# HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

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MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS APPELLANT

AND

MOGES ESHETU RESPONDENT

*Minister for Immigration and Multicultural Affairs v Eshetu*
[1999] HCA 21
*13 May 1999*
S26/1998

**ORDER**

1. *Appeal allowed with costs.*

2. *Set aside the order of the Full Court of the Federal Court made on 10 July 1997 and, in lieu thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

**Representation:**

J Basten QC with R T Beech-Jones for the appellant (instructed by Australian Government Solicitor)

T A Game SC with E A Wilkins and G P Craddock for the respondent (instructed by Kessels & Associates)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

# HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

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RE THE MINISTER FOR IMMIGRATION
AND MULTICULTURAL AFFAIRS OF THE
COMMONWEALTH OF AUSTRALIA & ANOR RESPONDENTS

Ex parte MOGES ESHETU PROSECUTOR

*Re Minister for Immigration and Multicultural Affairs; Ex parte Eshetu*
*13 May 1999*
S104/1998

**ORDER**

*Application dismissed with costs*.

**Representation:**

T A Game SC with E A Wilkins and G P Craddock for the prosecutor (instructed by Kessels & Associates)

J Basten QC with R T Beech-Jones for the first respondent (instructed by Australian Government Solicitor)

No appearance for the second respondent

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## CATCHWORDS

**Minister for Immigration and Multicultural Affairs v Eshetu**

**Re Minister for Immigration and Multicultural Affairs & Anor; Ex parte Eshetu**

Administrative law – High Court – Constitution, s 75(v) – Prohibition and mandamus – Refugee Review Tribunal – "Wednesbury" unreasonableness – Whether Tribunal acting within jurisdiction.

Immigration law – Refugees – Refugee Review Tribunal decision refusing to grant protection visa – Whether review available if Tribunal acts inconsistently with s 420 of the *Migration Act* 1958 (Cth) – Whether ground of review precluded by s 476(2)(b) of the Act – Whether failure of Tribunal to make certain findings of fact an error of law – "well-founded fear of being persecuted".

Words and phrases – "well-founded fear of persecution" – "jurisdictional fact".

Constitution, s 75(v).
*Migration Act* 1958 (Cth), ss 36, 65, 420, 430, 475, 476.

1 GLEESON CJ AND McHUGH J. Two matters were heard together. The first is an appeal by the Minister for Immigration and Multicultural Affairs ("the Minister") against a decision of the Full Court of the Federal Court[1] which, by majority[2], reversed a decision of Hill J[3]. Hill J had dismissed Mr Eshetu's application, under the *Migration Act* 1958 (Cth) ("the Migration Act"), for judicial review of a decision of the Refugee Review Tribunal ("the Tribunal"). The Full Court allowed an appeal from Hill J, set aside the decision of the Tribunal and ordered that the matter be remitted to the Tribunal for re-hearing. The Minister appealed to this Court, seeking to reinstate the decision of the Tribunal. The second matter is an application by Mr Eshetu seeking relief in the form of prohibition or mandamus, pursuant to s 75(v) of the Constitution. The ground of that application is that "the Tribunal's decision was so unreasonable that no reasonable Tribunal, acting within jurisdiction and according to law, would have come to such a decision." It is argued on behalf of Mr Eshetu that, even if this Court should uphold the Minister's appeal against the decision of the Full Court of the Federal Court, nevertheless the Court should, in the exercise of its constitutional powers, which are in some respects wider than those conferred by statute on the Federal Court, grant constitutional relief against the decision of the Tribunal.

2 Mr Eshetu is a citizen of Ethiopia. At the time of the decision of the Tribunal, in November 1995, he was aged 22. Prior to his departure from Ethiopia he was a student. He left Ethiopia in June 1992. He obtained a visa to travel to Israel, where he lived for a time as a dependant of his sister, who was working there for the United Nations. Whilst in Israel he obtained a false passport, and made arrangements to travel to Australia. He arrived in Australia in September 1993, and applied for refugee status on 6 October 1993. As a result of changes to the law since then, his application is to be dealt with as an application for a protection visa. The application was refused by a delegate of the Minister in August 1994, and Mr Eshetu applied for a review of that decision by the Tribunal. The review was conducted from February to November 1995. Throughout the review, Mr Eshetu had the services of a lawyer.

The proceedings before the Tribunal

3 There were two hearings before the Tribunal, one in February 1995, and the other in August 1995.

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**1** *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 300.

**2** Davies and Burchett JJ, Whitlam J dissenting.

**3** *Eshetu v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 474.

4 The Tribunal gathered, from various sources, a substantial amount of information about the state of affairs in Ethiopia during 1991 and 1992, and at the time of the Tribunal's hearings. That information was disclosed to Mr Eshetu and his lawyers, and on a number of occasions they were invited to make, and made, comments about it.

5 The issue before the Tribunal was whether the Tribunal was satisfied that Mr Eshetu was a refugee, and was entitled to a protection visa, on the ground that he had a well-founded fear of being persecuted if he were to return to Ethiopia.

6 The Tribunal's reasons for decision were given in November 1995. The final conclusion was expressed as follows:

> "I accept that Mr Eshetu fears returning to Ethiopia. However, I find the chance that he will experience persecution for any of the reasons contained in the Convention to be remote. His fear of persecution is therefore not well-founded. He is thus not a refugee, not someone to whom Australia has protection obligations and not entitled to a protection visa."

7 The Tribunal affirmed the decision not to grant Mr Eshetu a protection visa.

8 The proceedings in the Tribunal were not adversarial litigation. They were an administrative review of a decision of a delegate of the Minister made under s 65 of the Migration Act. Under that section, the Minister was obliged to grant a visa if satisfied that certain prescribed criteria had been satisfied. If not so satisfied, the Minister's obligation was to refuse to grant the visa. Thus, what was under review was a decision to refuse to grant a visa based upon an absence of satisfaction that the prescribed criteria had been met.

9 Section 420 of the Migration Act provides:

> "(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
>
> (2) The Tribunal, in reviewing a decision:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and
>
> (b) must act according to substantial justice and the merits of the case."

10 Although the proceedings were not adversarial, as a matter of practical administration, and in accordance with the requirements of substantial justice and a proper consideration of the merits of the case, the Tribunal, at the outset of the review, sought and obtained from Mr Eshetu his explanation of what he said was

his fear of persecution, and the grounds of his fear. There was no other way in which the Tribunal could sensibly and fairly have reached a conclusion as to whether his fear was well-founded. Understandably, Mr Eshetu's account of the reasons for his fear of persecution became the focus of the Tribunal's investigations and final decision.

11 The Tribunal gave lengthy reasons for its decision. The reasons commenced with a summary of the claims made by Mr Eshetu. Those claims included an account of his family background and early life as he grew up in Addis Ababa, and the role of his parents and siblings in political activities. He was a member of the Amhara, one of the principal ethnic groups in Ethiopia. Mr Eshetu told of his opposition to the Mengistu regime. President Mengistu lost power, and fled, in May 1991, and rebel forces took control. In October 1991, Mr Eshetu commenced at university, and was soon afterwards elected as one of the members of the Student Council. The Council was involved in political activity.

12 The Tribunal gave the following account of the reasons advanced by Mr Eshetu as to why he feared that he would be persecuted if he returned to Ethiopia:

> "Mr Eshetu said that the Student Council decided to organise a protest march to the US Embassy on 5 December 1991 to convince the US government that the transitional government was not representative of all Ethiopians and should be replaced. Posters were put up around the university to advertise the march. A day before the march, uniformed officers from the EPRDF army came into Mr Eshetu's class and arrested him. Twenty five or so students, including the other 10 members of the Student Council, were also arrested. They were taken to Maikelawi Prison where they were held for three days. They were given no food and were badly beaten. After this they were released and told that if they participated in any further anti-government activities they would be executed immediately. Mr Eshetu could not walk for a week because of injuries to his feet. After his release Mr Eshetu returned to class, but four days after his return took the day off to see a doctor. That night some members of the Student Council came to his home and told him that four members of the Council had been arrested again and warned him that it was not safe for him to remain in Ethiopia. He has not heard from the Student Council members since.
>
> Mr Eshetu added that since leaving Ethiopia he had learned that many of the people who were arrested with him in 1991 have since been killed or had vanished. He had also learned that 25 people, including a number of his friends, were killed during a demonstration on 4 January 1993. Over 100 people were injured during the demonstration. Mr Eshetu claimed he was told that his friends were not killed indiscriminately, but had been executed by other armed students in the crowd. He believes that he too would have

been killed had he remained in Ethiopia. Since the march a number of people, including friends of Mr Eshetu, have disappeared and it is assumed they have been killed."

13 A substantial part of the reasons for decision of the Tribunal summarise the information which the Tribunal obtained as to the current situation in, and recent history of, Ethiopia. That information came from such sources as the Department of Foreign Affairs and Trade, the United States State Department, Amnesty International, the Ethiopian Human Rights Council, Community Aid Abroad, and reports of other international organisations, and foreign newspapers.

14 Much of the Tribunal's reasoning was directed to the claim by Mr Eshetu that there was an occasion, in December 1991, when all, or all but one, of the members of the Student Council of the university were arrested, imprisoned, and tortured. The Tribunal was concerned to find whether there was any independent information to support Mr Eshetu's assertion that such an event had occurred. During the first hearing, the Tribunal expressed some scepticism about Mr Eshetu's story, because inquiries had failed to uncover any contemporaneous reports, or later accounts of the event. The Tribunal, in its reasons for decision, said:

"I do not accept that Mr Eshetu and another 25 students, including all but one of the members of the Student Council from the University of Addis Ababa, were detained and tortured for three days for planning a demonstration in December 1991.

None of the reports before the Tribunal published by those monitoring the human rights situation in Ethiopia at the time mention this particular incident in which Mr Eshetu claims to have been involved, nor were those contacted by the Tribunal regarding the claim aware of the alleged arrests. Searches of Reuters and Nexis data bases, which hold media reports from a number of international newspapers and magazines, conducted by the Department [DFAT], revealed no mention of these arrests.

While I acknowledge that not all detentions or other human rights abuses will be mentioned in human rights reports or other published materials, for the reasons set out below, I consider that the detention and torture of 25 students, including all but one of the members of the Student Council in Addis Ababa in December 1991 would have been known to at least some of those monitoring the human rights situation and would have been reported in publications produced by these organisations.

During the time in question the human rights situation in Ethiopia was being monitored by both national and international human rights organisations and the evidence before the Tribunal clearly indicates that groups opposing the

> [EPRDF] both in Ethiopia and overseas made public allegations regarding alleged human rights abuses at the time."

15 The reasons then go on to give details of reports to which reference had been made. The following finding was then expressed:

> "In these circumstances, I find the claim that 25 students, including all but one member of the Student Council, were arrested in their classrooms and detained and tortured for three days without anyone making the incident public or reporting it to the human rights organisations monitoring the situation in Ethiopia at this time to be implausible."

16 The Tribunal then turned to the second aspect of the claim made by Mr Eshetu, concerning what he said he had been told about the fate of his friends and colleagues.

17 For reasons set out, the Tribunal did not accept that a large number of Mr Eshetu's friends and colleagues from university had been detained, had disappeared or had been killed since his departure from Ethiopia because of their political views and activities.

18 The Tribunal went on to deal with the information it had received as to the current political situation in Ethiopia, and the manner in which those opposed to the government were treated. Reports from various international organisations were set out.

19 The Tribunal said:

> "From the evidence before the Tribunal it is clear that Ethiopia still has some way to go before a stable democratic system which adequately protects human rights is established. It is also clear that some of those who oppose the government are at risk of detention and other forms of serious harm in Ethiopia. However, the evidence does not, in my view, indicate that there is widespread or systematic persecution of government critics or opponents in Addis Ababa such that people who are not prominent members of political organisations or involved with organisations which advocate or are believed to advocate violence, would face more than a remote chance of persecution.
>
> DFAT clearly state that those who peacefully criticise or oppose the government are not at risk of serious harm in Ethiopia unless they are associated with, or believed to be associated with, one of the organisations which advocates violence."

20 The Tribunal found that Mr Eshetu was not, and never had been, a prominent member of a political organisation, and that he was not associated with any organisation which advocated violence.

21 Next the Tribunal went on to consider the possibility that Mr Eshetu faced a chance of being persecuted because of his Amharic ethnicity. For reasons which the Tribunal explained, it was considered that Mr Eshetu faced no more than a remote chance of being persecuted on that ground.

22 Ultimately, therefore, the Tribunal came to the conclusions summarised above.

The proceedings in the Federal Court

23 By virtue of s 475 of the Migration Act the decision of the Tribunal was subject to judicial review in the Federal Court. The grounds of review are set out in s 476, which provides:

> "(1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:
>
> (a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;
>
> (b) that the person who purported to make the decision did not have jurisdiction to make the decision;
>
> (c) that the decision was not authorised by this Act or the regulations;
>
> (d) that the decision was an improper exercise of the power conferred by this Act or the regulations;
>
> (e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;
>
> (f) that the decision was induced or affected by fraud or by actual bias;
>
> (g) that there was no evidence or other material to justify the making of the decision.

(2) The following are not grounds upon which an application may be made under subsection (1):

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

(3) The reference in paragraph (1) (d) to an improper exercise of a power is to be construed as being a reference to:

(a) an exercise of a power for a purpose other than a purpose for which the power is conferred; and

(b) an exercise of a personal discretionary power at the direction or behest of another person; and

(c) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

but not as including a reference to:

(d) taking an irrelevant consideration into account in the exercise of a power; or

(e) failing to take a relevant consideration into account in the exercise of a power; or

(f) an exercise of a discretionary power in bad faith; or

(g) any other exercise of the power in such a way that represents an abuse of the power that is not covered by paragraphs (a) to (c).

(4) The ground specified in paragraph (1) (g) is not to be taken to have been made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

24 Section 485 provides that the Federal Court does not have any other jurisdiction in respect of decisions of the Tribunal apart from that conferred (and defined) by s 476.

25 The validity of the limitations upon the jurisdiction of the Federal Court involved in ss 476 and 485 was challenged, unsuccessfully, in *Abebe v The Commonwealth*[4]. That challenge had not been determined by the time of argument in the present case. If it had been successful, Mr Eshetu would have sought the benefit of such success, but, in the light of its failure, it is unnecessary to pursue the point. The legislation which was considered and applied in the Federal Court has been held to be valid.

26 Mr Eshetu applied for a review of the Tribunal's decision under s 476. The application was heard by Hill J[5].

27 Hill J discussed the constraints upon the scope of his review of the Tribunal's decision which arose from s 476, and considered the contentious issue of the relationship between s 420 and s 476 of the Migration Act. It will be necessary to return to that subject in more detail below. For the present, it suffices to say that Hill J took the view that there was scope for three arguments on behalf of Mr Eshetu. The first was an argument that the Tribunal proceeded upon the erroneous basis that the applicant's information should not be accepted unless it was corroborated. The second was an argument that the Tribunal fell into error in making no express finding in relation to the credibility of the applicant. The third was an argument concerning the rejection by the Tribunal of the applicant's evidence about the December 1991 incident involving the Student Council for the reason that no objective record of such an incident could be found.

28 The first two arguments, Hill J considered, were without substance. He rejected the submission that the Tribunal had approached its task on the basis that Mr Eshetu must fail unless his information was corroborated, and he was not persuaded that, simply because the Tribunal made no express reference in terms to Mr Eshetu's credibility, that subject had not been taken into account. There was an express statement by the Tribunal that Mr Eshetu's story of the December 1991 incident was not accepted.

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**4** [1999] HCA 14.

**5** (1997) 142 ALR 474.

29 In relation to the third argument, Hill J made it clear that he had a great deal of sympathy with Mr Eshetu's case on the merits. He referred to some of the detail of the information, and comments, from international organisations which had been obtained by the Tribunal. Hill J's view of the significance of such information was substantially different from the Tribunal's view. He attached greater weight to information from the EHRC about human rights violations in the country, and he attached little weight to the absence of any independent knowledge or record of the incident which Mr Eshetu claimed had occurred. His Honour made it clear that if he had been conducting a merits review of the Tribunal's decision, he would have set it aside. He observed that the case before him had been conducted on the basis that the Tribunal's finding, or lack of satisfaction, in relation to the December 1991 incident was of crucial importance. He expressed the opinion that the Tribunal had "wholly ignored the view of the EHRC representative that it was quite possible that the event would not have come to the notice of that organisation." He concluded[6]:

> "The Tribunal's conclusion totally lacks logic. The Tribunal's decision as reached was so unreasonable that no reasonable tribunal could reach it. But sadly, that is not a ground of review. It cannot be said that the Tribunal did not undertake a review to ascertain the merits, albeit that the review was flawed in the manner I have suggested."

30 The application was dismissed.

31 Mr Eshetu appealed to the Full Court of the Federal Court. The majority in the Full Court, Davies and Burchett JJ, approached the matter upon a legal basis which differed substantially from the approach of Hill J. Whitlam J, who dissented, took a similar legal approach to that of Hill J. However, he examined in detail, and rejected, Hill J's criticisms of the Tribunal's reasoning in relation to the December 1991 incident. Whitlam J, after a close analysis of the facts, concluded that it was wrong to say that the Tribunal had ignored the view of the EHRC representative, and said that there was "nothing illogical about the Tribunal's finding that the events described by Mr Eshetu did not happen"[7]. He said that "[t]he likelihood that such events would be noticed and reported is plainly something that may be considered in assessing the plausibility of Mr Eshetu's

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**6** (1997) 142 ALR 474 at 486-487.

**7** (1997) 71 FCR 300 at 368.

story"[8]. Whitlam J also noted that the Tribunal had available to it material that was not before Hill J. Whitlam J said[9]:

> "It borders on the fantastic to think that such an occurrence would escape the attention of human rights monitors at the time, especially EHRC which was at a later time astute to record the registration difficulties of the then provisional Student Council."

32 Whitlam J characterised a conclusion to the contrary of that arrived at by the Tribunal as "bordering on perverse"[10]. Thus, although both Hill J at first instance, and Whitlam J in the Full Court, accepted that they were not in a position to undertake a merits review of the Tribunal's decision, they both addressed the question whether the decision was so unreasonable that no reasonable person could reach it, and came to strongly worded, and opposite, conclusions. Hill J thought that the Tribunal's conclusion on the facts was obviously wrong, and Whitlam J thought it was obviously right, or at least obviously justified. It seems fair to say that what was involved was an issue of fact upon which different minds could reach different conclusions.

33 Davies J, who decided that the appeal to the Full Court should be allowed, based his decision upon two grounds. First, accepting Hill J's conclusion as to the unreasonableness of the factual decision of the Tribunal, Davies J held that this meant there had been a failure to comply with s 420 of the Act, and that, consequently, the provisions of s 476(1)(a) applied. His Honour referred to a number of previous decisions of the Federal Court in which judges had expressed conflicting opinions on the availability of such an approach, and he noted that Hill J was amongst those who rejected it.

34 The second ground upon which Davies J based his conclusion was that there had been an error of law on the part of the Tribunal, in that the Tribunal's reasoning manifested a misunderstanding of the concept of "well-founded fear of persecution"[11].

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**8** (1997) 71 FCR 300 at 368.

**9** (1997) 71 FCR 300 at 369.

**10** (1997) 71 FCR 300 at 369.

**11** (1997) 71 FCR 300 at 313.

35 Davies J said[12]:

> "The question for the Tribunal was not whether 25 students including 11 members of the Student Council had all been arrested on 5 December 1991 and had all been beaten and tortured for three days. The question for the Tribunal was whether Mr Eshetu had left Ethiopia because of fear of persecution for his political opinions, whether he feared to return to Ethiopia for that reason and whether those fears were well-founded. Neither in the Tribunal's questioning of Mr Eshetu during the hearing nor in the Tribunal's lengthy reasons for decision did the Tribunal seriously enter into the question as to why Mr Eshetu had left Ethiopia, whether he had in fact been a student member of the University, whether he had suffered an injury to his foot and if so in what circumstances and whether he had gone into hiding, and if so why.
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> …
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> The Tribunal was the decision-maker of fact. However, it seems to me that, by failing to identify when Mr Eshetu's 'strong subjective fear' developed and by failing to make findings as to whether that fear developed whilst Mr Eshetu was in Ethiopia and whether it was because of that fear that Mr Eshetu left Ethiopia, the Tribunal failed to deal with crucial issues which the definition required to be examined.
>
> …
>
> I do not suggest that attention may not be given by a tribunal to the objective facts or that an applicant's claim may not be rejected as being inconsistent with objectively known facts …
>
> The present, however, is a different type of case. Mr Eshetu gave to the Tribunal a detailed individual story which, at least insofar as it affected him, was not inconsistent with known facts at the relevant time. The Tribunal ought not to have rejected Mr Eshetu's claim without coming to a view, if it could, as to whether Mr Eshetu had been a member of the Student Council as he alleged, whether he had suffered an injury to his leg as he said, whether he had left the University in December 1991 as he said, whether he had hidden in his elder brother's house thereafter and whether he had left Ethiopia because of persecution by the government's forces. The failure to do so discloses an error of approach due to a misunderstanding of the meaning and operation of the term 'well-founded fear'".

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**12** (1997) 71 FCR 300 at 312-313.

36 Burchett J agreed with Davies J, and devoted the greater part of his reasons for judgment to a consideration of the previously conflicting authorities in the Federal Court as to the relationship between s 420 and s 476, and to an examination of a number of lines of reasoning which led him to a conclusion about that relationship which was the same as that of Davies J, and contrary to that of Hill J. His Honour took the view that, notwithstanding the provisions of s 476(2), a decision that was so unreasonable that no reasonable person could have made it may well involve a contravention of s 420 and could, therefore, provide a ground for setting aside a decision under s 476(1).

37 Burchett J also agreed with Davies J that the decision of the Tribunal had been affected by an error of law in the approach it took to the concept of a well-founded fear.

38 There are two substantial issues which require this Court's decision. First, the appeal from the Full Court and the application under s 75(v) of the Constitution raise the matter of what is sometimes described as "Wednesbury unreasonableness", which, in the case of the appeal, also requires consideration of the construction of the Migration Act. Secondly, the appeal raises the question whether there was an error of law in the Tribunal's approach to the question of well-founded fear of persecution.

"Wednesbury unreasonableness"

39 Mr Eshetu's claim for relief by way of prohibition or mandamus under s 75(v) of the Constitution is based solely upon the ground that the Tribunal's decision was so unreasonable that no reasonable Tribunal, acting within jurisdiction and according to law, would have come to such a conclusion. His contention in the Minister's appeal, supporting the reasoning of Davies and Burchett JJ, is that, notwithstanding s 476(2)(b) of the Migration Act, this is a ground upon which the Federal Court could overturn the Tribunal's decision. Alternatively, he contends that, even if the Federal Court lacks such power, this Court has the power in the exercise of its constitutional function under s 75(v) to compel officers of the Commonwealth to act according to law. This raises a number of issues, the first of which is whether the present is a case of unreasonableness of the kind recognised in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[13] as a basis for judicial review of administrative action.

40 The essence of the suggested illogicality or unreasonableness in the Tribunal's decision, as observed by Hill J, and accepted by Davies and Burchett JJ, although strongly contested by Whitlam J, is said to lie in the process of reasoning by which the Tribunal came to regard the information given by Mr Eshetu as to

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**13** [1948] 1 KB 223.

the December 1991 incident which led to his departure from Ethiopia as implausible. It was considered by Hill J that the Tribunal failed to give sufficient weight to certain information before it, especially information from EHRC, and attached unwarranted importance to the absence of any independent record of the alleged occurrences. Whitlam J was of the view that the reasoning displayed no error. Even if it did, however, there is a serious question whether the suggested error is of the kind to which the Wednesbury principle is directed. We are not here concerned, for example, with the unreasonable exercise of a discretion, and it is difficult to characterise the Tribunal's decision, even on Hill J's view of it, as an abuse of power. Someone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as "illogical" or "unreasonable", or even "so unreasonable that no reasonable person could adopt it". If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence.

41 In *Puhlhofer v Hillingdon London Borough Council*[14] Lord Brightman said:

> "Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

42 In *Chan v Minister for Immigration and Ethnic Affairs*[15] a delegate's decision that an applicant for refugee status had a fear of persecution which was not well-founded was held to fall within the provisions of the legislation then applicable which corresponded to the concept of Wednesbury unreasonableness. The conclusion is conveniently summarised in the judgment of Toohey J as follows[16]:

> "In essence the delegate concluded that while the appellant had a fear of persecution, that fear was not well-founded. However, the delegate had accepted that there may have been 'discrimination' against the appellant. Given the circumstances of that discrimination, no reasonable delegate could have concluded that it did not amount to persecution. Nor could a reasonable delegate have concluded other than that there was a real chance of imprisonment or exile if the appellant returned to China."

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**14** [1986] AC 484 at 518.

**15** (1989) 169 CLR 379.

**16** (1989) 169 CLR 379 at 408.

43 In the same case Mason CJ[17] criticised the Full Court of the Federal Court for having "trespassed into the forbidden field of review on the merits".

44 In *Wednesbury* itself[18], which was concerned with an issue as to whether the imposition of a condition imposed by a licensing authority was so unreasonable as to be beyond the proper exercise of the authority's powers, Lord Greene MR[19] said that what a court may consider unreasonable is a very different thing from "something overwhelming" such that it means that a decision was one that no reasonable body could have come to. As Mason J pointed out in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[20], when the ground of asserted unreasonableness is giving too much or too little weight to one consideration or another "a court should proceed with caution … lest it exceed its supervisory role by reviewing the decision on its merits."

45 In the present case the question was whether the Tribunal was satisfied that Mr Eshetu's fear of persecution was well-founded. The Tribunal took as its commencing point his explanation of the reasons for his fear and then subjected those reasons to investigation and scrutiny. Having done that the Tribunal expressed a lack of satisfaction. It was criticised on the ground that it gave inadequate weight to certain considerations and undue weight to others. Its ultimate decision was said to have been based upon a process of reasoning flawed in those respects. This is not a case of Wednesbury unreasonableness, and it does not constitute a proper basis for the grant of constitutional relief under s 75(v) of the Constitution.

46 Mr Eshetu's position is even weaker in so far as, in resisting the Minister's appeal, he relies on ss 420 and 476 of the Migration Act.

47 In s 476(2)(b) the legislature has expressed an intention to define the jurisdiction of the Federal Court in such a manner as to exclude review of a Tribunal's decision upon the ground presently under consideration. The ground thus excluded corresponds to that referred to, for example, in s 5(2)(g) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

48 It is not an acceptable approach to statutory interpretation to negate the clear intention of the legislature by reliance on s 420 of the Migration Act. In any event,

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**17** (1989) 169 CLR 379 at 391.

**18** [1948] 1 KB 223.

**19** [1948] 1 KB 223 at 230.

**20** (1986) 162 CLR 24 at 42.

s 420, when understood in its legal and statutory context, is an inadequate foundation for an attempt to overcome the provisions of s 476(2).

49 The relationship, or lack of it, between ss 420 and 476 was correctly explained by Lindgren J at first instance in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs*[21]. The history of legislative provisions similar to s 420 was examined in *Qantas Airways Ltd v Gubbins*[22]. They are intended to be facultative, not restrictive. Their purpose is to free tribunals, at least to some degree, from constraints otherwise applicable to courts of law, and regarded as inappropriate to tribunals. The extent to which they free tribunals from obligations applicable to the courts of law may give rise to dispute in particular cases, but that is another question.

50 Section 420 is to be understood in its statutory context. It appears in Pt 7 Div 3 of the Migration Act, which is headed "Exercise of Refugee Review Tribunal's powers". The following two sections deal with the constitution of the Tribunal. Part 7 Div 4 deals with the procedures to be adopted by the Tribunal. Part 7 Div 5 deals with similar matters. There follows Pt 8 of the Act, which includes s 476, and which provides a set of provisions which confer, and define, the Federal Court's jurisdiction to review Tribunal decisions.

51 Davies J, in the Full Court of the Federal Court[23], took the view that the requirement of s 420 that the Tribunal, in reviewing a decision, must act according to substantial justice and the merits of the case, meant that, notwithstanding the terms of s 476(2), if there were a contravention of that requirement the decision of the Tribunal may be set aside. Burchett J[24] treated s 420 as conferring rights which s 476(2) did not take away. However, the language, and the purpose, of s 476(2)(b) is clear. The provision was intended to define the jurisdiction of the Federal Court in relation to judicial review of the Tribunal's decisions by excluding as a ground of review the ground relied upon by Mr Eshetu.

52 The proposition that the Tribunal's decision manifested "Wednesbury unreasonableness" has not been sustained. Even if it had been sustained, Hill J was right to conclude that it did not provide a ground upon which the Federal Court could set aside the Tribunal's decision.

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**21** Unreported, Federal Court of Australia, 6 May 1997.

**22** (1992) 28 NSWLR 26.

**23** (1997) 71 FCR 300 at 305.

**24** (1997) 71 FCR 300 at 320.

53 The application under s 75(v) should be dismissed. The fate of the appeal then turns upon the remaining matter in issue.

Other error of law?

54 The criticisms made by Davies J, and accepted by Burchett J, of the reasoning of the Tribunal have been set out above. The Tribunal, his Honour said, failed to examine or determine a number of factual matters. Why did Mr Eshetu leave Ethiopia (assuming his explanation about the December 1991 incident was rejected)? Had he been a university student? Had he injured his foot, and, if so, how? Had he been a member of the Student Council? Had he gone into hiding? If so, why? The Tribunal, his Honour considered, should have made a finding as to how and why the fear (which it accepted Mr Eshetu entertained) developed.

55 These may or may not be valid criticisms of the Tribunal. The Tribunal concentrated its attention on Mr Eshetu's explanation of his fears. Having rejected that explanation, it did not embark upon a search for some alternative explanation which he did not advance. Once again, different minds could form different views about the reasonableness of that approach. However, it involves no error of law. The ultimate question was whether the Tribunal was satisfied about something. The approach adopted by the Tribunal does not manifest a legally erroneous view as to what it was about which it needed to be satisfied. For the Tribunal to conclude that, although it was satisfied that Mr Eshetu feared persecution, an examination of the reasons he advanced as to why he held that fear failed to satisfy the Tribunal that the fear was well-founded, does not reflect any misunderstanding as to the meaning of the concept of a well-founded fear.

56 No error of law was shown. What emerged was nothing more than a number of reasons for disagreeing with the Tribunal's views of the merits of the case. The merits were for the Tribunal to determine, not for the Federal Court.

Conclusion

57 The appeal should be allowed. The order made by the Full Court of the Federal Court should be set aside, and the orders of Hill J restored. The application under s 75(v) of the Constitution should be dismissed. Mr Eshetu must pay the Minister's costs of the appeal to the Full Court of the Federal Court and to this Court, and of the application under s 75(v).

58 GAUDRON AND KIRBY JJ. The Minister for Immigration and Multicultural Affairs ("the Minister") has been granted special leave to appeal from a decision of the Full Court of the Federal Court of Australia[25] setting aside a decision of the Refugee Review Tribunal ("the Tribunal"). The Tribunal held that Moges Eshetu, an Ethiopian national, was not a refugee for the purposes of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (together referred to as "the Convention"), and, thus, not entitled to a protection visa under s 36 of the *Migration Act* 1958 (Cth) ("the Act").

59 In addition to the Minister's appeal, Mr Eshetu has applied to this Court for relief under s 75(v) of the Constitution to prevent the Minister from acting on the Tribunal's decision. He seeks relief on the ground that the decision is unreasonable. The appeal and the application were heard together.

Relevant legislative provisions

60 To understand why there are two separate proceedings before the Court and, also, to appreciate the issues involved, it is necessary to refer immediately to various provisions of the Act.

61 By s 36 of the Act, a person is entitled to a protection visa if he or she is a refugee as defined in the Convention[26]. By s 411(1)(c), "a decision to refuse to grant a protection visa" is reviewable by the Tribunal, which may affirm or vary the decision in question or set it aside and substitute a new decision[27].

62 Provision is made in Divs 3 and 4 of Pt 7 of the Act with respect to the manner in which the Tribunal is to exercise its powers and conduct reviews. Section 420, the meaning and effect of which is in issue in the appeal, provides:

> "(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
>
> (2) The Tribunal, in reviewing a decision:

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**25** *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 300.

**26** Section 36(2) of the Act states that:

> " A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

**27** Sections 415(2)(a), (b) and (d).

(a) is not bound by technicalities, legal forms or rules of evidence; and
(b) must act according to substantial justice and the merits of the case."

63 Decisions of the Tribunal are, by s 475(1)(b), reviewable by the Federal Court on the grounds specified in s 476(1), those grounds being somewhat more circumscribed than those upon which other administrative decisions may be reviewed under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). The grounds upon which a decision of the Tribunal may be reviewed are specified in s 476(1) as follows:

"(a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;
(b) that the person who purported to make the decision did not have jurisdiction to make the decision;
(c) that the decision was not authorised by this Act or the regulations;
(d) that the decision was an improper exercise of the power conferred by this Act or the regulations;
(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;
(f) that the decision was induced or affected by fraud or by actual bias;
(g) that there was no evidence or other material to justify the making of the decision."[28]

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**28** The grounds specified in pars (d) and (g) of s 476(1) are limited by sub-ss (3) and (4) which provide:

"(3) The reference in paragraph (1)(d) to an improper exercise of a power is to be construed as being a reference to:

(a) an exercise of a power for a purpose other than a purpose for which the power is conferred; and

(b) an exercise of a personal discretionary power at the direction or behest of another person; and

(c) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

but not as including a reference to:

(Footnote continues on next page)

By s 476(2) it is provided:

> " The following are not grounds upon which an application may be made under subsection (1):
> (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
> (b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power."

64 The effect of s 476(2) is not to relieve the Tribunal from observance of the rules of natural justice or to authorise the making of unreasonable decisions. Rather, it is to forbid the Federal Court from reviewing a decision on those grounds[29]. A person who wishes to rely on those grounds can do so only in proceedings under s 75(v) of the Constitution which confers jurisdiction on this Court in all matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". The validity of the scheme of

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> (d) taking an irrelevant consideration into account in the exercise of a power; or
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> (e) failing to take a relevant consideration into account in the exercise of a power; or
>
> (f) an exercise of a discretionary power in bad faith; or
>
> (g) any other exercise of the power in such a way that represents an abuse of the power that is not covered by paragraphs (a) to (c).
>
> (4) The ground specified in paragraph (1)(g) is not to be taken to have been made out unless:
>
> (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or
>
> (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

**29** See, as to the effect of s 476(2), *Abebe v The Commonwealth* [1999] HCA 14 at [50] per Gleeson CJ and McHugh J, [99] per Gaudron J, [141] per Gummow and Hayne JJ.

judicial review thus mandated was upheld by this Court in *Abebe v The Commonwealth*[30].

History of the proceedings

65 In October 1993, Mr Eshetu made applications under the Act for refugee status and for a Domestic Protection Temporary Entry Permit. His applications were refused by the Minister's delegate. He then lodged an application for review by the Tribunal. Before that application was determined, the Act was amended with the consequence that the application was to be dealt with by the Tribunal as if it were an application for review of a decision to refuse a protection visa[31]. The application was dismissed and Mr Eshetu then applied to the Federal Court for review of the Tribunal's decision.

66 By his amended application to the Federal Court, Mr Eshetu sought review on various grounds including grounds to the effect that:

. the Tribunal failed to observe procedures required by the Act, namely, the procedures required by s 420; and

. the Tribunal erred in its interpretation and application of the Convention.

His application came on for hearing before Hill J[32]. His Honour held that none of the grounds in s 476(1) of the Act were made out. However, he expressed the view that the Tribunal's decision was unreasonable, in the sense that "no reasonable tribunal could reach it"[33]. As already indicated, s 476(2)(b) prevents the Federal Court from reviewing a decision on that ground. In the result, Mr Eshetu's application was dismissed.

67 Mr Eshetu then appealed to the Full Court of the Federal Court. It was held, by majority (Davies and Burchett JJ, Whitlam J dissenting), that s 420 of the Act prescribes procedures to be observed by the Tribunal and that its decision was reviewable under ss 476(1)(a) or 476(1)(e) on the ground that they were not[34].

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**30** [1999] HCA 14 at [56] per Gleeson CJ and McHugh J, [244] per Kirby J, [302] per Callinan J.

**31** Section 39 of the *Migration Reform Act* 1992 (Cth) as replaced by s 84 and Sched 2 cl 2 of the *Migration Legislation Amendment Act* 1994 (Cth).

**32** *Eshetu v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 474.

**33** (1997) 142 ALR 474 at 486.

**34** (1997) 71 FCR 300 at 303-304 per Davies J, 317, 321 per Burchett J.

However, their Honours did not decide whether the procedures had or had not been observed. In their view, the Tribunal's approach to the question whether Mr Eshetu was a refugee involved an error of law[35]. The Minister now appeals from that decision.

68 In the appeal, it was contended on behalf of Mr Eshetu that, if the Tribunal's decision did not involve an error of law, it nevertheless involved a failure to observe the procedures required by s 420 of the Act. It may be noted that it was also put on behalf of Mr Eshetu in the appeal that, if the scheme of review mandated by s 476 of the Act were to be held invalid in *Abebe*, the question of the reasonableness of the Tribunal's decision should be remitted to the Federal Court. As already indicated, however, it was held in that case that the scheme is valid. That being so, the reasonableness of the Tribunal's decision can only be considered in Mr Eshetu's application for relief under s 75(v) of the Constitution.

Section 420 of the Act

69 It is convenient to first consider whether s 420 of the Act specifies procedures to be observed by the Tribunal, a question upon which different views have been expressed in the Federal Court[36]. In this case, Davies J expressed the view, with which Burchett J agreed[37], that whilst s 476(2) excludes the operation of the rules of natural justice, s 420 provides, in substitution for those rules, that procedures shall be fair[38]. In his Honour's view, "[i]f the procedures of the Tribunal have not

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**35** (1997) 71 FCR 300 at 313 per Davies J, 323-324 per Burchett J.

**36** See, for example, holding that a breach of s 420 does not ground an entitlement to judicial review under s 476(1), *Thanh Phat Ma v Billings* (1996) 71 FCR 431; *Mohideen v Minister for Immigration and Multicultural Affairs* unreported, Federal Court of Australia, 17 April 1997; *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* unreported, Federal Court of Australia, 6 May 1997; *Nguyen Do Vinh v Minister for Immigration and Ethnic Affairs* (1997) 46 ALD 528; *Ratnayake v Minister for Immigration and Ethnic Affairs* (1997) 74 FCR 542; *Dai v Minister for Immigration and Ethnic Affairs* (1997) 144 ALR 147. In other cases, judges of the Federal Court have held that a breach of s 420 may be reviewable under ss 476(1)(a) or 476(1)(e), for example in *Asrat v Vrachnas* unreported, Federal Court of Australia, 23 August 1996; *Sarbjit Singh v Minister for Immigration and Ethnic Affairs* unreported, Federal Court of Australia, 18 October 1996; *Minister for Immigration and Ethnic Affairs v Surjit Singh* (1997) 74 FCR 553; *Yao-Jing v Minister for Immigration and Multicultural Affairs* (1997) 74 FCR 275.

**37** (1997) 71 FCR 300 at 317.

**38** (1997) 71 FCR 300 at 305-306.

met that prescription, [a decision] may be set aside" and "[i]t matters not that the breach may also have amounted to a breach of the rules of procedural fairness"[39].

70 Similarly, Davies J was of the view that for the purposes of s 476(1)(e), "the 'applicable law' [includes] ... the substantive elements of the s 420(2)(b) requirement that the ... Tribunal act in accordance with the substantial justice and merits of the case."[40] Seemingly, his Honour also took the view that, although it is not open to the Federal Court to review a decision of the Tribunal on the grounds of unreasonableness, it is open to that Court to examine the decision to ascertain whether it was so unreasonable that it involved an incorrect interpretation of the requirement in s 420(2)(b) that the Tribunal act in accordance with substantial justice and the merits of the case[41].

71 It is well established that legislative provisions are to be read in the context of the relevant Act as a whole[42]. In the Full Court, Davies and Burchett JJ were each of the view that that required s 420 to be reconciled with s 476(2) of the Act. Thus, in the view taken by their Honours, s 420 imports requirements in substitution for requirements excluded by s 476(2) of the Act[43]. That view assumes that s 476(2) operates not merely to preclude review by the Federal Court on the grounds specified in that sub-section but, subject to s 420, to authorise unreasonable decisions and decisions arrived at in breach of the rules of natural justice. That assumption is contrary to the decision of this Court in *Abebe*.

72 It is unnecessary to repeat the reasoning that led to the conclusion in *Abebe* that s 476(2) does not operate to excuse non-compliance with the rules of natural justice or to authorise decisions that are unreasonable, in the sense in which that term is used in s 476(2) of the Act. It is sufficient to note that the view that it does operate in that way is contrary both to the form and to the language of s 476. Moreover, it is not easily reconciled with ss 485 and 486 of the Act.

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**39** (1997) 71 FCR 300 at 305.

**40** (1997) 71 FCR 300 at 304-305.

**41** (1997) 71 FCR 300 at 306.

**42** See *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449 at 455 per Isaacs and Rich JJ; *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 per Mason J.

**43** (1997) 71 FCR 300 at 306-307 per Davies J, 317 per Burchett J.

73 Relevantly, s 476 is not expressed as a privative clause[44] and is, in terms, directed only to specifying the grounds on which decisions may and may not be reviewed by the Federal Court. Consistent with that limited operation, s 486 acknowledges the jurisdiction conferred on this Court by s 75(v) of the Constitution. Of even greater significance, s 485(3) specifies that, if a matter is remitted by this Court to the Federal Court, the latter Court "does not have any powers in relation to that matter other than the powers it would have had if the matter had been as a result of an application made under [Pt 8 of the Act]"[45]. That latter provision would be unnecessary if s 476(2) operated to authorise departure from the rules of natural justice and to permit decisions which are unreasonable.

74 Once it is appreciated that s 476(2) authorises neither unreasonable decisions nor decisions arrived at in breach of the rules of natural justice, it is impossible, in our view, to conclude that s 420 mandates substitute procedures to be observed by the Tribunal or a substitute method by which it is to reach its decisions. Nor is that operation suggested by its terms or its context.

75 It is important to note that s 420(2) of the Act is in two parts. Paragraph (a) provides that in reviewing a decision, the Tribunal "is not bound by technicalities, legal forms or rules of evidence". Paragraph (b), which provides that it "must act according to substantial justice and the merits of the case", is its counterpart. Together, those paragraphs describe the general nature of review proceedings and require the Tribunal to operate as an administrative body with flexible procedures and not as a body with technical rules of the kind that have sometimes been adopted by quasi-judicial tribunals.

76 In describing the general nature of the procedures the Tribunal is to adopt, s 420 informs the grounds of review specified in s 476 of the Act, including those excluded from the Federal Court's consideration by s 476(2). Thus, for example, it would be an error of law reviewable under s 476(1)(e) for the Tribunal to decline jurisdiction because of some technical error in the application for review. Conversely, it would neither be an error of law nor a procedural irregularity for the Tribunal to reach a decision on the basis of hearsay information which would not be admissible in legal proceedings. These examples are not exhaustive. They suffice, however, to illustrate that s 420 has an effect, but only an indirect effect, on review proceedings.

77 Once it is appreciated that s 476(2) does not excuse breach of the rules of natural justice or authorise unreasonable decisions and that s 420 serves to describe

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**44** See *Abebe v The Commonwealth* [1999] HCA 14 at [98-99] per Gaudron J, [156] per Gummow and Hayne JJ.

**45** Part 8 of the Act includes s 476.

the general nature of review proceedings, there is no basis for concluding that the latter section operates to mandate specific procedures to be observed by the Tribunal or the method by which it is to reach its decision. It follows that the Tribunal's decision is not reviewable, whether in this Court or in the Federal Court, on the ground that the Tribunal failed to observe procedures required by s 420 of the Act.

Error of law: relevant factual background and nature of Mr Eshetu's claim

78 The substantive question for the Tribunal to decide was whether Mr Eshetu was a refugee as defined in the Convention. To ascertain whether there was an error of law involved in its decision that he was not, it is necessary to have regard to the factual background in which he claimed refugee status and the nature of the claim that he made.

79 As earlier indicated, Mr Eshetu is a citizen of Ethiopia. That country is comprised of a large number of ethnic groups. Mr Eshetu is a member of one of the largest groups, the Amharas, who have long dominated the central government of Ethiopia.

80 Until May 1991, the Mengistu government was in power in Ethiopia. In that month, President Mengistu fled and the country fell to the Ethiopian People's Revolutionary Democratic Front ("the EPRDF"), a coalition of opposition groups dominated by the Tigray People's Liberation Front. There was some opposition to the EPRDF takeover and, immediately following that event, several people were killed in demonstrations in Addis Ababa. It appears that, at this time, Mr Eshetu's father was killed in Assab, a city in what is now Eritrea. Mr Eshetu believes he was killed by the EPRDF.

81 In July 1991, a transitional government was formed in Ethiopia. It was comprised of several different political parties and ethnic organisations. Despite improvements with respect to freedom of speech and human rights generally, inter-ethnic violence continued for some time and militias from different groups continued to clash with each other. Members of groups involved in conflict with the EPRDF were also detained during 1991 and 1992. And as the Tribunal recorded in its decision, the US Human Rights Report for 1991 noted that, in this period, there were "charges and countercharges among [the] various political parties [comprising the transitional government] of politically motivated violence in the countryside, including some disappearances of party workers".

82 Various bodies have monitored the situation in Ethiopia since 1991. In its decision, the Tribunal summarised the report of Amnesty International of April 1995[46] as follows:

> "The Amnesty Report ... states that hundreds of [All Amhara People's Organisation ("AAPO")] supporters were arrested in 1994 and 1995. The Report notes the arrest of five leading AAPO members, including the party leader Professor Asrat Woldeyes and the detention of the 500 people involved in a demonstration for his release. Amnesty states that the demonstration was a peaceful event until the police intervened, beating some demonstrators and arresting others."

The Tribunal added that "[a]part from these detentions, the Amnesty Report contains no other reports of detentions of AAPO members." The Tribunal also noted that the Human Rights Watch World Report 1995 reported the arrest and detention of 158 supporters of AAPO in September 1994.

83 Mr Eshetu supported his claim to refugee status by reference to events in which he said he was involved before he left Ethiopia in June 1992 and, also, by reference to subsequent events, including events allegedly involving his brother and former associates. As to the former events, he claimed that he commenced university studies in October 1991 and, shortly afterwards, became one of eleven members of the Student Council. According to his account, the Student Council was organising a protest march on the United States Embassy when, on 4 December, 25 students, including himself and all, or possibly all but one, other members of the Student Council, were arrested, detained for three days and told that if they involved themselves in further anti-government activities they would be executed.

84 Mr Eshetu claims to have suffered injuries to his feet during his detention in December 1991 and says that, a few days after his release, some members of the Student Council came to his home and told him that four other members had been rearrested and that it was not safe to stay in Ethiopia. Thereafter, he obtained a passport through unofficial channels and travelled to Israel in June 1992. In Israel, he resided with his sister, a United Nations employee. When his Israeli visa expired, he travelled to Australia, and, on 6 October 1993, applied for refugee status.

85 In the course of the review proceedings, Mr Eshetu expressed his belief, based on information received from his sister in Israel and his brothers in Ethiopia, that, since his departure, former colleagues had been killed or had vanished. He referred specifically to a demonstration on 4 January 1993 in which, according to

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**46** "Ethiopia Accountability past and present: Human rights in transition".

his information, 25 people, including a number of his friends, were killed and over 100 injured. He also informed the Tribunal that, following the EPRDF takeover in May 1991, his brother, a member of AAPO, had lost his job at the Ministry of Mines. The same brother died in 1994. According to Mr Eshetu, he was told by a servant that his brother committed suicide but he was later told by his sister that, although the circumstances of his brother's death were unclear, he did not kill himself.

86 In the proceedings before the Tribunal, Mr Eshetu also pointed out that he was involved with the Ethiopian Association in Australia and, in that capacity, had participated in demonstrations and other activities in Australia against the current government of Ethiopia.

The Convention: well-founded fear; political opinion

87 The Convention relevantly defines a "refugee" as a person who:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country"[47].

88 It is settled law in this country that a person has a well-founded fear if there is a real risk of persecution for one or more of the reasons set out in the Convention[48]. As explained by Dawson J in *Chan v Minister for Immigration and Ethnic Affairs*, "[a] real chance is one that is not remote, regardless of whether it is less or more than 50 per cent."[49] It is also settled law in this country that the fear

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**47** Article 1A(2) as amended by Art 1.2 of the 1967 Protocol relating to the Status of Refugees.

**48** *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 388-389 per Mason CJ, 398 per Dawson J, 406-407 per Toohey J, 426-427 per McHugh J.

**49** (1989) 169 CLR 379 at 398. See also at 389 per Mason CJ. Toohey J stated at 407: "It does not weigh the prospects of persecution but, equally, it discounts what is remote or insubstantial." And at 429, McHugh J commented that "an applicant for refugee status may have a well-founded fear of persecution even though there is only a 10 per cent chance that he will be shot, tortured or otherwise persecuted. Obviously, a far-fetched possibility of persecution must be excluded."

must be well-founded when the question whether a person is a refugee falls for determination[50].

89 One other matter should be noted. It was held in *Minister for Immigration and Ethnic Affairs v Guo*[51] that "[f]or the purposes of the Convention, a political opinion need not be an opinion that is actually held by the refugee." As was there explained, it is sufficient that "such an opinion is imputed to him or her by the persecutor."[52]

The Tribunal's decision

90 Without making any finding as to what, if anything, happened to Mr Eshetu in December 1991, the Tribunal rejected his claim "that [he] and another 25 students, including all but one of the members of the Student Council ... were detained and tortured for three days for planning a demonstration". Further, it rejected his claim "that a large number of [his] friends and colleagues from university [had] been detained, disappeared or killed since his departure ... because of their political views or activities." More specifically, the Tribunal found with respect to the demonstration in January 1993, in which Mr Eshetu claimed his friends had either been killed or injured, that it was "now generally agreed that only one person, a first year student, was killed".

91 The Tribunal did accept that Mr Eshetu is opposed to the current government in Ethiopia and that, if returned, he will continue his opposition. In that context, the Tribunal had regard to the current position of AAPO, which it described as "the main organisation of the Amhara people" and, also, that of Amharas generally.

92 So far as concerns AAPO, the Tribunal noted that the Department of Foreign Affairs and Trade "describe[d] the organisation as 'reckless' and add[ed] that in their view the demonstration which resulted in the arrest of some 500 of AAPO members ... on 20 September 1994 was a 'calculated act to defy the law and

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**50** *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 399 per Dawson J, 405 per Toohey J, 414-415 per Gaudron J, 432 per McHugh J. See also *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 302 per Mason, Deane and Dawson JJ*; R v Home Secretary; Ex parte Sivakumaran* [1988] AC 958 at 992 per Lord Keith of Kinkel.

**51** (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

**52** (1997) 191 CLR 559 at 571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ. See also *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 416 per Gaudron J, 433 per McHugh J.

provoke the subsequent arrests'". Further, the Tribunal found that there was "extremely strong evidence that AAPO members and others who oppose the government in peaceful ways are not at risk of harm in Addis Ababa."

93 Similarly, the Tribunal found that although Amharas have been harassed and attacked by other groups in regions in which they are a minority, there was no evidence that that occurred in Addis Ababa. Moreover, the Tribunal noted that the Department of Foreign Affairs and Trade had advised that "Amharas still predominate in the public service and ... are not victimised or persecuted by the authorities".

94 Mr Eshetu comes from Addis Ababa and there was no evidence to suggest that he might take up residence in any other part of Ethiopia. In that context, the Tribunal's findings would, if they stopped at the point recounted above, support its conclusion that, although Mr Eshetu has a genuine fear of persecution, there is only a remote risk of his being persecuted either on the ground of his political opinion or that of his Amharic ethnicity and, thus, his fear is not well-founded. However, the findings do not stop at that point.

95 The Tribunal appears to have accepted that some persons are at risk of persecution in Ethiopia for their political opinions or those imputed to them. Thus, it noted that the Department of Foreign Affairs and Trade "advises that opponents of the government who advocate or become involved in any attempts at violent overthrow of the government or people who are active members of organisations such as the [Oromo Liberation Front] and the [Islamic Front for the Liberation of Oromia] which advocate or are perceived to advocate violence are at risk of detention in Ethiopia." A little later, it stated that "the evidence does not ... indicate that there is widespread or systematic persecution of government critics or opponents in Addis Ababa such that people who are not prominent members of political organisations or involved with organisations which advocate or are believed to advocate violence, would face more than a remote chance of persecution."

96 In a context in which it appears to have accepted that some people are at risk of persecution, the Tribunal stated that "[t]here [was] no evidence ... which suggests that Mr Eshetu would advocate or become involved in violent activities or groups which advocated violence", and added that the evidence did not suggest "that Amharas in general are liable to be suspected of such involvement." What it did not consider was whether Mr Eshetu was likely to be perceived by the authorities to advocate violence.

97 The question whether Mr Eshetu might be perceived to advocate violence is one that requires an examination of what, if anything, happened to him in December 1991, the circumstances of his departure from Ethiopia and the attitude, if any, likely to be taken by the government to a person who left Ethiopia and voiced anti-government sentiments abroad.

98 In the Full Court, Davies J was of the view that failure to consider various matters, including some of those referred to above, indicated that the Tribunal misunderstood "the meaning and operation of the term 'well-founded fear'"[53]. Burchett J was of the view that the Tribunal erred in law in its understanding of "well-founded fear", its error being discerned from its use of "the word 'remote' ... as a substitution for considering the statutory test, 'well-founded'."[54]

99 In our opinion, the Tribunal's reasons do not disclose any error with respect to the nature of the fear which must exist before an applicant is recognised as a refugee. However, its failure to consider whether a political opinion which might result in persecution was likely to be attributed to Mr Eshetu does reveal that it erred in law in failing to appreciate that, in the Convention, "political opinion" includes an opinion attributed to the applicant by the authorities in his or her country of origin. Accordingly, in our view, the appeal should be dismissed.

Relief under s 75(v) of the Constitution

100 The only ground on which it was argued that Mr Eshetu should be granted relief under s 75(v) of the Constitution was the unreasonableness of the Tribunal's decision. We each adhere to what we said in *Abebe* with respect to relief under s 75(v) in the case of a decision that is unreasonable, in the sense that no reasonable person could reach that decision[55]. However, the fact that a decision involves an error of law does not mean that it is unreasonable.

101 In essence, an unreasonable decision is one for which no logical basis can be discerned. That is not this case. The logical basis upon which the Tribunal proceeded is apparent: the Tribunal simply did not accept the claims made by Mr Eshetu either with respect to events in which he said he had been involved or with respect to events subsequent to his departure from Ethiopia. It follows, in our

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**53** (1997) 71 FCR 300 at 313.

**54** (1997) 71 FCR 300 at 324.

**55** *Abebe v The Commonwealth* [1999] HCA 14 at [114-116] per Gaudron J, [208-210] per Kirby J.

view, that the ground upon which Mr Eshetu seeks relief under s 75(v) of the Constitution has not been made out.

102 Although the Tribunal's decision cannot be described as unreasonable, it may be that, to the extent that it failed to consider whether there was a real risk of persecution by reason of a political opinion imputed or likely to be imputed to Mr Eshetu, that was an error amounting to a constructive failure to exercise jurisdiction which would ground relief under s 75(v) of the Constitution[56]. However, that is not a matter that was argued. Nor is it a matter that we need consider. In our view, relief should be refused on the ground that it can serve no useful purpose beyond that which would be achieved by dismissing the appeal.

103 Prohibition may be refused if an alternative remedy is available by way of appeal[57]. And where, as here, there are separate proceedings by way of appeal and an application under s 75(v) of the Constitution, it is appropriate to refuse relief under s 75(v) unless that relief would serve some purpose beyond that which is achieved by the order disposing of the appeal.

Conclusion

104 We would dismiss the appeal and order the Minister to pay the costs of the appeal. We would dismiss the application for relief under s 75(v) of the Constitution. We would make no order as to the costs of that application, it having been brought, in large measure, in consequence of the bifurcated review process mandated by s 476(2) of the Act.

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**56** See, with respect to a constructive failure to exercise jurisdiction, *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 at 480 per Barwick CJ, 483 per Gibbs J; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 267-269 per Aickin J; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 143-144 per Brennan J, 152-153 per Deane J; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 577 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ, 594-595 per Kirby J.

**57** See *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 193-194 per Gibbs CJ (with whom Mason J agreed), 204 per Murphy J, 214 per Wilson and Dawson JJ, 218 per Brennan J, 225 per Deane J. See also *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 30 per Murphy J, 34 per Wilson J; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 375 per Mason J, 382 per Brennan J, 384 per Deane J.

GUMMOW J.

The appeal

105 Two proceedings have been heard together by the Full Court. The first is an appeal from a judgment of the Full Court of the Federal Court in *Eshetu v Minister for Immigration and Multicultural Affairs* (Davies and Burchett JJ; Whitlam J dissenting)[58] which allowed an appeal against the decision of Hill J[59]. I agree, for the reasons given by the Chief Justice and McHugh J, that the appeal to this Court should be allowed and the orders of Hill J restored.

106 In particular, I express my agreement with the reasoning of Lindgren J in *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs*[60] concerning an issue of statutory construction upon which the present litigation also turns. Section 476(1)(a) of the *Migration Act* 1958 (Cth) ("the Act") specifies as a ground for review in the Federal Court:

> "that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed".

Lindgren J referred to various provisions in the Act which establish such procedures[61]. Section 420 of the Act states:

> "(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.
>
> (2) The Tribunal, in reviewing a decision:
>
> (a) is not bound by technicalities, legal forms or rules of evidence; and
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> (b) must act according to substantial justice and the merits of the case."

107 A provision such as s 420(2) does not exclude consideration of the question (on an application under s 75(v) of the Constitution for prohibition addressed to

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**58** (1997) 71 FCR 300.

**59** (1997) 142 ALR 474.

**60** Unreported, Federal Court of Australia, 6 May 1997, [1997] 324 FCA; rev (1997) 81 FCR 71.

**61** His Honour referred to ss 425(1)(a), 426, 427(2), 428(4) and 429.

officers of the Refugee Review Tribunal ("the Tribunal")) whether or not there was evidence upon which the Minister attained the state of satisfaction referred to in s 65 of the Act[62]. The significance of s 65 appears later in the reasons dealing with the application under s 75(v) of the Constitution.

108 With respect to the interrelation between s 420 and the statutory ground of review in par (a) of s 476(1), Lindgren J in *Sun* concluded that the better view was that s 420 did not establish procedures of the kind identified in the later provision. His Honour described s 420 as containing "general exhortatory provisions, the terms of which do not conform to the common understanding of a 'procedure'". This, to his Honour, signified "the steps, more or less precisely identified, which are or may be involved in particular proceedings". In particular, the direction in s 420(1) that the Tribunal pursue the objective of "providing a mechanism of review that is fair, just, economical, informal and quick" did not amount to a requirement that the Tribunal observe a procedure in connection with the making of a particular decision for the purposes of par (a) of s 476(1).

109 Lindgren J referred to four considerations favouring this construction. I agree, with respect, in his Honour's approach to the matter and set out the passage in question.

> "First, the objectives referred to in [s] 420(1) will often be inconsistent as between themselves. In particular, a mechanism of review that is 'economical, informal and quick' may well not be 'fair' or 'just'. It is difficult to accept that the legislature intended in [s] 476(1)(a) to provide a ground of review where a mechanism of review in its application to a particular case, although 'fair' and 'just', was not 'economical', 'informal' and 'quick'. Similarly, I do not think that the legislature intended by [s] 476(1)(a) to afford a ground of review wherever the [Tribunal] provided a mechanism of review which, in its application to a particular case, was 'economical', 'informal' and 'quick', but which might be considered to be somewhat less than 'fair' and 'just' in some respect.
>
> The second consideration is derived from the nature of non-observance of the supposed 'procedure' laid down in [s] 420(1). Non-observance would be, for example, a 'failure to pursue the objective of providing a mechanism of review that is fair' or a 'failure to pursue the objective of providing a mechanism of review that is economical'. The nature of the complaint made in a particular case might make relevant evidence of the [Tribunal's] staff and financial resources and its internal organisation and practices. A mere conclusion that a mechanism of review in its operation in a particular case did not satisfy one or more of the epithets in [s] 420(1), would not necessarily

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**62** See *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 434-435, 440.

establish that the [Tribunal] had not been pursuing the specified objective. The difficulty, perhaps practical impossibility, of proving a failure to pursue that objective in some cases suggests that the requirement of [s] 420(1) was not intended to fall within the ground of review described in [s] 476(1)(a).

The third consideration is founded on [s] 476(2)(a) … [T]hat [section] provides that a breach of the rules of natural justice is not a ground upon which an application may be made under [s] 476(1). If [s] 420(1) requires observance of a 'procedure' for the purpose of [s] 476(1)(a), in so far as it refers to a 'fair' and 'just' mechanism of review, it must refer to 'procedural fairness' – an expression synonymous with 'natural justice'[63]. But [s] 476(2)(a) provides expressly that breach of the rules of natural justice is not a ground of review. This suggests that the legislature did not intend the 'procedures' of [s] 476(1)(a) to embrace the standards which [s] 420(1) requires the [Tribunal] to pursue.

There is another argument based on [s] 476(2)(a) that leads to the same result. The general law notion of natural justice comprises the 'impartial tribunal' requirement (the 'bias rule') and the 'fair hearing requirement' (the 'hearing rule')[64]. While [s] 476(2)(a) makes clear that these requirements do not provide the basis of a ground of review, [s] 476(1)(f) provides that actual bias is such a ground, while [s] 476(1)(a) and [s] 425(1)(a), taken together, have the effect that a failure to give a genuine opportunity to appear before the [Tribunal] to give evidence, is also such a ground. This suggests that the legislature turned its mind to the twin requirements of natural justice and intended that [s] 476(1)(f) and [s] 425(1)(a) should occupy the field that would otherwise be occupied by the rules of natural justice. It will be clear that I do not agree that the expression in [s] 476(2)(a), 'the rules of natural justice', is to be read down in some way so that it refers to those rules only in so far as they depend on the general law, and does not detract from any generally expressed requirement of the Act which might otherwise be thought to have the effect of mandating observance of those rules.

The fourth consideration derives from the Explanatory Memorandum which accompanied the *Migration Reform Bill* 1992. That Memorandum makes clear that s 476 was intended to introduce a regime of limited grounds of review which were 'certain' in their meaning[65]. To permit review on the

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**63** See Aronson and Dyer, *Judicial Review of Administrative Action*, (1996) at 391.

**64** See Aronson and Dyer, *Judicial Review of Administrative Action*, (1996) at 387ff.

**65** See esp at 81-82.

ground that a mechanism of review is not 'fair' or 'just' is discordant with that intention."

110 Before parting with the appeal, I should refer to the prosecutor's Amended Notice of Contention filed by leave after conclusion of the hearing. The prosecutor contends that the Federal Court had jurisdiction in the matter which was conferred by s 8 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"). However, the effect of s 485(1) of the Act, which has been held valid[66], is to deny what otherwise would have been any conferral of jurisdiction under the ADJR Act.

111 It remains to consider the application under s 75(v) of the Constitution for prohibition and mandamus. To that I now turn.

Prohibition and mandamus

112 The prosecutor was born in 1973 and raised in Addis Ababa. He left Ethiopia in 1992. The prosecutor arrived in Sydney on 8 September 1993 on a Singapore Airlines flight. Earlier, on 20 August 1993, he had obtained from the Australian Embassy in Tel Aviv a Tourist (Short Stay) Visa which was good until 20 December 1993. The visa was in Class 670 which was established by Sched 2 to the Migration (1993) Regulations ("the 1993 Regulations") made under the Act and, it would appear, was an "entry visa" within the meaning of s 17(5)(b) of the Act and permitted the prosecutor to enter Australia (s 17(2))[67].

113 Thereafter, on 6 October 1993, the prosecutor made an application for refugee status and for a Domestic Protection (Temporary) Entry Permit ("DPTEP") being Class 784 under the 1993 Regulations. One criterion to be satisfied for the grant of such a permit was that the applicant have been determined by the Minister to have refugee status[68]. Section 22AA of the Act stated:

"If the Minister is satisfied that a person is a refugee, the Minister may determine, in writing, that the person is a refugee."

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**66** *Abebe v The Commonwealth* [1999] HCA 14.

**67** Sections 17 and 22AA, referred to later in these reasons, were repealed by s 9 of the *Migration Reform Act* 1992 (Cth) ("the 1992 Act"), but with effect, by reason of s 5 of the *Migration Laws Amendment Act* 1993 (Cth) ("the 1993 Act"), from 1 September 1994.

**68** Item 784.731 in Sched 2 to the 1993 Regulations. The 1993 Regulations were repealed by SR No 261 of 1994.

By letter dated 4 August 1994, the prosecutor was notified of a decision by a delegate of the Minister to refuse these applications. Section 176(1) of the Act[69] empowered the Minister to delegate to a person any of the Minister's powers under the Act. Further, s 34A of the *Acts Interpretation Act* 1901 (Cth) had the effect that, where the exercise of a power or function by the Minister was dependent upon the opinion, belief or state of mind of that person in relation to a matter, the power or function might be exercised by the delegate upon the opinion, belief or state of mind of the delegate in relation to that matter[70].

114 On 17 August 1994, the prosecutor applied for review by the Tribunal of the above decisions. On 1 September 1994, there came into force the totality of amendments effected to the Act by the 1992 Act, the 1993 Act and the 1994 Act and the 1993 Regulations were replaced by the Migration Regulations, SR No 268 of 1994 ("the 1994 Regulations"). One consequence was that at the time the Tribunal gave its decision on 30 November 1995, the decisions of the delegate that the prosecutor was not a refugee and to refuse the grant of the DPTEP were "RRT-reviewable decisions" within the meaning of pars (a) and (b) of s 411(1) of the Act. The effect of s 414 in the present case was to oblige the Tribunal to review the decisions of the delegate if a valid application were made. Any varied or substituted decision was, except for the purposes of appeals, to be taken to be a decision of the Minister and the Tribunal was not to purport to make a decision that was not authorised by the Act or the Regulations thereunder (s 415(3), (4)). Further, the effect of s 415(1) was to empower the Tribunal to exercise the powers and discretions conferred by the Act upon "the person who made" the decisions under review.

115 The provisions I have described involved the taking of two steps of a jurisdictional nature. First, the effect of s 414 and the definition of "RRT-reviewable decisions" was to specify that which attracted the jurisdiction of the Tribunal. Secondly, in the exercise of that jurisdiction the Tribunal was to exercise the powers and discretions conferred by the Act upon the Minister and the delegate on behalf of the Minister, but with the limitations which attended the exercise of those powers and discretions by those officers. The Tribunal was not authorised to make a decision which the Act would not have authorised the Minister (and thus the delegate) to make.

116 Section 430 imposed significant requirements upon the Tribunal with respect to the formulation and presentation of its decision. It required the Tribunal to prepare a written statement setting out (a) "the decision of the Tribunal on the

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**69** Section 176 was renumbered as s 496 by the *Migration Legislation Amendment Act* 1994 (Cth) ("the 1994 Act").

**70** See *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 276-277.

review"; (b) "the reasons for the decision"; and (c) "the findings on any material questions of fact", and referring to "the evidence or any other material on which the findings of fact were based". One consequence of these requirements is that the present is not a case where an application for prohibition or mandamus is entertained on a record containing a decision but without disclosure of the reasoning for the decision or findings on material questions of fact or references to the evidence or material on which those findings were based.

117 The second point to be made is that in such a proceeding the subject-matter for judicial review nevertheless remains the decision itself. In some degree, the submissions for the prosecutor treated as distinct subject-matter for judicial review under s 75(v) of the Constitution the cogency of the reasoning of the Tribunal and the adequacy of its findings on material questions of fact. Such an approach is misconceived. Section 430 obliges the Tribunal to prepare a written statement dealing with certain matters. It thereby furthers the objectives of reasoned decision-making and the strengthening of public confidence in that process. But the section does not provide the foundation for a merits review of the fact-finding processes of the Tribunal[71].

118 By the time the Tribunal gave its decision, s 36 of the Act provided for a class of visas to be known as "protection visas" and stipulated in sub-s (2) thereof:

> "A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

Further, s 65 of the Act now provided that the Minister was to grant a visa sought by a valid application "if satisfied" of various matters, including that any criteria for the visa prescribed by the Act were satisfied (s 65(1)(a)(ii)). Item 221 of subclass 866 of Sched 2 to the 1994 Regulations specified as a criterion to be satisfied at the time of decision:

> "The Minister is satisfied the applicant is a person to whom Australia has protection obligations under the Refugees Convention."

The term "Refugees Convention" was defined in Item 111 of subclass 866 so as to include the 1967 Refugees Protocol.

119 Section 65(1) is a provision of central importance and should be set out in full. It stated:

> "After considering a valid application for a visa, the Minister:

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**71** cf *Fleming v The Queen* (1998) 73 ALJR 1; 158 ALR 379.

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) *the other criteria for it prescribed by this Act* or the regulations *have been satisfied*; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any visa tax, English Education Charge under the *Immigration (Education) Charge Act 1992* and any charge under the *Migration (Health Services) Charge Act 1991* payable in relation to the application have been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa." (emphasis added)

The reference in sub-par (a)(ii) to other criteria drew in, for the present case, s 36. It will be noted that s 65(1) imposed upon the Minister an obligation to grant or to refuse to grant a visa, rather than a power to be exercised at discretion. The Minister's satisfaction was an anterior matter, being a component of the condition precedent to the discharge of the obligation to grant or refuse the visa.

120 In the light of these legislative changes, the Tribunal approached the matter on the footing that it was to determine whether it was satisfied that the prosecutor met the criterion for a protection visa specified in s 36(2), namely that he was a non-citizen in Australia to whom this country had protection obligations under the Refugees Convention as amended by the Refugees Protocol. The Tribunal determined that the prosecutor was not a refugee and affirmed the decision that he was not entitled to a protection visa. It provided a detailed written statement in discharge of the obligation imposed by s 430 of the Act.

121 The prosecutor seeks in this Court under s 75(v) of the Constitution orders absolute for prohibition restraining the Minister, the first respondent, from acting on or giving effect to the decision of the Tribunal of 30 November 1995. He also seeks mandamus directed to the Tribunal to rehear and redetermine according to law his application for a protection visa. The sole ground advanced is that the decision of the Tribunal was "so unreasonable that no reasonable Tribunal, *acting within jurisdiction* and according to law, would have come to such a decision" (emphasis added).

122 The prosecutor framed this ground with reference to what was said by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[72]. This was done to lay the ground for submissions that the present applications under s 75(v) of the Constitution were to be resolved by the application of principles of "*Wednesbury* unreasonableness". However, that approach to the matter misconceives the significance of the form in which ss 36 and 65 of the Act were cast. In *Foley v Padley*, Brennan J said[73]:

> "It is hard to overstate the importance of what Knox CJ, Starke and Dixon JJ said in *Country Roads Board v Neale Ads Pty Ltd*[74]:
>
> > 'The whole controversy illustrates the danger which attends the formulation of principles and doctrines and all reasoning a priori in matters which in the end are governed by the meaning of the language in which the Legislature has expressed its will.'"

The present case bears out the force of those remarks.

123 The legislation with which the English Court of Appeal was concerned in *Wednesbury*, the *Sunday Entertainments Act* 1932 (UK) ("the Entertainments Act"), provided in s 1(1):

> "The authority having power, in any area to which this section extends, to grant licences under the Cinematograph Act, 1909, may, notwithstanding anything in any enactment relating to Sunday observance, allow places in that area licensed under the said Act to be opened and used on Sundays for the purpose of cinematograph entertainments, *subject to such conditions as the authority think fit to impose* …" (emphasis added)

The case concerned the exercise of the power of an authority to impose conditions, not, for example, any anterior question as to the jurisdictional fact that the authority have power in the area to grant licences under the 1909 statute. In *Attorney-General (NSW) v Quin*[75], Brennan J identified the duty and jurisdiction of the court to review administrative action by reference to the declaration and enforcement of the law which (i) determines the limits of the power in question and (ii) governs its exercise. *Wednesbury* is concerned with the second, namely with abuse of power. The plaintiff in *Wednesbury* brought an action for a

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**72** [1948] 1 KB 223 at 229-231.

**73** (1984) 154 CLR 349 at 364.

**74** (1930) 43 CLR 126 at 135.

**75** (1990) 170 CLR 1 at 36-37.

declaration that the conditions imposed under s 1(1) of the Entertainments Act was "ultra vires and unreasonable"[76].

124 What have come to be known as principles of "*Wednesbury* unreasonableness" have developed by analogy to principles governing the judicial control in private law of the exercise of powers and discretions vested in trustees and others[77]. The principles in question are now part of that body of administrative law which is concerned with the judicial review of abuse of discretionary powers[78]. That is how "*Wednesbury* unreasonableness" has been understood on numerous occasions in this Court[79]. A notable example is provided by the judgment of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[80]. His Honour's discussion of *Wednesbury*[81] occurred in the

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**76** [1948] 1 KB 223 at 224.

**77** See *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 72 ALJR 1270 at 1275-1276; 155 ALR 684 at 690-691; *Thomas on Powers*, (1998), at vii and §6-202.

**78** See Wade and Forsyth, *Administrative Law*, 7th ed (1994), Ch 12, esp at 399-402; Craig, *Administrative Law*, 3rd ed (1994), Ch 11, esp at 400-411; de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed (1995), Ch 13, esp at 549.

**79** *Norbis v Norbis* (1986) 161 CLR 513 at 540-541; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 392, 407-408; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36-37; *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 101; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36-37; cf *Parramatta City Council v Pestell* (1972) 128 CLR 305 at 327-329.

**80** (1986) 162 CLR 24 at 39-46.

**81** (1986) 162 CLR 24 at 41-42.

course of elaboration of the proposition[82] that "[t]he limited role of a court [in] reviewing the exercise of an administrative discretion must constantly be borne in mind". The point, reiterated by leading United States scholars, is that "[j]udicial review can be a source of excessive discretion as well as a means of limiting discretion"[83].

125 "*Wednesbury* unreasonableness" may have been picked up as a statutory ground of review of administrative decisions by s 5(1)(e) and s 5(2)(g) and (j) of the ADJR Act. No question under the ADJR Act arises in this proceeding. Statutory review apart, "*Wednesbury* unreasonableness" may overlap with other more clearly developed grounds for judicial review. For example, in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[84], it was held, with respect to the Act in an earlier form, that the determination of refugee status which was at issue in *Chan v Minister for Immigration and Ethnic Affairs*[85] was best understood as flawed by an error of law in the application of the test of refugee status. Again, in *Australian Broadcasting Tribunal v Bond*, Deane J treated "Wednesbury principles" as being "encompassed by the obligation to act judicially in cases where that obligation exists"[86].

126 Finally, it may be that the basis of "*Wednesbury* unreasonableness" is found in the proposition adopted by Brennan J in *Kruger v The Commonwealth* that "when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised"[87]. The result, as identified by the late Professor de Smith[88], is that "an authority failing to comply with this obligation acts unlawfully or *ultra vires*". Further, the decision of the authority in question may be tantamount to a refusal to exercise its discretion[89]. If the matter be looked

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**82** (1986) 162 CLR 24 at 40.

**83** Davis and Pierce, *Administrative Law Treatise*, 3rd ed (1994), vol 3, §17.3.

**84** (1996) 185 CLR 259 at 273.

**85** (1989) 169 CLR 379.

**86** (1990) 170 CLR 321 at 367.

**87** (1997) 190 CLR 1 at 36; cf the statement of the obligation to afford procedural fairness by Mason J in *Kioa v West* (1985) 159 CLR 550 at 584-585.

**88** *De Smith's Judicial Review of Administrative Action*, 4th ed (1980) at 346.

**89** See *Williams v Giddy* [1911] AC 381 at 385-386, an appeal from the Supreme Court of New South Wales in which the judgment of the Privy Council was delivered by Lord Macnaghten.

at in that way, then there appears more readily a footing for judicial review by way of prohibition or mandamus or injunctive relief under s 75(v) of the Constitution in an appropriate case.

127 However, none of these matters needs further be explored in the present case. This is because the attack upon the decision of the Tribunal is not directed to the exercise of a discretionary power. Rather, this is a case where the legislature has made "some fact or event a condition upon which the existence of which the jurisdiction of a tribunal or court shall depend"[90]. The court or tribunal cannot give itself jurisdiction by erroneously deciding that the fact or event exists[91]. The fact or event may turn upon the limits of constitutional power but no question of "constitutional facts" arises in the present case. I have identified earlier in these reasons two jurisdictional factors. Further attention to the second of them is required.

128 The requirement which flowed from a combination of ss 36 and 65 of the Act that, before granting a protection visa, the Minister and, on review, the Tribunal be "satisfied" that the prosecutor was a refugee presented an issue as to whether the prosecutor met a criterion which, if satisfied, entitled him to the grant of the visa in question.

129 The ground upon which the prosecutor seeks relief under s 75(v) of the Constitution expressly states the assumption that the Tribunal was acting within its jurisdiction but the case the prosecutor presents necessarily turns upon the application of ss 36 and 65 of the Act. These provisions do not present an issue that arises within jurisdiction. However, rather than dismiss the application on this ground, I should say something as to what would be the outcome of an application more accurately expressed. In doing so, some conclusions reached as to matters of legal principle must, of necessity, be provisional and not foreclose debate in any later case upon fully developed submissions.

130 The "jurisdictional fact", upon the presence of which jurisdiction is conditioned, need not be a "fact" in the ordinary meaning of that term. The precondition or criterion may consist of various elements and whilst the phrase "jurisdictional fact" is an awkward one in such circumstances it will, for convenience, be retained in what follows. In *Bankstown Municipal Council v Fripp*[92], Isaacs and Rich JJ pointed out that, with the object of preventing litigation

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**90** *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 125.

**91** *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 214.

**92** (1919) 26 CLR 385 at 403.

on questions of jurisdictional fact, the legislature may introduce into the criterion elements of opinion or belief by the decision-maker. Section 65 of the Act is an example. The prosecutor was entitled to the grant of a visa only if the Minister were "satisfied" that the prosecutor answered the description in s 36(2).

131 A determination that the decision-maker is not "satisfied" that an applicant answers a statutory criterion which must be met before the decision-maker is empowered or obliged to confer a statutory privilege or immunity goes to the jurisdiction of the decision-maker and is reviewable under s 75(v) of the Constitution. This is established by a long line of authority in this Court which proceeds upon the footing that s 75 is a constitutional grant of jurisdiction to the Court[93].

132 In *Attorney-General (NSW) v Quin*, Brennan J observed[94]:

> "The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government. … [T]he duty extends to judicial review of administrative action alleged to go beyond the power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law. The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall CJ in *Marbury v Madison*[95]:
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> 'It is, emphatically, the province and duty of the judicial department to say what the law is.'
>
> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from

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**93** See *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 428, 438-439; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 179, 204-205, 220-222, 231-232, 241-242; *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 652-654; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 631-633.

**94** (1990) 170 CLR 1 at 35-36.

**95** 1 Cranch 137 at 177 (1803) [5 US 87 at 111].

legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

133 In *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd*, Latham CJ said[96]:

"[W]here the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist."

The Chief Justice added[97]:

"It should be emphasized that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational, or not bona fide."

134 In *Foley v Padley*, the passages from the judgment of Latham CJ were approved by Gibbs CJ[98] and Brennan J[99] as correct statements of the law. In particular, Brennan J went on to emphasise that the question for the court is not whether it would have formed the opinion in question but whether the repository of the power could have formed the opinion reasonably and that an allegation of

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**96** (1944) 69 CLR 407 at 430.

**97** (1944) 69 CLR 407 at 432.

**98** (1984) 154 CLR 349 at 353.

**99** (1984) 154 CLR 349 at 370. See also at 375 per Dawson J. The point is made in other authorities, including *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; *Federal Commissioner of Taxation v Bayly* (1952) 86 CLR 506 at 510; *Federal Commissioner of Taxation v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 57; *Buck v Bavone* (1976) 135 CLR 110 at 118-119; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274-276; *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303, 308.

unreasonableness in the formation of that opinion may often prove to be no more than an impermissible attack upon the merits of the decision then made in purported exercise of the power[100].

135 In *Connell*[101], the jurisdictional fact turned upon the question whether the decision-maker had been properly "satisfied" that certain rates of remuneration were "anomalous" within the meaning of a regulation made under the *Coal Production (War-time) Act* 1944 (Cth). It was held by this Court[102] that prohibition should go against the authority on the ground that it had not been properly so satisfied. As Menzies J later explained the decision[103]:

> "[T]he grant of power was construed as not extending to the formation of an unchallengeable opinion unless and until a correct interpretation had been put upon the word 'anomalous'".

Counsel for the prosecutor in *Connell* had submitted that there was "not any evidence upon which a reasonable person could form the opinion that there was an anomaly in the sense of [the regulation]"[104]. Latham CJ approached the matter as presenting the question "whether or not there was evidence upon which the [decision-maker] could be satisfied that [the] rates were anomalous"[105] and, as indicated, decided the matter in favour of the prosecutor.

136 Later, in *Buck v Bavone*[106], Gibbs J observed, in the course of construing the powers conferred upon a board established under the *Potato Marketing Act* 1948 (SA), that it was not uncommon for statutes to provide that a decision-maker shall or may take certain action if satisfied of the existence of certain specified matters. His Honour noted that the nature of the matters of which the authority is required

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**100** (1984) 154 CLR 349 at 370.

**101** (1944) 69 CLR 407.

**102** Latham CJ, Rich, Starke and Williams JJ; McTiernan J dissenting.

**103** *Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437 at 453.

**104** (1944) 69 CLR 407 at 422 per Kitto KC *arguendo*.

**105** (1944) 69 CLR 407 at 435.

**106** (1976) 135 CLR 110.

to be satisfied often largely will indicate whether the decision of the authority can be effectively reviewed by the courts. His Honour continued[107]:

> "In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached."

137 This passage is consistent with the proposition that, where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question. It may be otherwise if the evidence which establishes or denies, or, with other matters, goes to establish or to deny, that the necessary criterion has been met was all one way.

138 It is here that the crucial question arises. On the one hand, where the issue concerns an alleged error of law not going to the fulfilment of a statutory precondition to the existence of jurisdiction, it is said in this Court that there is no error of law simply in making a wrong finding of fact, although the making of findings and the drawing of inferences in the absence of evidence is an error of law. Mason CJ referred to the authorities for these propositions in *Australian Broadcasting Tribunal v Bond*[108]. His Honour went on to observe that the approach taken in some English authorities that findings and inferences are reviewable for error of law on the ground that they could not reasonably be made out on the evidence or reasonably be drawn from the primary facts had not so far been accepted in this Court[109].

139 On the other hand, where the question is whether a decision-maker in the position of the Minister under s 65(1) of the Act reasonably could have formed the opinion as to satisfaction of statutory criteria upon which jurisdiction depends, different considerations arise in an application under s 75(v) of the Constitution.

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**107** (1976) 135 CLR 110 at 118-119.

**108** (1990) 170 CLR 321 at 355-356.

**109** (1990) 170 CLR 321 at 356-357.

Section 75 controls jurisdictional fact-finding not only by those administering the laws of the Commonwealth but by judicial officers sitting as federal courts whose jurisdiction is defined by laws made by the Parliament under s 77(i) of the Constitution. In such cases, there is an avenue, with special leave, for appeal to this Court under s 73(ii) of the Constitution. These considerations have encouraged the view in this Court that it is desirable that the Federal Court "should be permitted to exercise its jurisdiction without interference by this Court by way of grant of prohibition except in those instances where the matter in question plainly gives rise to an absence or excess of jurisdiction"[110].

140 Further, whilst it is for this Court to determine independently for itself whether in a particular case a specialist tribunal has or lacks jurisdiction, weight is to be given, on questions of fact and usage, to the tribunal's decision, the weight to vary with the circumstances[111]. The circumstances will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in the exercise of its functions and the extent to which its decisions are supported by disclosed processes of reasoning. A similar doctrine has been developed by the Supreme Court of Canada, at least with respect to findings of non-jurisdictional fact[112].

141 Such considerations suggest that there would be real difficulties with the general adoption for the purposes of s 75(v) of the Constitution of the course with respect to review of jurisdictional facts espoused by Lord Wilberforce. In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*[113], the House of Lords was concerned with s 68 of the *Education Act* 1944 (UK). This empowered the Secretary of State, if satisfied of various matters, to give certain directions to education authorities. After observing that such a

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**110** *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 127. See also *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 225-226; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 375-376.

**111** *R v Williams; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 153 CLR 402 at 411.

**112** *United Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd* [1993] 2 SCR 316 at 335; *Pezim v British Columbia (Superintendent of Brokers)* [1994] 2 SCR 557 at 591-592; *Ross v New Brunswick School District No 15* [1996] 1 SCR 825 at 846-847; *Westcoast Energy Inc v Canada (National Energy Board)* [1998] 1 SCR 322 at 353-355, 414-415.

**113** [1977] AC 1014.

provision might exclude judicial review on "a matter of pure judgment", Lord Wilberforce continued[114]:

> "If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts [and] whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge: see *Secretary of State for Employment v ASLEF (No 2)*[115]."

142 This approach to the matter has been criticised as vesting the courts with too great a latitude for substituting their view for that of the decision-maker and for giving insufficient weight to the consideration that decision-makers "tend to reach decisions on the basis of bounded rationality"[116]. The decision-maker may legitimately proceed by methods which are inquisitorial rather than adversarial. That is what occurred in the Tribunal in this matter.

143 In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*, in their joint judgment four members of the Court warned in this field against drawing too closely upon analogies in the conduct and determination of civil litigation[117]. Their Honours continued[118]:

> "Where facts are in dispute in civil litigation conducted under common law procedures, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have thought it in their respective interests to adduce at the trial. Administrative decision-making is of a different nature[119]. A whole range of possible approaches to decision-making in the particular circumstances of the case

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**114** [1977] AC 1014 at 1047. In a related context, Lord Wilberforce later spoke to similar effect: *R v Secretary of State for the Home Department, Ex parte Khawaja* [1984] AC 74 at 105.

**115** [1972] 2 QB 455 at 493 per Lord Denning MR.

**116** Craig, *Administrative Law*, 3rd ed (1994) at 372.

**117** (1996) 185 CLR 259 at 282.

**118** (1996) 185 CLR 259 at 282.

**119** *Mahon v Air New Zealand Ltd* [1984] AC 808 at 814.

may be correct in the sense that their adoption by a delegate would not be an error of law."

The Court pointed out that terms such as "balance of probabilities" and "evidence" when used to describe the material before the decision-maker are borrowed from civil litigation conducted by the above methods.

144 Further, the formulation by Lord Wilberforce proceeds upon the footing that the formation of the judgment in question requires "the existence of some facts"[120], but this was said in a context where there was no statutory requirement for the provision of written reasons such as that imposed in this case by s 430 of the Act.

145 Where the issue whether a statutory power was enlivened turns upon the further question of whether the requisite satisfaction of the decision-maker was arrived at reasonably, I would not adopt the criterion advanced by Lord Wilberforce. I would prefer the scrutiny of the written statement provided under s 430 by a criterion of "reasonableness review"[121]. This would reflect the significance attached earlier in these reasons to the passage extracted from the judgment of Gibbs J in *Buck v Bavone*[122]. It would permit review in cases where the satisfaction of the decision-maker was based on findings or inferences of fact which were not supported by some probative material or logical grounds[123].

146 It may be that there should be accepted some stricter view as to what must be shown in such a case by an applicant seeking relief under s 75(v) of the Constitution. It is not necessary to determine whether this is so. That question may be left for developed argument in another case.

147 The fact-finding and reasoning of the Tribunal are discussed in the judgment of the Chief Justice and McHugh J. They show that its decision was not based on findings or inferences of fact which were not supported by some probative material or could not be supported on logical grounds. That other decision-makers may have reached a different view, and have done so reasonably, is not to the point.

148 There is one further matter which should be mentioned. It will be recalled that, in the passage set out earlier in these reasons from his judgment in *Buck v*

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**120** [1977] AC 1014 at 1047.

**121** See Schwartz, *Administrative Law*, 3rd ed (1991), §10.32.

**122** (1976) 135 CLR 110 at 118-119.

**123** cf *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 366; *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 at 776-777.

*Bavone*[124], Gibbs J treated as material factors in an assessment of whether a decision-maker had reasonably attained the necessary degree of satisfaction the taking into account of irrelevant considerations or otherwise misconstruing the relevant legislation. In the course of argument on the present appeal, the prosecutor advanced a submission which would, if accepted, appear to fall in that category. The Tribunal made the following finding:

> "I accept that Mr Eshetu has a strong subjective fear of returning to Ethiopia based on his conviction that the current government of Ethiopia is conducting a repressive campaign against its opponents in general and Amharas in particular. However, I find the chance that he will face serious harm amounting to persecution either because he opposes the current government or because he is an Amhara to be remote."

In the penultimate passage of the reasons for decision, the Tribunal stated:

> "I accept that Mr Eshetu fears returning to Ethiopia. However, I find the chance that he will experience persecution for any of the reasons contained in the Convention to be remote. His fear of persecution is therefore not well-founded. He is thus not a refugee, not someone to whom Australia has protection obligations and not entitled to a protection visa."

149 Counsel for the prosecutor submitted that, having found the presence of a strong subjective fear on the part of Mr Eshetu, the Tribunal then misdirected itself as to what was required in order to determine whether Mr Eshetu had made out his claim.

150 It is established by what was said by Mason CJ, Dawson J, Toohey J and McHugh J in *Chan*[125] that the Convention definition of "refugee" involves mixed subjective and objective elements. In particular, there must be a state of mind, a fear of being persecuted, and a basis for that fear which is well founded. Without a real chance of persecution there cannot be a well-founded fear of persecution and the objective facts are not confined to those which induced the applicant's fear. The view of Gaudron J in *Chan* that, if the experiences of the applicant produced a well-founded fear of being persecuted, "then a continuing fear ought to be accepted as well-founded unless it is at least possible to say that the fear of a reasonable person in the position of the claimant would be allayed by knowledge

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**124** (1976) 135 CLR 110 at 118-119.

**125** (1989) 169 CLR 379 at 389, 398, 406, 429.

of subsequent changes in the country of nationality"[126] does not represent the view of the Court in *Chan*.

151 There was no error of law involved in the path by which the Tribunal reached its conclusion adverse to the prosecutor.

Conclusions

152 The appeal should be allowed and orders made as proposed by the Chief Justice and McHugh J. The application for prohibition and mandamus should be dismissed.

153 The prosecutor understood he was obliged to bring the further proceeding as a consequence of the procedural bifurcation mandated by Pt 8 of the Act, in particular by s 476 and s 485. I have considered whether the prosecutor ought not to suffer a costs order in favour of the first respondent, the Minister, who administers the Act. However, the undesirable procedural situation arises not from his administration of the law but from the statute the Parliament enacted. The application should be dismissed with costs.

154 There is a further aspect of this procedural bifurcation which should be noted. The application to this Court under s 75(v) of the Constitution was instituted on the footing that the effect of s 476(2)(b) and s 485(1) of the Act was to deny to the Federal Court the jurisdiction it otherwise would have had under s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") in respect of a "*Wednesbury* unreasonableness" ground of review. However, where the question is whether the Minister was obliged by s 65 to grant a protection visa upon satisfaction that the applicant met the criterion under s 36(2) for a protection visa, "*Wednesbury* unreasonableness" does not enter the picture. Rather, the question would appear to be whether the Minister did not have jurisdiction to make the decision (s 476(1)(b)), the decision was not authorised by the Act (s 476(1)(c)), the decision involved an error of law (s 476(1)(e)) or there was no evidence or other material to justify the making of the decision (s 476(1)(g) as amplified by s 476(4)). The exclusion by s 476(2)(b) of "*Wednesbury* unreasonableness" would not be material. Upon that footing, the Federal Court would have jurisdiction conferred by both s 486 of the Act and s 39B of the Judiciary Act, concurrently with that conferred upon this Court by s 75(v) of the Constitution.

155 The existence of such concurrent jurisdiction in the Federal Court would support a remitter to the Federal Court under s 44 of the Judiciary Act. Section 485(3) would not apply to limit the powers of the Federal Court in respect of such a remitted matter.

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**126** (1989) 169 CLR 379 at 415.

156 No remitter was sought in this case but, in my view, the assumptions upon which the prosecutor acted, namely the materiality of "*Wednesbury* unreasonableness" and the exclusivity of the jurisdiction of this Court in relation thereto, were, in the circumstances of the present litigation, misplaced.

157 HAYNE J. For the reasons Gummow J and I gave in *Abebe v The Commonwealth*[127] I consider that Pt 8 of the *Migration Act* 1958 (Cth) ("the Act") is invalid. That view did not command the assent of a majority of the Court and I must therefore deal with the present appeal on the basis that Pt 8 of the Act is valid.

158 For the reasons given by Gleeson CJ and McHugh J the appeal by the Minister should be allowed with costs, the order of the Full Court of the Federal Court set aside and the appeal to that Court dismissed with costs. In particular, I agree that s 420 of the Act does not create rights or a ground of review additional to those given in s 476.

159 I agree that the application under s 75(v) of the Constitution should be dismissed, again with costs. I prefer to express no view on whether what is called the *Wednesbury* unreasonableness ground[128] is a ground for granting any of the remedies referred to in s 75(v) or on what is properly encompassed by that ground. I therefore express no view on whether it is a ground that concerns, or concerns only, the exercise of discretion rather than the finding of facts. The questions debated in the course of argument about what was said by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[129] need not be answered in this case. Even if *Wednesbury* unreasonableness is given as wide a reach as the applicant contended, and even if it is a ground that is open to an applicant for relief under s 75(v), the reasons given by Gleeson CJ and McHugh J show that the decision of the Refugee Review Tribunal was a decision that was open to it. The applicant did not show that the decision was so unreasonable that no reasonable Tribunal, acting within jurisdiction and according to law, could have reached the conclusion that this Tribunal did.

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**127** [1999] HCA 14.

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

**129** (1986) 162 CLR 24 at 42.

CALLINAN J.

Introduction

160 This case raises similar questions to those falling for consideration in *Abebe v The Commonwealth*[130]: the operation of, and relationship between ss 420 and 476 of the *Migration Act* 1958 (Cth) ("the Migration Act"); the validity of Pt 8 of that Act; and the entitlement or otherwise of an applicant for a protection visa to prerogative relief from this Court.

Facts and previous proceedings

161 Mr Moges Eshetu, to whom I will refer as the respondent, in October 1993, applied to the appellant for refugee status and a domestic protection (temporary) entry permit. He was unsuccessful and sought review of the delegate's decision by the Refugee Review Tribunal. The Tribunal dealt with the respondent's application as a decision to refuse him a protection visa. (Changes which had occurred in the relevant legislation between the delegate's decision and the review by the Tribunal effectively replaced a grant of refugee status with a protection visa[131].)

Facts

162 The respondent's case for a protection visa was presented upon the basis of these factual assertions. He was a citizen of Ethiopia, and of the Amharan race. The respondent grew up in Addis Ababa, the capital of Ethiopia which was then governed by the pro-communist government of President Mengistu Mariam. He was 22 years old, and had a five years old son who lived in Ethiopia. Two of the respondent's brothers were involved in the Ethiopian People's Revolutionary Party, an activist group which opposed the Mengistu government.

163 It was as a result of persecution inflicted on his brothers, for anti-government activity, the respondent said, that he hated the Mengistu regime and became involved in efforts directed against it. These occurred from the time the respondent was a student in secondary school.

164 When, in May 1991, President Mengistu fled Ethiopia, the government of the country was seized by the Ethiopian People's Revolutionary Democratic Front. In October 1991, the respondent commenced studies at university in Addis Ababa. The respondent's evidence was that soon after enrolment he was elected as one of a council of students numbering 11. The council discussed political matters, and,

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**130** [1999] HCA 14.

**131** See *Migration Reform Act* 1992 (Cth) s 39.

in particular, expressed concern that the Amharan race was being excluded from the coalition of groups in or influencing the government.

165 As an expression of their concern the council organised a march to the United States Embassy. The day before the march was due to be held, the respondent, along with 24 others, was imprisoned, beaten and warned against any further anti-government activity. He said that he suffered injury to his feet as a result of that beating.

166 The respondent claimed that shortly after this brief period of imprisonment he was informed that there had been further arrests, and that it was not safe for him to remain in the country. Accordingly, he arranged to leave Ethiopia by paying a bribe to obtain a passport. He travelled first to Israel, where his sister lived and worked for the United Nations, and then to Australia. After his arrival he applied for a grant of a status then of equivalence with the holder of a protection visa on the basis that he had a well-founded fear of persecution should he be required to return to Ethiopia.

167 The respondent said that there had been a further student demonstration in January 1993 which had led to the death of one student according to an Amnesty International report published in 1995. It was not suggested that the respondent had participated in this demonstration.

168 The Tribunal expressly rejected the claim that he had been detained. Although it was accepted that the respondent opposed the Ethiopian government, the Tribunal concluded that he did not face "more than a remote chance of detention or other serious harm amounting to persecution in Ethiopia". A similar conclusion was reached with respect to any likelihood of persecution on grounds of the respondent's ethnicity.

169 The respondent sought judicial review of the Tribunal's decision in the Federal Court. The matter was heard by Hill J, who dismissed the application[132]. His Honour formed the view that the Tribunal's decision was unreasonable. However, s 476(2)(b) of the Migration Act, Hill J concluded, denied unreasonableness as a ground upon which the application could succeed.

170 The respondent successfully appealed to the Full Court of the Federal Court (Davies and Burchett JJ, Whitlam J dissenting)[133]. The Minister appeals against that decision to this Court on three grounds which summarise those conclusions of the majority that are under attack:

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**132** *Eshetu v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 474.

**133** *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 300.

1. The majority of the Full Court erred in holding that a failure by the Tribunal to make findings of primary facts could constitute an error of law for the purposes of s 476(1)(e) of the Migration Act because it constituted an "incorrect interpretation" of the mandate contained in s 420(2)(b) of the Act to act "according to substantial justice and the merits of the case".

2. The majority of the Full Court erred in failing to hold that the terms of s 420(2) of the Act did not provide a statutory basis for judicial review of the fact-finding process undertaken by the Tribunal, particularly in the context of the express exclusion of the grounds referred to in s 476(2) of the Act.

3. His Honour Burchett J erred in holding that the Tribunal erred in law in finding that the fears of the respondent were "remote" without explaining its understanding of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

171 In the event that the Minister's appeal to this Court should succeed, the respondent initially contended here that he was entitled to prerogative relief upon the following ground:

> "That the second respondent's [the Tribunal's] decision was so unreasonable that no reasonable Tribunal, acting within jurisdiction and according to law, would have come to such a decision."

172 The respondent subsequently took the opportunity offered by the Court of raising the same point in this case as was being raised in the case of *Abebe v The Commonwealth*: that is, that Pt 8 of the Migration Act (in which s 476 appears) was wholly or partially invalid although the amendment that was subsequently made by the respondent did not in terms do so. The amended notice of contention stated:

> "… It is contended that the decision of the Full Federal Court should be affirmed pursuant to s 5(1)(b) and/or 5(1)(f) of the [*Administrative Decisions (Judicial Review) Act* 1977 (Cth)] ("the ADJR Act").
>
> Grounds
>
> 1. The decision of [the Tribunal] is judicially reviewable on the ground set out in section 5(1)(b) of the ADJR Act, in that procedures that were required by law to be observed in connection with the making of the decision were not observed; namely failing to act according to substantial justice and the merits of the case contrary to s 420 of the [Migration Act]. Alternatively, the failure to act according to substantial justice and the merits of the case was a reviewable error of law pursuant to s 5(1)(f) of the ADJR Act.

…

2. The Tribunal erred in law (s 5(1)(f) of the ADJR Act) in that it incorrectly interpreted and applied the applicable law, namely the 1951 United Nations Convention Relating to the Status of Refugees, as amended by the 1967 Protocol, to the facts.

3. The Tribunal erred in law (s 5(1)(f) of the ADJR Act) in that it incorrectly interpreted and applied the applicable law, namely whether there was a real chance that the respondent was at risk of persecution if returned to his country of nationality.

4. The Tribunal erred in law (s 5(1)(f) of the ADJR Act) in that it failed to properly apply the law to the facts when it dismissed the respondent's case upon the basis that his evidence in relation to past persecutory acts was not confirmed by material before the Tribunal and without assessing the credibility of the respondent."

173 It is convenient first to set out some of the sections upon which this appeal turns:

**"Refugee Review Tribunal's way of operating**

420 (1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case.

. . .

**Where review 'on the papers' is not available**

425 (1) Where section 424 does not apply, the Tribunal:

(a) must give the applicant an opportunity to appear before it to give evidence; and

(b) may obtain such other evidence as it considers necessary.

(2) Subject to paragraph (1)(a), the Tribunal is not required to allow any person to address it orally about the issues arising in relation to the decision under review.

. . .

**Application for review**

476 (1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

(a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;

(b) that the person who purported to make the decision did not have jurisdiction to make the decision;

(c) that the decision was not authorised by this Act or the regulations;

(d) that the decision was an improper exercise of the power conferred by this Act or the regulations;

(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;

(f) that the decision was induced or affected by fraud or by actual bias;

(g) that there was no evidence or other material to justify the making of the decision.

(2) The following are not grounds upon which an application may be made under subsection (1):

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

…"

174 These provisions were all inserted in the Migration Act by the *Migration Reform Act* 1992 (Cth).

175 Davies J in the Full Court found that s 420 prescribed procedures with which the Tribunal was bound to comply; that any breach of s 420 involves reviewable error by the Tribunal under s 476. His Honour so concluded on the basis that the requirements contained in s 420 are mandatory and that s 476 had to be read subject to them. Burchett J agreed, and held that the combination of ss 420, 425 and 476(1) conferred enforceable statutory rights equivalent to those available at common law for breach of the rules of natural justice.

176 The relationship between s 420 and s 476 has been considered in a number of cases in the Federal Court[134]. For reasons which will appear, it is necessary for me to refer in detail to one only of them, *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs*[135], which was heard by Lindgren J at first instance, and was the subject of appeal to the Full Court[136]. There, the decision of Lindgren J was unanimously reversed by a Court constituted by Wilcox, Burchett and North JJ. Lindgren J discussed the relationship between the two sections in these terms[137]:

> "Sub-section 420(1) directs the RRT [the Tribunal] 'in carrying out its function under [the] Act ... to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick'. A requirement that the RRT pursue an objective of providing a mechanism of review satisfying such a general description is not, in my respectful opinion, a requirement that it observe a procedure in connection with the making of a particular decision, with which para 476(1)(a) is concerned.
>
> This view gains support from four more specific considerations. First, the objectives referred to in sub-s 420(1) will often be inconsistent as between themselves. In particular, a mechanism of review that is 'economical, informal and quick' may well not be 'fair' or 'just'. It is difficult to accept that the legislature intended in para 476(1)(a) to provide a ground of review where

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**134** See for example *Velmurugu v Minister for Immigration and Ethnic Affairs* (1996) 44 ALD 253 per Olney J; *Wannakuwattewa v Minister for Immigration and Ethnic Affairs*, unreported, Federal Court of Australia, 24 June 1996 per North J; *Dai Xing Yao v Minister for Immigration and Ethnic Affairs*, unreported, Federal Court of Australia, 18 September 1996 per Black CJ, Davies and Sundberg JJ; *Singh v Minister for Immigration and Ethnic Affairs*, unreported, Federal Court of Australia, 18 October 1996 per Lockhart J.

**135** Unreported, Federal Court of Australia, 6 May 1997.

**136** *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1997) 151 ALR 505.

**137** At 40-47.

a mechanism of review in its application to a particular case, although 'fair' and 'just', was not 'economical', 'informal' and 'quick'. Similarly, I do not think that the legislature intended by para 476(1)(a) to afford a ground of review wherever the RRT provided a mechanism of review which, in its application to a particular case, was 'economical', 'informal' and 'quick', but which might be considered to be somewhat less than 'fair' and 'just' in some respect.

The second consideration is derived from the nature of non-observance of the supposed 'procedure' laid down in sub-s 420(1). Non-observance would be, for example, a 'failure to pursue the objective of providing a mechanism of review that is fair' or a 'failure to pursue the objective of providing a mechanism of review that is economical'. The nature of the complaint made in a particular case might make relevant evidence of the RRT's staff and financial resources and its internal organisation and practices. A mere conclusion that a mechanism of review in its operation in a particular case did not satisfy one or more of the epithets in sub-s 420(1), would not necessarily establish that the RRT had not been pursuing the specified objective. The difficulty, perhaps practical impossibility, of proving a failure to pursue that objective in some cases suggests that the requirement of sub-s 420(1) was not intended to fall within the ground of review described in para 476(1)(a).

The third consideration is founded on para 476(2)(a) the terms of which were set out earlier. It will be recalled that that paragraph provides that a breach of the rules of natural justice is not a ground upon which an application may be made under sub-s 476(1). If sub-s 420(1) requires observance of a 'procedure' for the purpose of para 476(1)(a), in so far as it refers to a 'fair' and 'just' mechanism of review, it must refer to 'procedural fairness' - an expression synonymous with 'natural justice'[138]. But para 476(2)(a) provides expressly that breach of the rules of natural justice is not a ground of review. This suggests that the legislature did not intend the 'procedures' of para 476(1)(a) to embrace the standards which sub-s 420(1) requires the RRT to pursue.

There is another argument based on para 476(2)(a) that leads to the same result. The general law notion of natural justice comprises the 'impartial tribunal' requirement (the 'bias rule') and the 'fair hearing requirement' (the 'hearing rule')[139]. While para 476(2)(a) makes clear that these requirements do not provide the basis of a ground of review, para 476(1)(f) provides that actual bias is such a ground, while para 476(1)(a) and

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**138** See Aronson and Dyer, *Judicial Review of Administrative Action* (1996) at 391.

**139** See Aronson and Dyer, *Judicial Review of Administrative Action* (1996) at 387 ff.

para 425(1)(a), taken together, have the effect that a failure to give a genuine opportunity to appear before the RRT to give evidence, is also such a ground. This suggests that the legislature turned its mind to the twin requirements of natural justice and intended that para 476(1)(f) and para 425(1)(a) should occupy the field that would otherwise be occupied by the rules of natural justice. It will be clear that I do not agree that the expression in para 476(2)(a), 'the rules of natural justice', is to be read down in some way so that it refers to those rules only in so far as they depend on the general law, and does not detract from any generally expressed requirement of the Act which might otherwise be thought to have the effect of mandating observance of those rules.

The fourth consideration derives from the Explanatory Memorandum which accompanied the *Migration Reform Bill* 1992. That Memorandum makes clear that s 476 was intended to introduce a regime of limited grounds of review which were 'certain' in their meaning[140]. To permit review on the ground that a mechanism of review is not 'fair' or 'just' is discordant with that intention.

For all the foregoing reasons, I think that the better view is that sub-s 420(1) does not lay down a procedure required to be observed in connection with the making of a decision by the RRT. Before parting with sub-s 420(1), however, I make the following further observation. It should not be thought that all non-observances of statutory directives addressed to a public body must give rise to a civil remedy. Statements of broad objectives to be pursued afford a paradigm illustration of statutory commands which are not intended to generate a private right of action. An example is found in s 9 of the *Disability Services Act* 1992 (Qld) which was considered in *Criminal Justice Commission v Queensland Advocacy Incorporated*[141]."

177 His Honour then compared the two sections under consideration in *Criminal Justice Commission v Queensland Advocacy Incorporated* with s 420 and cited the following passage from the judgment of Demack J in that case:

"When the provisions of s 9 of the *Disability Services Act* 1992 are considered, it is clear that they enunciate broad principles and do not create private rights that can be enforced by court action. Part 4 of the Act sets out objectives to be promoted by service developers and service providers. It does not prescribe obligations that must be met. The sections, which follow s 9 in Part 4, all have the verb 'should', indicating that what is there described are desirable goals which the community, through Parliament, has accepted.

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**140** See esp at 81-82.

**141** [1996] 2 Qd R 118.

Thus, whilst it is correct ... that the Public Trustee is a service provider, ... it does not follow that the residents have rights given by s 9 which, if the Public Trustee does not pursue, this Court or any court can authorise [Queensland Advocacy Incorporated] to pursue."[142]

178 Lindgren J continued:

"Of course, it is possible to distinguish from the statutory provisions with which his Honour was concerned, the words '[t]he Tribunal … is to pursue the objective of providing … ' in sub-s 420(1) of the Act. The construction of any statutory provision must depend on its own terms and context. However, in my view the general sense of the passage quoted is aptly applied to sub-s 420(1).

I do not need to resolve the issue of construction finally, because it is not shown that the Smidt Tribunal failed to provide a mechanism of review that was fair, just, economical, informal and quick. The numerous specific complaints made by Mr Sun are considered later. In particular, however, I do not think that the fact that the Smidt Tribunal embarked upon a hearing *de novo* shows that it adopted a mechanism of review which failed to satisfy those epithets.

… I turn now to para 420(2)(b). I earlier gave reasons for construing both this paragraph and sub-s 420(1) as not laying down 'procedures'. In addition, the third and fourth specific considerations which I identified in relation to sub-s 420(1) apply, with necessary adaptations, to para 420(2)(b).

It will be recalled that sub-s 420(2) provides that the RRT, in reviewing a decision:

'(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case.'

These two paragraphs are related by way of contrast. The RRT would fail to observe the command contained in para (b) if it relied on technicalities, legal forms or rules of evidence in preference to acting 'according to substantial justice and the merits of the case', even if it did not regard itself as 'bound by' them. This view is consistent with the following passage from the Explanatory Memorandum that accompanied the *Migration Reform Bill* 1992:

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**142** [1996] 2 Qd R 118 at 144-145.

> '"Substantial justice" is used to emphasise that it is the issues raised by the case, rather than the process of deciding it, which should guide the RRT in making its decisions. It is intended that the RRT will operate in an informal non-adversarial way that will facilitate applicants putting their own case in their own words.'

I agree with Foster J in *Yao-Jing Li*[143] that para 420(2)(b) requires that the RRT must come to grips with the substance and merits of an application before it. His Honour said[144]:

> ' ... the term "substantial justice" is concerned with the decision of the issues raised in the case rather than the process of deciding them.'

If the last part of this passage is correct, and in any event for reasons given elsewhere, with respect I disagree with his Honour's conclusion that '[a] failure to [act in accordance with substantial justice] would be a non-observance of a procedure required by the Act and reviewable under s 476(1)(a)'[145].

On the other hand, if, contrary to my view, para 420(2)(b) lays down a procedure, it lays down a requirement of procedural fairness, non-compliance with which is not a ground of review because of para 476(2)(a) of the Act. Again, this suggests that the legislature did not intend para 476(1)(a) to embrace the standard which para 420(2)(b) imposes."

179 In *Abebe* I expressed brief reasons and a conclusion with respect to the operation and relationship between ss 420 and 476. It is because I agree with the reasons of Lindgren J also on these that I have set them out at some length in this judgment even though his Honour found it unnecessary to reach a conclusive decision on the interpretation of s 420(1). His Honour abstained from conclusively deciding that matter because he was not satisfied that the Tribunal had in that case in any way failed to provide a mechanism that was fair, just, economical, informal and quick. In this case it was not suggested that the Tribunal did not provide such a mechanism. That Ms Smidt who constituted the Tribunal here did in any event act in all respects in accordance with the spirit and intendment of s 420 appears

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**143** *Yao-Jing Li v Minister for Immigration and Multicultural Affairs*, unreported, Federal Court of Australia, 24 April 1997.

**144** *Yao-Jing Li v Minister for Immigration and Multicultural Affairs*, unreported, Federal Court of Australia, 24 April 1997 at 39.

**145** *Yao-Jing Li v Minister for Immigration and Multicultural Affairs*, unreported, Federal Court of Australia, 24 April 1997 at 39.

sufficiently from the matters to which I will refer in considering the application for prerogative relief.

180 With respect to the argument raised that Pt 8 of the Act is wholly or partially invalid, I adhere to my reasons for judgment and conclusion in *Abebe* that Pt 8 is not invalid.

181 The amendment that the respondent made to his application sought to invoke the aid of s 5(1)(b) and s 5(1)(f) of the ADJR Act. The respondent argued that Pt 8 of the Act was invalid and that therefore the respondent's rights to a review of his application and the decision of the Tribunal were governed only by the ADJR Act. The argument must fail because Pt 8 is not invalid. The presence in Pt 8 of s 444(3)(b)[146] reinforces the legislative intention that Pt 8 of the Migration Act should operate as a modification or variation of the principles and rules stated in the ADJR Act.

The application for prerogative relief

182 I now turn to the respondent's application for prerogative relief against the Tribunal made in pursuance of s 75(v) of the Constitution.

183 The respondent argued that the Tribunal acted wholly unreasonably by determining to reject the respondent's case solely on the basis that no corroboration could be found for the events of 1991, as described by the Minister. The argument assumed that unreasonableness in the sense discussed in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[147] was a ground upon which the respondent could rely for a grant of prerogative relief pursuant to s 75(v) of the Constitution.

184 It was accepted by the respondent that in accordance with the decision of this Court in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[148] the weight to be accorded to a relevant consideration by an administrative decision-maker is

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**146** Section 444(3)(b) provides:

> "If the President [of the Administrative Appeals Tribunal] accepts the referral of an application for review of an RRT-reviewable decision:
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> (b) the [*Administrative Appeals Tribunal Act* 1975 (Cth)] applies to the review of the RRT-reviewable decision subject to the modifications in this Division."

**147** [1948] 1 KB 223.

**148** (1986) 162 CLR 24.

generally a question for the decision-maker and not the Court[149]. Although absence of corroboration did loom large in the Tribunal's decision, it was not the only basis upon which the Tribunal proceeded. However even if it were, the weight to be accorded to that factor was a matter for the Tribunal and not for the Federal Court.

185 The respondent however relied upon a passage in the same case in the judgment of Mason J in which his Honour said this[150]:

> "I say 'generally' because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is 'manifestly unreasonable'. This ground of review was considered by Lord Greene MR in *Wednesbury Corporation*[151], in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it."

186 The respondent also pointed to a statement of Deane J in *Australian Broadcasting Tribunal v Bond* [152]:

> "In so doing, I have treated what are sometimes referred to as 'Wednesbury principles'[153] as encompassed by the obligation to act judicially in cases where that obligation exists[154].
>
> If a statutory tribunal is required to act judicially, it must act rationally and reasonably. Of its nature, a duty to act judicially (or in accordance with the requirements of procedural fairness or natural justice) excludes the right

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**149** *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 per Mason J.

**150** (1986) 162 CLR 24 at 41 per Mason J.

**151** [1948] 1 KB 223 at 230, 233-234.

**152** (1990) 170 CLR 321 at 367.

**153** See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229-233.

**154** But cf, for a contrary approach, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410-411, 414-415.

> to decide arbitrarily, irrationally or unreasonably. It requires that regard be paid to material considerations and that immaterial or irrelevant considerations be ignored. It excludes the right to act on preconceived prejudice or suspicion. Arguably, it requires a minimum degree of 'proportionality'[155]."

187 It is unnecessary to consider whether his Honour's arguably broader statement of the principle of "unreasonableness" has attracted the support of other members of this Court because in my view the Tribunal's decision cannot be characterized as unreasonable in any of the senses in which Deane J would define or even arguably define that term.

188 In furtherance of his reliance on *Australian Broadcasting Tribunal v Bond*[156] the respondent advanced two contentions: that the Tribunal acted irrationally, arbitrarily or without "a minimum degree of proportionality"; and that the Tribunal failed to make necessary factual findings essential to the determination of the ultimate issue as required by the decision of this Court in *Australian Broadcasting Tribunal v Bond*[157]. The respondent sought to make good these contentions by reference to the following submissions:

1. The Tribunal made no explicit finding adverse to the respondent's credit;

2. The Tribunal accepted that the respondent has a strong subjective fear of return to Ethiopia, yet found that the chance of persecution upon return to Ethiopia was remote;

3. Having accepted that the respondent had been involved in anti-Mengistu demonstrations at school and may have been arrested, the Tribunal logically should have found that the respondent and others were detained and tortured for planning a demonstration in December 1991. The Tribunal's reliance upon the fact that no human rights monitoring organisation was aware of the arrests, and that the media searches turned up no reference to the incident was, in effect, utterly irrational. Equally, it was said, the Tribunal's focus upon the death toll was to neglect unreasonably other significant evidence of harsh repression. The Tribunal had no regard to the conditions in Ethiopia at the time and difficulties associated with the availability, dissemination, and publication of information under those conditions.

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**155** cf *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410.

**156** (1990) 170 CLR 321.

**157** (1990) 170 CLR 321.

189 I do not think these criticisms do justice to the conduct and reasoning of Ms Smidt constituting the Tribunal. She granted the respondent more than one oral hearing to enable him to persuade her of these matters if he could; she vigorously pursued inquiries in respect of various matters raised by the respondent. She weighed up with anxiety, but, in the end was not convinced of the accuracy of the respondent's account of the occurrence of the events of 1991. She should not be criticized for not saying in terms anything about the respondent's honesty or reliability although her views in that regard may fairly readily be inferred from the findings that she did make. Ms Smidt said this on 30 November 1995:

> "I found it most unlikely that an event such as that described by Mr Eshetu, involving as it did the arrest and torture of the entire student council, would not have been reported by those involved or have been mentioned in at least some of the sources consulted. Mr Eshetu maintained that the incident had indeed occurred.
>
> Following the hearing, submissions on this issue were received from Mr Kessells [solicitor for the respondent] who argued that Mr Eshetu's claim regarding the arrest of the Student Council should not be discounted because it had not been mentioned in publications covering the period. I then decided to conduct additional research on the issue."

190 After the further inquiries which she had instituted, Ms Smidt invited the respondent effectively to make such responses and comments as he might choose.

191 When all that could be said for the respondent was said, the Tribunal affirmed the refusal to grant the visa for these reasons:

> "From the evidence before the Tribunal it is clear that Ethiopia still has some way to go before a stable democratic system which adequately protects human rights in established. It is also clear that some of those who oppose the government are at risk of detention and other forms of serious harm in Ethiopia. However, the evidence does not, in my view, indicate that there is widespread or systematic persecution of government critics or opponents in Addis Ababa such that people who are not prominent members of political organisations or involved with organisations which advocate or are believed to advocate violence, would face more than a remote chance of persecution.
>
> . . .
>
> Mr Eshetu comes from Addis Ababa. There is no evidence before the Tribunal which suggests that Mr Eshetu would advocate or become involved in violent activities or groups which advocated violence on his return to Ethiopia, nor does the evidence suggest that Amharas in general are liable to be suspected of such involvement. In these circumstances, I find the chance

> that Mr Eshetu would face serious harm amounting to persecution on return to Ethiopia as a result of his political opinion to be remote.
>
> . . .
>
> However, none of the evidence before the Tribunal suggests Amharas in Addis Ababa are at risk of violence or harassment by other groups and I find the chance that Mr Eshetu will be a victim of ethnic violence on return to Ethiopia to be remote."

192 If, as here, an applicant chooses to make particular issues central to his or her application for a visa, that applicant can hardly be heard to complain if the Tribunal pays the greatest attention to them, and, in the absence of satisfaction about those issues, becomes strongly inclined to reject and ultimately does reject the application for the visa. That is what happened here. There is no doubt that the Tribunal asked the correct ultimate question, whether the respondent had a well-founded fear of persecution and considered relevant factors in giving an answer to it. Although it may be taken that the subjective element of the question as to the existence of the fear was present, the Tribunal was not satisfied that the fear of the respondent was well-founded.

193 This (unlike *Australian Broadcasting Tribunal v Bond*[158]) is not a case therefore in which the Tribunal failed to determine, by making an explicit factual finding, a factual issue which was an essential preliminary to the making of the ultimate decision. The only essential matter for decision was of the existence or otherwise of the relevant well-founded fear and in making that decision the Tribunal gave particular, but not exclusive consideration to the matters which the respondent placed at the forefront of his application. Not surprisingly, when the assertions in respect of them failed, the respondent's application almost inevitably failed also.

194 In my opinion the decision of the Tribunal cannot therefore be characterized in any relevant sense as an unreasonable one. It depended upon a view of the facts that was open to the Tribunal. Its reasoning in no way infringed the *Wednesbury* principle in any of its possible formulations, assuming that it is applicable to an application for prerogative writs under the Constitution. In my opinion Whitlam J in dissent in the Full Court captured the essence of the respondent's claim and the Tribunal's treatment of it[159]:

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**158** (1990) 170 CLR 321.

**159** (1997) 71 FCR 300 at 369.

> "I have read carefully too the transcripts of Mr Eshetu's evidence and they reveal a conscientious and considerate treatment of a distressed man living in a world of emigres swirling with rumours about their native country."

195 I say something at this point about a matter that was touched upon in argument, and which it is unnecessary to decide in this case, that is whether an onus lies upon an applicant for a visa. In a practical sense it would be a brave or unrealistic applicant who did not at least raise in favour of the application all that could be raised by him or her, in order to ensure that the Tribunal was left in a sufficient state of satisfaction as to the entitlement to a visa.

196 I would order that the appeal be allowed with costs, and that the application for orders nisi for prerogative relief be refused and that the prosecutor pay the respondent's costs of and incidental to that application.