just in a given case.

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5 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 364 [68].

6 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.

7 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 376 [108].

8 (2013) 249 CLR 332 at 363-364 [67], 376 [109].

9 (1963) 109 CLR 467 at 473; [1963] HCA 54.

10 *Migration Act* 1958 (Cth), s 420(1).

11 *Migration Act* 1958 (Cth), s 420(2)(b).

14 In *Minister for Immigration and Citizenship v Li*, it was accepted that the Migration Review Tribunal is to act in an efficient manner[12]. This did not explain why that Tribunal decided abruptly to conclude the review when the applicant had requested time to allow the outcome of a relevant assessment, one which might favour the review of her application, to be known. It was not obvious how the Tribunal had reached its decision not to exercise its discretionary power to adjourn the hearing, but it was to be inferred that some error in reasoning had led to what was plainly an unjustifiable and unreasonable decision. In this case the basis for the Tribunal's decision is apparent. The decision is plainly justified by reference to it.

15 The crux of the primary judge's reasoning concerning the exercise of the power given by s 426A appears to be that the Tribunal should have exercised it in the respondents' favour because, in a practical sense, it could have done so. This analysis fails to identify an unreasonable decision in the sense explained above. The requirement to be implied in a provision such as s 426A, that a decision-maker act reasonably, does not require the decision to be one which is advantageous to the person who is the subject of it.

16 The primary judge's reasoning implies an obligation on the part of the Tribunal which would apply in most, if not all, cases where there had been no response to the invitation to attend. No such obligation is to be found as expressed or to be implied in the statute. The fact that the Tribunal could contact the respondents is but a factor which it could take into account in deciding whether to proceed to make its decision on the evidence before it.

17 On the Minister's appeal to the Full Court of the Federal Court (Griffiths, Kerr and Farrell JJ), the Court focused on the nature of the appeal to it from the decision of the primary judge rather than the substance of her Honour's decision. It was necessary, their Honours considered, that it be shown that the primary judge had made an error in the process of evaluating whether the Tribunal's decision was unreasonable[13]. The approach to be taken was said to be analogous to what is necessary in appeals from discretionary judgments[14].

18 The question for the Full Court was whether the Tribunal's decision was legally unreasonable and whether the primary judge's reasoning in this regard was correct. It was necessary for it to decide these questions for itself rather than

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12 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 368 [80].

13 *Minister for Immigration and Border Protection v SZVFW* (2017) 248 FCR 1 at 13-14 [41]-[43].

14 *Minister for Immigration and Border Protection v SZVFW* (2017) 248 FCR 1 at 14-15 [45]-[46].

to defer to what the primary judge had held and require the Minister to identify some error in her Honour's reasoning. No question of the application of the principles stated in *House v The King*[15] arises in cases of this kind, for the reasons given by Nettle and Gordon JJ[16].

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15 (1936) 55 CLR 499; [1936] HCA 40.

16 At [85]-[87].

19 GAGELER J. The question of public importance in this appeal is as to the standard of appellate review applicable to a challenge on an appeal by way of rehearing to a conclusion of a primary judge that an administrative decision-maker exceeded decision-making authority by making an unreasonable decision. Resolution of that question turns on two subsidiary questions: the first as to the nature of an appeal by way of rehearing, the second as to the nature of a legally unreasonable decision.

20 Existing authority answers both of those subsidiary questions in ways which will need to be explained. The answers together provide the answer to the ultimate question. The answer is that the appellate court must reach its own conclusion as to whether the administrative decision was unreasonable. That is to say, the appellate court must determine not whether the conclusion of the primary judge was open but whether the conclusion of the primary judge was, in the opinion of the appellate court, the right conclusion.

The circumstances which give rise to this appeal

21 The judgment from which this appeal is brought by special leave is a judgment of the Full Court of the Federal Court[17] in an appeal by way of rehearing[18] under s 24 of the *Federal Court of Australia Act* 1976 (Cth). The appeal to the Full Court was from final orders made by a judge of the Federal Circuit Court[19]. The primary judge had made those orders in the exercise of the original jurisdiction conferred on the Federal Circuit Court by s 476 of the *Migration Act* 1958 (Cth). The original jurisdiction conferred by that section is expressed to be "the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution".

22 The migration decision in relation to which the Federal Circuit Court had exercised that jurisdiction to make the orders under appeal to the Full Court was a decision of the Refugee Review Tribunal which had affirmed under s 415(2)(a) of the *Migration Act* a decision of a delegate of the Minister for Immigration and Border Protection to refuse to grant protection visas to the first and second respondents to the present appeal, who are husband and wife. The Tribunal had made that decision after choosing, in the exercise of the procedural power conferred by s 426A of the *Migration Act*, to proceed to make a decision under s 415 without further notice to the respondents in circumstances where they had

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17 *Minister for Immigration and Border Protection v SZVFW* (2017) 248 FCR 1.

18 *Western Australia v Ward* (2002) 213 CLR 1 at 86-87 [68]-[71]; [2002] HCA 28, overruling *Duralla Pty Ltd v Plant* (1984) 2 FCR 342 and *Petreski v Cargill* (1987) 18 FCR 68.

19 *SZVFW v Minister for Immigration and Border Protection* (2016) 311 FLR 459.

failed to respond to an invitation from the Tribunal to give evidence and present arguments at a hearing.

23 In the Federal Circuit Court, the primary judge had concluded that the Tribunal's choice to proceed to make the decision without taking any further action to allow or enable the respondents to appear before it was unreasonable and that the Tribunal had for that reason exceeded its decision-making authority in affirming the decision of the delegate. The primary judge had given effect to that conclusion by making an order in the nature of certiorari setting aside the Tribunal's decision and an order in the nature of mandamus compelling the Tribunal to redetermine the respondents' application for review of the delegate's decision according to law.

24 On appeal to the Full Court, the Minister challenged the primary judge's conclusion of unreasonableness. The Minister's sole ground of appeal was expressed in terms that "[t]he primary judge erred in concluding that it was legally unreasonable for the [Tribunal] to make a decision on the review before it without taking any further action to allow or enable the [respondents] to appear before it". The Minister's written and oral submissions in the appeal did nothing to narrow that ground.

25 Analogising from what it described as "well-known authorities which emphasise the need for caution by an appellate court which is asked to disturb the outcome of a discretionary judgment, where evaluative issues are also necessarily involved", the Full Court approached its task of determining the appeal by asking whether the primary judge's conclusion of unreasonableness was attended by "appealable error" in the sense applicable to determination of an appeal from a judgment founded on an exercise of discretion[20]. The Full Court treated that standard of appellate review as applicable on the basis that the primary judge's conclusion of unreasonableness "was largely an evaluative one"[21].

26 Applying that deferential standard of appellate review, the Full Court found that reasons advanced by the Minister in argument before it for considering that the Tribunal's choice to proceed to make the decision was not unreasonable were insufficient to demonstrate the requisite appealable error on the part of the primary judge. For that reason, the Full Court dismissed the appeal.

27 Had the Full Court applied the correct standard of appellate review, the Full Court would have examined the evidence contained in the record of the proceeding in the Federal Circuit Court which gave rise to the orders under

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20 (2017) 248 FCR 1 at 14 [45], 15-17 [49]-[55].

21 (2017) 248 FCR 1 at 15 [46].

appeal to form its own conclusion as to whether the choice of the Tribunal to proceed to make the decision was unreasonable. The Full Court would have given respectful consideration to the reasons given by the primary judge for reaching the conclusion under appeal in the process of forming its own conclusion. But the Full Court would have given effect to its own conclusion if its own conclusion differed from that of the primary judge.

28 The conclusion which the Full Court should have reached on the evidence contained in the appellate record was that the choice of the Tribunal was not unreasonable, with the consequence that the contrary conclusion of the primary judge was erroneous. That was so whether or not the conclusion of the primary judge was reached on a correct understanding of legal principle and on an available view of the facts. The Full Court should have allowed the appeal, should have set aside the orders of the primary judge and in place of those orders should have dismissed the application for judicial review.

The nature of an appeal by way of rehearing

The need for appealable error

29 As appeals are creatures of statutes, incidents of appeals can vary from statute to statute. To describe a particular appeal as an appeal by way of rehearing can accordingly be to fail to identify all of the statutory incidents of that appeal[22]. More than a century of case law expounding the ordinary incidents of an appeal by way of rehearing from a final judgment of a judge sitting without a jury nevertheless allows those ordinary incidents to be identified with relative precision. The answer to the first of the subsidiary questions involved in this appeal is to be found in those ordinary incidents.

30 Like an appeal in the strict sense, of which an appeal to the High Court under s 73 of the Constitution is the prime example, an appeal by way of rehearing is a procedure under which the appellate court is permitted and, unless the appellate court dismisses the appeal or remits the matter for rehearing, required to "give the judgment which in its opinion ought to have been given in the first instance"[23]. And like an appeal in the strict sense, an appeal by way of rehearing is a procedure for the correction of error[24]. "[T]he existence of an

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22 *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 128-129 [2]; [2008] HCA 13.

23 *Fox v Percy* (2003) 214 CLR 118 at 125 [23]; [2003] HCA 22, quoting *Dearman v Dearman* (1908) 7 CLR 549 at 561; [1908] HCA 84.

24 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109; [1931] HCA 34, quoting *Attorney-General v Sillem* (1864) 10 HLC 704 at 724 [11 ER 1200 at 1209].

error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal."[25]

31 For practical purposes, the difference between correction of error on an appeal in the strict sense and correction of error on an appeal by way of rehearing lies in the temporal perspective that the appellate court is required to adopt in examining the correctness of the judgment under appeal. An appellate court determining an appeal in the strict sense is required to determine the correctness of the judgment under appeal at the time that judgment was given: in an appeal from a final judgment of a judge sitting without a jury, the correctness of the judgment is to be determined on the evidence adduced at the trial[26] and on the law as it then stood[27]. An appellate court determining an appeal by way of rehearing, in contrast, is required to determine the correctness of the judgment under appeal in retrospect: in an appeal from a final judgment of a judge sitting without a jury, the correctness of the judgment is to be determined on the evidence adduced at the trial supplemented by any further evidence that the appellate court may allow to be adduced on the appeal[28], and on the law as it stands when the appellate court gives judgment on the appeal[29].

32 To the extent necessary to address the ground or grounds on which an appellant claims that a judgment under appeal is erroneous, an appellate court in an appeal (whether in the strict sense or by way of rehearing) from a final judgment of a judge sitting without a jury "is obliged to conduct a real review of the trial and ... of [the] judge's reasons"[30]. The appellate court "cannot excuse

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25 *Norbis v Norbis* (1986) 161 CLR 513 at 519; [1986] HCA 17. See also *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111]; [1998] HCA 67; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203-204 [14]; [2000] HCA 47.

26 *Mickelberg v The Queen* (1989) 167 CLR 259; [1989] HCA 35; *Eastman v The Queen* (2000) 203 CLR 1; [2000] HCA 29.

27 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 106-108, 110-111.

28 *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111]; *Allesch v Maunz* (2000) 203 CLR 172 at 180-181 [22]-[23]; [2000] HCA 40.

29 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 106-108; *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 567 [29].

30 *Fox v Percy* (2003) 214 CLR 118 at 126-127 [25].

itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions"[31].

33 Performing its obligation to conduct a "real review", the appellate court "must, of necessity, observe the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record"[32]. Limitations of that nature can include: "those occasioned by the resolution of any conflicts at trial about witness credibility based on factors such as the demeanour or impression of witnesses; any disadvantages that may derive from considerations not adequately reflected in the recorded transcript of the trial; and matters arising from the advantages that a primary judge may enjoy in the opportunity to consider, and reflect upon, the entirety of the evidence as it is received at trial and to draw conclusions from that evidence, viewed as a whole"[33]. The appellate court needs to be conscious that "[n]o judicial reasons can ever state all of the pertinent factors; nor can they express every feature of the evidence that causes a decision-maker to prefer one factual conclusion over another"[34]. The more prominently limitations of that nature feature in a particular appeal, the more difficult it will be for the appellate court to be satisfied that the primary judge was in error[35].

34 Natural limitations on an appellate court's ability to be satisfied of error on the part of a primary judge inhering in the need for the appellate court to proceed on the record play no part in this appeal. They have little impact in practice on the determination of an appeal from a judgment given in a proceeding for judicial review of administrative action. Ordinarily[36], as here, the trial of a judicial review proceeding will have been conducted wholly or substantially by reference to documentary and affidavit evidence which an appellate court is in as good a position to evaluate as was the primary judge.

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31 *Dearman v Dearman* (1908) 7 CLR 549 at 564, partly quoted in *Fox v Percy* (2003) 214 CLR 118 at 127 [25].

32 *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23], quoting *Dearman v Dearman* (1908) 7 CLR 549 at 561.

33 *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458 at 465 [17]; 224 ALR 1 at 7; [2006] HCA 1.

34 *Fox v Percy* (2003) 214 CLR 118 at 132 [41] (footnote omitted).

35 Eg *S W Hart & Co Pty Ltd v Edwards Hot Water Systems* (1985) 159 CLR 466 at 478; [1985] HCA 59.

36 Eg *Cabal v United Mexican States* (2001) 108 FCR 311 at 362 [223].

The two standards of appellate review

35 Whilst the conception of error is integral to the conception of an appeal, what amounts to "appealable error" in a judgment cannot be understood without reference to a standard of appellate review. Subject to constitutional limitations, a standard of appellate review amounts to a legislative or common law allocation of decision-making authority between the trial court and the appellate court[37].

36 In relation to an appeal from a final judgment of a primary judge sitting without a jury, essentially two standards of appellate review have come to be recognised in Australia. The present case provides no occasion to consider the "added restraint" and "particular caution" which an appellate court should exercise in reviewing a judgment on a matter of practice and procedure[38].

37 If and to the extent that the judgment under appeal turned on the exercise of what can be characterised as a "discretion" committed to the court of which the primary judge was a member, the long-settled understanding is that members of an appellate court cannot substitute on appeal a judgment which turns on their own exercise of discretion "merely because they would themselves have exercised the original discretion, had it attached to them, in a different way"[39]. For appealable error in the exercise of judicial discretion to be established, the appellate court must be satisfied that what was done by the primary judge in the judgment under appeal amounted "to a failure to exercise the discretion actually entrusted to the court"[40].

38 The classic statement in *House v The King*[41] of the standard of appellate review applicable to the exercise of a judicial discretion reflects that understanding:

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37 Edwards and Elliott, *Federal Standards of Review*, 3rd ed (2018) at 4-5.

38 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 176-177; [1981] HCA 39, citing *In re the Will of F B Gilbert (dec'd)* (1946) 46 SR (NSW) 318 at 323. See also *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at 665 [34]; [2010] HCA 21.

39 *Lovell v Lovell* (1950) 81 CLR 513 at 519; [1950] HCA 52, quoting *Charles Osenton & Co v Johnston* [1942] AC 130 at 138.

40 *Lovell v Lovell* (1950) 81 CLR 513 at 519, citing *Sharp v Wakefield* [1891] AC 173 at 179.

41 (1936) 55 CLR 499 at 504-505; [1936] HCA 40.

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

39 For a period during the 1960s and 1970s (before the introduction in 1984 of the current comprehensive requirement for special leave as a precondition to an appeal under s 73 of the Constitution[42]), some Justices of the High Court expressed support for importing similar considerations into appellate review of an evaluative conclusion reached by a primary judge when applying imprecisely defined legal criteria to findings of primary fact, even where the appellate court's ability to apply those criteria to those findings of primary fact so as to form its own opinion as to the correctness of the primary judge's conclusions was unimpeded by any limitation inherent in proceeding on the record[43]. In an appeal from a judgment of a judge sitting without a jury in a common law negligence case where there was no challenge to the judge's findings of primary fact, for example, some Justices would have refrained from finding error in the primary judge's conclusion that conduct failed to measure up to "the conduct of a hypothetical reasonable man in the circumstances" unless convinced that the primary judge had overlooked some relevant primary fact or unless convinced that the conclusion was "clearly wrong" in the sense that "no rational interpretation of the facts" would sustain it[44].

40 That approach of "judicial restraint"[45] in undertaking appellate review of evaluative conclusions reached by primary judges in the application of broad

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42 *Judiciary Amendment Act (No 2)* 1984 (Cth).

43 Eg *Whiteley Muir and Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505 at 506; *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 199, 213-214; [1970] HCA 43; *Edwards v Noble* (1971) 125 CLR 296 at 303-304, 312-313; [1971] HCA 54; *Hicks v Roberts* (1977) 16 ALR 466 at 469; *Livingstone v Halvorsen* (1978) 53 ALJR 50 at 52; 22 ALR 213 at 217.

44 *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 213-214.

45 Cf *Cashman v Kinnear* [1973] 2 NSWLR 495 at 500.

legal standards to findings of primary fact was by no means aberrant. There are comparable jurisdictions in which comparable approaches are the norm[46]. The approach, however, never commanded the assent of a majority of the High Court. It was firmly rejected – "despatched"[47] – by the majority in *Warren v Coombes*[48].

41 Rejecting the approach of appellate restraint and reaffirming the approach more commonly taken in Australian and English case law of treating correctness as the general standard of appellate review, the majority in *Warren v Coombes* stated[49]:

> "Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it."

In language significant for its studied generality, the majority in *Warren v Coombes* went on to state[50]:

> "The duty of the appellate court is to decide the case – the facts as well as the law – for itself. In so doing it must recognize the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full weight to his decision, they consider that it was wrong, they must discharge their duty and give effect to their own judgment."

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46 Eg *Pullman-Standard v Swint* 456 US 273 at 290-293 (1982); *United States v McConney* 728 F 2d 1195 at 1199-1204 (1984); *Housen v Nikolaisen* [2002] 2 SCR 235 at 245-246 [1]-[6].

47 *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 326 [83]; 160 ALR 588 at 614; [1999] HCA 3.

48 (1979) 142 CLR 531; [1979] HCA 9.

49 (1979) 142 CLR 531 at 551.

50 (1979) 142 CLR 531 at 552.

Defending the correctness standard against the criticism that it opens a final judgment to a multiplicity of judicial opinions none of which is more likely to be better than the first[51], the majority explained[52]:

> "The fact that judges differ often and markedly as to what would in particular circumstances be expected of a reasonable man seems to us in itself to be a reason why no narrow view should be taken of the appellate function. The resolution of these questions by courts of appeal should lead ultimately not to uncertainty but to consistency and predictability, besides being more likely to result in the attainment of justice in individual cases."

42 The most carefully crafted of judicial explications of legal principle can still be over-read. Within months of *Warren v Coombes* being decided, the High Court was confronted in *Gronow v Gronow*[53] with the submission that it was "now for an appellate court to substitute its own exercise of discretion for that of the primary judge in every appeal against the exercise of a discretionary judgment". The submission was rejected. *Warren v Coombes* had not been concerned with the "question which arises on an appeal from an exercise of a discretionary judgment", it was emphasised, and nothing in the majority judgment lent "any support to the notion that their Honours intended to discard, or to depart from, the settled principles of law which govern such a case"[54].

43 The line of demarcation between conclusions of a primary judge which attract the deferential standard of appellate review applicable to an exercise of judicial discretion articulated in *House v The King* and conclusions of a primary judge which attract the more general correctness standard of appellate review rearticulated in *Warren v Coombes* was in due course squarely addressed in *Norbis v Norbis*[55]. The *House v The King* standard was there held to apply to appellate review of an order made by a judge in the exercise of a statutory power conferred on the Family Court to "make such order as it thinks fit altering the interests of the parties" in matrimonial property[56]. Mason and Deane JJ, with

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51 Cf *Gray v Turnbull* (1870) LR 2 HL Sc & Div 53 at 54.

52 (1979) 142 CLR 531 at 552.

53 (1979) 144 CLR 513 at 525; [1979] HCA 63.

54 (1979) 144 CLR 513 at 526. See also at 534.

55 (1986) 161 CLR 513.

56 Section 79 of the *Family Law Act* 1975 (Cth).

whom Brennan J agreed[57], explained that making the order involved an exercise of "discretion" in the sense in which that term had been deployed in *House v The King* because application of the statutory criterion called for "value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right"[58].

44 The holding in *Norbis v Norbis*, and their Honours' explanation of the reason for it, accorded with earlier decisions which had applied the *House v The King* standard to appellate review of evaluative conclusions in respect of which the applicable legal criteria permitted of some latitude of choice or margin of appreciation such as to admit of a range of legally permissible outcomes. Conclusions as to "just and equitable" apportionment of responsibility between tortfeasors under contribution legislation[59], as to assessment of general damages at common law[60], as to the valuation of property[61], and as to the best interests of the child under child welfare legislation[62] furnish examples. Their Honours in *Norbis v Norbis* went on to explain that the line of demarcation which they identified stemmed from the fundamental conception of an appeal as a process for the correction of error: "[i]f the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance"[63].

45 *Norbis v Norbis* was not departed from in *Singer v Berghouse*[64], where the *House v The King* standard was held to be applicable on appellate review of an opinion formed by a primary judge, as a precondition to the exercise of discretion

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57 (1986) 161 CLR 513 at 536.

58 (1986) 161 CLR 513 at 517-518.

59 Eg *Pennington v Norris* (1956) 96 CLR 10 at 15-16; [1956] HCA 26; *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALJR 492 at 493-494; 59 ALR 529 at 532; [1985] HCA 34.

60 Eg *Miller v Jennings* (1954) 92 CLR 190 at 196; [1954] HCA 65.

61 Eg *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336 at 381; [1981] HCA 4.

62 Eg *Mace v Murray* (1955) 92 CLR 370 at 378; [1955] HCA 2.

63 (1986) 161 CLR 513 at 518.

64 (1994) 181 CLR 201; [1994] HCA 40.

to make a maintenance order in testator's family maintenance proceedings, as to whether an applicant for the order had been left with "inadequate" provision for his or her "proper maintenance, education and advancement in life"[65]. Explaining that holding, the majority expressed agreement with the statement that "[u]nless appellate courts show restraint in disturbing the evaluative determinations of primary decision-makers they will inevitably invite appeals to a different evaluation which, objectively speaking, may be no better than the first"[66]. To describe a second evaluative determination as "no better than the first" is necessarily to postulate that both determinations are legally permissible.

46 *Warren v Coombes* itself illustrates that it is not sufficient to justify departure from the correctness standard of appellate review that a conclusion of a primary judge has been arrived at by a process of reasoning which can be characterised as evaluative. In *Warren v Coombes*, the conclusion of the primary judge to which the general standard was held to be applicable was a conclusion that the defendant had not failed to exercise reasonable care. The point is further illustrated by the outcome in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd*[67]. There the conclusion of the primary judge which was the subject of appellate challenge was that certain conduct in which a corporation was found to have engaged answered the statutory description of "conduct that is unconscionable"[68]. A submission to the effect that the evaluative character of that conclusion triggered application of the standard of appellate review applicable to an exercise of judicial discretion was unanimously rejected: implicitly by three members of the High Court, and explicitly by the other two. Callinan J, with whom Kirby J specifically agreed on this point[69], suggested that "every judgment of a trial judge requires an evaluation of facts" and pointed out that "[a]n evaluation of facts found is precisely one of the exercises which an appellate court is obliged, when an unrestricted right of appeal is available, to undertake"[70]. Like a common law duty of care, a statutory prohibition on conduct that is unconscionable posits a standard of conduct which, on proven facts, a person obliged to meet that standard either has met or has not.

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65 Section 9(2) of the *Family Provision Act* 1982 (NSW).

66 (1994) 181 CLR 201 at 212, quoting *Golosky v Golosky* unreported, Court of Appeal of the Supreme Court of New South Wales, 5 October 1993 at 8.

67 (2003) 214 CLR 51; [2003] HCA 18.

68 Section 51AA(1) of the *Trade Practices Act* 1974 (Cth).

69 (2003) 214 CLR 51 at 86, footnote 114.

70 (2003) 214 CLR 51 at 111 [167].

47 The *Norbis v Norbis* explanation of when the standard of appellate review applicable to an exercise of judicial discretion is attracted and when it is not was reiterated in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*[71]. In the context of restating the ordinary incidents of an appeal by way of rehearing, and with reference to *House v The King*, it was reiterated that "discretion" in the sense applicable to appellate review of an exercise of judicial discretion refers to a decision-making process in which "the decision-maker is allowed some latitude as to the choice of the decision to be made"[72].

48 The course of High Court authority since *Warren v Coombes* has accordingly proceeded on a consistent understanding of how the line of demarcation is to be drawn between those of a primary judge's conclusions which attract the correctness standard of appellate review reaffirmed in that case and those which attract the deferential standard applicable to appellate review of an exercise of judicial discretion. Without excluding the potential for other considerations to affect the standard of appellate review in a particular category of case, the understanding provides a principled basis for making at least the principal distinction.

49 The line is not drawn by reference to whether the primary judge's process of reasoning to reach a conclusion can be characterised as evaluative or is on a topic on which judicial minds might reasonably differ. The line is drawn by reference to whether the legal criterion applied or purportedly applied by the primary judge to reach the conclusion demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v The King* standard applies. The resultant line is not bright; but it is tolerably clear and workable.

50 That understanding has in the past been acknowledged and applied to guide appellate review in the Full Court of the Federal Court[73]. There is no reason to depart from it now.

The nature of a legally unreasonable decision

51 Having expounded the general and, in its application to the determination of a claim for relief under or by reference to s 75(v) of the Constitution, exhaustive proposition that "[t]he duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law

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71 (2000) 203 CLR 194.

72 (2000) 203 CLR 194 at 205 [19].

73 Eg *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at 436 [25].

which determines the limits and governs the exercise of the repository's power", Brennan J in *Attorney-General (NSW) v Quin*[74] immediately explained how "'*Wednesbury* unreasonableness' (the nomenclature comes from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[75])" was consistent with that proposition: "[a]cting on the implied intention of the legislature that a power be exercised reasonably, the court holds invalid a purported exercise of the power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action"[76]. His Honour called in aid the exposition of Professor Wade to the effect that, "[w]ithin the bounds of legal reasonableness", the repository has "genuinely free discretion"; "[i]f it passes those bounds, [the repository] acts ultra vires"[77].

52 Expression of the standard of legal reasonableness in terms of the minimum to be expected of any "reasonable repository of the power" in the circumstances of the impugned decision or action has the benefit of emphasising both the "extremely confined"[78] scope and context-specific operation of the limitation it imposes. That is not to say that the standard might not be appropriately expressed in another form of words.

53 Whatever room might remain for argument about the most appropriate expression of the standard of legal reasonableness, however, the nature of legal unreasonableness should be taken to be settled by the explanation of it in *Quin*. The requirement that a statutory power be exercised within the bounds of reasonableness is an implied condition of the statutory conferral of the power. The implication arises through operation of a common law presumption of statutory interpretation that a statutory power is conferred on condition that the power can be exercised only within those bounds. The presumption prevails to condition the exercise of the power on the repository complying with the standard of legal reasonableness absent statutory indication that the repository must meet some higher standard (an example of which is where the repository is restricted to exercising the power only on reasonable grounds[79]) or will

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74 (1990) 170 CLR 1 at 35-36; [1990] HCA 21.

75 [1948] 1 KB 223.

76 (1990) 170 CLR 1 at 36.

77 (1990) 170 CLR 1 at 36, quoting Wade, *Administrative Law*, 6th ed (1988) at 407.

78 (1990) 170 CLR 1 at 36.

79 Eg *George v Rockett* (1990) 170 CLR 104 at 116; [1990] HCA 26; *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 429 [10]; [2006] HCA 45; *Prior v Mole* (2017) 91 ALJR 441 at 445 [4], 449-450 [24]-[27], 457 [73], 460-461 [97]-[100]; 343 ALR 1 at 5, 10-11, 21, 26; [2017] HCA 10.

sufficiently comply with the statute by meeting some lower standard (an example of which is where the statute requires no more than that the repository exercise the power in good faith and for a purpose permitted by the statute[80]). Where the presumption prevails so as to condition the exercise of the power on the repository complying with the standard of legal reasonableness, a decision made or action taken in purported exercise of a statutory power in breach of the standard of legal reasonableness is a decision or action which lies beyond the scope of the authority conferred by the power.

54 The question of whether or not a decision made or action taken in purported exercise of a statutory power is legally unreasonable is accordingly a question directed to whether or not the decision or action is within the scope of the statutory authority conferred on the repository. Being a question as to the limits of statutory authority, it is a question in respect of which our constitutional system demands of the judicial branch of government the ability to give a unique answer. Whilst "there has never been a pervasive notion that limited government mandated an all-encompassing judicial duty to supply all of the relevant meaning of statutes", the constitutional entrenchment of judicial power in courts of competent jurisdiction leaves no room for doubt that "the judicial duty is to ensure that [an] administrative agency stays within the zone of discretion committed to it by its organic act"[81].

55 What follows from the constitutional commitment of that duty to the judiciary is that a court, having jurisdiction to determine a claim for constitutional writs or other relief on the basis of an allegation that a decision which has been made in fact was beyond statutory authority because of unreasonableness in the purported exercise of the power to make that decision, or in the purported exercise of some other power in the statutory procedure which led to the making of the decision, has no option but to determine in the exercise of its own jurisdiction whether the impugned decision is unreasonable, or is materially affected by unreasonableness. The nature of the determination to be made means that the court can have no latitude of choice: on the evidence adduced at trial, the determination of the primary judge can only be that the

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80 Eg *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-506; [1947] HCA 21; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 523 [59]; [2009] HCA 4; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 620 [360]; [2015] HCA 1.

81 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 153 [43]; [2000] HCA 5, quoting Monaghan, "*Marbury* and the Administrative State", (1983) 83 *Columbia Law Review* 1 at 33.

alleged want or excess of statutory authority has been established or has not been established.

56 From the perspective of an appellate court engaged in an appeal by way of rehearing from the determination of a primary judge, the primary judge's conclusion can only be either right or wrong. To the extent put in issue by the ground or grounds of appeal, the appellate court has no option but to decide for itself whether it is one or the other. Were that not so, the legal limits which the repository of the statutory power is statutorily obliged to observe would risk being blurred in the outworking of the judicial process designed to ensure their observance.

57 Nothing in the more recent expositions of principle by the High Court in *Minister for Immigration and Citizenship v Li*[82], or by the Full Court of the Federal Court in *Minister for Immigration and Border Protection v Singh*[83] or *Minister for Immigration and Border Protection v Stretton*[84], is inconsistent with that explanation of the nature of legal unreasonableness and its consequences for appellate review of a primary judge's conclusion that legal unreasonableness has or has not been established.

58 References in *Li*[85], as in *Quin*[86], to legal unreasonableness as an "abuse of power" cannot be read as treating a judicial conclusion of unreasonableness as admitting of a margin of appreciation of the kind involved in a judicial conclusion of "abuse of process"[87]. Except to the extent specifically permitted by statute[88], a judge undertaking judicial review of administrative action would depart from performance of the judicial function and impermissibly enter the zone of discretion committed to the administrator were the judge to be drawn into forming his or her own conclusion as to whether the administrator had exercised

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82 (2013) 249 CLR 332; [2013] HCA 18.

83 (2014) 231 FCR 437.

84 (2016) 237 FCR 1.

85 (2013) 249 CLR 332 at 348 [22], 364 [67] and [69].

86 (1990) 170 CLR 1 at 36.

87 Cf *Walton v Gardiner* (1993) 177 CLR 378 at 398-399; [1993] HCA 77; *R v Carroll* (2002) 213 CLR 635 at 657 [73]; [2002] HCA 55; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 264 [7]; [2006] HCA 27.

88 Eg s 5(2)(j) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

power in a manner which, though lawful, might be characterised as an abuse[89]. So much was recognised in the joint judgment in *Li* in the statements that "courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power" and that "[p]roperly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker"[90].

59 References in *Stretton* to a conclusion that a decision is legally unreasonable being "evaluative" and to the task being "not definitional, but one of characterisation" were usefully directed to emphasising that determination of whether a purported exercise of a statutory power is so unreasonable that no reasonable repository of the power could have so exercised the power is informed not only by "the terms, scope and policy of the statute" but also by "fundamental values" anchored in the common law tradition[91]. Reasonableness is itself a traditional conception of the common law – a translation of "the human into the legal"[92]. Reasonableness is not exhausted by rationality; it is inherently sensitive to context; it cannot be reduced to a formulary. In the discernment of unreasonableness, "[t]here are no talismanic words that can avoid the process of judgment"[93].

60 Of present importance is that those references in *Stretton* were not directed to denying the character of a judicial determination of legal unreasonableness as a determination "as to whether the decision bespeaks an exercise of power beyond its source"[94]. That question does not admit of a range of legally permissible outcomes. *Stretton* recognised that, "[w]hile judicial decision about that question might be contestable, there can only, legally, be one correct answer", from which it followed that "[t]he proper framework" for an appeal by way of rehearing from a conclusion of a primary judge that an administrative decision-maker exceeded decision-making authority by making an unreasonable decision was "not ... the review of the exercise of a judicial

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89 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 23 [72]; [2003] HCA 6.

90 (2013) 249 CLR 332 at 363 [66].

91 (2016) 237 FCR 1 at 5-6 [9]-[11].

92 Allsop, "The Law as an Expression of the Whole Personality", [2017] (Summer) *Bar News* 25 at 31.

93 Cf *Universal Camera Corp v National Labor Relations Board* 340 US 474 at 489 (1951).

94 (2016) 237 FCR 1 at 5 [9].

discretion or of an evaluative judgment of like character"[95]. In so doing, *Stretton* foreshadowed the resolution of the principal question in the present appeal.

The Tribunal's choice was not unreasonable

61 The question as to the standard of appellate review having been resolved, the question which remains for determination in the appeal from the Full Court of the Federal Court is whether the Federal Circuit Court was wrong to conclude that the Tribunal's purported exercise of power was unreasonable.

62 The decision of the Tribunal in respect of which relief was claimed in the Federal Circuit Court, as has been noted, was a decision under s 415(2)(a) of the *Migration Act* affirming a decision of a delegate of the Minister to refuse to grant protection visas to the respondents. The respondents claimed in their application to the Federal Circuit Court that the decision was beyond power by reason that the prior purported exercise of the procedural power conferred by s 426A was beyond power because it was unreasonable.

63 Section 426A(1) provides that, if two preconditions are met, "the Tribunal may make a decision on the review without taking any further action to allow or enable the applicant to appear before it". The first precondition is that the applicant for review "is invited under section 425 to appear before the Tribunal". The second is that the applicant "does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear". Section 426A(2) makes clear that the power conferred by s 426A(1) is discretionary by spelling out that the section "does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review in order to enable the applicant's appearance before it as rescheduled".

64 Before the Federal Circuit Court, an issue emerged as to whether the first precondition to the exercise of the discretionary power had been met. The issue concerned the fate of a letter which the Tribunal had written inviting the respondents to appear before the Tribunal and give evidence on the scheduled hearing date. The letter had been addressed to the respondents at their residential address in the Sydney suburb of Roselands, which the respondents had provided to the Tribunal in their application for review of the delegate's decision as their address for service. The issue concerned whether evidence adduced by the Minister was sufficient to demonstrate that the letter had in fact been dispatched by prepaid post from the registry of the Tribunal. Dispatch of the letter by those means needed to have occurred if there was to have been service under s 441A(4) resulting in deemed receipt under s 441C(4), both of which were necessary in order for the respondents to have been invited under s 425 to appear before the

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95 (2016) 237 FCR 1 at 9 [25].

Tribunal. The primary judge proceeded on the implicit finding that the letter had been dispatched, with the result that the precondition had been met. The Full Court gave expression to the same finding[96], which the respondents have not challenged by notice of contention. There was no dispute that the second of the preconditions to the exercise of the power had been met. The respondents failed to attend the Tribunal hearing. Their originating application to the Federal Circuit Court asserted that they had not been in Sydney at the time and did not receive any letter about the hearing date.

65 There is, and was before the Federal Circuit Court and the Full Court, no dispute that the power conferred by s 426A is conditioned by the requirement that it be exercised reasonably. There is, and was, also no dispute that the choice the Tribunal made in purported exercise of the power conferred by s 426A was material to the decision which the Tribunal went on purportedly to make under s 415(2)(a) such as to result in the invalidity of that decision if the choice was unreasonable. The issue was solely as to the reasonableness of the choice.

66 The Tribunal was under no obligation to give reasons for the choice that it made in purported exercise of the power conferred by s 426A. But in fact it did give reasons. The record of the Tribunal's decision to affirm the decision of the delegate contained the following explanation:

> "The delegate's decision record, which the applicant provided to the Tribunal with his review application, indicates that the applicant was invited to attend a Department interview but did not attend or otherwise contact the Department. While the applicants sought this Tribunal's review in respect of the delegate's decision, he did not provide the Tribunal with any further documentation in support of his claims for Australia's protection.
>
> By letter dated 15 August 2014 the Tribunal invited the applicants to appear before it on 10 September 2014 to give evidence and present arguments. That letter was sent to the applicants' last identified address for correspondence and noted that if the applicants did not attend the scheduled hearing the Tribunal may make a decision without taking any further action to allow or enable them to appear. The applicants did not respond to that invitation or make any contact with the Tribunal in respect of their scheduled appearance or the review application more generally.
>
> Based on the evidence before it the Tribunal finds that the hearing invitation was sent to the last address for service provided in connection with the review and in the circumstances, pursuant to section 426A of the

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96 (2017) 248 FCR 1 at 5 [14].

> Act, the Tribunal has decided to make its decision on the review without taking any further action to enable the applicants to appear before it."

67 The primary judge pointed out that the decision on the review was of immense significance to the respondents, that the time between the invitation and the scheduled hearing was relatively short, that the Tribunal had nothing before it to indicate that its letter of invitation had in fact come to the attention of the respondents, and that the Tribunal did not follow up the respondents in the absence of a response to its letter of invitation despite them having given an email address and telephone number in the application for review of the delegate's decision. Neither individually nor in combination, however, do those factors take the Tribunal's choice to make a decision without further notice to the respondents beyond the bounds of reasonableness.

68 The Tribunal is exhorted to "pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick"[97], to "act according to substantial justice and the merits of the case"[98], and in applying Div 4 of Pt 7, within which ss 425 and 426A are located, to "act in a way that is fair and just"[99]. Because Div 4 "is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with"[100], the Tribunal acting fairly and justly is entitled to regard an applicant to whom it is satisfied that an invitation complying with s 425 has been sent as having had adequate notice of his or her opportunity to appear before the Tribunal when considering exercising the discretion under s 426A(1) in the event of non-appearance.

69 Where the Tribunal is satisfied that the statutory procedure contemplated by s 425 for inviting the applicant for review to appear before it has been followed and where the applicant without explanation fails to appear, the Tribunal being mindful of the exhortations to be fair and just but also to be economical and quick would ordinarily act reasonably in deciding in the exercise of the discretion under s 426A(1) to proceed to make a decision on the merits of the application for review without making any further attempt to make contact with the applicant. Ordinarily, it could not later be said on judicial review that

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97 Section 420(1) of the *Migration Act*.

98 Section 420(2)(b) of the *Migration Act*.

99 Section 422B(3) of the *Migration Act*.

100 Section 422B(1) of the *Migration Act*.

"no sensible [Tribunal] acting with due appreciation of its responsibilities"[101] could have taken that course.

70 Nothing before the Tribunal took the respondents' application for review into the realm of the extraordinary. To the contrary, the respondents' failure to respond to the earlier invitation from the Minister's Department and their failure to provide the Tribunal with any further documentation in support of their claims for protection, both of which considerations were expressly taken into account by the Tribunal, suggested that a further attempt by the Tribunal to make contact with them would be unlikely to elicit a response.

71 The Tribunal did not act unreasonably in choosing to make the decision without taking any further action to allow or enable the respondents to appear before it. The primary judge's conclusion that the Tribunal did act unreasonably in so doing was wrong. The Full Court should have so decided.

Orders

72 The appropriate orders are as proposed by Nettle and Gordon JJ.

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101 Cf *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 365 [71], quoting *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064.

73 NETTLE AND GORDON JJ. This appeal concerns judicial review of an administrative discretion exercised by the Refugee Review Tribunal ("the Tribunal")[102]. The discretion was found in s 426A of the *Migration Act* 1958 (Cth), which relevantly provided[103] that if an applicant for review of an "RRT-reviewable decision"[104] (in this appeal, a decision to refuse to grant a protection visa[105]) is invited under s 425 of the Act to appear before the Tribunal, and does not appear before the Tribunal on the day on which the applicant is scheduled to appear, the Tribunal *may* make a decision on the review without taking any further action to enable the applicant to appear before it[106].

74 SZVFW and his wife, the first and second respondents, were refused protection visas by a delegate of the appellant, the Minister for Immigration and Border Protection. They applied to the Tribunal for a review of the delegate's decision. SZVFW and his wife did not appear before the Tribunal on the day of their review hearing. The Tribunal proceeded under s 426A of the Act to make a decision on their review application and affirmed the decision under review to refuse the protection visas.

75 SZVFW and his wife then sought judicial review of the Tribunal's decision. The primary judge determined that the decision of the Tribunal to proceed in the absence of SZVFW and his wife was legally unreasonable. The Minister appealed to the Full Court of the Federal Court of Australia. The Full Court dismissed the appeal, holding that the Minister had to identify error in the reasoning of the primary judge in a manner broadly analogous to that required to be established in appeals from discretionary judgments[107].

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102 At the relevant time, the Refugee Review Tribunal. Now, the Administrative Appeals Tribunal.

103 Section 426A has subsequently been amended, with effect from 18 April 2015: see s 2 of, and item 26 of Sched 4 to, the *Migration Amendment (Protection and Other Measures) Act* 2015 (Cth). The relevant version of the Act is as at 12 September 2014, when the Tribunal made its determination.

104 s 411 of the Act.

105 s 411(1)(c) of the Act.

106 s 426A(1) of the Act.

107 *Minister for Immigration and Border Protection v SZVFW* (2017) 248 FCR 1 at 14-17 [43]-[57].

76 Both the approach adopted by, and the decision of, the Full Court were incorrect. The *only* question for the Full Court (and for this Court on appeal) was whether the Tribunal's exercise of power under s 426A was beyond power because it was legally unreasonable[108]. There is only one answer to that question: "yes" or "no". In this appeal, the answer is "no": the Tribunal's decision was *not* legally unreasonable. The appeal should be allowed.

77 These reasons will address the nature of the court's task on review where it has been alleged that a decision is legally unreasonable, as well as the relevant standard of legal reasonableness, and then consider the particular facts and circumstances of this appeal.

Nature of the court's task

78 The task of the court, where it has been alleged that a decision is legally unreasonable, is to ask whether the exercise of power by the decision-maker was beyond power because it was legally unreasonable[109].

79 That task requires the court to assess the quality of the administrative decision by reference to the statutory source of the power exercised in making the decision and, thus, assess whether the decision was lawful, having regard to the scope, purpose and objects of the statutory source of the power[110].

80 Parliament is taken to intend that a statutory power will be exercised reasonably by a decision-maker[111]. The question with which the legal standard of reasonableness is concerned is whether, in relation to the particular decision in issue, the statutory power, properly construed, has been *abused* by the decision-maker or, put in different terms, the decision is beyond power[112]. That question is critical to an understanding of the task for a court on review.

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108 See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351-352 [30], 367-369 [77]-[85], 378-380 [114]-[124]; [2013] HCA 18.

109 *Li* (2013) 249 CLR 332 at 351-352 [30], 367-369 [77]-[85], 378-380 [114]-[124].

110 *Li* (2013) 249 CLR 332 at 363-364 [67], 370-371 [90], 376 [109] citing *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473; see also at 473-474; [1963] HCA 54.

111 *Li* (2013) 249 CLR 332 at 350 [26], 351 [29], 362 [63], 370 [88].

112 *Li* (2013) 249 CLR 332 at 363-364 [67]; see also at 370-371 [90], 371 [92], 375 [105].

81 How that abuse of statutory power manifests itself is not closed or limited by particular categories of conduct, process or outcome. The abuse of statutory power is not limited to a decision affected by specific errors which bring about an improper exercise of power because, for example, the decision-maker took into account an irrelevant consideration or failed to take into account a relevant consideration; or exercised the power in bad faith, or for a purpose other than a purpose for which it was conferred; or exercised the power in such a way that the result of the exercise of power is uncertain[113].

82 Nor is the abuse of statutory power limited to a decision which may be described as "manifestly unreasonable"[114], or to what might be described as an irrational, if not bizarre, decision that is so unreasonable that no reasonable person could have arrived at it[115]. A conclusion of legal unreasonableness may be outcome focused – where, for instance, there is no "evident and intelligible justification" for the decision[116]. As Gageler J explained in *Minister for Immigration and Citizenship v Li*, "[r]eview by a court of the reasonableness of a decision made by another repository of power 'is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process' but also with 'whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law'"[117].

83 Indeed, grievous error may result if a court on review had to identify a particular error to found its conclusion of unreasonableness. If the court approached the assessment in this way, at least one important part of the lens for assessing legal unreasonableness would be removed: namely, error identified by observing that the *result* is so unreasonable that it could not have been reached if proper reasoning had been applied in the exercise of the statutory power in the particular circumstances. In that situation, the court is not undertaking merits review of an exercise of a discretionary power by a decision-maker[118].

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113 *Li* (2013) 249 CLR 332 at 365-366 [72].

114 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41; [1986] HCA 40.

115 See *Li* (2013) 249 CLR 332 at 364 [68], 375 [105].

116 *Li* (2013) 249 CLR 332 at 367 [76]; see also at 373 [98], 375 [105].

117 (2013) 249 CLR 332 at 375 [105] quoting *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at 220-221 [47].

118 See, eg, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; [1990] HCA 21.

Rather, the court is asking whether the decision-maker's purported exercise of power was beyond power because it was legally unreasonable.

84 Moreover, legal unreasonableness is invariably fact dependent and requires a careful evaluation of the evidence. That is, assessment of whether a decision was beyond power because it was legally unreasonable depends on the application of the relevant principles to the *particular* factual circumstances of the case, rather than by way of an analysis of factual similarities or differences between individual cases. Where reasons are provided, they will be a focal point for that assessment. It would be a rare case to find that the exercise of a discretionary power was unreasonable where the reasons demonstrated a justification for that exercise of power.

85 On review, a conclusion by a primary judge that a decision-maker has exercised a power in a manner which is unreasonable does not depend upon the exercise of any discretion by the primary judge. It may involve an evaluative process. But labelling the task of a primary judge as "evaluative" does not entitle an appeal court to determine, for example, that the purported exercise of power by the decision-maker was valid because it was not legally unreasonable but then, nonetheless, go on to conclude that it was open to the primary judge to reach the opposite view.

86 In *Li*[119] it was observed that, in determining the standard of legal reasonableness, an analogy between judicial review of administrative action and appellate review of judicial discretion is apparent. While the plurality had regard to *House v The King*[120], the plurality's observations were not directed to the proposition, and do not state, that a *House v The King* error must be established in the context of judicial review of administrative decisions. Rather, the analogy drawn by reference to *House v The King* was that, in the same way that an appeal court does not interfere with a lower court's exercise of a judicial discretion just because the court might have exercised the discretion in a different way, similarly, in a judicial review context, a court should not interfere with an administrator's exercise of a discretion just because the court would have exercised the discretion in a different way.

87 The analogy drawn in *Li* did *not* go on to state that the principles applicable to appellate review of judicial discretion also apply in relation to judicial review of administrative action. It did not provide any support for the contention that an evaluative approach by a primary judge on an application for

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119 (2013) 249 CLR 332 at 366 [75], 376-377 [110] citing *Peko-Wallsend* (1986) 162 CLR 24 at 41-42.

120 (1936) 55 CLR 499; [1936] HCA 40.

judicial review is to be treated as analogous to an exercise of judicial discretion. In the case of judicial review of administrative action, a discretion given to an administrative decision-maker is not transferred to, or picked up by, the primary judge; nor is the primary judge's review of the administrative decision the exercise of a discretion.

Standard of legal reasonableness

88 The standard of reasonableness is derived from the applicable statute but also from the general law.

89 First, there is a legal presumption that a discretionary power, statutorily conferred, must be exercised reasonably in the legal sense of that word[121]. That is, when something is to be done within the discretion of the decision-maker, it is to be done according to the rule of reason and justice; it is to be done according to law[122].

90 Second, in this appeal, the applicable statutory power was to be found in s 426A of the Act, which, at the relevant time, provided:

> "(1) If the applicant:
>
> (a) is invited under section 425 to appear before the Tribunal; and
>
> (b) does not appear before the Tribunal on the day on which, or at the time and place at which, the applicant is scheduled to appear;
>
> the Tribunal *may make* a decision on the review without taking any further action to allow or enable the applicant to appear before it.
>
> (2) This section does not prevent the Tribunal from rescheduling the applicant's appearance before it, or from delaying its decision on the review in order to enable the applicant's appearance before it as rescheduled." (emphasis added)

There was no express list of factors which the Tribunal was required to take into account in making its decision on the review without taking any further action to allow or enable an applicant to appear before it. However, the power was not

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121 *Li* (2013) 249 CLR 332 at 351 [29], 362 [63], 370-371 [88]-[92].

122 *Li* (2013) 249 CLR 332 at 363 [65], 370-371 [90].

without limitation. The scope and purpose of the Act provided limits[123] on the exercise of the Tribunal's power under s 426A.

91 Further, s 425 of the Act imposed requirements that the Tribunal *must invite* the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review[124], unless, relevantly, the Tribunal considers that it should decide the review in the applicant's favour, on the material before it[125].

92 Pursuant to s 425A, if an applicant is invited to appear before the Tribunal, the Tribunal must give the applicant notice of the day on which, and the time and place at which, the applicant is scheduled to appear[126], and that notice must be given by one of the methods specified in s 441A[127], unless the applicant is in immigration detention (in which case, alternative methods are prescribed)[128]. The notice methods specified in s 441A included: by hand[129]; by hand to a person at the applicant's last residential or business address[130]; by prepaid post or other prepaid means[131]; transmission by fax, email or other electronic means[132]; or by giving documents to a carer of a minor[133].

93 If the Tribunal complies with the requirements of s 441A, the applicant is taken to have received the document under s 441C. Relevantly, s 441C(4) provided that if the Tribunal gives a document to a person by the method in

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123 See *Li* (2013) 249 CLR 332 at 363-364 [67], 370-371 [90], 376 [109] citing *Klein* (1963) 109 CLR 467 at 473; see also at 473-474.

124 s 425(1) of the Act.

125 s 425(2) of the Act.

126 s 425A(1) of the Act.

127 s 425A(2)(a) of the Act.

128 s 425A(2)(b) of the Act.

129 s 441A(2) of the Act.

130 s 441A(3) of the Act.

131 s 441A(4) of the Act.

132 s 441A(5) of the Act.

133 s 441A(6) of the Act.

s 441A(4) (which involves dispatching the document by prepaid post or other prepaid means), the person is taken to have received the document after the expiry of a prescribed time period.

94 Third, the Tribunal's statutory task, as revealed by a consideration of the Act as a whole and, in particular, the provisions of Pt 7 (including those to which reference has been made), is to arrive at the correct or preferable decision in the case before it, according to the material before it[134].

95 Fourth, the range of powers, discretions and obligations granted to the Tribunal by Pt 7 of the Act, and the way in which the statute conditions them, contains an exhaustive statement of the rules of natural justice in relation to the "matters" that Part deals with[135].

96 Fifth, Parliament has conferred on the Tribunal the necessary flexibility to ensure that the Tribunal can fully perform its statutory task. Indeed, the discretion in s 426A itself provides flexibility so that the Tribunal's statutory task can be performed. Put in different terms, the legislative scheme of the Act concerning review of decisions in Pt 7 is not one that *requires* the exercise of power, or the performance of obligations, where conferred on the Tribunal, on a once only basis. The nature of the subject matter of the review and the manner of the exercise of the review may, on occasion, mean that the power may be exercised and the function or duty must be performed from time to time, as occasion requires, in order to arrive at the correct or preferable decision in the case before the Tribunal according to the material before it[136]. But, of course, the exercise of the discretion in s 426A does not *require* the Tribunal to postpone or refrain from making a decision on a review every time an applicant suggests they wish to provide further information, cannot meet a deadline, or fails to appear.

97 The discretion in s 426A recognises that the exercise of the discretion in a given case will be affected by the subject matter of the particular review, the course the review has taken, the Tribunal's approach throughout the review, the applicant's situation and conduct throughout the review and the other surrounding circumstances. That is, there is an area within which the

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134 *Li* (2013) 249 CLR 332 at 341-342 [10], 371-372 [93].

135 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 266 [35]; [2010] HCA 23.

136 *Li* (2013) 249 CLR 332 at 341-342 [10], 371-372 [93].

decision-maker has a genuinely free discretion which resides within the bounds of legal reasonableness[137].

98 It is against that important framework that the particular review the subject of this appeal must be considered.

Facts

99 On 3 December 2013, SZVFW and his wife applied for Protection (Class XA) visas. The application gave as SZVFW and his wife's residential and postal address an address in Roselands, New South Wales. SZVFW did not agree to the Department of Immigration and Border Protection ("the Department") communicating with him by fax, email or other electronic means. He did provide a mobile number. Both SZVFW and his wife undertook to inform the Department if they intended to change their address for more than 14 days while their application was being considered.

100 By a letter dated 18 December 2013, the Department acknowledged the application had been lodged and sought further information from SZVFW and his wife. That letter was addressed to the Roselands address. By a letter dated 3 March 2014, the Department invited SZVFW to an interview with a delegate of the Minister on 26 March 2014, and also invited SZVFW to provide any additional supporting documents. Again, the letter was addressed to the Roselands address. The letter stated, among other things, that "[i]f you do not attend the interview your application may be decided on the information already provided to us".

101 On 25 March 2014, a Mandarin-speaking departmental officer contacted SZVFW to tell him that his interview required rescheduling. The next day, on 26 March 2014, a Mandarin-speaking departmental officer contacted SZVFW to tell him that his interview was to be held at 11.00am on 9 April 2014. Neither SZVFW nor his wife attended the scheduled interview or provided any further supporting documents.

102 By a letter dated 16 April 2014, the Department advised SZVFW and his wife that their application had been refused. The letter was addressed to the Roselands address.

103 On 12 May 2014, SZVFW and his wife lodged an application for review by the Tribunal ("the Review Application"). The Review Application specified the Roselands address as the address to which correspondence was to be sent.

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137 *Li* (2013) 249 CLR 332 at 363 [65]-[66].

The Review Application also contained a mobile number and an email address for SZVFW.

104 By a letter dated 12 May 2014, the Tribunal acknowledged receipt of the Review Application and invited SZVFW and his wife to provide material or written arguments as soon as possible. The letter was addressed to the Roselands address. Neither SZVFW nor his wife responded to the invitation.

105 By a letter dated 15 August 2014, the Tribunal invited SZVFW and his wife to appear before it on 10 September 2014 ("the Invitation Letter"). The Invitation Letter was addressed to the Roselands address. It was sent by ordinary post, not registered post. The Invitation Letter stated, among other things, that "[i]f you do not attend the scheduled hearing, the Tribunal may make a decision without taking any further action to allow or enable you to appear before it". Neither SZVFW nor his wife contacted the Tribunal or attended the hearing.

106 The Tribunal exercised the power conferred on it by s 426A(1) of the Act, as it then stood, to make a decision on the Review Application without taking any further action to allow or enable SZVFW and his wife to appear before it. The Tribunal affirmed the decision under review.

107 By a letter dated 15 September 2014, SZVFW and his wife were informed of the Tribunal's decision. The letter was addressed to the Roselands address. SZVFW and his wife sought judicial review of the Tribunal's decision in the Federal Circuit Court.

Decisions below

108 In order to explain how the Full Court fell into error, it is necessary to trace the reasoning of the primary judge and then the reasoning of the Full Court.

Federal Circuit Court

109 The primary judge accepted that there was no obligation on the Tribunal, in every case where there has been a failure to respond to an invitation to appear, to search records and find other ways of communicating with the applicant.

110 The primary judge expressed concern as to whether she could be satisfied that the Invitation Letter was dispatched within three working days of the date of the letter, so as to come within the method prescribed by s 441A(4) of the Act and thereby satisfy s 426A(1)(a), but held that it was unnecessary to resolve that issue. In effect, according to her Honour, it was enough that the Tribunal was not able, on the evidence before it, to satisfy itself that SZVFW and his wife had been formally advised of the hearing, or that SZVFW and his wife were, in a practical sense, aware of the hearing date and time.

111 Her Honour considered that the Invitation Letter was of great significance because SZVFW and his wife had applied for protection visas and their attendance at the hearing could have made a difference to the outcome of the review. Her Honour considered that the Tribunal easily could have identified another avenue of communicating with SZVFW and his wife because the Review Application included a mobile number and an email address. But there was no evidence of attempted, subsequent email or telephone communication with SZVFW and his wife.

112 The primary judge further noted that the matter had been before the Tribunal for a relatively short period of time, there was not a lengthy period during which SZVFW and his wife did "nothing", they were not represented by a migration agent or solicitor, and the Invitation Letter was the first invitation sent to them. In that sense, the absence of a pattern of communication between the Tribunal and SZVFW and his wife was not determinative.

113 The primary judge concluded that, even assuming that the Invitation Letter *was* dispatched within the prescribed period (such that the Invitation Letter complied with ss 425, 425A and 426A(1)), the Tribunal's decision to make a decision on the Review Application without taking any further action to allow or enable SZVFW and his wife to appear before it was legally unreasonable.

Full Court

114 The Full Court stated that it was not its task to "step into the shoes of the primary judge" and determine for itself whether the Tribunal's exercise of the discretion under s 426A was unreasonable in the legal sense[138]. Instead, "to succeed in the appeal" the Full Court required the Minister to "establish an appealable error on the part of the primary judge, whether that error be of fact or law"[139].

115 According to the Full Court, the primary judge's finding that the Tribunal's decision under s 426A was unreasonable "was fundamentally a decision which turned on her Honour's evaluative judgment"[140] and which "necessarily involved the primary judge determining what weight she should give to individual relevant circumstances"[141].

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138 *SZVFW* (2017) 248 FCR 1 at 14 [43].

139 *SZVFW* (2017) 248 FCR 1 at 14 [43].

140 *SZVFW* (2017) 248 FCR 1 at 14 [44].

141 *SZVFW* (2017) 248 FCR 1 at 14 [44].

116 It followed, in the view of the Full Court, that it was for the Minister to persuade the Full Court that the primary judge's evaluation of the legal unreasonableness ground involved an error akin to that required to be established in appeals from discretionary judgments[142]. Adopting that approach, the Full Court deferred to the weight attributed by the primary judge and concluded that no error had been identified in the primary judge's reasons.

117 The approach adopted by the Full Court led it into error. The Full Court had to examine the administrative decision of the Tribunal to determine whether the primary judge was correct to conclude that the administrative decision was legally unreasonable. Contrary to the conclusion reached by the primary judge (and the Full Court), the administrative decision of the Tribunal was *not* legally unreasonable.

Tribunal's decision was not legally unreasonable

118 The Tribunal found, based on the evidence before it, that the Invitation Letter was sent to the last address for correspondence provided in connection with the review. On review, that finding was not challenged. That finding provided the basis to establish that the requirements of s 441A, and in particular s 441A(4), were satisfied. Although the Tribunal did not expressly refer to s 441C(4), the effect of that provision is to deem SZVFW and his wife to have received the Invitation Letter if it was dispatched by prepaid post or by other prepaid means.

119 The significance of compliance with s 441A(4) was that the deeming effect of s 441C(4) was engaged and ss 425 and 425A were satisfied. The Tribunal was then permitted to engage s 426A and make a decision on the review without taking any further action to allow an applicant to appear before it. And that is what the Tribunal did in this case.

120 The primary judge's analysis paid no regard to the fact that s 441C had been satisfied, the place of that presumption in the statutory scheme, or the fact that there was no attempt to rebut that statutory presumption. Granted, as the primary judge put it, s 425 of the Act imposed an obligation on the Tribunal to give SZVFW and his wife a "meaningful opportunity" to appear and present evidence and arguments in support of the Review Application. But the Tribunal did not deny them that opportunity.

121 Moreover, the primary judge paid no regard to the lack of interaction of SZVFW and his wife with the delegate of the Minister when they did not attend to be interviewed by the delegate, where there could be no suggestion that they

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142 *SZVFW* (2017) 248 FCR 1 at 13-15 [40]-[47], especially at 14-15 [45]-[47].

had not received a written invitation to attend that interview and even after being contacted by telephone. That is, there was no suggestion that the failure of SZVFW and his wife to attend the hearing before the Tribunal was unexpected or remarkable.

122 Finally, although the primary judge was correct to identify that the Invitation Letter was of great importance to SZVFW and his wife, the primary judge paid no regard to the fact that the hearing before the delegate was equally, if not more, important and SZVFW and his wife did not attend that hearing. The fact that SZVFW and his wife did not attend before the delegate provided a further basis for the Tribunal to proceed to determine the application. The approach and position of SZVFW and his wife did not change before the Tribunal. Their failure to provide further information when invited by the Tribunal, or to attend the hearing, was consistent with their conduct before the delegate. That conduct did not improve or detract from the position of SZVFW and his wife that had existed at the time of the delegate's decision.

123 The exercise of the statutory decision-making power by the Tribunal was not beyond power. Having regard to the statutory source of the power exercised in making the decision, the subject matter of the particular review, the course the review had taken, the Tribunal's approach throughout the review, the situation and conduct of SZVFW and his wife throughout the review and the other surrounding circumstances, the exercise of the power was not unreasonable.

Conclusion and orders

124 For those reasons, the Tribunal's decision to make a decision on the Review Application without taking any further action to enable SZVFW and his wife to appear before it was not legally unreasonable.

125 The appeal should be allowed. Paragraph 1 of the order of the Full Court of the Federal Court of Australia dated 2 March 2017 should be set aside and, in its place, it should be ordered that:

1. the appeal be allowed; and

2. the order of the Federal Circuit Court of Australia dated 19 August 2016 be set aside and, in its place, order that the application be dismissed.

126 The Minister is to pay the first and second respondents' costs of this appeal.

EDELMAN J.

Introduction

127 Speaking in the context of the adjudication of questions of construction of legislation, Aronson, Groves and Weeks observe that "[o]ne of the assumptions underlying Marshall CJ's judgment in *Marbury v Madison* remains to this day, namely, that to every question of law, there can be only one right answer"[143]. On judicial review of, or appeal from, a decision concerning the construction of legislation, a contract, a will, or a trust, no latitude is given to a primary decision maker even where the primary decision was one about which opinions might reasonably differ. "As to construction, there is always one and only one true meaning to be given to fully expressed words."[144]

128 However, there are other categories of case, also where the primary decision is one about which opinions might differ, but where, other legal errors aside, review is limited to, or an appeal is constrained to, decisions outside a permissible range. On judicial review of administrative action, the legality of an otherwise lawful decision disclosing no error of law is generally assessed for reasonableness rather than for correctness. On appeals from decisions commonly described as "discretionary", judicial restraint is also required even if the appellate judge would have reached a different decision. For instance, in criminal law, the classic example is that a sentence will not usually be overturned merely because the appellate judge would have made a different order[145]. In civil law, the classic example concerns an assessment of general damages for personal injury[146].

129 This appeal concerns the nature of judicial restraint in these two categories. The Refugee Review Tribunal had affirmed a decision of a delegate of the Minister to refuse to grant protection visas to the first and second respondents. The Federal Circuit Court of Australia held that the Tribunal acted beyond power on the ground of unreasonableness. On appeal, the Full Court of the Federal Court of Australia effectively held that judicial restraint should be exercised because the decision of the Federal Circuit Court was "largely an

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143 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) at 202 [4.80] (footnote omitted).

144 *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 78; [1925] HCA 18.

145 *House v The King* (1936) 55 CLR 499 at 504-505; [1936] HCA 40.

146 *Miller v Jennings* (1954) 92 CLR 190 at 196; [1954] HCA 65.

evaluative one"[147] and comparable to circumstances where a "discretionary" decision is made.

130 The first issue on this appeal concerns the nature of judicial review for legal unreasonableness. For the reasons below, the Federal Circuit Court erred in concluding that the decision of the Tribunal should be set aside on the ground of unreasonableness. The second issue concerns the circumstances in which judicial restraint should be exercised on an appeal. The Full Court should not have exercised judicial restraint on the appeal from the Federal Circuit Court. This appeal should be allowed.

Judicial review for unreasonableness

The basis for judicial review on the ground of unreasonableness

131 The reasonableness constraint that usually applies to the exercise by an administrator of statutory power is generally based upon a statutory implication[148]. Where the statutory implication imposes a duty of reasonableness as a condition of decision making, violation of that duty means that the decision will have been made beyond power and therefore unlawfully. This appeal, and the discussion that follows, is concerned only with unreasonableness as an independent ground of judicial review. It is not concerned with unreasonableness as a description of those other grounds of judicial review concerned with specific errors in decision making, such as "[b]ad faith, dishonesty ... attention given to extraneous circumstances, [and] disregard of public policy"[149].

132 The implication of reasonableness is not unique to statutes. When a legal power is conferred by an instrument, it is often implied that the legal power will be exercised reasonably. For instance, at least where reasons are given, courts

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147 *Minister for Immigration and Border Protection v SZVFW* (2017) 248 FCR 1 at 15 [46].

148 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36; [1997] HCA 27; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650 [126]; [1999] HCA 21; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [29]; [2013] HCA 18.

149 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 365 [69], quoting *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229.

will examine the exercise of general powers in trust deeds[150] or will trusts[151] to determine whether the decision could reasonably have been reached by the trustee. Even in contract, where powers are usually expected to be exercised with self-interest, a contractual clause that empowers one party to act to the detriment of another has sometimes been construed to require the power holder to reach the decision reasonably[152] or, in more detail, "reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained"[153]. In every case the terms of the statute or instrument, in their context, determine whether the implication is required.

133 The precise content of the implied duty of reasonableness will also depend on the circumstances. In England it has been said that the terms and context of a contract might impliedly proscribe "a decision to which no reasonable person having the relevant discretion could have subscribed"[154]. Similarly, when a trustee has an implied duty to act reasonably in the exercise of a power of

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150 *In re Beloved Wilkes's Charity* (1851) 3 Mac & G 440 at 448 [42 ER 330 at 333-334]; *Metropolitan Gas Co v Federal Commissioner of Taxation* (1932) 47 CLR 621 at 633; [1932] HCA 58; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 441-442.

151 *Tempest v Lord Camoys* (1882) 21 Ch D 571 at 580, see also at 578. See also *Cox v Archer* (1964) 110 CLR 1 at 7; [1964] HCA 18; *Lutheran Church of Australia South Australia District Inc v Farmers' Co-operative Executors and Trustees Ltd* (1970) 121 CLR 628 at 639; [1970] HCA 12.

152 *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* (2015) 329 ALR 1 at 161-163 [1010]-[1015].

153 *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 273 [288], citing *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558 and *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618.

154 *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 at 323 [64]; *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at 1672 [28], see also at 1677 [53], 1688 [103]; [2015] 4 All ER 639 at 650, see also at 654-655, 665.

appointment, perhaps in cases other than those where reasons are provided[155], it may sometimes be that the duty of reasonableness obliges the trustee not to act perversely[156] or in a manner in which "no reasonable trustee ... could possibly act"[157]. Ultimately, however, the assessment of reasonableness will be undertaken in light of a construction of the instrument as a whole, and influenced by expressions such as "their sole and absolute discretion"[158] in the empowering provision.

134 Like other legal instruments, statutes often confer powers upon a decision maker without any express condition as to the manner in which those powers must be exercised. To the question: "how should the power be exercised?" the implication will not usually be: "in any way that the decision maker desires". Rather, it will usually be implied that the power should be exercised reasonably. As for the content of the duty of reasonableness, following the classic exposition by Lord Greene MR[159], the content of the implication of reasonableness as an independent ground of judicial review has often been expressed in this Court in terms similar to those which ask whether a decision is "so unreasonable that no reasonable repository of the power could have taken the impugned decision or action"[160]. In Canada, in a distinction now abandoned[161], this high standard of

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155 See, eg, *In re Beloved Wilkes's Charity* (1851) 3 Mac & G 440 at 448 [42 ER 330 at 333-334]; *In re Londonderry's Settlement* [1964] Ch 918 at 928-929; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 441-442.

156 *In re Lofthouse, an Infant* (1885) 29 Ch D 921 at 930.

157 *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896 at 907, see also at 901, 905.

158 See, eg, *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896 at 898.

159 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229, 234.

160 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; [1990] HCA 21. See also *Buck v Bavone* (1976) 135 CLR 110 at 118; [1976] HCA 24; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 554 [115]-[116]; [1999] HCA 14; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 654 [136]; *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1128 [20]; 259 ALR 429 at 434; [2009] HCA 39; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 645 [122]-[123]; [2010] HCA 16.

161 *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at 213 [32], 214-218 [34]-[41]; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)* [2011] 3 SCR 471 at 482 [15].

unreasonableness was once described as "patent" unreasonableness in contrast with "unreasonableness simpliciter"[162]. Although Lord Cooke of Thorndon presciently observed nearly two decades ago[163], and a majority of this Court more recently said[164], that the legal standard of reasonableness is not necessarily limited to patent unreasonableness, it is not helpful to attempt to divide unreasonableness into predetermined species. Rather, the precise content of an implication of reasonableness, where it is implied, will be based upon the context, including the scope, purpose, and real object of the statute[165].

135 An important matter of context in relation to the statutory implication is the legal tradition in which many statutes conferring administrative powers have been enacted. A strong part of that tradition has been the common description of unreasonableness in the terms of "patent" unreasonableness. One reason for this description may be that the consequence of a finding of unreasonableness is that the decision by the body entrusted by Parliament will be beyond power and unlawful. The strong terms of the common description of unreasonableness may be based upon an assumption that Parliament did not manifest an intention that such a conclusion be lightly reached. To reiterate, this is not to suggest that there are two, or more, tests of unreasonableness. There is only one, but its content is assessed in light of the terms, scope, purpose, and object of the statute, as Allsop CJ eloquently said in *Minister for Immigration and Border Protection v Stretton*[166].

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162 *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation* [1979] 2 SCR 227 at 237; *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 at 777-779 [57]-[60]; *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 at 1005 [27]. See also Allan, "Common Law Reason and the Limits of Judicial Deference", in Dyzenhaus (ed), *The Unity of Public Law*, (2004) 289 at 297, speaking of the "specious sub-divisions – super-*Wednesbury* and sub-*Wednesbury*".

163 *R v Chief Constable of Sussex, Ex parte International Trader's Ferry Ltd* [1999] 2 AC 418 at 452.

164 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 364 [68], see also at 375 [105].

165 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 364 [67], citing *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473; [1963] HCA 54.

166 (2016) 237 FCR 1 at 5 [9].

The unreasonableness conclusion of the Federal Circuit Court

136 The first respondent and his wife, the second respondent ("the respondents"), applied to the Tribunal for review of a decision of a delegate of the Minister, who had refused their original applications for Protection (Class XA) visas. The respondents did not attend the Tribunal hearing.

137 At the relevant time, if an applicant for review were invited (under s 425 of the *Migration Act* 1958 (Cth), with the notice required under s 425A) to appear before the Tribunal and did not appear at the designated time and place, s 426A(1) of the *Migration Act* empowered the Tribunal to make a decision on the review "without taking any further action to allow or enable the applicant to appear before it". There was no dispute in this Court that the respondents had been invited, in compliance with the requirements of the *Migration Act*, to appear before the Tribunal. They did not appear at the designated time and place.

138 The Tribunal proceeded to hear the matter in the absence of the respondents. The reasons that the Tribunal gave for doing so were essentially threefold: (i) the respondents had been invited to appear before the Tribunal by a letter that was sent to their last identified address for correspondence; (ii) in the letter sent to the respondents the Tribunal had said that, if the respondents did not attend the scheduled hearing, the Tribunal may make a decision without taking any further action to allow or enable them to appear; and (iii) the respondents had not made any contact with the Tribunal, including to provide any further documentation, in respect of their scheduled appearance or the review application more generally.

139 The respondents sought review of the Tribunal's decision. The Federal Circuit Court held that the Tribunal had acted unreasonably when it proceeded under s 426A of the *Migration Act* in the absence of the respondents to consider, and refuse, their applications for protection visas. The primary judge relied upon a number of matters in reaching her conclusion that the decision was unreasonable: (i) the lack of evidence before the Tribunal that the letter was delivered by ordinary post[167]; (ii) the relatively short period of time between the sending of the invitation and the hearing[168]; (iii) the significance of the hearing to the respondents[169]; and (iv) the lack of "follow-up" by the Tribunal in the absence

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167 *SZVFW v Minister for Immigration and Border Protection* (2016) 311 FLR 459 at 472-473 [76].

168 (2016) 311 FLR 459 at 473 [77].

169 (2016) 311 FLR 459 at 473 [79].

of a response from the respondents, despite the Tribunal having the respondents' email address and a telephone number[170].

140 The matters relied upon by the primary judge do not, even in combination, establish legal unreasonableness. In particular, two matters of statutory context require a highly demanding approach in determining whether legal unreasonableness exists in the exercise of the power under s 426A(1), which is in Div 4 of Pt 7 of the *Migration Act*. First, there was the objective of review of protection visa decisions under Pt 7, expressed in s 420(1) as providing a mechanism that is "fair, just, economical, informal and quick". Secondly, and in relation to "fairness and justice", s 422B(1) provided that "[Div 4] is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with" and, as Nettle and Gordon JJ observe, the effect of s 441C(4) was to deem the respondents to have received the invitation to the hearing.

141 The decision by the Tribunal, for the reasons it gave, was not legally unreasonable. Three further reasons, additional to those given by the Tribunal, are also relevant. First, in the original applications by the respondents to the Minister, they undertook to inform the Department if they intended to change their address for more than 14 days while their applications were being considered. No change of address was provided. It was reasonable for the Tribunal to draw the inference that the respondents were still accessing mail at that address. Secondly, the letter from the Department refusing the respondents' original applications was sent to their nominated address. Thirdly, prior to the decision of the delegate, the respondents had not attended a scheduled interview with the Department, despite apparently being made aware of the interview by letters sent to their nominated address and a telephone call rescheduling the interview. It would have been reasonable to infer that a rescheduled hearing before the Tribunal might have been futile.

Judicial restraint on appeals

142 The second issue on this appeal is whether the principles of judicial restraint could preclude an appellate court from substituting its own view on whether the Tribunal's decision was unreasonable if the appellate court considered that the answer given by the primary judge was open in the circumstances.

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170 (2016) 311 FLR 459 at 474 [80].

Judicial restraint, deference, and discretionary decisions

143 The concept I describe in these reasons (and have described previously[171]) as "judicial restraint" is one for which different labels are sometimes used. One label commonly used is the review of a "discretionary decision". Another is the review of a decision where "deference" is afforded to the primary decision maker. Although labels in this area "ought not to fetter our substantive thinking"[172], the use of some labels can lead to confusion, as it did in this case.

144 The label "discretionary", when used in relation to a decision that is the subject of judicial restraint, was said by Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*[173] to describe a situation in which "'no one [consideration] and no combination of [considerations] is necessarily determinative of the result'. Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made". Similarly, in *Norbis v Norbis*[174], Mason and Deane JJ spoke of a discretionary decision as one involving "value judgments in respect of which there is room for reasonable differences of opinion".

145 In addition to cases involving these "discretionary" decisions, there are other, similar circumstances where judicial restraint is exercised by extension from these cases. In *Miller v Jennings*[175], Dixon CJ and Kitto J exercised judicial restraint in the assessment of general damages, saying that "there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision". More controversially, four members of this Court in *Batistatos v Roads and Traffic Authority (NSW)*[176] might be taken as suggesting that the duty[177] of a court to exercise its power to prevent an abuse of process is subject to appellate judicial restraint for the same reasons. A similar approach was thought by the Full Court to apply in this case.

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171 *The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346 at [147].

172 Steyn, "Deference: a Tangled Story", [2005] *Public Law* 346 at 350.

173 (2000) 203 CLR 194 at 205 [19]; [2000] HCA 47, quoting *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76; [1989] HCA 46.

174 (1986) 161 CLR 513 at 518; [1986] HCA 17.

175 (1954) 92 CLR 190 at 196.

176 (2006) 226 CLR 256 at 264 [7]; [2006] HCA 27. Cf at 321-322 [223], 326 [238].

177 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536.

The Full Court said that an appellate court will approach its consideration of a primary judge's assessment of the unreasonableness of the Tribunal's decision by "broad analogy" with "helpful guidance ... from well-known authorities which emphasise the need for caution by an appellate court which is asked to disturb the outcome of a discretionary judgment"[178].

146 The expression "discretion" is commonly used and unobjectionable. But, to avoid confusion, it must be used with care. There are two reasons for this.

147 First, "discretion" can be a slippery term that is used in law in a number of different ways[179]. Even in the particular sense described above – a situation where no one consideration is determinative of the result – the label could be attached to almost any circumstance where legal standards impose duties upon a decision maker but the decision maker is required to evaluate different, competing considerations. Not all of those circumstances require the exercise of judicial restraint when reviewing the decision of the primary decision maker. In other words, although the notion of "discretion" is associated with "room for individual choice", there is a danger that it will be thought that a decision concerning an evaluative, and uncertain, legal issue is one that should be subject to judicial restraint upon review. This danger is exemplified by the approach of the Full Court in this case.

148 Secondly, some categories of decision that were once discretionary are still described as such, although they are no longer the subject of any real judicial restraint. For instance, the historical foundation of much equitable doctrine lay in the notion of a discretionary application of conscience[180]. This Court has said of equitable remedies that "the interference of a court of equity is a matter of mere discretion"[181]. Yet, it is well recognised that legal rules now govern the equitable "discretion" to award specific performance[182], to grant

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178 (2017) 248 FCR 1 at 14 [45].

179 *Norbis v Norbis* (1986) 161 CLR 513 at 518; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 204 [19].

180 See *Ramsay Health Care Australia Pty Ltd v Compton* (2017) 91 ALJR 803 at 820-821 [99]-[100]; 345 ALR 534 at 555; [2017] HCA 28.

181 *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at 114; [1995] HCA 14, quoting Story and Perry, *Commentaries on Equity Jurisprudence, as Administered in England and America*, 12th ed (1877), vol 1 at 677 §693.

182 *Pakenham Upper Fruit Co Ltd v Crosby* (1924) 35 CLR 386 at 401; [1924] HCA 55; *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 297-298, 314; [1931] HCA 15.

injunctions[183], or to award an account of profits[184]. No judicial restraint is exercised by appellate courts in considering whether there has been compliance with those rules.

149 In other jurisdictions, the language of discretion as a description of circumstances in which judicial restraint is exercised is often replaced by describing the decision as one where "deference" is afforded to the primary decision maker. For instance, in the House of Lords in *R v Director of Public Prosecutions; Ex parte Kebilene*[185], Lord Hope of Craighead said that some categories of case created an area "within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person". And in the Supreme Court of Canada in *Dr Q v College of Physicians and Surgeons of British Columbia*[186], McLachlin CJ, writing for the Court, said that a reviewing judge's task was "to review the decision with the appropriate degree of curial deference". But the label "deference" has been deprecated in Australia[187]. It has historical[188], unfortunate connotations of

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183 *Pakenham Upper Fruit Co Ltd v Crosby* (1924) 35 CLR 386 at 400-401; *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 298-299, 307.

184 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559; [1995] HCA 18.

185 [2000] 2 AC 326 at 381. See, further, *R v Lambert* [2002] QB 1112 at 1124 [16]; *Brown v Stott (Procurator Fiscal, Dunfermline)* [2003] 1 AC 681 at 710-711; *R (L) v Commissioner of Police of the Metropolis* [2010] 1 AC 410 at 440 [74]; *R (GC) v Commissioner of Police of the Metropolis* [2011] 1 WLR 1230 at 1244 [43]; [2011] 3 All ER 859 at 876; *R (Nicklinson) v Ministry of Justice* [2015] AC 657 at 783 [78], 870 [348]; *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945 at 965 [22], 971 [33], 1007 [150], 1015 [180].

186 [2003] 1 SCR 226 at 234 [16]. See also *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at 226 [62], 255 [135]; *Smith v Alliance Pipeline Ltd* [2011] 1 SCR 160 at 172-173 [24]-[25], 187 [78], 188-200 [80]-[106]; *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals* [2011] 3 SCR 616; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada* [2012] 2 SCR 283; *Agraira v Canada (Public Safety and Emergency Preparedness)* [2013] 2 SCR 559; *Mouvement laïque québécois v Saguenay (City)* [2015] 2 SCR 3; *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval* [2016] 1 SCR 29; *Quebec (Attorney General) v Guérin* [2017] 2 SCR 3 at 24 [41].

187 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 153 [44]; [2000] HCA 5.

188 Hamburger, *Is Administrative Law Unlawful?*, (2014) at 285, 299.

servility[189]. Where judicial restraint is exercised, the appellate or reviewing court is not deferring to the primary decision maker in the sense of submission to the "source" or "pedigree" of the decision[190]. Rather, the court is recognising that in cases where judicial restraint is required, then within a range of possible, usually reasonable, decisions made in the proper way[191], the court is required not to interfere with the primary decision.

When judicial restraint is required

150 Sometimes the reason for judicial restraint is said to be that "there is room for reasonable differences of opinion, no particular opinion being uniquely right"[192]. This explanation might be said to confuse uncertainty with indeterminacy[193] but, in any event, it cannot be sufficient because otherwise it could mean that restraint could be exercised even when reviewing decisions about the legal meaning of legislation or decisions about the common law. Although there is often room for reasonable differences of opinion in those cases which "consist of reasoned thinking supporting one view or the other", and although judges sometimes avoid the language of correctness, saying that they "adopt, accept, or prefer one argument to the other"[194], there is no judicial restraint exercised in Australia when reviewing a primary decision concerning the legal meaning of a legislative provision or the common law[195].

151 Where the source of the power and grounds of review is statutory, then any requirement for judicial restraint should be implied from, or based upon, the terms of the statute. For instance, the judicial restraint required on review of the quantum of an award of contribution between tortfeasors arises where the

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189 *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 240 [75].

190 Allan, "Common Law Reason and the Limits of Judicial Deference", in Dyzenhaus (ed), *The Unity of Public Law*, (2004) 289 at 291.

191 *House v The King* (1936) 55 CLR 499 at 505.

192 *Norbis v Norbis* (1986) 161 CLR 513 at 518.

193 Dworkin, *Justice for Hedgehogs*, (2011) at 90-96. Cf Raz, "Legal Principles and the Limits of Law", (1972) 81 *Yale Law Journal* 823 at 843-848.

194 *Northwood Inc v British Columbia (Forest Practices Board)* (2001) 86 BCLR (3d) 215 at 229 [36]. See also *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 353 [71]; [2009] HCA 2.

195 Cf *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984).

relevant statute creating that power "intends to give a very wide discretion to the judge or jury entrusted with the original task", and from the breadth of that discretion it is inferred that "[m]uch latitude must be allowed to the original tribunal"[196]. On the other hand, as the appellant observed in written submissions, a statutory provision that proscribes "conduct that is unconscionable, within the meaning of the unwritten law"[197], is, like the doctrine of unconscionability in equity upon which it is based, not one that requires judicial restraint[198], at least to the extent that the evaluative exercise is not affected by the natural limitations of the appellate judge[199].

152 One significant indication of a manifested legislative intention that judicial restraint should be exercised upon review is the breadth of the decision making power afforded to the primary decision maker. In *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*[200], Gleeson CJ, Gaudron and Hayne JJ focused upon the statutory breadth of the decision making power, saying:

> "The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment."

Their Honours characterised as "discretionary decisions" requiring judicial restraint those involving (i) the satisfaction or otherwise of the decision maker that industrial action being pursued was a threat for the purposes of s 170MW(3) of the then *Workplace Relations Act* 1996 (Cth), and (ii) whether the bargaining period should be terminated[201].

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196 *Pennington v Norris* (1956) 96 CLR 10 at 15-16; [1956] HCA 26.

197 *Competition and Consumer Act* 2010 (Cth), Sched 2, s 20, cf ss 21, 22.

198 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 111 [167]; [2003] HCA 18.

199 See *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 434-435 [144]; [2013] HCA 25; *Thorne v Kennedy* (2017) 91 ALJR 1260 at 1272-1273 [41]-[43]; 350 ALR 1 at 14-15; [2017] HCA 49.

200 (2000) 203 CLR 194 at 205 [19] (footnote omitted).

201 (2000) 203 CLR 194 at 205 [20].

153 The breadth of a statutory decision making power is not conclusive of a manifested statutory intention that judicial restraint should be exercised upon review of the decision. All matters of statutory context are relevant. Those matters include the nature of the rights in issue and the manner in which they have historically been adjudicated, the extent to which the subject matter of the decision is concerned with matters of general public interest rather than merely individual rights and interests, and the expertise of the primary decision maker in the area of adjudication. Further, where the review is by way of an appeal, the nature of any restraint upon the judge will depend upon whether, on the proper construction of the legislation conferring the right of appeal, the appeal is by way of a hearing de novo, an appeal in the strict sense, or an appeal by way of rehearing. I agree with the section of Gageler J's reasons headed "The need for appealable error", concerning the difference between correction of error on an appeal in the strict sense and correction of error on an appeal by way of rehearing, and the natural limitations that can sometimes constrain an appellate judge reaching a conclusion that the primary decision maker erred[202].

No judicial restraint in an appeal concerning an unreasonableness finding

154 The power of the primary judge to make a finding of legal unreasonableness derived from s 476 of the *Migration Act*. That section provided the Federal Circuit Court with the same original jurisdiction that this Court has under s 75(v) of the Constitution, subject to exceptions that are not presently relevant. As I have explained, the primary judge's judicial review for legal unreasonableness involved both a question of law and the application of that law. Like questions of construction of legislation, contracts, wills, or trusts, it was a question about which it is readily acknowledged in this country that there can only be one right answer and an appeal from the decision is concerned with its correctness[203]. It contrasts with questions such as the sentence to be imposed for a crime or the general damages to be awarded for personal injury where the uncertainty of result is a significant factor, sometimes described as a circumstance where there is no right answer, which requires judicial restraint on an appeal from the decision.

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202 At [29]-[34].

203 Cf *Groia v Law Society of Upper Canada*, 2018 SCC 27 at [46]; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at [27], [73]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at [158], [253]; *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 at [50].

155 The assessment of legal unreasonableness was also a legal question concerned with the boundaries of the authority of the Tribunal[204]. Although there may be uncertainty in some, perhaps many, cases involving decisions of legal unreasonableness, and although the assessment of legal unreasonableness involves value judgments upon which it might be said that reasonable minds could differ, our constitutional tradition has never been to exercise judicial restraint in relation to appeals or judicial review of this category of question. If it were constitutionally permissible, there would need to be clear words in legislation, or a strong foundation for an inference, before an appellate court would depart from that tradition. There is no foundation for such an inference in the *Migration Act*.

Conclusion

156 The appeal should be allowed and orders made in the terms proposed by Nettle and Gordon JJ.

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204 *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at [111].